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WHEN JUDGES ABANDON ANALOGY: THE PROBLEM OF DELAY IN COMMENCING CRIMINAL PROSECUTIONS

PHYLLIS GOLDFARB*

Time is like a river made up of the events which happen, and a violent stream [it is]; for as soon as a thing has been seen, it is carried away and another comes in its place and this will be carried away as well.

*Marcus Aurelius*¹

It is monstrous to put a man on his trial after such a lapse of time. How can he account for his conduct so far back? If you accuse a man of a crime the next day, he may be enabled to bring forward his servants and family to say where he was and what he was about at the time; but if the charge be not preferred for a year or more, how can he clear himself? No man's life would be safe if such a prosecution were permitted. It would be very unjust to put him on his trial.

*Baron Alderson*²

Time is not a neutral feature with respect to the quality of adversarial trials. Indeed, time can affect adversarial fact-finding in a variety of ways. Until the close of the eighteenth century, for example, the trials of British subjects who had been taken into custody were held immediately after arraignment.³ This rush to trial disproportionately favored the prosecution because the accused

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1. G. LONG, *MEDITATIONS OF MARCUS AURELIUS* 140 (Book IV, ¶ 43) (1930), *quoted in* D. GRANFIELD, *THE INNER EXPERIENCE OF LAW: A JURISPRUDENCE OF SUBJECTIVITY* 265 (1988).

2. *The Queen v. Robins*, 1 Cox Crim. Cas. 114 (Somerset Winter Assizes 1844).

3. See J. GOEBEL & T. NAUGHTON, *LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE* 610-11 (1944), *cited in* Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 711, 721 (1976).

rarely had sufficient opportunity to gather evidence and witnesses, to prepare carefully, or to present a full defense.

Ironically, the sluggish pace of the contemporary American criminal process can accomplish the same mischief as did the speed of British trials of an era past. Frequently, of course, arrests follow soon after alleged offenses, and formal processing commences within hours or days of the arrest. In a troubling minority of cases, however, an arrest is made months or years after an alleged offense, or is not made at all, and prosecution originates via grand jury indictment.⁴ In these cases, charges are first filed after an extended period of delay,⁵ for which there may be manifold explanations. These explanations may include dilatory reporting of offenses,⁶ investigatory difficulty in producing a likely offender,⁷ inability to apprehend a suspected offender,⁸ a standard waiting period before the next grand jury term,⁹ prolonged investigation of

4. See S. SALTZBURG, *AMERICAN CRIMINAL PROCEDURE* 17 (1984) (citing *National Advisory Commission on Criminal Justice Standards and Goals: Courts* 11-15 (1973)). "In some situations, the accused may have no formal contact with the law until he has been indicted by a grand jury. Following such an indictment, a court order may be issued authorizing police officers to take the accused into custody. But these are exceptional situations." *Id.*

5. These delays can be of considerable length. See, e.g., *United States v. Benson*, 846 F.2d 1338, 1340 (11th Cir. 1988) (eight-year delay); *United States v. Eckhardt*, 843 F.2d 989, 994 (7th Cir.) (nine-year delay), *cert. denied*, 109 S. Ct. 106 (1988); *United States v. Bartlett*, 794 F.2d 1285, 1287 (8th Cir.) (five-year delay), *cert. denied*, 479 U.S. 934 (1986); *United States v. Coppola*, 788 F.2d 303, 308 (5th Cir. 1986) (five-year delay); *Stoner v. Graddick*, 751 F.2d 1535, 1543-47 (11th Cir. 1985) (*per curiam*) (nineteen-year delay); *Payne v. Rees*, 738 F.2d 118, 120 (6th Cir. 1984) (six-year delay); *Scherling v. Superior Court*, 22 Cal. 3d 493, 500, 585 P.2d 219, 223, 149 Cal. Rptr. 597, 601 (1978) (nine-year delay); *People v. Archerd*, 3 Cal. 3d 615, 621, 477 P.2d 421, 423, 91 Cal. Rptr. 397, 399 (1970) (eleven-year delay); *Commonwealth v. Patten*, 401 Mass. 20, 22, 513 N.E.2d 689, 691 (1987) (ten-year delay); *State v. Luck*, 15 Ohio St. 3d 150, 153, 472 N.E.2d 1097, 1104 (1984) (fifteen-year delay), *cert. denied*, 470 U.S. 1084 (1985); *Story v. State*, 721 P.2d 1020, 1026 (Wyo.) (seventeen-year delay), *cert. denied*, 479 U.S. 962 (1986). The record for longest pre-accusation delay may reside with *State v. Jurgens*, 424 N.W.2d 546, 550 (Minn. Ct. App. 1988), in which the court upheld against due process challenge an indictment issued 22 years after the alleged offense.

6. See *United States v. Indelicato*, 611 F.2d 376 (1st Cir. 1979); *Story*, 721 P.2d at 1020.

7. See, e.g., *Patten*, 401 Mass. at 20, 513 N.E.2d at 689; *Commonwealth v. Imbruglia*, 377 Mass. 682, 387 N.E.2d 559 (1979), *Commonwealth v. Ward*, 14 Mass. App. Ct. 37, 436 N.E.2d 439 (1982).

8. See, e.g., *United States v. Solomon*, 688 F.2d 1171 (7th Cir. 1982); *Smith v. United States*, 414 A.2d 1189 (D.C. 1980).

9. See *United States v. Ismaili*, 828 F.2d 153 (3d Cir. 1987), *cert. denied*, 485 U.S. 935 (1988).

the defendant,¹⁰ continuing investigation against co-defendants,¹¹ the need to maintain an informant's or undercover officer's street identity for a longer period,¹² bureaucratic inefficiency,¹³ or bureaucratic priority.¹⁴

Although some of these explanations are understandable, the consequent delays in charging the suspect can pose difficulties that go beyond inconvenience or anxiety.¹⁵ The gravest danger posed by such delay is the subversion of the system itself, the distortion of the adversary process.¹⁶ This distortion results from the erosion of evidence as the clock ticks during the pre-accusation period.

10. See, e.g., *id.*; *United States v. Brock*, 782 F.2d 1442 (7th Cir. 1986); *United States v. Atisha*, 804 F.2d 920 (6th Cir. 1986), *cert. denied*, 479 U.S. 1067 (1987); *United States v. Bliss*, 735 F.2d 294 (8th Cir. 1984); *United States v. Durnin*, 632 F.2d 1297 (5th Cir. 1980); *United States v. Surface*, 624 F.2d 23 (5th Cir. 1980); *United States v. Hood*, 593 F.2d 293 (8th Cir. 1979); *United States v. Walker*, 601 F.2d 1051 (9th Cir. 1979); *Commonwealth v. Best*, 381 Mass. 472, 411 N.E.2d 442 (1980); *Commonwealth v. Canon*, 373 Mass. 494, 368 N.E.2d 1181, *cert. denied*, 435 U.S. 933 (1977); *Commonwealth v. Horan*, 360 Mass. 739, 277 N.E.2d 491 (1972).

11. See, e.g., *United States v. Coppola*, 788 F.2d 303 (5th Cir. 1986); *United States v. Singer*, 687 F.2d 1135 (8th Cir. 1982); *United States v. Ciampaglia*, 628 F.2d 632 (1st Cir.), *cert. denied*, 449 U.S. 956 (1980); *United States v. Taylor*, 603 F.2d 732 (8th Cir.), *cert. denied*, 444 U.S. 982 (1979).

12. See *United States v. Johnson*, 802 F.2d 833 (5th Cir. 1986); *United States v. Jones*, 524 F.2d 834 (D.C. Cir. 1975); *Robinson v. United States*, 459 F.2d 847 (D.C. Cir. 1972); *Woody v. United States*, 370 F.2d 214 (D.C. Cir. 1966) (*per curiam*); *Godfrey v. United States*, 358 F.2d 850 (D.C. Cir. 1966) (*per curiam*); *Powell v. United States*, 352 F.2d 705 (D.C. Cir. 1965); *Ross v. United States*, 349 F.2d 210 (D.C. Cir. 1965).

13. See *United States v. Benson*, 846 F.2d 1338 (11th Cir. 1988); *United States v. Sebetich*, 776 F.2d 412 (3d Cir. 1985), *cert. denied*, 484 U.S. 1017 (1988); *United States v. Williams*, 738 F.2d 172 (7th Cir. 1984); *United States v. Purham*, 725 F.2d 450 (8th Cir. 1984); *United States v. Townley*, 665 F.2d 579 (5th Cir.), *cert. denied*, 456 U.S. 1010 (1982); *United States v. MacDonald*, 632 F.2d 258 (4th Cir. 1980), *rev'd*, 456 U.S. 1 (1982); *United States v. Walker*, 601 F.2d 1051 (9th Cir. 1979); *United States v. Mays*, 549 F.2d 670 (9th Cir. 1977).

14. See *United States v. Adams*, 834 F.2d 632 (7th Cir. 1987), *cert. denied*, 484 U.S. 1046 (1988); *Townley*, 665 F.2d at 579; *United States v. King*, 560 F.2d 122 (2d Cir.), *cert. denied*, 434 U.S. 925 (1977); *United States v. Smyth*, 556 F.2d 1179 (5th Cir. 1977); *United States v. Mejias*, 552 F.2d 435 (2d Cir.), *cert. denied*, 434 U.S. 847 (1977).

15. Minimizing anxiety is one of the goals of speedy trial protection. See *United States v. Ewell*, 383 U.S. 116, 120 (1966).

16. In *Barker v. Wingo*, 407 U.S. 514, 532 (1972), the Supreme Court indicated that the most severe form of prejudice that pretrial delay can create is impairment of the ability to present a defense because such impaired ability "skews the fairness of the entire system."

This Article examines the law of pre-accusation delay¹⁷ in light of the requirements of both adversarial fact-finding and analogical reasoning. I contend that current law does not adequately address the harm generated by pre-accusation delay, and that other doctrinal choices more responsive to the problem and more protective of the adversary process are available to the courts.

Further, the Article suggests that the judicial doctrine chosen in pre-accusation delay cases does not represent a true application of analogical reasoning processes. Rather, it represents a failure to use such reasoning processes in a conventional manner. Therefore, the law of pre-accusation delay provides fertile ground for cultivating insight into the actual processes of practical legal reasoning. The goal of the Article is two-fold: to improve current legal analysis of the charging delay problem, and to use the charging delay problem to enhance our general understanding of the internal workings of American legal culture.

Section I illustrates and describes the contours of the charging delay problem. Section II surveys the prevailing constitutional analysis of the problem, as shaped over the past two decades by the Supreme Court and elaborated by lower courts. Section III reviews a variety of alternative doctrinal analyses that the courts could have developed to address the problem, followed in Section IV by an assessment of the merits of these analyses and their fit with traditional representations of analogical reasoning processes. Section V develops a likely explanation of the abandonment of traditional analogical reasoning in charging delay cases and evaluates its impact on systemic legitimacy. Finally, Section VI proposes the expansion of traditional analogical reasoning in the interest of generating ideas about practicable alternatives to categorical legal analysis.

17. The terms "pre-accusation delay," "pre-charge delay," "charging delay," and "pre-indictment delay" are used interchangeably in this Article. Although "pre-indictment delay" is the most common denomination of the phenomenon described, it is technically the least accurate of the labels because a person can be charged via complaint or information prior to the issuance of the indictment. See S. SALTZBURG, *supra* note 4, at 17-23 (citing *National Advisory Commission on Criminal Justice Standards and Goals: Courts* 11-15 (1973)) (describing the steps in the criminal process). Therefore, I have shown a preference in this Article for the other labels, although all are intended to describe the same set of circumstances.

I. THE CHARGING DELAY PROBLEM

A. *Illustration*¹⁸

The telephone rings in your law office. The clerk of the court is calling, informing you that you have been appointed to a criminal case in which the client will be arraigned today. The original grand jury indictment charges your client with armed assault. You report to the court, read the indictment and the police report, and meet with your client. You learn the following:

The police report alleges that your client, while driving a car, pointed a gun at another driver, an undercover police officer. The offense allegedly occurred on a crowded residential street on a warm day sixteen months ago. Your client was not arrested until she was taken into custody today on the indictment warrant. The primary evidence against her is a photo identification that the complaining witness made on the day of the incident.

You speak to your client. She reports that she was not involved in the incident alleged. During the preceding sixteen months, the authorities gave her no notice whatsoever that she was a suspect in the case. She lives in the neighborhood in which the charged incident occurred and recalls vaguely that she heard several people in the neighborhood talking some time ago about an incident similar to that alleged, although she cannot recall their identities. She believes that witnesses to the incident may live in her neighborhood, and that they may be able to verify her non-involvement.

Your client also informs you that although she is employed now and living on her own, she was between jobs at the time of the incident and living with her family. She thinks that on the day of the offense, she was probably searching for work because that was what she was doing virtually every day during that time period. She also thinks that had she been notified promptly of the importance of the underlying date, she would have been able to reconstruct more specifically her activities and whereabouts than memory allows today. She believes as well that the family members with whom she lived would have been able to corroborate her ac-

18. If this example sounds strange, it is a strangeness borne of reality. The narrative recited closely parallels a case that I litigated. See *United States v. Jenkins*, Crim. No. F-5268-83 (D.C. Sup. Ct. Apr. 5, 1984).

count. At this point, however, they will likely be unable to recall her conduct of a day long past.

With this information in hand, you contact an investigator to accompany you on a door-to-door canvass of the neighborhood in which the charged offense occurred. You want to do this immediately because so much time has already elapsed since the charged offense. Your investigation succeeds in locating some witnesses. But when asked to discuss sixteen-month-old events, the witnesses provide information that is conclusory at best and devoid of detail. No one remembers seeing your client at the scene of the incident. Although these witnesses may have once supported the position that your client was misidentified as a participant, their present memories lack specificity. One of the witnesses indicates that in addition to the passage of time, a head injury she suffered in a recent car accident has contributed to the deterioration of her memory.

In the course of your investigation, you also learn about the existence of others who are believed to have had information about the alleged offense. For example, several persons with whom you spoke believe that someone who formerly lived in the neighborhood is the principal witness to the underlying incident. She has moved out of town, however, and no one knows where she currently resides. Had you been able to contact her at an earlier date, you would have arranged for this witness to leave a forwarding address with you so that she might be reached to serve as a witness at trial. Another person reports that she once overheard a neighborhood resident speaking of the alleged offense as if he were knowledgeable about it. Unfortunately, this man died recently.

You are frustrated by the failure of your investigative efforts and feel acutely the effect of a lengthy charging delay on your ability to mount a defense on your client's behalf. The difficulty of your job has multiplied, as has the risk to your client, by virtue of the government's taking so long to secure an indictment. You begin to consider legal strategies. Surely, you believe, there must be some proscription against charging a case at such a leisurely pace that its defense is undermined. You research the law of pre-indictment delay and decide to file a motion to dismiss the indictment due to unreasonable and prejudicial delay.

B. Description

In a system that relies on retrospective reconstruction of complex events,¹⁹ delay at any stage of the criminal process can erode information of evidentiary significance through memories dimmed, witnesses gone and artifacts lost.²⁰ Delay at the pre-accusation phase represents the sharpest threat to the fact-finding integrity of the criminal process because the opportunity to preserve sources of evidence never arises. Suspects who were not arrested, questioned, or in any way notified that they would later be called to account for specific acts alleged to have occurred at a specific time are thereby precluded from taking steps to preserve potential evidence from gradual and inevitable diminution over time.²¹ If put on notice, defendants-to-be might ask potential witnesses to make notes of their observations of particular events, arrange to keep track of the whereabouts of witnesses, secure physical evidence, or record their own and others' recollections when memories are fresh. Without notice, however, these preservative measures are unavailable.²²

19. For an analysis of the problems and hazards of accurate fact-finding at trial, see generally J. FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* (1949).

20. See, e.g., *United States v. Comosona*, 848 F.2d 1110 (10th Cir. 1988) (defendant claimed memory failure and inability to locate witnesses); *United States v. Benson*, 846 F.2d 1338 (11th Cir. 1988) (defendant claimed unavailability of two witnesses, death of government agent testifying for defense and destruction of important evidence); *Prantil v. California*, 843 F.2d 314 (9th Cir.) (defendant claimed witness had memory loss), *cert. denied*, 109 S. Ct. 158 (1988); *United States v. Acevedo*, 842 F.2d 502 (1st Cir. 1988) (defendant claimed memory impairment and inability to locate witnesses); *United States v. L'Allier*, 838 F.2d 234 (7th Cir. 1988) (defendant claimed memory loss for himself and witnesses); *United States v. Ismaili*, 828 F.2d 153 (3d Cir. 1987) (defendant claimed death of two key witnesses and loss of records), *cert. denied*, 485 U.S. 935 (1988); *United States v. Atisha*, 804 F.2d 920 (6th Cir. 1986) (defendant claimed memory loss for himself and witnesses), *cert. denied*, 479 U.S. 1067 (1987); *United States v. Royals*, 777 F.2d 1089 (5th Cir. 1985) (defendant claimed inability to locate investigative file); *United States v. MacDonald*, 632 F.2d 258 (4th Cir. 1980) (defendant claimed loss of witness), *rev'd*, 456 U.S. 1 (1982); *United States v. Elsbery*, 602 F.2d 1054 (2d Cir.) (defendant claimed some witnesses had become antagonistic and others' memories had dimmed), *cert. denied*, 444 U.S. 994 (1979).

21. Based on experimental findings, psychologists have graphed a "forgetting" curve, indicating that memory drops off sharply within a short time after an event. See, e.g., H. EBBINGHAUS, *MEMORY: A CONTRIBUTION TO PSYCHOLOGY* 62-80 (Dover ed. 1964) (originally published 1885), *cited in* E. LOFTUS & J. DOYLE, *EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL* 71 (1987); see also Gardner, *The Perception and Memory of Witnesses*, 18 CORNELL L.Q. 391, 392-93 (1933).

22. In *Tolliver v. United States*, 378 A.2d 679 (D.C. 1977), which rejected a due process challenge to eighteen months of pre-indictment delay, the court based its holding on the

In some circumstances, pre-accusation delay may cause the prosecution to suffer attrition of evidence. For example, if the delay has resulted from dilatory reporting, the prosecution will not have had the opportunity to take steps to preserve its sources of evidence. Such delay can benefit the defense and may even result in dismissal of the charges when the prosecutor determines that the remaining evidence is insufficient to support a conviction.²³

On the other hand, in cases such as the illustration provided in Section IA, time operates as a defendant's nemesis. The state, having embarked on an investigation when a criminal incident first comes to light, can safeguard its case by taking preservative measures unavailable to the defense.²⁴ The upshot of this, according to Justice Douglas, is that during the period prior to formal accusation, "the State may proceed methodically to build its case while the prospective defendant proceeds to lose his."²⁵ Given the disproportionate adversarial advantage that, according to some ob-

fact that the government had arrested appellant within one month of the offense and had contacted him several times prior to the indictment. These factors, the court stated, suggested that the appellant "was clearly on notice that he was accused in the case and that he was aware at an early point after the offense that he would need an explanation of his whereabouts on the day of the offense." *Id.* at 681.

23. Whether the impairment of the prosecution's case helps or hurts a defendant will vary with the circumstances. Generally, defendants raising claims of prejudicial pre-accusation delay may not rely on the impaired memories of prosecution witnesses as proof of prejudice suffered. *See, e.g.,* *United States v. Marler*, 756 F.2d 206, 214 (1st Cir. 1985) (no due process violation when prosecution witnesses suffered memory lapses); *United States v. Snyder*, 668 F.2d 686, 689 (2d Cir.) (same), *cert. denied*, 458 U.S. 1111 (1982). This result is surprising because the memory loss of a prosecution witness can impair cross-examination, which Wigmore called "the greatest legal engine ever invented for the discovery of truth." 5 WIGMORE, EVIDENCE § 1367 (Chadbourn rev. ed. 1974). Without effective cross-examination, the defendant's confrontation clause protection may be weakened. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the Witnesses against him . . ."). The presentation of a defense occurs through cross-examination of prosecution witnesses as well as through direct examination of defense witnesses. *See generally* Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567 (1978). Nevertheless, the Supreme Court has refused to link the right to present a defense to effective cross-examination of a memory-impaired prosecution witness. *See, e.g., United States v. Owens*, 484 U.S. 554 (1988).

24. As the court said in *United States v. Jones*, 524 F.2d 834, 844 n.21 (D.C. Cir. 1975), "We have recognized that the inability of an accused or his witnesses to recall past events in detail can affect credibility insofar as the jury must contrast general denials with detailed testimony by police officers whose memories are refreshed by notes or other records."

25. *United States v. Marion*, 404 U.S. 307, 331 (1971) (Douglas, J., concurring).

servers, the prosecution already enjoys,²⁶ time becomes an even heavier thumb on the scales, undermining trust in the accuracy and fairness of case outcomes. This specter of distorted fact-finding turns the phenomenon of bureaucratic heel-dragging into a problem of constitutional dimensions.²⁷

II. THE CONSTITUTIONAL ANALYSIS

A. *The Supreme Court*

Although statutes of limitation provide the traditional protection against delay-related hardships to the defense,²⁸ the Supreme

26. See generally Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960).

27. See, e.g., Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319 (1957) (examining the values that ground the constitutional concept of procedural due process). The author states:

The various procedural safeguards traditionally demanded in the name of due process appear to be directed to two objectives. One is the goal of insuring the reliability of the guilt-determining process—reducing to a minimum the possibility that any innocent individual will be punished. It is not of crucial importance whether the individual tried is in fact guilty or innocent, but it is of crucial concern that the integrity of the process of ascertaining guilt or innocence never be impaired. If in this effort to insure that none but those guilty be convicted, many guilty go free, the price is not too great in the long view of democratic government. If there is any consideration basic to all civilized procedures it is this, no matter how disparate the means chosen to give it effect.

Id. at 346.

28. See *United States v. Ewell*, 383 U.S. 116, 122 (1966). The purposes of statutes of limitation are to protect persons from having to defend themselves against charges obscured by time and to encourage officials to commence expeditious prosecutions. See *Toussie v. United States*, 397 U.S. 112, 114-15 (1970). The Supreme Court has indicated that criminal statutes of limitation should be construed liberally in the defendant's favor. *United States v. Habig*, 390 U.S. 222, 227 (1968) (citing *United States v. Scharton*, 285 U.S. 518, 522 (1932)).

Every jurisdiction has statutes of repose or limitation barring prosecutions unless charges are filed within a stated period after the offense. See, e.g., 18 U.S.C. § 3282 (1982) (providing a five-year statute of limitation for non-capital offenses); Mass. Gen. L. ch. 277, § 63 (1955 & Supp. 1989) (providing a ten-year statute of limitation for serious felonies, specifically listed); Mass. Gen. L. ch. 136, § 9 (1962) (providing a six-month statute of limitation for certain "blue laws").

Even though statutes of limitation pose an outside limit on filing indictments, they do not pose an outside limit on informing defendants that they have been charged. Federal Rule of Criminal Procedure 6(e)(4) authorizes sealing timely filed indictments until the defendant is in custody. The purpose of the rule is to minimize the risk that knowledge of the issuance of an indictment would enable the defendant to avoid arrest. *United States v. Muse*, 633 F.2d 1041, 1043 (2d Cir. 1980), *cert. denied*, 450 U.S. 984 (1981). But if the defendant can show "substantial actual prejudice" due to the delay in unsealing the indictment, it must be dis-

Court has established that these statutes do not occupy the entire field of defendants' rights with respect to protracted charging delays.²⁹ In the 1971 case *United States v. Marion*,³⁰ the Court suggested that the due process clause of the fifth amendment provides an additional layer of protection.³¹ Although the Court subsequently assured us that the due process clause has "a limited role to play in protecting against oppressive delay,"³² the holding itself was virtually unavoidable once the fairness of proceedings, the underlying due process concern, was implicated by protracted delay.³³

In *United States v. Lovasco*,³⁴ the Supreme Court addressed the issue of pre-accusation delay once again. Examining the role of due process in protecting against the hazards of pre-indictment delay, the Court reversed the trial court's dismissal of an indictment filed eighteen months after a criminal offense occurred.³⁵ Although the trial court had found that the eighteen-month delay prejudiced the defendant,³⁶ the Supreme Court stated, in essence, that proof of prejudice is a necessary but not a sufficient condition for establishing due process infirmities.³⁷ Instead, the Court established a two-part inquiry focusing on both defense prejudice and prosecutorial motive.³⁸ In fact, the Court's language suggested that proof of prejudice was, in effect, a standing requirement for raising the due process issue: "[Although] proof of actual prejudice makes a due process claim concrete and ripe for adjudication . . . [it does not] make the claim automatically valid," and the reasons for the delay must be considered.³⁹

missed. See *Srulowitz v. United States*, 819 F.2d 37, 40 (2d Cir.), *cert. denied*, 484 U.S. 853 (1987); *United States v. Mitchell*, 769 F.2d 1544, 1548 (11th Cir. 1985), *cert. denied*, 474 U.S. 1066 (1986); *Muse*, 633 F.2d at 1043; *United States v. Davis*, 598 F. Supp. 453, 458 (S.D.N.Y. 1984).

29. *United States v. Marion*, 404 U.S. 307, 324 (1971).

30. 404 U.S. 307 (1971).

31. See *id.* at 324.

32. *United States v. Lovasco*, 431 U.S. 783, 789 (1977).

33. See Kadish, *supra* note 27.

34. 431 U.S. 783 (1977).

35. *Id.* at 784.

36. See *id.* at 787. The Court of Appeals for the Eighth Circuit had affirmed this finding of fact. *United States v. Lovasco*, 532 F.2d 59, 61 (8th Cir. 1976).

37. *Lovasco*, 431 U.S. at 790.

38. *Id.*

39. *Id.* at 789.

Despite silence in the trial court record was silent as to the government's reasons for delay,⁴⁰ the Supreme Court accepted the representations made in the government's Eighth Circuit briefs that "the delay was caused by the government's efforts to identify persons in addition to respondent who may have participated in the offenses."⁴¹ Although the seventeen months of additional investigation had produced no results, the Court characterized this lack of success as a "fortuity" of no legal consequence.⁴² Substituting an explanation of investigative delay for the district court's finding that no reason justified the delay, the Supreme Court held that, despite a showing of delay-related prejudice, good faith investigation did not deprive a defendant of due process.⁴³ The Court did not balance the degree of prejudice against the reasons for the delay because a finding of good faith investigative delay terminated the constitutional inquiry. The majority provided no further guidance as to the legitimacy of non-investigative reasons for delay.⁴⁴

Apparently, a series of policy arguments endorsed in the opinion influenced the holding in *Lovasco*. The majority observed that requiring prosecutors to file charges as soon as probable cause exists, but before they can establish guilt beyond a reasonable doubt, would create the risk of a number of deleterious consequences, including the filing of unwarranted charges, extension of the burdens of the formal pre-trial period, evaporation of potentially fruitful sources of information before they are fully exploited, and the use of limited court resources on cases that prove insubstantial or encompass only some of the charges or defendants involved.⁴⁵

The Court argued further that requiring the filing of charges once the state gathered evidence sufficient to prove guilt beyond a reasonable doubt would pose related problems.⁴⁶ First, such a rule might impair the prosecutor's ability to continue the investigation,

40. *Id.* at 796.

41. *Id.* (quoting Petition for Certiorari at 14).

42. *Id.* at 795 n.16.

43. *Id.* at 796.

44. *Id.* at 797.

45. *Id.* at 791-92 (citing *United States v. Watson*, 423 U.S. 411, 431 (1976) (Powell, J., concurring)).

46. *Id.* at 792.

especially if the case involved multiple defendants and offenses.⁴⁷ If the prosecutor could obtain subsequent indictments in such cases, multiple trials might be needed even though the cases were based on a single set of facts.⁴⁸ Second, the point at which prosecutors have gathered enough evidence to support a conviction is seldom clear-cut, and prosecutors might feel pressured to resolve doubtful cases in favor of filing early charges, some of which might prove unwarranted.⁴⁹ Finally, requiring prosecutions to commence once prosecutors have assembled sufficient evidence would inhibit the prosecutor's exercise of discretion in assessing whether commencing prosecution is in the public interest.⁵⁰

Surprisingly, the Court did not discuss what is perhaps the strongest policy argument in support of its holding: the relationship between extended pre-accusation investigation and the quality of fact-finding at trial. The prosecution's interest in private investigation for developing facts is protected by a prosecutor's ability to delay formal charging. To the extent that good fact-gathering depends on such confidentiality, pre-accusation delays can improve the quality of the adversarial process.

B. Federal Courts of Appeals

The Supreme Court has not returned to the issue of pre-accusation delay since *Lovasco*;⁵¹ hence state courts and lower federal

47. *Id.* at 792-93.

48. *Id.* at 793.

49. *Id.*

50. *Id.* at 794 (citing ABA STANDARDS, THE PROSECUTION FUNCTION § 3.9 n.9 (1971)).

51. Not that they have not been asked. Although the issue has been presented to the Court on numerous occasions, the Court has consistently declined to address it. *See, e.g.,* Hoo v. United States, 825 F.2d 667 (2d Cir. 1987), *cert. denied*, 484 U.S. 1035 (1988); Moran v. United States, 759 F.2d 777 (9th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986); Hollingsworth Oil Co. v. United States, 782 F.2d. 1044 (6th Cir. 1985), *cert. denied*, 479 U.S. 820 (1986); Ohio v. Luck, 15 Ohio St. 3d 150, 472 N.E.2d 1097 (1984), *cert. denied*, 470 U.S. 1084; Story v. Wyoming, 721 P.2d 1020 (Wyo.), *cert. denied*, 479 U.S. 962 (1986).

At least one justice believes the Supreme Court should return to the issue of pre-accusation delay. Dissenting from denial of certiorari in Hoo v. United States, Justice White wrote:

The issue presented by this petition for certiorari is what is the correct test for determining if prosecutorial preindictment delay amounts to a violation of the Due Process Clause of the Fifth Amendment The continuing conflict amongst the Circuits on this important question of constitutional law requires resolution by this Court; I would grant certiorari.

courts have been responsible for the development of the law in this area.⁵² Over the past dozen years, lower courts have fashioned a range of standards, within the contours of *Lovasco*, by which the due process inquiry is conducted. An examination of the decisions in the various federal appellate circuits illustrates the manner in which courts have conducted the due process analysis of pre-accusation delay.

Since 1977, all federal circuits have required, at minimum, a showing of "actual prejudice" before upholding a claim that pre-accusation delay has offended due process.⁵³ The burden of establishing prejudice is, logically, on the defendant, who holds the information regarding the nature of, and the extent to which, delay

Hoo, 484 U.S. at 1035.

52. This is as the Supreme Court intended. As Justice Marshall wrote in *Lovasco*, 431 U.S. at 796-77:

In *Marion*, we conceded that we could not determine in the abstract the circumstances in which preaccusation delay would require dismissing prosecutions. [citation omitted] More than five years later, that statement remains true . . . We therefore leave to the lower courts, in the first instance, the task of applying the settled principles of due process that we have discussed to the particular circumstances of individual cases.

53. See *United States v. Zukowski*, 851 F.2d 174, 178-79 (7th Cir.) (death of witnesses and faded memories of other witnesses insufficient showing of prejudice), *cert. denied*, 109 S. Ct. 174 (1988); *United States v. Wallace*, 848 F.2d 1464, 1469-70 (9th Cir. 1988) (loss of potential witnesses was insufficient showing of prejudice); *United States v. Comosona*, 848 F.2d 1110, 1114 (10th Cir. 1988) (memory failure and inability to locate witness was not actual prejudice); *United States v. Benson*, 846 F.2d 1338, 1341-42 (11th Cir. 1988) (unavailability of two witnesses, death of government agent testifying for defense and destruction of evidence constitute actual prejudice); *United States v. Thornberg*, 844 F.2d 573, 580 (8th Cir.) (no relief when defendant did not specify how he was prejudiced), *cert. denied*, 108 S. Ct. 2913 (1988); *United States v. Acevedo*, 842 F.2d 502, 505 (1st Cir. 1988) (memory impairment and inability to locate witnesses not sufficient prejudice); *United States v. Ismaili*, 828 F.2d 153, 167-69 (3d Cir. 1987) (death of two witnesses and loss of records insufficient showing of prejudice), *cert. denied*, 485 U.S. 935 (1988); *United States v. Atisha*, 804 F.2d 920, 928-29 (6th Cir. 1986) (memory loss insufficient showing of prejudice), *cert. denied*, 479 U.S. 1067 (1987); *United States v. Johnson*, 802 F.2d 833, 836 (5th Cir. 1986) (memory impairment not sufficient showing of actual prejudice); *United States v. MacDonald*, 632 F.2d 258, 263-65 (4th Cir. 1980) (loss of witness and passage of time deemed sufficient prejudice), *rev'd*, 456 U.S. 1 (1982); *United States v. Elsbery*, 602 F.2d 1054, 1059 (2d Cir.) (antagonistic witnesses, memory loss and inability to recoup financial losses not actual prejudice), *cert. denied*, 444 U.S. 994 (1979); *United States v. Pollack*, 534 F.2d 964, 969-70 (D.C. Cir.) (death of witness and loss of records insufficient showing of prejudice), *cert. denied*, 429 U.S. 924 (1976).

has impaired his or her capacity to present a defense.⁵⁴ Most circuits address the prejudice question first, requiring that the trial court find proof of actual prejudice as a threshold matter, and turn to the question of justification only if that threshold is crossed.⁵⁵

The threshold is high, as many courts acknowledge.⁵⁶ A defendant must establish not just the impairment of a defense because of missing evidence, but also the availability of that evidence but for the delay,⁵⁷ and its exculpatory nature were it now available.⁵⁸ This

54. See, e.g., *United States v. Swacker*, 628 F.2d 1250, 1254 (9th Cir. 1980); *Elsbery*, 602 F.2d at 1059; *United States v. Mays*, 549 F.2d 670, 677 (9th Cir. 1977); *People v. Price*, 165 Cal. App. 3d 536, 542, 211 Cal. Rptr. 642, 646 (1985).

55. See, e.g., *United States v. Savage*, 863 F.2d 595, 598 (8th Cir. 1988), *cert. denied*, 109 S. Ct. 2105 (1989); *Comosona*, 848 F.2d at 1114; *Benson*, 846 F.2d at 1342; *United States v. Eckhardt*, 843 F.2d 989, 995 (7th Cir.), *cert. denied*, 109 S. Ct. 106 (1988); *Prantil v. California*, 843 F.2d 314, 318 (9th Cir.) (per curiam), *cert. denied*, 109 S. Ct. 158 (1988); *Acevedo*, 842 F.2d at 505; *Atisha*, 804 F.2d at 928; *United States v. Automated Medical Laboratories, Inc.*, 770 F.2d 399, 403-04 (4th Cir. 1985); *United States v. Birney*, 686 F.2d 102, 105 (2d Cir. 1982); *United States v. Shaw*, 555 F.2d 1295, 1299 (5th Cir. 1977).

In *United States v. Sebetich*, 776 F.2d 412, 430 (3d Cir. 1985), *cert. denied*, 484 U.S. 1017 (1988), and *Ismaili*, 828 F.2d at 167, the Third Circuit first addressed the government's reasons for delay before examining whether the delay had prejudiced the appellant. "Because they clearly failed to show intentional delay, we need not reach the question whether appellants have met the burden of showing actual prejudice." *Sebetich*, 776 F.2d at 430. But in *United States v. Otto*, 742 F.2d 104, 107-08 (3d Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985), the Third Circuit required a showing of actual prejudice before considering the reasons for delay.

56. See, e.g., *United States v. Moran*, 759 F.2d 777, 782 (9th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986); *Payne v. Rees*, 738 F.2d 118, 122 (6th Cir. 1984); *United States v. Tiemens*, 724 F.2d 928, 929 (11th Cir.) (per curiam), *cert. denied*, 469 U.S. 837 (1984); *United States v. Solomon*, 686 F.2d 863, 872 (11th Cir. 1982); *United States v. Capone*, 683 F.2d 582, 589 (1st Cir. 1982); *United States v. Farber*, 679 F.2d 733, 734 (8th Cir.) (per curiam), *cert. denied*, 459 U.S. 874 (1982); *Elsbery*, 602 F.2d at 1059; *Pollack*, 534 F.2d at 969; *United States v. Stamp*, 458 F.2d 759, 768 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 975 (1972).

57. See, e.g., *Capone*, 683 F.2d at 589; *United States v. West*, 607 F.2d 300, 304-05 (9th Cir. 1979) (per curiam); *Elsbery*, 602 F.2d at 1059; *United States v. Walker*, 601 F.2d 1051, 1055-57 (9th Cir. 1979); *United States v. Richburg*, 478 F. Supp. 535 (M.D. Tenn. 1979) (mem.).

58. See, e.g., *United States v. Marler*, 756 F.2d 206, 213-14 (1st Cir. 1985) (no prejudice when prior testimony of unavailable witness was of little probative value); *Stoner v. Gradick*, 751 F.2d 1535, 1544-45 (11th Cir. 1985) (per curiam) (no prejudice when testimony of witness would have been inadmissible hearsay); *United States v. Williams*, 738 F.2d 172, 176 (7th Cir. 1984) (death of witness was prejudicial only if witness would have testified, withstood cross-examination and been found credible by jury); *Solomon*, 688 F.2d at 1179 (no prejudice when testimony of unavailable witness would have contradicted sworn affidavit); *United States v. Surface*, 624 F.2d 23, 25 (5th Cir. 1980) (mere claim that unavailable wit-

showing must be "non-speculative," requiring, for example, that a defendant establish credibly the content of a witness' testimony if the witness had lived, had remained accessible or had a memory unobscured by time.⁵⁹ A defendant cannot establish simply that the witness would have been available, but must show that the witness' testimony would have been available—for example, that the witness could have supplied admissible evidence and was not protected by, or would not have invoked, a privilege against self-incrimination or any other testimonial privilege.⁶⁰

ness "might be able to clear defendant of the charges" does not establish actual prejudice); *United States v. Kail*, 612 F.2d 443, 446 (9th Cir. 1979) (no prejudice when no showing of content of forgotten testimony), *cert. denied*, 445 U.S. 966 (1980); *United States v. D'Andrea*, 585 F.2d 1351, 1356 (7th Cir. 1978) (no prejudice when no showing of how unavailable testimony would have aided defendants' cause), *cert. denied*, 440 U.S. 983 (1979); *Arnold v. McCarthy*, 566 F.2d 1377, 1384 (9th Cir. 1978) (lost opportunity for jurors to observe demeanor of witness is only speculative prejudice); *Commonwealth v. Patten*, 401 Mass. 20, 22, 513 N.E.2d 689, 691 (1987) (missing evidence was as likely to have been inculpatory as exculpatory); *Commonwealth v. Best*, 381 Mass. 472, 486, 411 N.E.2d 442, 450-51 (1980) (record indicates that potential witness would not have been helpful); *Commonwealth v. Imbruglia*, 377 Mass. 682, 689, 387 N.E.2d 559, 564 (1979) (no showing that witness would have exculpated defendant); *Commonwealth v. Horan*, 360 Mass. 739, 742, 277 N.E.2d 491, 493 (1972) (two of three unavailable witnesses would not have been helpful to defense).

59. *See, e.g.*, *United States v. Wallace*, 848 F.2d 1464, 1470 (9th Cir. 1988) (no indication that potential witness would have testified for defendant); *United States v. Reme*, 738 F.2d 1156, 1163 (11th Cir. 1984) (defendant failed to state the expected testimony of specific unavailable witnesses), *cert. denied*, 471 U.S. 1104 (1985); *Williams*, 738 F.2d at 176 (defendant must show that unavailable witness would have testified, withstood cross-examination and been found credible); *United States v. Jenkins*, 701 F.2d 850, 855 (10th Cir. 1983) (defendant failed to show the particular facts to which witnesses would have testified); *United States v. Mills*, 641 F.2d 785, 788 (9th Cir.) (defendant failed to identify witnesses by true name, relate the substance of their testimony, or make efforts to locate them), *cert. denied*, 454 U.S. 902 (1981); *United States v. Toussant*, 619 F.2d 810, 814 (9th Cir. 1980) (*per curiam*) (defendant did not show what evidence had become unavailable due to delay); *Walker*, 601 F.2d at 1057 (no showing of what witnesses were unavailable or what their testimony would be); *United States v. Ramos Algarin*, 584 F.2d 562, 567 (1st Cir. 1978) (possibility that unavailable witness might provide additional information is speculative).

60. *See, e.g.*, *Wallace*, 848 F.2d at 1470 (potential witness may have invoked privilege against self-incrimination); *United States v. Adams*, 834 F.2d 632, 634 (7th Cir. 1987) (assertion that potential witness, if still alive, would have exonerated defendant by implicating himself was naive speculation), *cert. denied*, 484 U.S. 1046 (1988); *Stoner*, 751 F.2d at 1545 (testimony of potential witness who died would have been inadmissible hearsay); *Capone*, 683 F.2d at 589 (no showing that indicted co-conspirator would have waived his fifth amendment right not to testify).

Few defendants have been able to muster the requisite proof to clear this initial hurdle. Consequently, in some jurisdictions, the mechanics of the due process inquiry subsequent to the evaluation of actual prejudice are underdeveloped.⁶¹ Some courts, however, have found sufficient prejudice to trigger the second prong of the Supreme Court's due process test—the reason for the delay.⁶² Moreover, in an effort to demonstrate more fully the correctness of their holding, some courts have addressed the proffered explanations for delay despite a defendant's failure to establish actual prejudice.⁶³ Therefore, we have some indication of judicial views of the entire due process analysis of pre-accusation delay, although these views are by no means uniform.

In *United States v. Marion*,⁶⁴ the Supreme Court accepted in dictum the government's concession that intentional prosecutorial delay transgresses due process strictures when the delay is under-

61. See, e.g., *United States v. Acevedo*, 842 F.2d 502 (1st Cir. 1988); *United States v. Atisha*, 804 F.2d 920 (6th Cir. 1986), *cert. denied*, 479 U.S. 1067 (1987); *Otto*, 742 F.2d at 104; *Solomon*, 688 F.2d at 1171; *United States v. MacDonald*, 632 F.2d 258 (4th Cir. 1980), *rev'd*, 456 U.S. 1 (1982); *Elsbery*, 602 F.2d at 1054; *United States v. Pollack*, 534 F.2d 964 (D.C. Cir.), *cert. denied*, 429 U.S. 924 (1976).

62. See, e.g., *Benson*, 846 F.2d at 1342 (unavailability of two witnesses, death of government agent testifying for defense and destruction of evidence was sufficient prejudice); *Mills*, 704 F.2d at 1557 (lack of access to testimony of a confessor genuinely prejudiced defense preparation), *cert. denied*, 467 U.S. 1243 (1984); *United States v. Lindstrom*, 698 F.2d 1154, 1158 (11th Cir. 1983) (death of two key defense witnesses was prejudice sufficient to trigger examination of the reasons for delay); *United States v. Singer*, 687 F.2d 1135, 1143 (8th Cir. 1982) (death of witness who could have given exculpatory evidence constitutes sufficient prejudice); *Walker*, 601 F.2d at 1057 (unavailability of witness and inconvenience to defense in conducting investigation constitutes moderate prejudice); *United States v. Glist*, 594 F.2d 1374, 1378 (10th Cir. 1979) (sufficient prejudice and poor government preparation led to dismissal of charges); *Shaw*, 555 F.2d at 1299 (inability to locate two witnesses and inaccessibility of equipment and records support finding that defendant was somewhat prejudiced).

63. See, e.g., *Adams*, 834 F.2d at 633 (delay caused by limited resources and manpower, and need to prioritize this prosecution relative to others); *United States v. Johnson*, 802 F.2d 833, 836 (5th Cir. 1986) (delay was result of legitimate government concern for the safety and confidentiality of its undercover informants); *United States v. Bartlett*, 794 F.2d 1285, 1293 (8th Cir.) (delay caused by uncertainty as to whether federal or state court was proper jurisdiction for prosecution), *cert. denied*, 479 U.S. 934 (1986); *United States v. Sebetich*, 776 F.2d 412, 430 (3d Cir. 1985), *cert. denied*, 484 U.S. 1017 (1988) (delay was result of mix-up between federal and state authorities); *Williams*, 738 F.2d at 175 (delay was an oversight caused by case overload and administrative error); *D'Andrea*, 585 F.2d at 1356-57 (delay caused by death of FBI agent in charge of investigation).

64. 404 U.S. 307 (1971).

taken for the purpose of gaining tactical advantage over a defendant who thereby suffers prejudice.⁶⁵ The precise language of the portion of the opinion discussing intentional tactical delay indicates that the Court was not describing the standard for due process violations in this context. Because the appellee had claimed neither actual prejudice nor intentional delay, the Court expressly declined to elaborate a standard. Instead, it provided an illustration of one egregious situation that such a standard would likely proscribe.⁶⁶ In other words, the Court was establishing the due process ceiling to the problem. Several circuits, however, have fixed the ceiling and the floor in identical locations, requiring both actual prejudice and intentional tactical delay as the minimum showing for a due process violation.⁶⁷

The *Lovasco* opinion expanded the short list of impermissible government reasons for delay. According to the Court, both intentional tactical delay and reckless disregard of known circumstances indicating that delay would harm the defense offended due process principles.⁶⁸ Even if we view the latter not as an addition, but as the passive equivalent of the former, a few other courts clearly have expanded the list of impermissible reasons for government

65. *Id.* at 324.

66. *Id.*

67. *United States v. Comosona*, 848 F.2d 1110, 1113 (10th Cir. 1988); *Benson*, 846 F.2d at 1343; *Acevedo*, 842 F.2d at 504; *Ismaili*, 828 F.2d at 166-67; *United States v. Hoo*, 825 F.2d 667, 671 (2d Cir. 1987), *cert. denied*, 484 U.S. 1035 (1988); *United States v. Lebron-Gonzalez*, 816 F.2d 823, 831 (1st Cir.), *cert. denied*, 484 U.S. 843 (1987); *United States v. Caporale*, 806 F.2d 1487, 1514 (11th Cir. 1986), *cert. denied*, 482 U.S. 917 (1987); *Jenkins*, 701 F.2d at 854.

The Fifth and Seventh Circuits both have recent precedents requiring that the defendant show actual prejudice and intentional tactical delay before finding a due process violation. *See, e.g., United States v. Rein*, 848 F.2d 777, 781 (7th Cir. 1988); *United States v. Scott*, 795 F.2d 1245, 1249 (5th Cir. 1986). Both circuits acknowledge, however, some conflicts on the issue among cases within the circuit. *See, e.g., Dickerson v. Louisiana*, 816 F.2d 220, 229 n.16 (5th Cir.), *cert. denied*, 484 U.S. 956 (1987); *United States v. Hollins*, 811 F.2d 384, 387-88 (7th Cir. 1987).

68. *United States v. Lovasco*, 431 U.S. 783, 795 n.17 (1977). "A due process violation might also be made out upon a showing of prosecutorial delay incurred in reckless disregard of circumstances, known to the prosecution, suggesting that there existed an appreciable risk that delay would impair the ability to mount an effective defense." *Id.* (quoting Brief for United States at 32-33).

delay. Drawing on tort notions of fault, the Second,⁶⁹ Ninth⁷⁰ and Tenth Circuits⁷¹ have suggested that government negligence may be an impermissible reason for protracted delay that prejudices the defense. Through negligent delay, the courts reason, the government breaches its duty to defendants to initiate prosecutions with reasonable expedition. Consequently, the government must bear the responsibility for that delay. Despite the force of this argument, few jurisdictions are willing to allocate the costs of negligent processing to the government. Most courts let the costs of the government's negligence rest where they fall, with the defendant prevailing only upon a showing of official bad faith.⁷²

The Fifth,⁷³ Sixth,⁷⁴ Eighth,⁷⁵ Ninth,⁷⁶ Tenth⁷⁷ and Eleventh Circuits⁷⁸ have allocated to the defendant the burden of establishing improper reasons for the delay, despite the prosecution's exclusive access to the information necessary to make such a showing. The Seventh Circuit is divided on the issue; some cases place the burden of showing improper reasons on the defendant,⁷⁹ but others

69. The Second Circuit has neither recognized nor foreclosed negligence as an impermissible reason. *United States v. Birney*, 686 F.2d 102, 105 n.1 (2d Cir. 1982).

70. *United States v. Moran*, 759 F.2d 777, 781 (9th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986); *United States v. Mays*, 549 F.2d 670, 677 (9th Cir. 1977); *United States v. Simmons*, 536 F.2d 827, 831 (9th Cir.), *cert. denied*, 429 U.S. 854 (1976).

71. *Jenkins*, 701 F.2d at 856; *United States v. Glist*, 594 F.2d 1374, 1378 (10th Cir. 1979).

72. *See supra* note 67.

73. *United States v. Carlock*, 806 F.2d 535, 549 (5th Cir. 1986), *cert. denied*, 480 U.S. 949 (1987).

74. *United States v. Atisha*, 804 F.2d 920, 928 (6th Cir. 1986), *cert. denied*, 479 U.S. 1067 (1987); *United States v. Swainson*, 548 F.2d 657, 663-64 (6th Cir.), *cert. denied*, 431 U.S. 937 (1977).

75. *United States v. Savage*, 863 F.2d 595, 598 (8th Cir. 1988), *cert. denied*, 109 S. Ct. 2105 (1989); *United States v. Sims*, 779 F.2d 16, 17 (8th Cir. 1985); *United States v. Bliss*, 735 F.2d 294, 301 (8th Cir. 1984).

76. *United States v. Sand*, 541 F.2d 1370, 1373 (9th Cir. 1976), *cert. denied*, 429 U.S. 1103 (1977).

77. *Perez v. Sullivan*, 793 F.2d 249, 259 (10th Cir.), *cert. denied*, 479 U.S. 936 (1986); *United States v. Vigil*, 743 F.2d 751, 758 (10th Cir.), *cert. denied*, 469 U.S. 1090 (1984); *United States v. Francisco*, 575 F.2d 815, 817 (10th Cir. 1978).

78. *United States v. Benson*, 846 F.2d 1338, 1341 (11th Cir. 1988); *United States v. Butler*, 792 F.2d 1528, 1533 (11th Cir.), *cert. denied*, 479 U.S. 933 (1986).

79. *See United States v. Williams*, 738 F.2d 172, 175 n.1 (7th Cir. 1984) (recognizing split but avoiding resolution of the issue by holding that defendant had failed to show prejudice); *United States v. Watkins*, 709 F.2d 475, 479 (7th Cir. 1983) (requiring defendant to prove improper motive for delay).

maintain that once the defendant establishes prejudice, the burden shifts to the government to show legitimate reasons for the delay.⁸⁰ Those cases that employ burden-shifting after a defendant's *prima facie* showing of prejudice generally employ balancing as well, weighing the prejudice to the accused against the reasons for the delay. The Fifth,⁸¹ Seventh,⁸² Eighth,⁸³ Ninth⁸⁴ and Tenth Circuits⁸⁵ all rendered decisions endorsing a balancing approach to the due process question once the defendant establishes both delay-related prejudice and impermissible reasons for delay. Presumably, even in the Ninth and Tenth Circuits, balancing jurisdictions that find negligent delay impermissible, the doctrine permits a court to vindicate the government in a case involving negligent delay and moderate prejudice, when the severity of the prejudice does not override the culpability of the explanation.⁸⁶

The balancing process accords special weight to investigative delay. No appellate court has permitted the dismissal of an indictment following a finding—sometimes on the government's bare assertion—of a protracted period of good faith investigative delay even when the defendant shows actual prejudice.⁸⁷ This result is in keeping with *Lovasco*, if one interprets *Lovasco* as respecting the absolute justifiability of investigative delay no matter what havoc

80. *United States v. Solomon*, 688 F.2d 1171, 1179 (7th Cir. 1982) (stating court will balance reasons asserted by the government against the prejudice shown by the defendant); *United States v. King*, 593 F.2d 269, 272 (7th Cir. 1979) (same).

81. *United States v. Brand*, 556 F.2d 1312, 1317 n.7 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978).

82. *Solomon*, 688 F.2d at 1179.

83. *United States v. Savage*, 863 F.2d 595, 598 (8th Cir. 1988), *cert. denied*, 109 S. Ct. 2105 (1989); *United States v. Taylor*, 603 F.2d 732, 735 (8th Cir.), *cert. denied*, 444 U.S. 982 (1979).

84. *United States v. Moran*, 759 F.2d 777, 781 (9th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986); *United States v. Mays*, 549 F.2d 674, 677 (9th Cir. 1977).

85. *United States v. Comosona*, 614 F.2d 695, 696 (10th Cir. 1980).

86. *Mays*, 549 F.2d at 678; *see State v. Boseck*, 45 Wash. App. 62, 67, 732 P.2d 1182, 1185-86 (1986) (delay to obtain testimony of incriminating witness held to be sufficient justification to overcome assumed prejudice against defendant).

87. *United States v. Lindstrom*, 698 F.2d 1154, 1159 (11th Cir. 1983) (defendant produced no evidence to show that delay was a deliberate tactical maneuver by the government); *United States v. Shaw*, 555 F.2d 1295, 1299 (5th Cir. 1977) (need for investigation and allocating prosecutorial resources was not a deviation from fair play).

it wreaks on the defense.⁸⁸ One can read *Lovasco* more flexibly, however, as supporting a notion that investigative delay offends due process only when defendants, unlike Lovasco himself, can show substantial prejudice. No court has explored the distinction between the "moderate prejudice" suffered by Lovasco and a more severe form of prejudice suffered as a result of good faith investigative delay.

Within this doctrinal framework, courts have found constitutionally acceptable other reasons beyond investigative delay despite claims of defense impairment, either because the reasons outweighed the impairment or were legitimate in their own right. Examples of such reasons are: government counsel's failure to resolve scheduling conflicts with police officers,⁸⁹ shortages among law enforcement personnel,⁹⁰ prioritizing investigative efforts,⁹¹ budget limitations,⁹² case overload,⁹³ administrative error,⁹⁴ lack of diligence in pursuing an investigation,⁹⁵ unwillingness to file charges until a witness was tested before the grand jury,⁹⁶ waiting for an incompetent minor witness to become mature enough to testify,⁹⁷ awaiting an imminent scientific advance for purposes of testing forensic evidence,⁹⁸ awaiting the outcome of a state prosecution

88. *United States v. Lovasco*, 431 U.S. 783, 796 (1977) ("We therefore hold that to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time.").

89. *United States v. Peters*, 434 F. Supp. 357, 360 (D.D.C. 1977).

90. *United States v. Adams*, 834 F.2d 632, 633 (7th Cir. 1987), *cert. denied*, 484 U.S. 632 (1988); *United States v. Townley*, 665 F.2d 579, 582 (5th Cir.), *cert. denied*, 456 U.S. 1010 (1982); *United States v. Ramos Algarin*, 584 F.2d 562, 567 (1st Cir. 1978); *United States v. King*, 560 F.2d 122, 129 (2d Cir.), *cert. denied*, 434 U.S. 925 (1977).

91. *United States v. Williams*, 738 F.2d 172, 175 (7th Cir. 1984); *Townley*, 665 F.2d at 582; *King*, 560 F.2d at 129-30; *Shaw*, 555 F.2d at 1298.

92. *Adams*, 834 F.2d at 633; *King*, 560 F.2d at 129.

93. *Williams*, 738 F.2d at 175; *Townley*, 665 F.2d at 582.

94. *United States v. Sebetich*, 776 F.2d 412, 429 (3d Cir. 1985), *cert. denied*, 484 U.S. 1017 (1988); *Williams*, 738 F.2d at 175.

95. *United States v. Singer*, 687 F.2d 1135, 1144 (8th Cir. 1982); *United States v. Walker*, 601 F.2d 1051, 1056 (9th Cir. 1979).

96. *Walker*, 601 F.2d at 1057.

97. *People v. Price*, 165 Cal. App. 3d 536, 544, 211 Cal. Rptr. 642, 648 (1985).

98. *People v. Archerd*, 3 Cal. 3d 615, 620-21, 641-43, 477 P.2d 421, 423, 438-39, 91 Cal. Rptr. 397, 399, 414-15 (1970).

before bringing federal charges,⁹⁹ a prosecutor's honeymoon,¹⁰⁰ confusion as to the appropriate charge and venue,¹⁰¹ avoiding a grant of immunity to a grand jury witness until just prior to the expiration of the statute of limitations,¹⁰² and proceeding on a previously overlooked or dismissed charge once an unrelated conviction is reversed on appeal.¹⁰³

The foregoing analysis offers little hope that a motion to dismiss the indictment, such as that filed on behalf of the hypothetical client in Section IA, will prevail.¹⁰⁴ The client depicted there will likely face trial, although time has weakened her adversarial position relative to the prosecution. Indeed, virtually every case decided under the Supreme Court's *Lovasco* analysis has extended

99. *United States v. Marler*, 756 F.2d 206, 215 (1st Cir. 1985); *United States v. Purham*, 725 F.2d 450, 453-54 (8th Cir. 1984); *United States v. Mejias*, 552 F.2d 435, 441 (2d Cir.), *cert. denied*, 434 U.S. 847 (1977).

100. *United States v. Williams*, 738 F.2d 172, 175 (7th Cir. 1984).

101. *United States v. Bartlett*, 794 F.2d 1285, 1293 (8th Cir.), *cert. denied*, 479 U.S. 934 (1986).

102. *United States v. Capone*, 683 F.2d 582, 589 (1st Cir. 1982).

103. *Arnold v. McCarthy*, 566 F.2d 1377, 1385 (9th Cir. 1978).

104. Contrary to expectation in the case on which the illustration in Section IA is based, the trial judge granted the motion to dismiss the indictment. After a day of testimony from prosecution and defense witnesses, the judge found that the pre-indictment delay had prejudiced the defendant and that the government had no legitimate explanation for the delay. The evidence showed that the undercover officer, the complainant in the case, had surfaced soon after the underlying incident and that the government neither sought nor gathered evidence after the date on which the incident occurred. Hence the court found the pre-indictment delay violative of due process. Although the judge did not make explicit the standard that he applied, he did cite favorably the pre-*Lovasco* case law in the District of Columbia, especially *Ross v. United States*, 349 F.2d 210 (D.C. Cir. 1965). The judge's decision may also have been influenced by the defendant's incarceration on another offense, such that dismissal of this indictment did not result in his release to the community.

Nevertheless, the result is surprising because trial judges always have the option of reserving decision on a dismissal motion until after the trial has been conducted, at which time they can better evaluate whether a period of charging delay has in fact impaired the trial. See, e.g., *People v. Price*, 165 Cal. App. 3d 536, 542, 211 Cal. Rptr. 642, 646 (1985); *People v. Archerd*, 3 Cal. 3d 615, 641, 477 P.2d 421, 438, 91 Cal. Rptr. 397 (1970). Such a decision would create difficulties for the defense. For example, the same witnesses needed to show prejudice by testifying at the motion hearings about their faded memories might have to be relied on at trial for the assistance of their partial recollections. Not only might the prosecution impeach these witnesses with their prior claims of memory failure, but the defense attorney might be forced to put the best face possible on the defense presented, glossing over the delay-created weaknesses in order to persuade the fact-finder of the merits of the remaining defense case. Clearly, the defense strategy at the motion hearing and the defense strategy at trial can undercut each other.

constitutional approval to long periods of charging delay.¹⁰⁵ Had the Supreme Court adopted other sorts of analyses, the outcomes of these cases might not have been so uniform. The doctrinal alternatives available to the Court at the time of its *Lovasco* decision are worth closer scrutiny.

III. ALTERNATIVE CONSTITUTIONAL ANALYSES

In outlining the prevailing doctrinal form for analyzing the problem of pre-accusation delay, the Supreme Court has explicitly or implicitly rejected alternative forms of analysis. I examine the most salient of these alternatives at the outset. The purpose of this examination is to inform more fully our judgments about the value of the chosen road by comparing it with roads not taken.

A. *Speedy Trial*

Observers of the legal system have long been concerned with "the law's delay."¹⁰⁶ The framers enacted this concern into law in the sixth amendment of the United States Constitution.¹⁰⁷ The speedy trial clause, which is first in the sixth amendment's catalogue of criminal trial rights,¹⁰⁸ had distinguished precursors in

105. Extensive research involving hundreds of federal and state cases has produced only a few exceptions. Those few cases in which courts have found pre-accusation delay to transgress due process strictures are as follows: *United States v. Glist*, 594 F.2d 1374 (10th Cir. 1979); *Howell v. Barker*, 684 F. Supp. 132 (E.D.N.C. 1988); *United States v. Sample*, 565 F. Supp. 1166 (E.D. Va. 1983); *United States v. Morrison*, 518 F. Supp. 917 (S.D.N.Y. 1981); *State v. Luck*, 15 Ohio St. 3d 150, 472 N.E.2d 1097 (1984), *cert. denied*, 470 U.S. 1084.

106. In Hamlet's famous soliloquy beginning "To be, or not to be," the prince cites "the law's delay" as one of the agonies justifying suicide:

For who would bear the whips and scorns of time,
The oppressor's wrong, the proud man's contumely,
The pangs of despised love, the law's delay,
The insolence of office and the spurns
That patient merit of the unworthy takes,
When he himself might his quietus make with
a bare bodkin?

Shakespeare, *Hamlet*, act III, scene I, lines 70-76 (THE RIVERSIDE SHAKESPEARE 1135, 1160 (1974)).

107. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .").

108. The full text of the sixth amendment reads:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime

English jurisprudence—the Assize of Clarendon (1166),¹⁰⁹ Magna Carta (1215),¹¹⁰ Habeas Corpus Act (1679)¹¹¹—in colonial bills of rights¹¹² and original state constitutions.¹¹³ The right to come to trial “free from vexatious, capricious, and oppressive delays manu-

shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Id.

109. The Assize of Clarendon, found in 2 ENGLISH HISTORICAL DOCUMENTS 408 (1953), is cited in *Klopfers v. North Carolina*, 386 U.S. 213, 223 n.9 (1967):

And when a robber or murderer or thief or receiver of them has been arrested through the aforesaid oath, if the justices are not about to come speedily enough into the country where they have been taken, let the sheriffs send word to the nearest justice by some well-informed person that they have arrested such men, and the justices shall send back word to the sheriffs informing them where they desire the men to be brought before them; and let the sheriffs bring them before the justices.

110. The pertinent passage reads: “[W]e will not deny or defer to any man either justice or right.” MAGNA CARTA, ch. 29 [ch. 40 of KING JOHN’S CHARTER of 1215] (1225), *translated and quoted in* E. COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 45 (Brooke 5th ed. 1797), *cited in Klopfers*, 386 U.S. at 223.

Sir Edward Coke, a primary influence on colonial American law, interpreted chapter 29 of the Magna Carta in this manner: “[E]very subject of this realme . . . may take his remedy by the course of the law, and have justice, and right for the injury done to him, freely without sale, fully without any deniall, and speedily without delay.” E. COKE, *supra*, at 55, *quoted in Klopfers*, 386 U.S. at 224.

111. 31 Car. II, ch. 2, § 1. For a further discussion of the relationship between the British Habeas Corpus Act and modern speedy trial rights, see *United States v. Provoo*, 17 F.R.D. 183, 196-97 (D. Md.), *aff’d. mem.*, 350 U.S. 857 (1955) (per curiam).

112. See, e.g., VA. CONST., Declaration of Rights, § 8 (“[A] man hath a right . . . to a speedy trial . . .”), *cited in Klopfers*, 386 U.S. at 225.

113. See, e.g., MASS. CONST. part I, art. IX:

Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

The Massachusetts Supreme Judicial Court has interpreted this provision as a guarantee of the right to a speedy trial. See *Commonwealth v. Hanley*, 337 Mass. 384, 387, 149 N.E.2d 608, 610 (1958).

See also DEL. CONST. art. I, § 7 (1792); KY. CONST. art. XII, § 10 (1792); MD. CONST., Declaration of Rights, art. XIX (1776); N.H. CONST. part I, art. XIV (1784); PA. CONST., Declaration of Rights, art. 1, § IX (1776); TENN. CONST. art. I, § 9 (1796); VT. CONST. ch. I, art. X (1786). These constitutions are cited in *Klopfers*, 386 U.S. at 225-26 n.21.

factured by the ministers of justice"¹¹⁴—the oft-cited nineteenth century definition of the sixth amendment right—was deemed so "implicit in the concept of ordered liberty"¹¹⁵ that in *Klopfer v. North Carolina*,¹¹⁶ it was incorporated through the fourteenth amendment as a limit on state action and is guaranteed independently in each of the fifty states.¹¹⁷ In the federal system,¹¹⁸ as in many states,¹¹⁹ speedy trial rights receive both constitutional and statutory protection, the latter often taking the form of precise timing requirements for the commencement of trial.

The framers crafted the speedy trial clause of the sixth amendment to address the problem of delay in coming to judgment before a criminal tribunal. They believed this concern with delay would serve the underlying purposes of effective law enforcement and enhanced deterrence,¹²⁰ while shielding individuals from the problems engendered by prolonged periods of unresolved criminal liability, particularly problems of anxiety, oppressive pretrial incarceration and loss of defense evidence.¹²¹ Because delay can occur at any stage of the criminal process, from offense to conviction,

114. See *Provoe*, 17 F.R.D. at 197 (citing BLACK'S CONSTITUTIONAL LAW § 266).

115. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). This is one expression of the selective incorporation standard by which judges determine whether particular amendments of the federal constitution are applicable to the states. See *id.* at 325-29.

116. 386 U.S. 213 (1967).

117. *Id.* at 226.

118. See The Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-3174 (1988) (as amended by Speedy Trial Act Amendments Act of 1979, Pub. L. No. 96-43, 93 Stat. 331); see also FED. R. CRIM. P. 48(b):

If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

119. See, e.g., MASS. R. CRIM. P. 36, 43C MASS. GEN. LAWS ANN. (West 1980), which essentially guarantees trial within twelve months of the defendant's first court appearance, excluding specifically itemized delays not fairly attributable to the prosecution. A complete list of state speedy trial statutes appears in ABA STANDARDS, SPEEDY TRIAL § 2.1 (1967).

120. See J. BENTHAM, THE THEORY OF LEGISLATION 326 (Ogden ed. 1931). "[I]t is desirable that punishment should follow offence as closely as possible; for its impression upon the minds of men is weakened by distance, and, besides, distance adds to the uncertainty of punishment, by affording new chances of escape." *Id.*

121. See *United States v. Ewell*, 383 U.S. 116 (1966). "This guarantee is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself." *Id.* at 120.

the purposes of the speedy trial guarantee would seem to be served fully only by limiting undue delay at whatever point in the process it occurs.¹²² Nevertheless, in *United States v. Marion*,¹²³ the Supreme Court held that sixth amendment speedy trial protection did not encompass delays occurring in the pre-accusation period.¹²⁴ In so holding, the Court relied heavily on interpretations of state and federal cases and statutes. The Court found a far greater number of legislative and judicial constructions of speedy trial provisions that excluded pre-accusation delay from sixth amendment protection than included it.¹²⁵

Despite the results of the Court's tally, some of the purposes of speedy trial protection are weakened considerably when we withhold pre-charge delay from the reach of the protection's grasp. To the extent that prolonged delay in charging possibly harms the prosecution either through loss of evidence or loss of the ability to locate the defendant, it undermines the purpose of providing incentives for effective law enforcement.¹²⁶ Moreover, whatever deterrence criminal sanctions furnish is enhanced to the extent that punishment follows closely upon the offense, not simply upon the charge; therefore, a speedy trial following an indictment issued after extended delay poorly serves the purpose of deterrence. Clearly, the deterrence rationale for speedy trial supports inclusion of pre-charge delay within the shelter of the speedy trial umbrella.

Furthermore, a trial conducted years after the alleged commission of an offense may suffer impaired fact-finding, an impairment that is not diminished if the delay transpires prior to charging. In fact, uncharged defendants lacking notice of a prosecution that would induce them to forestall the erosion of defense evidence are likely to suffer even greater delay-related prejudice than are charged defendants.¹²⁷ The sixth amendment's right to a speedy trial, embodying as it does a historical concern with delay's decay

122. See *supra* notes 19-27 and accompanying text.

123. 404 U.S. 307 (1971).

124. *Id.* at 313.

125. *Id.* at 315-20.

126. See *supra* note 23 and accompanying text.

127. See *supra* notes 19-22 and accompanying text.

of the adversarial process,¹²⁸ would seem to be the logical source of protection against such decay, whether it was caused by delay in the pre-charge or the post-charge period.¹²⁹ The exclusion of pre-charge delay from the sixth amendment's scope serves the underlying purpose of the speedy trial guarantee less successfully than its inclusion.

In *Marion*, Supreme Court removed pre-accusation delay from speedy trial purview by claiming that post-accusation delay implicates different interests than pre-accusation delay.¹³⁰ A more accurate characterization, however, is that pre-accusation delay implicates a subset of the three readily identifiable speedy trial interests: to prevent oppressive pretrial incarceration, to minimize the anxiety and concern of the accused, and to limit the possibility that the defense will be impaired.¹³¹ In *Barker v. Wingo*,¹³² decided six months after *Marion*, the Supreme Court labeled the third of these interests the "most serious" interest of all because "the inability of a defendant adequately to prepare his case skews the fairness of the entire system."¹³³ By contrast, the *Marion* majority had relegated the third interest, limiting defense impairment, to a position of lesser importance, asserting that "the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense."¹³⁴ The Court's contrary position in *Marion* diminished the importance of the problem of defense prejudice and thereby helped justify the Court's separation of pre-accusation delays, in which defense

128. See *supra* notes 106-21 and accompanying text; see also *United States v. McWilliams*, 163 F.2d 695, 696 (D.C. Cir. 1947):

As in all long-delayed cases, the witnesses now are scattered; some are not accessible, more particularly to the defendants who are without funds; the memories of witnesses as to events occurring many years ago are not clear. It is for these reasons among others that the Constitution of the United States requires a speedy trial . . .

129. See *Marion*, 404 U.S. at 321. "Passage of time, whether before or after arrest, may impair memories, cause evidence to be lost, deprive the defendant of witnesses, and otherwise interfere with his ability to defend himself." *Id.*

130. *Id.* at 320.

131. See *supra* note 121. These interests were reiterated in *Barker v. Wingo*, 407 U.S. 514, 532 (1972).

132. 407 U.S. 514 (1972).

133. *Id.* at 532.

134. *Marion*, 404 U.S. at 320.

prejudice is the leading concern, from post-accusation delays, in which defense prejudice is accompanied by additional concerns.

The argument that post-accusation and pre-accusation delays implicate different interests is facilitated as well by the Court's muddled approach to resolving speedy trial problems. In *Strunk v. United States*,¹³⁵ the Supreme Court held that dismissal is the only possible remedy for a speedy trial violation.¹³⁶ Yet, as Professor Amsterdam has suggested,¹³⁷ if the speedy trial wrong in a particular case is oppressive pretrial incarceration, the appropriate remedy would be simply to release the defendant from pretrial custody pending trial; if the particular wrong is pretrial anxiety, the appropriate remedy would be to expedite the trial. Only when the wrong complained of is the impairment of the defense would the responsive remedy be to dismiss the prosecution.

If the speedy trial issue were addressed and analyzed according to these distinct interests, the problem of pre-accusation delay would be equivalent, in underlying concern and appropriate response, to the sole speedy trial problem—defense prejudice—that warrants dismissal. Had the Supreme Court accepted Professor Amsterdam's tutelage in this area, courts today might analyze prejudicial pre-accusation delay under the *Barker v. Wingo* balancing approach as the most serious kind of speedy trial problem.¹³⁸ Instead, the prevailing confusion in speedy trial jurisprudence has contributed to the mechanical severance of pre-accusation delay from the speedy trial context.

In severing pre-accusation delay from the speedy trial context, the Supreme Court also relied on the argument that the sixth amendment, by its own terms, applies only to the "accused," indicating its focus on the period after which a defendant is formally

135. 412 U.S. 434 (1973).

136. *Id.* at 440.

137. See Amsterdam, *Speedy Criminal Trial: Rights and Remedies*, 27 STAN. L. REV. 525, 535 (1975).

138. See *Barker v. Wingo*, 407 U.S. 514, 530 (1972):

The approach we accept is a balancing test, in which the conduct of both the prosecution and the defendant are weighed . . . [S]ome of the factors which courts should assess in determining whether a particular defendant has been deprived of his right . . . [are] [l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.

charged.¹³⁹ Although this is one possible interpretation of the sixth amendment, it is not the only interpretation. The amendment may use the word "accused" because a trial, speedy or not, is a definitional impossibility without an accusation. Persons facing trial become the accused at some point, and only at that point do they have the requisite injury and stake in the outcome to complain of delays in being brought to trial, no matter when those delays occurred.¹⁴⁰ In choosing between these interpretations, we receive no guidance from the drafters' intentions in selecting the word "accused," because unlike some other provisions of the Bill of Rights, the sixth amendment was little discussed before its approval.¹⁴¹

Without the interpretive aid that legislative history might have provided, we must look for guidance elsewhere to determine whether the sixth amendment means, as the Court insisted, "what it appears to say."¹⁴² The Court's reliance on literalism is surprising, because a truly literal reading of the speedy trial clause would furnish protection only against delays arising during the presentation of proof at the trial itself,¹⁴³ an interpretation at odds with history.¹⁴⁴ History provides other evidence to suggest that the sixth amendment should not be read literally. First is the evidence from early common law. In a case from colonial America, *The King v. Robinson*,¹⁴⁵ the court refused a motion for a criminal information against the defendant, in part, on the ground that more than two

139. See *United States v. Marion*, 404 U.S. 307, 313-20 (1971).

140. See *id.* at 328 (Douglas, J., concurring) ("But the words 'the accused,' as I understand them in their Sixth Amendment setting, mean only the person who has standing to complain of prosecutorial delay in seeking an indictment or filing an information.").

141. The absence of a guarantee of political rights, such as those found in most state constitutions, fueled the ratification debates over the United States Constitution in 1789, but few of the public debates concerned criminal trial rights. See Clinton, *supra* note 3, at 731. The congressional debates about the Bill of Rights reveal nothing about the reception of the sixth amendment, suggesting that Congress considered its language either relatively noncontroversial or relatively inconsequential. *Id.* at 732-33 (citing 2 B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY*, 983-1167 (1971)).

142. See *Marion*, 404 U.S. at 314.

143. Note, *The Right to a Speedy Trial*, 20 STAN. L. REV. 476, 491 (1968).

144. See the admonition of Judge Learned Hand in *Guiseppe v. Walling*, 144 F.2d 608, 624 (2d Cir. 1944) (Hand, J., concurring) ("There is no surer way to misread a document than to read it literally."), *aff'd sub nom. Gemsco, Inc. v. Walling*, 324 U.S. 244 (1945). See generally *Barker v. Wingo*, 407 U.S. 514, 522-24 (1972), which clearly contemplates delays between charging and trial.

145. 1 Black. W. 541, 96 Eng. Rep. 313 (1765).

years had passed since the offense, and "the delay is not accounted for."¹⁴⁶ Similar interpretations of our common law heritage are found in three nineteenth century British cases. In *The King v. Marshall and Grantham*,¹⁴⁷ the court denied an application to proceed with criminal prosecution "because it was made so late."¹⁴⁸ In *The Queen v. Hext*,¹⁴⁹ the court denied a criminal information because a full term of the court had expired since the alleged assault had taken place. Although the applicant had good reasons for the delay—an attempt to settle the case—the court held that the information "ought to have been more prompt."¹⁵⁰ Likewise, in *The Queen v. Robins*,¹⁵¹ a two-year delay in charging bestiality led to a directed verdict of acquittal because a trial after such a lapse would be "monstrous."¹⁵²

Although the British cases postdate the Constitution, if they accurately reflect American common law heritage, they may represent the framers' understanding of the sixth amendment. Moreover, the framers may have constitutionalized the single colonial American case on the subject into the speedy trial clause. Although no evidence explicitly affirms this possibility, neither does any deny it. Nevertheless, in a footnote to the *Marion* opinion, the Supreme Court rejected this argument from the common law, preferring to focus instead on the English Habeas Corpus Act, another sixth amendment antecedent, which did not apply to pre-accusation delay.¹⁵³ Although the common law heritage seems to make a persuasive argument for including pre-accusation delay in speedy trial analysis, all that can be said with certainty is that the history is ambiguous.

A second historical argument based on British common law relates to the manner in which eighteenth century British prosecutions were commenced. A prosecution commenced when a private party retained counsel and filed a lawsuit alleging a crime had oc-

146. *Id.* at 542, 96 Eng. Rep. at 314.

147. 13 East 322, 104 Eng. Rep. 394 (1811).

148. *Id.*

149. 4 Jurist 339 (1840).

150. *Id.*

151. 1 Cox Crim. Cas. 114 (Somerset Winter Assizes 1844).

152. *Id.*

153. *United States v. Marion*, 404 U.S. 307, 314 n.6 (1971).

curred. Thereafter, an application for a criminal prosecution was filed, asking a defendant to show cause why he should not be imprisoned.¹⁵⁴ Hence, according to the British practice inherited by colonial America, a person was "accused" before being formally charged. In this historical context, the word "accused" appears to have had a more general meaning when the sixth amendment was drafted than it has today.

A third historical argument arises from the two cases of *United States v. Burr*.¹⁵⁵ In these cases, Chief Justice Marshall, the pre-eminent constitutional jurist of early America, rejected the notion that sixth amendment trial rights take effect only after indictment.¹⁵⁶ Although he was speaking specifically of compulsory process rights, Marshall viewed the sixth amendment as protecting the preparation and presentation of a defense, such that if events preceding indictment impaired this preparation or presentation, the sixth amendment would be transgressed.¹⁵⁷ If, as some commentators contend, the opinions of judges who were the framers' contemporaries are entitled to considerable weight in construing the framers' intentions,¹⁵⁸ Marshall's expansive view of the sixth amendment presents a powerful argument against literalism in speedy trial analysis.

A final historical argument resides in more recent constitutional history. Despite its limitation only to the "accused," another sixth amendment right—the right to assistance of counsel—has been held to attach prior to indictment. In *Escobedo v. Illinois*,¹⁵⁹ the Supreme Court held that the right to counsel attached during pre-accusation interrogation when "the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect."¹⁶⁰ In so holding, the Court said, "It would exalt form over substance to make the right to counsel, under these

154. See G. DESSON, CRIMINAL LAW, ADMINISTRATION AND PUBLIC ORDER 356 (1948), cited in *Marion*, 404 U.S. at 329 (Douglas, J., concurring).

155. *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d) [hereinafter *Burr I*]; *United States v. Burr*, 25 F. Cas. 187 (C.C.D. Va. 1807) (No. 14,694) [hereinafter *Burr II*].

156. See *Burr I*, 25 F. Cas. at 33.

157. See *id.*

158. See C. BEARD, THE SUPREME COURT AND THE CONSTITUTION 113-18 (1912).

159. 378 U.S. 478 (1964).

160. *Id.* at 490-91.

circumstances, depend on whether at the time of the interrogation, the authorities had secured a formal indictment."¹⁶¹ Although courts have largely ignored *Escobedo* since the advent of *Miranda v. Arizona*,¹⁶² its logic still has force. The Court's reasoning in *Escobedo* rejects exalting form over substance by claiming that delays in the criminal process take on sixth amendment proportions only if the authorities have secured a formal indictment.

Although none of the historical arguments against literalism in sixth amendment interpretation is dispositive, cumulatively they have persuasive power. This power is enhanced by a further argument: The speedy trial guarantee should be interpreted in the manner that most fully realizes its intended objectives.¹⁶³ Construing the speedy trial provision to exclude pre-accusation delay does not advance its purposes, as described above, nearly as effectively as would an inclusive construction.¹⁶⁴ The best reading of a textual provision that poses constitutional limits on delays in the criminal process is one that encompasses all delays that might adversely affect the criminal trial. By that standard, the prevailing interpreta-

161. *Id.* at 486.

162. 384 U.S. 436 (1966). Although the holding in *Miranda* is similar to the holding in *Escobedo*, the Court in *Miranda* grounded its protection of the accused during pre-charge interrogation in the fifth amendment privilege against self-incrimination rather than in the sixth amendment right to counsel. *See id.* at 467.

163. Support for this argument can be found in the language of a number of cases. *See, e.g., Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945), *cited in* Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 75 n.4 (1974):

Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

See also Gompers v. United States, 233 U.S. 604, 610 (1914):

[T]he provisions of the [sixth amendment] are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.

Accord Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892) ("It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intent of its makers.").

164. *See supra* notes 120-22 and accompanying text.

tion of the speedy trial clause does not appear to be the best interpretation.

B. *Compulsory Process*

Another logical application of doctrinal forms to the problem of pre-accusation delay is to view delay-related prejudice as contravening the rights protected by the sixth amendment's compulsory process clause.¹⁶⁵ Although explicitly protecting only the accused's right to subpoena witnesses, courts have read the guarantee of compulsory process expansively enough in recent years to give constitutional shelter to the accused's right to secure witnesses and evidence to present in his or her defense.¹⁶⁶ Professor Westen argues persuasively that the compulsory process right, undergirded by assumptions about the value of an adversarial process, encompasses the right to discover the existence of potential witnesses, to put them on the stand, to have their testimony admitted into evidence, to have it believed and to enjoy a general balance of advantage with the prosecution regarding the presentation of evidence.¹⁶⁷

Arguably, if the government's delay in bringing a prosecution results in the loss of witnesses, or specific portions of testimony, or any other evidence that the defendant would otherwise have had available and that bears on the defense, then the state, as the source of the delay, should be estopped from prosecuting the defendant.¹⁶⁸ Having deprived the defendant of information to refute the prosecution's case or to affirmatively establish innocence, the delay has frustrated the foundational principles of adversarial

165. "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor" U.S. CONST. amend. VI.

166. See *Washington v. Texas*, 388 U.S. 14, 19 (1967):^a

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies This right is a fundamental element of due process of law.

167. Westen, *supra* note 163, at 120-21.

168. In *United States v. Morrison*, 449 U.S. 361 (1981), the Supreme Court noted that if a defendant can make a showing of adverse consequences to the representation received, or to the fairness of the proceedings leading to conviction, dismissal would be an appropriate remedy. *Id.* at 365.

equilibrium that underlie the concept of compulsory process.¹⁶⁹ A trial under these circumstances would be adversarial in appearance, but not in substance because the actions, or failure of action, of one adversary would have disabled the other.¹⁷⁰ The reliability of the outcome generated by such an impoverished trial could not be trusted, raising the specter of false convictions.¹⁷¹ If a trial consistent with constitutional values of procedural fairness could no longer be held, then the indictment or information would have to be dismissed.

This application of compulsory process principles to instances of pre-accusation delay finds analogical support in a variety of cases employing compulsory process analyses. The notion that prosecution is foreclosed when the accused is deprived of evidence potentially material to his or her defense has jurisprudential roots as early as Chief Justice Marshall's opinions in *United States v. Burr*.¹⁷² When Burr sought access, over arguments of presidential privilege, to President Jefferson's letters from General James Wilkinson, which formed the basis for Jefferson's message to Congress charging Burr with treasonous acts, Justice Marshall ruled that the

169. See Westen, *supra* note 163, at 177-82; see also *Washington*, 388 U.S. at 19 ("Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense."); *Wardius v. Oregon*, 412 U.S. 470, 474 (1973) (finding due process violation in notice-of-alibi rule that provides no reciprocal discovery rights to defense because there must be a "balance of forces between the accused and his accuser").

170. In *United States v. Nixon*, 418 U.S. 683 (1974), the Supreme Court described the need for full fact development by both adversaries:

We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

Id. at 709.

171. See Kadish, *supra* note 27, for a description of the importance to our legal system of good procedures for guilt determination.

172. *Burr I*, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d); *Burr II*, 25 F. Cas. 187 (C.C.D. Va. 1807) (No. 14,694).

prosecution would be suspended until the letters were produced.¹⁷³ Although Marshall admitted that the defendant's need for disclosure had to be balanced against the President's need for secrecy, he found the defendant's interests weightier because it would be "a very serious thing, if such letter should contain any information material to the defence, to withhold from the accused the power of making use of it."¹⁷⁴ Presumably, if the letters had been lost or never made available, the Court would have dismissed the prosecution. The integrity of the process required that the state not force the accused to face prosecution without the benefit of potentially exculpatory information.

The Court decided the next important compulsory process case 160 years after *United States v. Burr*. The Court in *Washington v. Texas*¹⁷⁵ invalidated on compulsory process grounds a Texas statute that disqualified accomplices as incompetent to testify for the defense in criminal trials.¹⁷⁶ The Court construed compulsory process to mean not just the right to compel the attendance of witnesses and to offer their testimony, but "in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies."¹⁷⁷ In essence, this opinion affirmed a substantive compulsory process right to have defense evidence admitted at trial, suggesting that the state violates that right if its choices regarding the timing of bringing charges render material defense evidence unavailable. Therefore, pre-accusation delay that produces evidentiary deficits in the defense can, under a compulsory process rubric, deprive the state of the authority to conduct a prosecution.¹⁷⁸

173. See *Burr II*, 25 F. Cas. at 192.

174. *Id.*

175. 388 U.S. 14 (1967).

176. See *id.* at 23.

177. *Id.* at 19.

178. See, e.g., *United States v. Calzada*, 579 F.2d 1358 (7th Cir.), cert. dismissed, 439 U.S. 920 (1978).

We agree with the Ninth Circuit because it seems to us beyond serious dispute that the essence of the right to compulsory process is lost when the government can act . . . to deprive a defendant of the testimony of an eyewitness to the crime for which he or she is charged.

Id. at 1360-61.

In *Burr II* and *Washington*, the government was only indirectly responsible for causing the unavailability of material defense evidence.¹⁷⁹ Other cases involve state conduct that more directly contributes to the loss of defense evidence.¹⁸⁰ For example, in *Webb v.*

179. In each case, the government's action that deprived the defense of evidence was simply its compliance with a rule or statute, a presidential privilege statute in *Burr II* and a disqualification statute for accomplice testimony in *Washington*. See *Burr II*, 25 F. Cas. 187 (C.C.D. Va. 1807) (No. 14,694); *Washington v. Texas*, 388 U.S. 14 (1967). The Supreme Court has indicated that the government's invocation of evidentiary privileges that deprive defendants of important evidence will result in dismissal of criminal charges. See *United States v. Reynolds*, 345 U.S. 1, 12 (1953); see also *Jencks v. United States*, 353 U.S. 657, 671-72 (1957); *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957).

Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action.

Id. Professor Westen notes that this language is "suggestive of compulsory process." Westen, *supra* note 163, at 164.

Although the Court may require the prosecution to disregard evidentiary rules that contribute to defense impairment, courts do not usually require the prosecution, at least with respect to one set of circumstances, to actively remove a constitutional impediment to defense evidence. Generally, when a defense witness validly invokes a fifth amendment privilege against self-incrimination, the Court does not require the government to enforce the defendant's right to compulsory process through grants of immunity to the witness. See *United States v. Chitty*, 760 F.2d 425, 429 (2d Cir.), *cert. denied*, 474 U.S. 945 (1985); *United States v. Kepreos*, 759 F.2d 961, 966 (1st Cir.), *cert. denied*, 474 U.S. 901 (1985); *Mattheson v. King*, 751 F.2d 1432, 1442-44 (5th Cir. 1985), *cert. dismissed*, 475 U.S. 1138 (1986); *United States v. Brutzman*, 731 F.2d 1449, 1451-52 (9th Cir. 1984); *United States v. Taylor*, 728 F.2d 930, 935 (7th Cir. 1984); *United States v. Gottesman*, 724 F.2d 1517, 1523-24 (11th Cir. 1984); *United States v. Heldt*, 668 F.2d 1238, 1282-86 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 926 (1982); *United States v. Chagra*, 669 F.2d 241, 259-60 (5th Cir.), *cert. denied*, 459 U.S. 846 (1982); *United States v. Bowling*, 666 F.2d 1052, 1055 (6th Cir. 1981), *cert. denied*, 455 U.S. 960 (1982); *United States v. Turkish*, 623 F.2d 769, 773-74 (2d Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981); *United States v. Lenz*, 616 F.2d 960, 962-63 (6th Cir.), *cert. denied*, 447 U.S. 929 (1980). The Third Circuit has, however, recognized under certain circumstances a due process right to compel a grant of immunity to a defense witness claiming the fifth amendment privilege. See *Government of Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir. 1980).

180. See *Anderson v. Warden, Md. Penitentiary*, 696 F.2d 296, 299 (4th Cir. 1982) (compulsory process violated when trial judge pressed defense witnesses to change their testimony), *cert. denied*, 462 U.S. 1111 (1983); *Berg v. Morris*, 483 F. Supp. 179, 182-84 (E.D. Cal. 1980) (trial court coerced witness into giving inculpatory evidence by twice warning him that his probation would be revoked and perjury charges filed if he did not tell the truth); *State v. Fernandez*, 198 Conn. 1, 7-18, 501 A.2d 1195, 1199-1203 (1985) (due process violation when judge's questioning appeared to reject credibility of only defense witness); *State v. Jamison*, 64 N.J. 363, 377-78, 316 A.2d 439, 447 (1974) (trial judge persistently advised defense witness of his privilege against self incrimination and his fifth amendment rights);

Texas,¹⁸¹ a state trial judge admonished the sole defense witness about the consequences of perjury in such an intimidating fashion that the witness subsequently declined to testify.¹⁸² According to the Supreme Court, the judge's unnecessarily harsh words "effectively drove that witness off the stand."¹⁸³ Although relying largely on *Washington*, the leading compulsory process case, the Court reversed the defendant's conviction on due process grounds, stating that the judge's actions in causing the loss of the only defense witness deprived the defendant of a fair trial.¹⁸⁴

Similarly, other cases in which prosecutors or law enforcement officials harass defense witnesses,¹⁸⁵ or discourage potential wit-

see also *Chambers v. Mississippi*, 410 U.S. 284, 294-303 (1973) (trial court refused to permit defense to cross-examine a witness and to bring three other witnesses to the stand). Although *Chambers* was decided as a confrontation clause case, it has compulsory process overtones. See Westin, *supra* note 23, at 601-24.

181. 409 U.S. 95 (1972).

182. *Id.* at 96.

183. *Id.* at 98.

184. *Id.* Controversy currently reigns regarding the circumstances under which trial judges may exclude the testimony of defense witnesses as a sanction for a defendant's having failed to disclose the identity of the witnesses under alibi-notice rules of reciprocal discovery. In *Taylor v. Illinois*, 484 U.S. 400 (1988), the Supreme Court authorized a witnesses preclusion sanction under circumstances of willful tactical violation of discovery rules. Following *Taylor*, some lower courts have upheld preclusion sanctions. See, e.g., *Cox v. Wyrick*, 873 F.2d 200 (8th Cir. 1989) (deliberate and egregious attempt to obtain tactical advantage); *Chappee v. Rose*, 843 F.2d 25 (1st Cir. 1988) (same). Others hold that the preclusion sanction violates principles of compulsory process. See, e.g., *Walker v. Hood*, 679 F. Supp. 372, 380-81 (S.D.N.Y. 1988) (employing balancing test); *People v. Pronovost*, 773 P.2d 555, 558-59 (Colo. 1989) (same); *McCarty v. State*, 107 N.M. 651, —, 763 P.2d 360, 364 (1988) (same).

185. See, e.g., *United States v. MacCloskey*, 682 F.2d 468, 479 (4th Cir. 1982) (prosecutor telephoned lawyer of defendant's girlfriend to warn that if she testified at trial she could be re-indicted on dropped charges); *United States v. Goodwin*, 625 F.2d 693, 702-03 (5th Cir. 1980) (defense witness intimidated by prison officials' threats regarding his testimony at trial); *Freeman v. Georgia*, 599 F.2d 65, 68-69 (5th Cir. 1979) (police detective concealed location of witness), *cert. denied*, 444 U.S. 1013 (1980); *United States v. Hammond*, 598 F.2d 1008, 1013 (5th Cir. 1979) (FBI agent threatened defense witness with retaliation in another case pending against him), *rehearing granted*, 605 F.2d 862 (1979); *United States v. Opager*, 589 F.2d 799, 804-06 (5th Cir. 1979) (prosecutor's refusal to provide informant's address despite court order thwarted defense's ability to prepare its case); *Lockett v. Blackburn*, 571 F.2d 309, 311 (5th Cir.) (deliberate concealment by prosecutor of two eyewitnesses), *cert. denied*, 439 U.S. 873 (1978); *United States v. Morrison*, 535 F.2d 223, 226-28 (3d Cir. 1976) (prosecutor repeatedly warned defense witness and personally intimidated her concerning possibility of federal perjury charge if she testified falsely); *United States v. Thomas*, 488 F.2d 334, 336 (6th Cir. 1973) (defense witness told by secret service agent during recess of trial that he would be prosecuted for a felony if he testified); *United States*

nesses from speaking to defense investigators,¹⁸⁶ have found compulsory process or due process violations in the loss of potential defense evidence. Moreover, in *Singleton v. Lefkowitz*,¹⁸⁷ the Second Circuit found a compulsory process violation when the state's negligence had contributed to the unavailability of a witness. In marked contrast to pre-accusation delay doctrine, the Supreme Court in *Webb* required no showing of specific prejudice in circumstances involving interference with defense witnesses.¹⁸⁸ Other courts have reversed convictions despite overwhelming evidence of guilt and official good faith because the right to present a defense protected by the sixth and fourteenth amendments is so fundamental that courts cannot treat its infraction as harmless error.¹⁸⁹

In some circumstances involving prejudicial pre-accusation delay, the state frustrates the right to present a defense not through active interference with witnesses, but through passive, perhaps even unwitting, interference. This distinction is irrelevant to compulsory process analysis. The defendant, whose defense case may

v. Smith, 478 F.2d 976, 979 (D.C. Cir. 1973) (prosecutor advised defense witness that if he testified he would be prosecuted on other unrelated charges); *United States v. Jones*, 476 F.2d 885, 888 (D.C. Cir. 1973) (prosecutor intimidated witness leading to refusal to testify); *Bray v. Peyton*, 429 F.2d 500, 501 (4th Cir. 1970) (prosecutor intimidated witness who later declined to testify); cf. *United States v. Simmons*, 699 F.2d 1250, 1251 (D.C. Cir.) (no compulsory process violation when key witness' testimony not based on government threats but on advice of counsel), *cert. denied*, 464 U.S. 835 (1983); *United States v. Blackwell*, 694 F.2d 1325, 1334-40 (D.C. Cir. 1982) (no compulsory process violation when government warned witness of possible perjury charges if she testified falsely; violation found in threat of instituting certain charges against her); *United States v. Fricke*, 684 F.2d 1126, 1130 (5th Cir. 1982) (no compulsory process violation when government warned witnesses that they were targets of ongoing rather than potential grand jury investigation), *cert. denied*, 460 U.S. 1011 (1983).

186. See, e.g., *Gregory v. United States*, 369 F.2d 185, 188 (D.C. Cir. 1966) (prosecutor advised defense witness not to speak with defense counsel unless the prosecutor was present); cf. *United States v. Rogers*, 642 F. Supp. 934, 934-35 (D.C. Colo. 1986) (prosecutor's letter informing witnesses that they need not speak to defense is corrected by letter from court advising them of rights and responsibilities).

187. 583 F.2d 618 (2d Cir. 1978), *cert. denied*, 440 U.S. 929 (1979).

188. See *Webb*, 409 U.S. at 98.

189. See *United States v. Calzada*, 579 F.2d 1358, 1361-63 (7th Cir.) (no need to find willful misconduct to uphold dismissal of indictment), *cert. dismissed*, 439 U.S. 920 (1978). But see *United States v. Hammond*, 815 F.2d 302, 303-04 (5th Cir. 1987) (interference with defense witness by FBI agents and federal prosecutors, though improper, was harmless error); *State v. Mussehl*, 408 N.W.2d 844, 847 (Minn. 1987) (letter from prosecutor to potential witnesses discouraging them from talking to defense investigators was improper, but no showing it prejudicially impeded defense investigation).

have evaporated during a period of pre-accusation delay, suffers an injury, although often less demonstrable, that is the same as that suffered by the defendant in *Webb* and its progeny.¹⁹⁰ In both situations, the state's actions serve to undermine the defendant's use of the subpoena power.¹⁹¹ To hold that a fundamental right that is scrupulously protected against obstruction should, in this instance, be vulnerable to the state's active or passive decision to delay filing charges is inconsistent.

The proposition that courts can appropriately evaluate delay within a compulsory process framework finds support in an instructive line of compulsory process cases involving deportation of alien witnesses.¹⁹² In *United States v. Valenzuela-Bernal*,¹⁹³ the

190. See, e.g., *United States v. Wallace*, 848 F.2d 1464, 1469-70 (9th Cir. 1988) (loss of potential defense witness); *United States v. Acevedo*, 842 F.2d 502, 504-05 (1st Cir. 1988) (defense was unable to locate witnesses); *United States v. Adams*, 834 F.2d 632, 633-34 (7th Cir. 1987) (death of two defense witnesses during delay), *cert. denied*, 484 U.S. 1046 (1988); *United States v. Ismaili*, 828 F.2d 153, 167-69 (3d Cir. 1987) (death of two potential defense witnesses), *cert. denied*, 485 U.S. 935 (1988); *United States v. MacDonald*, 632 F.2d 258, 263-67 (4th Cir. 1981) (loss of testimony of defense witness), *rev'd*, 456 U.S. 1, 6-11 (1982); *United States v. King*, 560 F.2d 122, 129-31 (2d Cir.) (potential defense witness died during delay), *cert. denied*, 434 U.S. 925 (1977).

191. As observed in a leading treatise, W. LAFAYE & J. ISRAEL, *CRIMINAL PROCEDURE* 878 (1985): "The teaching of *Webb v. Texas* is that the government has a responsibility not to take actions that undermine the defendant's use of the subpoena authority."

192. See, e.g., *United States v. Armijo-Martinez*, 669 F.2d 1131, 1132-37 (6th Cir.) (dismissal required by government's deportation of 14 potential defense witnesses in violation of defendants' due process rights), *vacated on other grounds*, 459 U.S. 810 (1982); *United States v. Gonzales*, 617 F.2d 1358, 1362-64 (9th Cir.) (due process violation when government permitted witness to leave country in lieu of deportation), *cert. denied*, 449 U.S. 899 (1980); *United States v. Calzada*, 579 F.2d 1358, 1360-63 (7th Cir.) (dismissal required when witnesses were made unavailable by affirmative government action), *cert. dismissed*, 439 U.S. 920 (1978); *United States v. Tsutagawa*, 500 F.2d 420, 422-23 (9th Cir. 1974) (release of 35 potential witnesses was due process violation); *United States v. Mendez-Rodriguez*, 450 F.2d 1, 2-5 (9th Cir. 1971) (deportation of three aliens deprived defense of potential witnesses and due process of law); *United States v. Tariq*, 521 F. Supp. 773, 779-83 (D.C. Md. 1981) (due process and compulsory process violation when, by deporting witness, government interfered with defendant's ability to discover, prepare or offer exculpatory or relevant evidence); cf. *United States v. Rose*, 669 F.2d 23, 27-28 (1st Cir.) (government deportation of juvenile alien found not to violate defendant's due process and compulsory process rights when no showing that witness would have offered meaningful evidence), *cert. denied*, 459 U.S. 828 (1982); *United States v. Marquez-Amaya*, 686 F.2d 747 (9th Cir. 1982) (no violation when no plausible showing that deported witness was material and favorable to defense); *United States v. Trinidad*, 660 F.2d 387 (9th Cir. 1981) (no violation when deported witnesses' testimony would not have been relevant).

193. 458 U.S. 858 (1982).

Supreme Court indicated that the government's deportation of alien witnesses could work a compulsory process violation if the defendant were able to show "that the evidence lost would be both material and favorable to the defense."¹⁹⁴ Although in that case prompt deportation deprived the accused of the opportunity to interview witnesses, the Court did not require the defendant to render a detailed description of the lost testimony.¹⁹⁵ The Court merely asked him to make some showing of materiality; or at the very least, to advance some "plausible theory" of how the testimony would be helpful," a burden that Valenzuela-Bernal failed to meet.¹⁹⁶

Likewise, when the government is responsible for delay that causes loss of evidence to the accused, the delay works a compulsory process injury if the accused makes some showing that the missing evidence is material and favorable. The evidence lost through pre-accusation delay is like the evidence lost through deported witnesses never interviewed by the defense. Following this logic, a court should not require a specific description of unavailable testimony, but rather a plausible theory of the contribution such testimony would have made to the defense case. The *Valenzuela-Bernal* requirements for establishing a compulsory process violation are far less stringent and comport more closely to the realities of a missing evidence situation than the tests courts presently apply in pre-accusation delay cases.¹⁹⁷

Arguably, we should analyze the two lines of cases differently because the government at the time of deportation is generally aware that it is making a potential witness unavailable. Therefore, courts should hold the government to a higher standard in the deportation cases than in the delay cases, in which the evidentiary effect on a particular defendant may not be as apparent. But

194. *Id.* at 873.

195. *Id.*

196. *Id.* at 874 (Blackmun, J., concurring).

197. The realities of a missing evidence situation were apparent to Chief Justice Marshall in the *Burr* cases. *Burr I*, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d); *Burr II*, 25 F. Cas. 187 (C.C.D. Va. 1907) (No. 14,694). He observed that expecting the defendant to relate the precise nature of missing evidence was unreasonable. *Burr II*, 25 F. Cas. at 191. However, he required the defendant to supply a "reason for supposing that the testimony may be material." *Burr I*, 25 F. Cas. at 38.

where is the line between design and inadvertence? In criminal matters, particularly those of a serious nature, a prosecutor who has chosen to use the tools of state power to respond coercively to a defendant's alleged offenses hardly has a benign or neutral view of that defendant.¹⁹⁸ To entrust the only protection a defendant's case has from the ravages of charging delay to a prosecutor—a person in an adversarial posture, professionally and psychologically—is to invite failure.¹⁹⁹ The tendency of an adversary, at least unconsciously, to devalue or underestimate or fail to realize the impact on an opponent's case of a decision to delay charging, or to make any otherwise legitimate prosecutorial choice, may obscure the line between design and inadvertence in the delay-based loss of potentially exculpatory defense evidence.²⁰⁰

Even if the distinction between the two levels of culpability—choosing to harm an opponent's case and failing to consider the harm to an opponent's case—can be maintained, it is helpful to consider the analysis developed for cases in which the state loses evidence that may exculpate the defendant. *California v.*

198. See Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1387 (1987).

199. The Supreme Court has recognized that a person's judgments may be influenced by his or her role in the proceedings to which the judgments are relevant. For example, in *Dennis v. United States*, 384 U.S. 855 (1966), the Court found reversible error in the trial court's refusal to permit defendants to examine the grand jury testimony of government witnesses. In finding insufficient even a judge's *in camera* inspection of the grand jury transcript for possible impeachment material, Justice Fortas wrote: "The determination of what may be useful to the defense can properly and effectively be made only by an advocate." *Id.* at 875. Clearly, according to this logic, the determination of what may be harmful to the defense cannot properly and effectively be made by an opponent alone, with no guidance or oversight.

200. Professor Lawrence has argued for a greater recognition in legal doctrine of the role of the unconscious in legal doctrine. See Lawrence, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). He challenges traditional notions of intent, asserting that many injurious acts are neither intentional—"in the sense that certain outcomes are self-consciously sought"—nor unintentional—"in the sense that the outcomes are random, fortuitous, and uninfluenced by the decisionmaker's beliefs, desires, and wishes." *Id.* at 322. Rather, according to Freudian theory, the human mind guards itself against discomfort by denying or refusing to recognize its own motives, when those motives conflict with what one has learned is right. *Id.* Although Lawrence's argument specifically addresses the problem of racial motivation, it may be applied to other situations in which an actor (for example, a prosecutor) may have a personal interest in behaving contrary to the interests of another (for example, a defendant).

*Trombetta*²⁰¹ is such a case. In *Trombetta* the state lost breath samples taken in a drunk driving prosecution, samples that might have provided useful information to the defense had the state preserved them.²⁰² Loss of the breath samples was of no constitutional consequence to the Court, because states need only preserve evidence when it possesses an apparent exculpatory value and when the defense cannot obtain comparable evidence by any other reasonable method.²⁰³ A corollary of the *Trombetta* holding is that when the government loses exculpatory and unique evidence, it breaches a constitutional duty to the defendant, even if the loss is purely accidental.²⁰⁴ Logically, then, if lengthy periods of pre-accusation delay cause the defendant to lose irreplaceable exculpatory evidence, then the state, as the source of the delay, should suffer the consequences to the trial process, including forgoing prosecution if the process has been compromised beyond repair.

A pre-accusation delay case differs from *Trombetta* and *Valenzuela-Bernal* in that the state has never had possession of the missing evidence. The cases are alike, however, in that the defendant has never had the opportunity to come into possession of the evidence. This is the crucial point, because if the defense can show that the state's action permanently deprived the defendant of the opportunity to gather once extant evidence, then the consti-

201. 467 U.S. 479 (1984).

202. See *id.* at 483.

203. See *id.* at 489.

204. *Trombetta* remains good law, even after the decision in *Arizona v. Youngblood*, 109 S. Ct. 333 (1988). In *Youngblood*, a sexual assault prosecution, the police had failed to properly preserve semen samples so that full testing of this evidence to determine characteristics of the assailant could be completed. *Id.* at 334-35. The defendant was convicted despite expert testimony regarding the potential content of the missing evidence and despite the trial judge's instruction to jurors that they could draw an adverse inference if they found that the state had lost or destroyed any evidence. *Id.* at 335. Overturning the judgment of the Arizona Court of Appeals, the Supreme Court held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Id.* at 337. The implications of *Youngblood* are uncertain because its facts are far narrower than its broadly stated holding. Moreover, in reaching its holding, the Court approved and distinguished *Trombetta*, claiming that the possibility that the semen samples might have exculpated *Youngblood* was insufficient to meet *Trombetta*'s standard of "constitutional materiality." *Id.* at 336. Arguably, if that standard of constitutional materiality can be met in another case—for example, through a showing of actual prejudice—then bad faith need not be the *sine qua non* of a due process violation.

tutionally guaranteed subpoena authority has been drained of its intended value. Remedying this compulsory process injury may then require abandoning the prosecution.

Of course, prosecutions should not be needlessly abandoned. If the evidence lost is relatively insubstantial, dismissal would not be the appropriate remedy.²⁰⁵ But if the compulsory process injury is so severe as to preclude the defendant's maintaining an effective defense that would have been available absent the violation, then dismissal of the prosecution is the only responsive remedy.²⁰⁶ Moreover, this analysis is consistent with the jurisprudential trends toward outcome-oriented standards in a number of related areas of procedural law. In *United States v. Bagley*,²⁰⁷ a leading post-*Brady v. Maryland*²⁰⁸ opinion on disclosure of exculpatory evidence, and in *Strickland v. Washington*,²⁰⁹ an important recent opinion on ineffective assistance of counsel, the Court indicated that constitutional error requires reversal only when it undermines confidence in the outcome of a criminal trial.²¹⁰ Although the out-

205. This has long been the practice in the deported witness cases, in which courts have dismissed indictments only when the released witnesses were eyewitnesses to, or active participants in, the underlying incident charged. See, e.g., *United States v. Martinez-Morales*, 632 F.2d 112, 113-15 (9th Cir. 1980) (no dismissal when deported witnesses are not potential eyewitnesses to inducing and encouraging the offense); *United States v. Gonzalez*, 617 F.2d 1358, 1362-63 (9th Cir.) (dismissal of counts affirmed when deported witness had observed underlying conduct; dismissal of other counts reversed when witness had no connection to those counts), *cert. denied*, 449 U.S. 899 (1980); *United States v. Sanchez-Murillo*, 608 F.2d 1314, 1317-18 (9th Cir. 1979) (no dismissal when deported witness was not eyewitness); *United States v. Orozco-Rico*, 589 F.2d 433, 434-36 (9th Cir. 1978) (no dismissal when deported witnesses could not have conceivably helped defendant), *cert. denied*, 440 U.S. 967 (1979); *United States v. Castellanos-Machorro*, 512 F.2d 1181, 1182-83 (9th Cir. 1975) (no dismissal when deported witnesses had no connection with offense charged in indictment); *United States v. McQuillan*, 507 F.2d 30, 31-33 (9th Cir. 1974) (same).

206. See *supra* note 168; see also *Arizona v. Youngblood*, 109 S. Ct. 333, 343 (1988): "The societal interest in seeing criminals punished rightly requires that indictments be dismissed only when the unavailability of the evidence prevents the defendant from receiving a fair trial." *Id.* (Blackmun, J., dissenting).

207. 473 U.S. 667 (1985).

208. 373 U.S. 83 (1963).

209. 466 U.S. 668 (1984).

210. More precisely, the standard adopted in *Strickland* is as follows: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Although *Bagley* has no majority opinion, two opinions combine to constitute a majority perspective. Of these two opinions, one by Justice White and one by Justice Blackmun, the latter discussed the

come-oriented standards voiced in *Bagley* and *Strickland* represent a tightening of the prior standards for evaluating the effect of nondisclosure of exculpatory evidence²¹¹ and ineffective assistance of counsel,²¹² a move toward a pure outcome-oriented standard, to conform to the prevailing trend, in the area of pre-accusation delay would represent a relaxing of the current law. If a showing of nontactical, good faith reasons for delay always trumps a showing of actual prejudice, as the Supreme Court has implied²¹³ and many lower courts have stated,²¹⁴ then the defendant cannot prevail even though the actual prejudice may be sufficient to undermine confidence in the outcome of the trial. This is inconsistent with most other strains of constitutional criminal procedure.

governing standard more extensively. In his opinion, Justice Blackmun explicitly adopted the *Strickland* standard:

We find the *Strickland* formulation . . . sufficiently flexible to cover . . . cases of prosecutorial failure to disclose evidence favorable to the accused: The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

Bagley, 473 U.S. at 682 (opinion of Blackmun, J.); cf. *Arizona v. Youngblood*, 109 S. Ct. 333, 337 (1988) (requiring bad faith on the part of officials in failing to preserve evidence to establish a due process violation).

211. Prior to *Bagley*, the Court had implied that different standards applied to each of the three different types of nondisclosure situations: situations in which a defense attorney's request for exculpatory information was 1) non-existent, 2) general, or 3) specific. See *United States v. Agurs*, 427 U.S. 97, 106-07 (1976). The *Agurs* opinion suggests that when the defense has made a specific request for a particular type of exculpatory evidence, the standard of materiality that the defense must satisfy is not as high as the standard applied when the defense has made no request or a general request. *Id.* at 106. The Court in *Bagley*, however, adopted a single standard of materiality for all of these situations, the stringent standard that emerged from the no request/general request situation. See *Bagley*, 473 U.S. at 682-83.

212. Prior to *Strickland*, lower courts had adopted a number of different standards for finding that an attorney's unprofessional performance had caused prejudice sufficient to constitute reversible error. Some of the courts presumed prejudice, and others required that counsel's errors have some conceivable effect on the outcome. See generally W. LAFAYE & J. ISRAEL, *supra* note 191, at 531. The Court in *Strickland* replaced these lenient standards with the stricter outcome-oriented standard cited *supra* note 210.

213. See *United States v. Lovasco*, 431 U.S. 783, 796 (1977).

214. See *supra* note 67 and accompanying text.

C. *Traditional Due Process*

Due process remains an alternative to the Supreme Court's prescribed analysis in the area of pre-accusation delay because, I contend, the Court has distorted traditional due process analysis in *United States v. Marion*²¹⁵ and *United States v. Lovasco*.²¹⁶ Despite its due process labels, the Court's present analysis is incompatible with due process principles.

Flowing from the requirement enshrined in the Magna Carta that proceedings accord with *per legem terrae*, the law of the land,²¹⁷ courts have long interpreted the due process clauses of the fifth and fourteenth amendments to establish procedural limits on the exercise of legislative, executive and judicial authority.²¹⁸ Although the forms and methods of due process signification have generated considerable controversy,²¹⁹ the fact that most of the specific provisions of the Bill of Rights have been incorporated through the due process clause as limits on the states is by now accepted.²²⁰ In these instances, the boundaries of the due process right are tied to prevailing interpretations of specific amendments.²²¹ For example, the sixth amendment right to confront one's accusers has been incorporated against the states as a matter

215. 404 U.S. 307 (1971).

216. 431 U.S. 783 (1977).

217. See Redish & Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 460 (1986); see also *Hurtado v. California*, 110 U.S. 516, 521-25 (1884) (discussing the meaning of the law of the land); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276-78 (1855) (tracing the origins of the due process clause to the Magna Carta).

218. See *Murray's Lessee*, 59 U.S. (18 How.) at 276, the first Supreme Court decision construing the due process clause:

The constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process "due process of law" by its mere will.

219. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 507-27 (1965) (Black, J., dissenting).

220. See *In re Winship*, 397 U.S. 358, 382-83 n.11 (1970) (Black, J., dissenting), for a list of the Supreme Court cases rendering various provisions of the Bill of Rights applicable to the states.

221. See *Malloy v. Hogan*, 378 U.S. 1 (1964) (incorporating fifth amendment privilege against self-incrimination as a limit on states).

of fundamental fairness, and the resulting due process jurisprudence is coextensive with the corresponding sixth amendment jurisprudence.²²²

With the techniques of incorporationism, we have inherited a flexible due process jurisprudence.²²³ This approach, derided by its detractors as natural law jurisprudence,²²⁴ measures challenged governmental practices against principles "implicit in the concept of ordered liberty,"²²⁵ or "the American scheme of justice,"²²⁶ or "ultimate decency in a civilized society,"²²⁷ or like-phrased rhetorical formulations. Underneath the hyperbole, due process, distilled to its essence, means fairness.²²⁸ From the time of the framers to the present, it has contemplated, at the very least, that adjudicatory proceedings be conducted fairly.²²⁹

Even those who advocate a narrow view of due process acknowledge that it establishes outer boundaries for the conduct of a crim-

We have held that the guarantees of the First Amendment, . . . the prohibition of unreasonable searches and seizures of the Fourth Amendment, . . . and the right to counsel guaranteed by the Sixth Amendment, . . . are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.

Id. at 10.

222. See *Pointer v. Texas*, 380 U.S. 400 (1965).

223. See, e.g., *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Id.*, quoted in *Schweiker v. McClure*, 456 U.S. 188, 200 (1982).

224. The leading detractor was Justice Black. See *Adamson v. California*, 332 U.S. 46, 75 (1947) (Black, J., dissenting):

The "natural law" formula which the Court uses to reach its conclusion in this case should be abandoned as an incongruous excrescence on our Constitution It subtly conveys to courts, at the expense of legislatures, ultimate power over public policies in fields where no specific provision of the Constitution limits legislative power.

See also Grant, *The Natural Law Background of Due Process*, 31 COLUM. L. REV. 56 (1931).

225. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

226. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

227. *Adamson*, 332 U.S. at 61.

228. "Due process of law requires that the proceedings shall be fair" *Snyder v. Massachusetts*, 291 U.S. 97, 116 (1934).

229. Specific evidence exists that some of the framers of the fourteenth amendment included the right to a fair trial in the concept of due process of law. See Note, *Justice Without Favor: Due Process and Separation of Executive and Judicial Powers in State Government*, 94 YALE L.J. 1675, 1676 n.5 (1985).

inal trial.²³⁰ With respect to a criminal sanction, the overarching concern, indeed the meaning of fairness, has always been the reliability of the method for assigning guilt.²³¹ Given the inherent fallibility of human discernment, we can achieve this reliability only through procedures that minimize the risk that a legally innocent person will be convicted of criminal wrong.²³²

In any decisionmaking context, accuracy is the instrumental value that underlies due process safeguards.²³³ Yet in the particular case of criminal sanctions, some inaccuracies are more acceptable than others. Courts have attached such special importance to avoiding errors that disfavor the criminally accused that the cost of sacrificing accurate decisions that disfavor the accused has been, at least in rhetoric, graciously paid to serve that end. Nowhere does case law make this moral and constitutional choice more apparent than in *In re Winship*,²³⁴ which constitutionalized, as a matter of due process, the reasonable doubt burden of proving criminal wrongdoing.²³⁵ The Court in *Winship* recognized the "fundamental

230. In the companion cases of *Apodaca v. Oregon*, 406 U.S. 404 (1972), and *Johnson v. Louisiana*, 406 U.S. 356 (1972), upholding the constitutionality of non-unanimous jury verdicts in state criminal trials, Justice Powell wrote in concurrence:

No longer are questions regarding the constitutionality of particular criminal procedures resolved by focusing alone on the element in question and ascertaining whether a system of criminal justice might be imagined in which a fair trial could be afforded in the absence of that particular element. Rather, the focus is, as it should be, on the fundamentality of that element viewed in the context of the basic Anglo-American jurisprudential system common to the States That approach to due process readily accounts both for the conclusion that jury trial *is* fundamental and that unanimity is *not*.

Johnson, 406 U.S. at 372 n.9 (Powell, J. concurring) (citation omitted).

231. Kadish, *supra* note 27, at 346.

232. With respect to pre-trial identification procedures, another area of intersection between due process adjudication and constitutional criminal procedure, the likelihood of reliability of the identification is the paramount concern. A due process violation inheres in an identification procedure that is "unnecessarily suggestive and conducive to irreparable mistaken identification." *Stovall v. Denno*, 388 U.S. 293, 302 (1967).

233. See *Davis v. United States*, 160 U.S. 469 (1895) (reversing a conviction in which the judge had instructed the jury that their duty was to convict when evidence of the sanity of the accused was equally balanced). In *Brinegar v. United States*, 338 U.S. 160 (1949), the Court observed that the purpose of evidentiary and constitutional rules in criminal trials was to "safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property." *Id.* at 174.

234. 397 U.S. 358 (1970).

235. *Id.* at 364.

value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."²³⁶ At least with regard to factual disputes, doubt must be resolved in the defendant's favor.

In light of the explicit value of reliability in guilt determination that underlies the due process clause, and the due process commitment as expressed in *Winship* for a systemic tilt toward inaccurate acquittals rather than inaccurate convictions, how can the test established for evaluating the constitutionality of pre-accusation delay be deemed a due process test at all? The *Lovasco* opinion evinces no concern with the reliability of convictions or the accepted allocation of the risk of error.²³⁷ In *Lovasco*, the Court did not discount the effect on the trial's outcome of the defense evidence credited as lost due to delay; the Court simply never considered it.²³⁸ *Lovasco* and its progeny, which despite their various formulations seem to require something more than outcome-altering prejudice to find a constitutional violation, are uninformed by a due process vision. The due process label, then, is a misnomer.

An alternate vision may inform the pre-accusation delay cases. This is a vision of due process that requires not fair results but fair play. With respect to this issue, a defendant can ask no more than that a prosecutor not win conviction through gamesmanship. In many jurisdictions nontactical prosecutorial motives for delaying a charging decision are always permissible, no matter what harm the

236. *Id.* at 372 (Harlan, J., concurring). This is because "we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty." *Id.* The social disutility of convicting an innocent man is higher because

[i]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

Id. at 364 (Brennan, J., majority opinion).

237. *Cf. Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (discussing the importance of protecting "the 'integrity of the fact-finding process'" (quoting *Berger v. California*, 393 U.S. 314, 315 (1969))).

238. *See United States v. Lovasco*, 431 U.S. 783, 785-86 (1977). A similar oversight occurred subsequently in *Arizona v. Youngblood*, 109 S. Ct. 333, 336-38 (1988).

decision engenders.²³⁹ Even the burden of prosecutorial negligence in delaying charging is often placed on defendants as well.²⁴⁰ Regardless of the merits of this approach as a pure matter of policy, it has little to do with the extraordinary attention to accuracy that we have typically demanded of criminal convictions as a matter of due process.²⁴¹

The words "fair play" appear in the *Lovasco* opinion. When the Court describes the decision it faces, it reports that it is to "determine only whether the action complained of—here, compelling respondent to stand trial after the Government delayed indictment to investigate further—violates those 'fundamental conceptions of justice' which define 'the community's sense of fair play and decency.'"²⁴² The last clause in the sentence is from *Rochin v. California*,²⁴³ a case in which the Court held inadmissible the evidence obtained by seizing the defendant and pumping his stomach against his will.²⁴⁴

Although *Rochin* is a due process case, it flows from a separate line of due process precedents and is animated by separate values. In *Rochin*, the evidence obtained from the defendant's stomach—narcotics—was highly relevant to the charge of illegally possessing narcotics.²⁴⁵ The reliability of the method of assigning guilt, the traditional due process value, was not jeopardized by the government's conduct. What was jeopardized by forcibly pumping the defendant's stomach was the notion of respect for individual dignity.²⁴⁶ By citing the *Rochin* standard as its guide in *Lovasco*, the

239. See, e.g., *United States v. Carlock*, 806 F.2d 535 (5th Cir. 1986), cert. denied, 480 U.S. 949 (1987); *United States v. Marler*, 756 F.2d 206 (1st Cir. 1985); *United States v. Swainson*, 548 F.2d 657 (6th Cir.), cert. denied, 431 U.S. 937 (1977); and cases cited *supra* note 67.

240. See, e.g., *United States v. Benson*, 846 F.2d 1338, 1342-43 (11th Cir. 1988); and cases cited *supra* note 67.

241. Discussing federal employee loyalty programs, Kadish cites Supreme Court cases observing that the impact of a finding of disloyalty is similar to a criminal sanction. His conclusion from this observation reveals the importance of accuracy in criminal proceedings: "One might expect, therefore, the requirement of a relatively strong justification for increasing the hazard of misdeterminations." Kadish, *supra* note 27, at 352.

242. *Lovasco*, 431 U.S. at 790 (quoting *Rochin v. California*, 342 U.S. 165, 173 (1952)).

243. 342 U.S. 165 (1952).

244. *Id.* at 172-73.

245. *Id.* at 166.

246. See Kadish, *supra* note 27, at 347.

Court implied that all that was at issue in pre-accusation delay cases was whether the government had behaved abusively or excessively—whether it had played fairly. The Court in *Lovasco* then proceeded to consider at length the fairness of the government's conduct in these terms, ignoring entirely the more prominent due process concern—the reliability of fact-finding methods.²⁴⁷ Lower courts have followed the Supreme Court's use of the *Rochin* analysis in cases of pre-accusation delay.²⁴⁸

The *Lovasco* majority borrowed a standard that had been developed in a context in which reliability of fact-finding was not at issue and applied it in a context in which reliability was the paramount issue. In the latter context, a fair play standard, in its oblivion to consequences, represents an impoverished constitutional vision. When the reliability of a judgment of guilt or innocence is potentially compromised by government conduct, due process requires that the court at least address the reliability question.

One method that the Court in *Lovasco* might have used to address the reliability question is to apply a general due process scheme developed outside the context of criminal procedure. In the case of *Mathews v. Eldridge*,²⁴⁹ decided one year before *Lovasco*, the Supreme Court adopted a balancing test for the three distinct interests implicated by adjudicatory procedures: the government interests involved, the private interests affected and “the risk of an erroneous deprivation of private interests.”²⁵⁰ The Court in *Lovasco* analyzed the first of these factors, the government interests involved in pre-accusation delay cases. The opinion evaluates, for example, the need for continuing investigations,²⁵¹ the need for prosecutorial discretion in decisions about timing of charges²⁵² and the administrative burden that requiring prosecutors to document that decisionmaking process would entail.²⁵³ Yet the Court never

247. See *supra* notes 230-36 and accompanying text.

248. See, e.g., *United States v. Taylor*, 603 F.2d 732, 735 (8th Cir.) (no due process violation when government's reasons for delay were reasonable and in good faith), *cert. denied*, 444 U.S. 982 (1979).

249. 424 U.S. 319 (1976).

250. *Id.* at 335.

251. See *Lovasco*, 431 U.S. at 792-93.

252. *Id.* at 794.

253. *Id.* at 793-94 n.14.

completed its task, overlooking the other two interests that *Mathews* demanded it weigh in the balance. Because the other two factors—the private liberty interests²⁵⁴ and the risk of error²⁵⁵—have considerable weight in criminal proceedings, the failure to take them as seriously as the government interests likely distorted the due process analysis.

The apparent inconsistency between the historical due process requirements and the context-specific due process test for assessing the constitutionality of pre-accusation delay is troubling. Yet despite the isolation of pre-accusation delay analysis from due process norms, analogues from other jurisprudential contexts come to mind. The change in the locus of the fairness concern in this due process area is not unlike the change in the locus of the equality concern in the antidiscrimination law arena. For a period of time, antidiscrimination law toyed with proscribing practices that produced racially disproportionate effects;²⁵⁶ now it has abandoned that view in favor of a concern with racially discriminatory intent.²⁵⁷ The problem of pre-accusation delay represents a similar intent/effect issue, although it has not heretofore been conceptualized in this fashion. Translating the problem into these terms, can we say that with respect to pre-accusation delay the due process

254. "The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction." *In re Winship*, 397 U.S. 358, 363 (1970).

255. There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden . . . of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt.

Speiser v. Randall, 357 U.S. 513, 525-26 (1958), *quoted in Winship*, 397 U.S. at 364.

256. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (employer practices producing racially disproportionate impact made out prima facie case of discrimination under Title VII). *See generally Perry, The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540 (1977).

257. Although a showing of disproportionate impact theoretically still makes out a prima facie case of discrimination under Title VII, the Supreme Court has made proof of the discrimination claim more formidable. *See, e.g., Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989). Under the constitutional standard, equal protection principles are not violated absent proof of intentional discrimination. *See Washington v. Davis*, 426 U.S. 229, 242-43 (1976).

clause is not concerned with harm to the fact-finding process, but only with the intent to harm the fact-finding process? Can we say that due process principles are consistent with impaired fact-finding as long as all participants proceed in good faith? Constitutional history suggests otherwise. In the context of criminal cases, due process has always been concerned with consequences and the risks posed to reliable convictions.²⁵⁸

Despite the lessons of due process history, judges have fallen into an intent-based analysis for pre-accusation delay, rather than an effect-based approach, because of a misplaced focus of inquiry. They are analyzing fairness from the perspective of the prosecutor, rather than from the perspective of the defendant.²⁵⁹ That judges would view the problem of pre-accusation delay from the perspective of a prosecutor rather than a defendant is not surprising:

258. See *supra* notes 230-36 and accompanying text; see also *Arizona v. Youngblood*, 109 S. Ct. 333, 339 (1988) (Blackmun, J., dissenting): "The Constitution requires that criminal defendants be provided with a fair trial, not merely a 'good faith' try at a fair trial Regardless of intent or lack thereof, police action that results in a defendant's receiving an unfair trial constitutes a deprivation of due process." *Id.*

259. This proposition is demonstrated by the failure of the Court in *Lovasco*, in its mission to exonerate prosecutors of blame, to even consider the impact of the acknowledged prejudice on the defendant's ability to present a case or on the reliability of the outcome. At the point in the opinion in which the Court claims to adopt a defendant's perspective, it simply acknowledges that requiring prosecutors to file charges as soon as they can establish probable cause will increase the likelihood that the charges may be unwarranted and, ironically, will increase the length of post-charge delay. See *United States v. Lovasco*, 431 U.S. 783, 791 (1977). The fact that the Court assumed, without elaboration, that post-charge delay was worse than pre-charge delay indicates that the Court was not contemplating seriously the potential prejudice to the defendant. Defendants may in fact prefer post-charge delay. At least then they will have notice of charges, greater procedural rights and the opportunity through counsel to gather defense evidence. Nevertheless, constitutional protection of the accused in the the post-charge period is greater than in the pre-charge period.

After its incomplete consideration of the defendant's perspective, the Court in *Lovasco* considered the perspectives of prosecutors and judges. From the perspective of law enforcement officials, a requirement of immediate prosecution upon probable cause is unacceptable because it could make obtaining proof of guilt beyond a reasonable doubt impossible by causing potentially fruitful sources of information to evaporate before they are fully exploited. From the standpoint of the courts, such a requirement is unwise because scarce resources may be consumed on cases that prove to be insubstantial or that involve only some of the responsible parties or some of the criminal acts. Thus, the Court asserted, compelling prosecutors to initiate prosecutions as soon as they are legally entitled to do so would serve no one's interests. *Id.* at 791-92. The majority then went on for several pages about the problems a contrary ruling would pose for prosecutors.

The majority's position is critiqued *infra* notes 284-92 and accompanying text. Despite the flaws in the Court's reasoning, a prosecutor's perspective clearly dominates the opinion.

Judges are probably better able to imagine the position of the former than the latter.²⁶⁰ Differential access, even if unconscious, to the problems faced by various participants might affect the choice of the lens through which to view a problem. Yet, in assessing the breadth of constitutional rights designed to protect individuals from harms inflicted by excessive state authority,²⁶¹ the individual's perspective must hold center stage, even if this perspective is tempered by consideration of competing perspectives.

Once again, we can find a similar development in the effect/intent debate of antidiscrimination law. Rather than focus on the victims of discrimination and the impact of various practices on them (the effect analysis), the Burger Court focused on the alleged discriminators and their motives (the intent analysis).²⁶² If the perpetrators of a challenged practice did not intend to discriminate, they bear no blame and should suffer no consequences. Those already suffering consequences, whose injuries exist regardless of motive, have no remedy. Emphasis is placed on the fault of the injurer as a precondition for relief, instead of the harm to the injured.

Likewise, the pre-accusation delay cases focus on the blameworthiness of the prosecutor's conduct as a precondition for relief, rather than on the defendant's injury. Professor Reiss has recently argued that the focus on intent as a primary determinant of the constitutionality of prosecutorial conduct undermines the systemic values of consistency and predictability.²⁶³ An emphasis on prosecutorial intent, he claims, produces such "ad hoc and confused" results that one is hard-pressed to call the results fair.²⁶⁴

260. After all, judges and prosecutors have been trained and socialized in a legal community and make their livelihood within it. Defendants, on the other hand, stand in opposition to law. For insight into how problems of difference make it difficult for decisionmakers to appreciate the legal claims of "others," see Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987).

261. See, e.g., *supra* note 218 and accompanying text.

262. See Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052-57 (1978) (arguing that when the Supreme Court requires evidence of intentional discrimination, it is adopting the perspective of defendant-perpetrators and rejecting the perspective of plaintiff-victims).

263. See Reiss, *supra* note 198, at 1368.

264. *Id.*

Undermining the value of trustworthiness for generating criminal convictions in our system, resulting in the imposition of the most coercive of societal sanctions, places common understandings of the notion of fairness in even greater jeopardy.²⁶⁵

Instead of asking whether a prosecutor proceeded with good faith dispatch in bringing formal charges, loyalty to due process precedent requires that fairness analysis be conducted through a defendant's eyes: What is the impact of delay on the accused's ability to defend against the charges? If the accused demonstrates a substantial level of delay-related prejudice, creating a reasonable likelihood that it could affect the outcome, then under traditional due process doctrine, the reasons for the delay are rendered irrelevant. Fact-finding integrity has already been compromised and the trial cannot proceed fairly in these circumstances.

IV. CHOOSING AMONG ALTERNATIVES

Courts have had a number of doctrinal forms available to address the problem of delayed criminal charging: a speedy trial analysis, a compulsory process analysis and an authentic due process test. Using the tools of conventional legal argument, one can make a persuasive case that each of these analyses is preferable to that chosen—an isolated analysis, mislabeled due process, that is uninformed by widely accepted due process principles. In fact, using conventional legal arguments, one can make a persuasive case that the alternative analyses are to be preferred in the order in which they have been presented here.

Because delay in the criminal process is precisely the concern of the speedy trial clause,²⁶⁶ the analysis that has emerged from its interpretation presents the most appropriate framework for evaluating charging delay. A speedy trial approach provides a better analytic framework than a compulsory process approach because speedy trial concerns coincide squarely, in a factual and legal sense, with the concerns raised by charging delay. Compulsory process concerns—providing a fair opportunity for a defendant to

265. For a description of research indicating that satisfaction with adjudicatory proceedings relates less to outcome and more to notions of perceived procedural fairness, see generally E. LIND & T. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988).

266. See *supra* notes 106-29 and accompanying text.

bring in evidence to rebut criminal charges²⁶⁷—are broader than the concerns raised by charging delay. Nevertheless, because the fundamental problem with an extended period of charging delay is the havoc it wreaks on the defendant's opportunity to gather and present evidence in his or her behalf, compulsory process is also a logically appropriate framework for analyzing the constitutional impact of a delay-related loss of defense evidence. Due process, which reaches many of the same concerns addressed by explicit provisions of the Bill of Rights, is another appropriate framework for analyzing the impact of charging delay in a criminal trial because due process is a broad guarantor of fairness in adjudication.²⁶⁸

When alternative constitutional pegs on which to hang a rationale and decision are all logically suitable, many observers of the legal process would recommend use of the narrowest.²⁶⁹ A specific protection can atrophy if it is overlooked in favor of a broader ground of decision.²⁷⁰ Use of a narrow constitutional ground clearly identifies the interests at stake, refines the standards for assessing those interests, illuminates the intended shades of meaning of the particular language involved and develops guidance for deciding subsequent cases.

Moreover, tying decisions to express constitutional language may help protect these decisions as precedent and enhance their influential value for future decisions because many judges insist that

267. See *supra* notes 165-67 and accompanying text.

268. See *supra* notes 228-36 and accompanying text.

269. See, e.g., Westen, *supra* note 163, at 127 ("[W]herever a court can decide an issue on one of two alternative provisions—one general, the other specific—its analysis should start with the more specific."); cf. Clinton, *supra* note 3, at 793-94:

Since the *specific* guarantees of the fifth and sixth amendments are designed to resolve *specific* problems of criminal procedure, it would be more sensible to ground the right to defend, especially insofar as the right must address *new* obstacles to the accused not envisioned by the Framers, on concepts more general and flexible than the narrow and specific guarantees of the fifth and sixth amendments.

Professor Charles Black, on the other hand, would find it unnecessary to tie the resolution of issues to particular passages of constitutional text. See C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969). His thesis is discussed more fully in Section VI, *infra*.

270. See Westen, *supra* note 163, at 129 ("[T]o rely exclusively on the due process clause in the face of other applicable and more specific provisions of the Bill of Rights is to render the specific provisions mere surplusage.").

constitutional jurisprudence depends on sound interpretations of particular clauses of constitutional text, rather than on applications of nebulous general concepts such as "due process" to the facts of particular cases.²⁷¹ These judges fear that general language affords decisionmakers too much latitude to inject their subjective preferences into the analytic mix when developing the ground for decision.²⁷² Even if this belief is misguided,²⁷³ to the extent that judges hold it, case outcomes may be improved by relying on the narrowest ground that applies logically as the basis of decision.²⁷⁴ Hence, speedy trial analysis is preferable to compulsory process analysis, which is preferable to a genuine due process analysis, which is infinitely preferable to the faulty due process analysis that now prevails in evaluating the impact of charging delay on criminal proceedings.

If the courts had adopted a speedy trial analysis in pre-accusation delay cases, a showing of actual prejudice would not be a threshold requirement, but a predominant factor in evaluating the

271. Justice Black was a leading proponent of this view, although he expressed his opinion on the issue in the broader context of the incorporation debate. *See, e.g.,* *Rochin v. California*, 342 U.S. 165, 174-76 (1952) (Black, J., concurring).

272. *See, e.g.,* *Brooks v. Tennessee*, 406 U.S. 605, 614 (1972) (Burger, C.J., dissenting); *id.* at 617 (Rehnquist, J., dissenting); *Duncan v. Louisiana*, 391 U.S. 145, 168 (1968) (Black J., concurring).

273. Notwithstanding the generality or specificity of doctrine, many commentators—legal realists, critical theorists and feminist theorists among them—suggest that legal discourse largely expresses the social and political judgments of decisionmakers, even if these judgments do not consciously shape their decisions. *See, e.g.,* Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); D'Amato, *Can Any Legal Theory Constrain Any Judicial Decision?*, 43 U. MIAMI L. REV. 513 (1989); Minow, *supra* note 260.

274. Support for this proposition comes from two cases cited by Westen, *supra* note 261, at 127 n.72.

This is not a case in which the State has denied a defendant the benefit of a specific provision of the Bill of Rights When specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them. But here the claim is only that a prosecutor's remark . . . by itself so infected the trial with unfairness as to make the resulting conviction a denial of due process.

Donnelley v. DeChristoforo, 416 U.S. 637, 643 (1974) (citations omitted).

[A]part from trials conducted in violation of express constitutional mandates, a constitutionally unfair trial takes place only where the barriers and safeguards are so relaxed or forgotten . . . that the proceeding is more a spectacle . . . or trial by ordeal . . . than a disciplined contest.

United States v. Augenblick, 393 U.S. 348, 356 (1978) (citations omitted).

strength of the claim, to be weighed with the length of the delay and the reasons for the delay.²⁷⁵ If the courts had adopted a compulsory process approach in pre-accusation delay cases, the accused would prevail by showing that material evidence was missing as a result of the delay and by advancing a plausible theory as to how the missing evidence would have aided the defense.²⁷⁶ Essentially, this is a requirement of actual prejudice, although less strictly applied than the requirement of actual prejudice many courts now use in the pre-accusation delay arena.²⁷⁷ If the courts had adopted a traditional due process approach in pre-accusation delay cases, the accused would prevail upon a showing of prejudice to the defense that jeopardizes the reliability of the guilt determination process.²⁷⁸ Once the defense makes such a showing, the reasons for the delay, no matter how laudatory, would be rendered insufficient.

Fears concerning the dramatic increase in the dismissal of charges that might follow the use of any of these approaches are likely misplaced, given the paucity of dismissals and reversals of conviction that presently follow from application of the various standards in their respective contexts.²⁷⁹ Each of the alternative standards is still quite stringent. Unfortunately, none of these analyses may be delicate enough to afford relief to the most deserving, those whose inability to make the requisite showing of prejudice due to delay is directly related to the extent to which the

275. See *supra* note 138 and accompanying text. The fourth factor evaluated in the speedy trial balance—the accused's assertion of the right—will not be applicable in those pre-accusation delay cases in which authorities gave the accused no indication prior to charging that he or she was a suspect.

276. See *supra* notes 193-96 and accompanying text.

277. See *supra* notes 53-60 and accompanying text.

278. See *supra* notes 231-36 and accompanying text.

279. See, e.g., Amsterdam, *supra* note 137, at 525.

In a quite literal sense, the sixth amendment right to a speedy trial has today become . . . more honored in the breach than the observance. Various institutional arrangements and forces at work within the criminal process have long tended to convert the right of every criminal defendant to have a speedy trial into a very different sort of right: the right of a few defendants, most egregiously denied a speedy trial, to have the criminal charges against them dismissed on that account.

Id. (citations omitted).

delay has prejudiced them.²⁸⁰ Nevertheless, courts can appropriately insist upon a showing of prejudice because it provides the only mechanism for distinguishing truly frivolous and unsupported claims from those with merit.²⁸¹ The key lies in adjusting the standard for the showing of prejudice to a level that includes most of the cases in which prejudice has occurred and excludes most of those in which the claim is baseless. The compulsory process standard, requiring a plausible theory of the potential benefit of missing evidence, is a good model of compromise between the needs of law enforcement and the protection of defendants. The speedy trial balancing test²⁸² and the traditional due process standard²⁸³ represent similar compromises. The current test for analyzing preaccusation delay, however, is relatively uncompromising, elevating law enforcement interests to a degree that diminishes the protection constitutional law has historically provided to defendants.

Can the speedy trial, compulsory process and traditional due process standards be defended against the policy arguments so prominent in the *Lovasco* opinion? In *Lovasco*, the majority worried that unless courts approved good faith investigative delay in all circumstances, prosecutors would feel pressure to bring early

280. This conundrum is recognized in *Ross v. United States*, 349 F.2d 210, 215 (D.C. Cir. 1965) (per curiam) ("In a very real sense, the extent to which he was prejudiced is evidenced by the difficulty he encountered in establishing with particularity the elements of that prejudice.").

281. See e.g., *United States v. Mays*, 549 F.2d 670 (9th Cir. 1977).

[U]nless the defendant can make some showing as to what the testimony would have been, or specifically how the witness could have exonerated him, there is no way of knowing whether the defendant is merely speculating as to the contribution of the witness to his defense or perhaps even attempting to take advantage of the witness's unavailability to make a Due Process claim when it is in reality unfounded.

Id. at 677 n.12.

It is perhaps too cavalier for those unlikely to suffer criminal sanctions to advocate acceptance of a standard that assures that some persons, truly prejudiced by delay, may not obtain relief. I acknowledge the inevitability of that result with sorrow. I would ask, however, for continual re-examination of the standard used for proof of actual prejudice to determine if it meets the goal of distinguishing most of the meritorious cases from most of the frivolous cases. This determination, of course, is never more than a guess, but perpetually examined guesses, revised when appropriate, are better than arbitrary and irrevocable choices.

282. See *supra* note 138.

283. See *supra* notes 249-53 and accompanying text.

prosecutions.²⁸⁴ Early prosecutions, the Court asserted, can generate a number of problems, including unwarranted charging, partial charging, loss of evidence that the prosecution would have had available with a longer pre-charge investigation and preclusion of decisions not to prosecute stemming from further investigation.²⁸⁵

These points would be well-taken if a focus on the level of defense prejudice amounted to a requirement of early charging when the reason for delay was good faith investigation. Yet this would hardly seem to be the case when a limited number of defendants, not easily identified in advance, are likely to suffer such prejudice as a result of delay. Nor, as the majority feared, would a focus on defense prejudice instead of the good faith investigative reasons for delay force courts to decide in every case when prosecutions should have commenced, necessitating a reconstruction of the daily progress of each investigation.²⁸⁶ Courts would not need to decide when prosecutions should have commenced, only whether a showing of delay-related prejudice to the defense rises to a sufficient level to prevent fair and reliable fact-finding. Even when the motive for the prolonged investigation was to improve adversarial fact-finding by assembling solid evidence prior to charging, if the decision to delay actually impairs adversarial fact-finding by disabling an otherwise credible defense, constitutional principles require a remedy. In some cases, the only appropriate remedy may be dismissal of the charges.²⁸⁷

284. *United States v. Lovasco*, 431 U.S. 783, 793-94 (1977).

285. *Id.* at 792-94.

286. *Id.* at 793 n.14.

287. Of course, if steps short of dismissal can remedy the particular injury, dismissal would be unnecessary. When possible, judges should contemplate remedies short of dismissal. For example, some prejudice might be mitigated by letting evidence of the delay and its impact come before the jury. Judges might then consider relaxing rules of evidence (for example, admitting otherwise inadmissible hearsay evidence when it is very likely corroborative of direct evidence that would have been available but for the delay); drafting jury instructions relating to the problem of delay (for example, instructing jurors that they may draw an inference that evidence lost due to delay would have been favorable to the accused); or allowing defense counsel to argue favorable inferences from evidence shown to have once existed although it is now no longer available. See *Arizona v. Youngblood*, 109 S.Ct. 333, 338 (1988) (Stevens, J., concurring) (prejudice to defendant avoided by defense attorney's summation regarding state's failure to preserve potentially exculpatory evidence and by jury instruction that inference against state's interest was permitted from missing evidence).

The Constitution dwindles in value when we perceive it as a managerial document. True, constitutional interpretation may help shape the structure of incentives that affect the behavior of public officials.²⁸⁸ Nevertheless, the role of the amendments that constitute the Bill of Rights is to shield individuals from excessive state power, not to cast blame on officials who have behaved in ways that can injure individuals.²⁸⁹ Constitutional criminal procedure guides decisions about whether actions taken in a particular case have served the constitutional values of an adversary process or undermined them.²⁹⁰ This body of law provides a vehicle for assessing where the provable costs of even well-intentioned official decisions, whether made implicitly or explicitly, should lie.²⁹¹ Requiring a prosecutor to forgo a prosecution need not be viewed as a

288. A common argument advanced in support of the exclusionary rule in fourth amendment jurisprudence is that it structures the incentives for police to abide by constitutional precepts. Phrased in the negative, the purpose of the exclusionary rule "is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 217 (1960) (citing *Eleutei v. Richman*, 26 N.J. 506, 513, 141 A.2d 46, 50 (1958)).

289. See e.g., *Arizona v. Youngblood*, 109 S. Ct. 333, 341-42 (1988) (Blackmun, J., dissenting) ("[I]t makes no sense to ignore the fact that a defendant has been denied a fair trial because the State allowed evidence that was material to the defense to deteriorate beyond the point of usefulness, simply because the police were inept rather than malicious."); see also *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (prosecutor's inadvertent failure to disclose exculpatory evidence violates due process because the principle underlying due process cases "is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused"); accord *Napue v. Illinois*, 360 U.S. 264, 270 (1959) (prosecutor's knowing use of perjured testimony is a due process violation because it prevented a fair trial, even though prosecutor acted without "guile or a desire to prejudice" the defense.) (quoting *People v. Savvides*, 1 N.Y.2d 554, 557, 136 N.E.2d 853, 855, 154 N.Y.S.2d 885, 887 (1956)).

290. See, e.g., *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (Court stated that ineffective assistance of counsel violated the sixth amendment when "the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.").

291. Charging delays are often within the control of police and prosecutors, and include explicit decisions to continue investigations, to maintain an informant's undercover identity for a longer period and to pursue leads against suspected accomplices. Professor Amsterdam points out, however, that other seemingly unavoidable reasons for delay constitute implicit decisions:

Offenses may not be immediately reported; investigation may not immediately identify the offender; an identified offender may not be immediately apprehendable. When prosecution by indictment is required in a county that has only a few short criminal terms of court per year, an indictment may be delayed for weeks or even months until the impaneling of the next grand jury. It is customary to think of these delays as natural and inevitable; to some extent they are; but various prosecutorial decisions—such as the assignment of

judicial sanction for executive misbehavior. Just as the law forbids prosecution when an accused becomes incompetent to stand trial, in part because of the risk of unreliability introduced by the accused's inability to assist defense counsel,²⁹² so should the law forbid prosecution when delay prior to charging has had effects that introduce the risk of unreliability in fact-finding. In the latter instance, the prosecutor is partially responsible for the prejudicial effects, but in neither instance is the prosecutor at fault. Nonetheless, neither trial can proceed fairly.

In essence, the use of any of the alternative constitutional analyses described in Section III to protect against the harm of pre-accusation delay is functionally similar to the creation of a doctrine of laches in criminal cases. Laches is an affirmative defense that emerged from courts of equity, designed to prevent unfairness in civil matters in which plaintiffs had delayed filing suit.²⁹³ The approach many courts use in evaluating the laches issue is similar to the speedy trial balancing test, weighing the length of delay, the reasons for delay and the prejudice to the accused.²⁹⁴ As is common in the pre-accusation delay cases, the kind of prejudice that defendants often use to establish a laches defense is the loss of pertinent testimonial or documentary evidence.²⁹⁵ If the laches defense succeeds, courts disallow the lawsuit.²⁹⁶ The constitutional doctrine of pre-accusation delay, like the equitable doctrine of laches, should strike a balance between competing interests in ser-

manpower and priorities among investigations of known offenses—may also affect the length of such delays.

Amsterdam, *supra* note 137, at 527-28 (citations omitted).

292. To be found competent, a defendant must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding [and have] a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam). "[C]onviction of an accused person while he is legally incompetent violates due process." *Pate v. Robinson*, 383 U.S. 375, 378 (1966) (citing *Bishop v. United States*, 350 U.S. 961 (1956)).

293. See, e.g., *In re Bohart*, 743 F.2d 313, 326 (5th Cir. 1984); *EEOC v. Dresser Indus., Inc.*, 668 F.2d 1199, 1201 (11th Cir. 1982).

294. See, e.g., *University of Pittsburgh v. Champion Products, Inc.*, 686 F.2d 1040, 1044-45 (3d Cir.), *cert. denied*, 459 U.S. 1087 (1982); J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 419(d) (5th ed. 1941).

295. See, e.g., *EEOC v. Massey-Ferguson, Inc.*, 622 F.2d 271 (7th Cir. 1980); *EEOC v. Liberty Loan Corp.*, 584 F.2d 853 (8th Cir. 1978).

296. *Liberty Loan Corp.*, 584 F.2d at 853.

vice of broad conceptions of fairness in adversarial proceedings.²⁹⁷ In fact, courts must be at least as solicitous of fairness in criminal proceedings as they are of fairness in civil proceedings, given the gravity of the interests at stake in criminal litigation.²⁹⁸

V. THE DYNAMICS OF ABANDONED ANALOGIES

A. *Evaluating the Abandonment*

Although not endorsed by any court, the foregoing analyses applied to pre-accusation delay are of a venerable sort, entirely within the bounds of conventional legal discourse. Oddly, when confronted with the problem of pre-accusation delay, the Supreme Court selected the least sound of conventional alternatives for analyzing the problem, as measured by standards of mainstream jurisprudential thought. Therefore, the Court's choice merits examination and requires explanation. Why were formal legal categories not applied in the way that conventions of doctrine and precedent would have predicted? What light is shed by the jurisprudence of pre-accusation delay on the true processes of legal reasoning?

If, as is traditionally expressed, the predominant style of legal reasoning is analogical,²⁹⁹ then the law of pre-accusation delay is exceptional. Rather than acknowledging obvious "family resemblances"³⁰⁰ among various categories of doctrine, judicial decisionmakers appear to have proceeded in opposite fashion. Ignoring

297. See, e.g., *United States v. Mays*, 549 F.2d 670, 681 (9th Cir. 1977):

Pre-indictment delays, of course, have always generated particularly sensitive judicial problems requiring careful accommodations between the public's interest in effective law enforcement and the constitutionally protected interest of an accused in the fairness and reliability of the judicial process.

298. See *supra* note 254.

299. Edward Levi termed it "reasoning by example" or the "persuasion of similar situations." See E. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 1, vii (1949); see also S. BURTON, *AN INTRODUCTION TO LAW AND LEGAL REASONING* 9 (1985). Although some commentators characterize legal reasoning as having a deductive form, I will not address deductive reasoning processes in this Article, primarily because the analogical and deductive categories of legal reasoning overlap so extensively. Reasoning from the language of a rule or text is informed by the manner in which others have reasoned from the same or similar language in analogous situations. For a more comprehensive description of the interrelationship of analogical and deductive reasoning, see *id.* at 59-82.

300. The source of the equation of analogous cases to similarities among members of a family seems to be L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* §§ 65-76 (G. Anscombe trans. 1958). Many legal commentators speak of family resemblances among analogous

striking similarities,³⁰¹ they have emphasized slender differences between these categories.

Is this observation so oversimplified as to be overstated? Perhaps judges found simply that differences superseded the resemblances of pre-charge delay to other areas of law. Perhaps judges found the distinctions between pre-charge delay and speedy trial, compulsory process and due process so compelling as to recommend a discrete approach to the problem of dilatory charging. If this response has validity, then the critique of the use of analogical reasoning processes in the pre-accusation delay cases is blunted.

Although theoretically possible, this justification appears untenable, especially with respect to the speedy trial analogy. The problems of pre-charge and post-charge delay are virtually identical in their underlying facts and principles, both involving a period of government inaction that potentially impairs the presentation of evidence, particularly defense evidence, at trial. Forging an analogy between the two areas demands no intellectual leap. Common sense, in combination with legal sense, requires a powerful explanation before treating them differently.

Between pre-charge and post-charge delay, there is, of course, one factual distinction of potential moment—when the delay occurred—and we must examine what difference that distinction makes. The only way to determine the legal implications of the factual distinction is to evaluate it in light of the purposes of speedy trial law.³⁰² Although speedy trial doctrine is also designed to protect defendants from oppressive pre-trial anxiety and incarceration while awaiting trial, the primary concern of speedy trial doctrine—to protect the fact-finding process from the deteriora-

cases. See S. BURTON, *supra* note 297, at 85-99; Feinman, *The Jurisprudence of Classification*, 41 STAN. L. REV. 661, 678 (1989).

301. One definition of the word "analogy" is "resemblance in some particulars between things otherwise unlike." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 82 (1986).

302. The notion that, when considering an analogy, one can evaluate resemblances and distinctions only in light of the purposes of the underlying category comes from H. HART, *THE CONCEPT OF LAW* 155 (1961): "[U]ntil it is established what resemblances and differences are relevant, 'Treat like cases alike' must remain an empty form. To fill it we must know when, *for the purposes in hand*, cases are to be regarded as alike and what differences are relevant." *Id.* (emphasis added).

tion of delay—is also the primary concern of pre-accusation delay analysis.³⁰³

One of the purposes of pre-accusation delay is inapplicable to the speedy trial context: enhancing fact-gathering by permitting the prosecutor to conduct more thorough investigations. In other words, one purpose of permitting extended pre-accusation delay is to improve the fact-finding process. Nevertheless, well-intentioned prosecution efforts to improve fact-finding can actually work to undermine fact-gathering efforts by the defense. If, despite the best of intentions, delay impairs the overall fact-finding process, the primary difficulties engendered by pre-charge and post-charge delay become interchangeable. When the victims of each form of delay find themselves in much the same straits, the distinguishing features between these forms become trivial. In these circumstances, the speedy trial issue and the pre-accusation delay issue are functionally equivalent and their legal analysis should be equivalent as well.

Compulsory process and due process cases do not have as close a factual connection to charging delay as do speedy trial cases; therefore, their analogical link may not be as apparent. But by capturing the facts and concerns of compulsory process and due process in language of a higher level of generality, we can make the analogical relationship evident. As described in Section IIIB, compulsory process cases are concerned with actions by the government that diminish a defendant's opportunity to present evidence on his or her behalf.³⁰⁴ As described in Section IIIC, due process cases are concerned with government actions that undermine the fundamental fairness and reliability of adjudicatory proceedings.³⁰⁵ Each general description subsumes the underlying concern charging delay raises. Hence, all of these cases are variations on a theme. They overlap considerably, their boundaries blurred. They are all alike in broad aspects, in the essential animating principles that underlie each category of cases. In comparison with these animating principles, the factual differences that give each category a separate name appear trifling. A purely applied analogical reasoning

303. See *supra* notes 126-34, and accompanying text.

304. See *supra* notes 166-67 and accompanying text.

305. See *supra* notes 231-36 and accompanying text.

process conducted according to conventional legal understandings should have recognized the resemblances. By isolating the analysis of charging delay, evaluating it by a test all its own, the courts have turned the analogical reasoning process on its head.

B. *The Role of Consistency*

The legal system claims legitimacy, at least in part, on the basis of its logical infrastructure—its analytic mechanisms for finding similarities in legally similar cases, finding differences in legally different cases, then treating these cases accordingly. In a system of logical categorization, legitimacy depends on consistent application of the system's internal rules.³⁰⁶ When this logical ordering breaks down, as with the issue of charging delay, in which markedly similar cases are treated as though they are entirely unrelated, the need for internal consistency is frustrated.

Because few contemporary thinkers insist upon or desire purity in doctrinal classification,³⁰⁷ internal inconsistencies in the application of doctrine need not generate alarm about institutional integrity as long as the doctrinal decisionmaking is consistent with, and justified by, some external principle or policy that, at some level of agreement, society considers valuable to pursue.³⁰⁸ With respect to cases of pre-accusation delay, courts have not articulated an external principle to explain or justify the internal inconsistency of the doctrine. Unless we can derive a legitimating principle from the context, the decisions in this area render the legal process vulnerable to challenges to its authority.

Can external policies explain the courts' decisions regarding charging delay, even if courts have not articulated the policies in so many words? In seeking to answer this question, we must remem-

306. See, e.g., Feinman, *supra* note 300, at 676.

307. For exceptions to this rule, see, e.g., C. FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981); Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85.

308. This is essentially the perspective of post-realist legal theorists, who locate legal decisionmaking in the center of a continuum ranging from formal rigidity to unconstrained choice. Foremost among these theorists are Edward Levi and Karl Llewellyn, who assert that working through problems within an established legal tradition constrains decisionmaking. Nevertheless, they acknowledge the need to make policy choices in reaching these decisions. See generally E. LEVI, *supra* note 299; K. LLEWELLYN, *THE COMMON LAW TRADITION, DECIDING APPEALS* (1960); Feinman, *supra* note 300, at 676.

ber that since the Supreme Court framed its weak imitation of a due process analysis for addressing problems of charging delay, an overwhelming majority of cases have found no due process violation inhering in an extended period of pre-charge delay.³⁰⁹ Clearly, the choice of doctrinal forms has had a profound influence on the substantive outcomes of cases.

This pattern of results was likely to have been both foreseen and intended. Perhaps this pattern explains the court's doctrinal choice in the charging delay cases. Whenever a court crafts a procedural rule in a criminal case, it always has available at least two competing social visions from which to draw its external justification: a crime control vision and an individual protection vision.³¹⁰ In-

309. See *supra* note 105 and accompanying text.

310. Characterization of the crime control/due process dichotomy is generally attributed to H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968), in which the author describes the "value choices that underlie the details of the criminal process." *Id.* at 153. Labeling these visions "models," Packer asserts that the "Crime Control Model" is "based on the proposition that the repression of criminal conduct is by far the most important function to be performed by the criminal process." *Id.* at 158. The individual protection vision, which Packer calls the "Due Process Model," is based on "the concept of the primacy of the individual and the complementary concept of limitation on official power." *Id.* at 165.

John Griffiths has written an astute critique of Packer's work. Griffiths, *Ideology in Criminal Procedure or A Third "Model" of the Criminal Process*, 79 *YALE L.J.* 359 (1970). Griffiths claims that Packer has given us not two competing perspectives, but one: an ideology of an irreconcilable disharmony of interests between the state and the accused—a "Battle Model"—in which the only relevant variable is the balance of advantage between them. *Id.* at 367-71. To illustrate his point, Griffiths sketches an alternative view, based on an assumption of reconcilable interests between the state and the accused: a "Family Model" of the criminal process, named for an institution that sometimes inflicts punishment, but is premised on the idea of the harmony of interests of its members. *Id.* at 371-73. Griffiths then describes the fundamental changes that might be wrought by such a radical shift in the substantive premise of the criminal process. *Id.* at 373-94.

I agree with Griffiths that one cannot truly understand procedure without reference to substantive premises and outcomes. I also agree that the crime control vision and the due process vision share a belief in the irreconcilability of interests between the state and the accused. Nor do they exhaust the universe of possibilities with respect to imagining a system of criminal procedure. Nevertheless, as Griffiths ably demonstrates, our system of criminal procedure is built on an ideology of irreconcilable interests between the state and the accused, the Battle Model ideology, such that all procedural judgments are filtered through questions of balance of advantage. Although this ideology is historically contingent, not inevitable, we so unconsciously accept it in contemporary America that understanding the present context means understanding that ideology, and reforming the present context means starting from that premise as well. Stepping outside the ideological premises of our cultural system, while extraordinarily enlightening, is not the approach to adopt when, as

formed by these visions, the rule the court crafts serves to allocate power between the state and the defendant.³¹¹

Commentators have noted that the adversarial process of criminal adjudication operates to provide an extraordinary power imbalance in favor of the prosecution.³¹² Rather than seeking to remedy that imbalance with a compensatory procedural rule, to put the prosecution and defense on more level terrain, the Court chose, in these circumstances, to endorse the prevailing distribution of power. It chose to privilege the procedures recommended by crime control imagery and to suppress, except in aberrant cases, the imagery of protecting individuals from excessive state power.

With respect to some issues of criminal procedure, a crime control vision may supply an external policy justification that legitimately helps shape the doctrinal decisionmaking process. When choosing, for example, the procedures by which police may elicit confessions, or the procedures that police must follow in conducting searches and seizures, we should weigh the needs of law enforcement directly against the needs of individual protection from certain kinds of official excess. When, however, the type of official excess involved may bear directly on the judgment of criminal culpability, we cannot trade off the quality and reliability of that judgment in favor of the powerful imagery of crime control and the real needs of law enforcement.³¹³ These needs and images

here, the goal is to persuade decisionmakers about the value of reforms that they can implement within the present cultural context.

311. See Griffiths, *supra* note 310, at 367-68:

Since one or the other party to a process for settling disputes between irreconcilables must win in every case, the crucial question for criminal procedure so conceived is what bias to build into the rules. This is where Packer's Models differ. The Crime Control Model reflects a primary concern with the threat which individuals pose to the general social order and welfare; accordingly, it is designed to protect society by favoring it as much as possible through the rules of battle. The Due Process Model represents the alternative reaction to the assumed state of irreconcilability—an inclination to offset state power in the battle by providing rules as favorable as possible to an accused.

312. See generally Goldstein, *supra* note 26 (providing abundant support, through procedural examples, for the proposition that institutional arrangements in the criminal process aggravate the prosecution's disproportionate advantage).

313. See P. DEVLIN, *THE CRIMINAL PROSECUTION IN ENGLAND* 135 (1958):

When a criminal goes free, it is as much a failure of abstract justice as when an innocent man is convicted. . . . [B]ut an injustice on the one side is spread over the whole of society and an injustice on the other is concentrated in the suffer-

have limited force when the processes for adjudicating guilt are rendered untrustworthy; crime control and law enforcement are served by unreliable criminal convictions only in the minds of the most cynical. Because a legal system cannot espouse such cynicism in support of its claim to authority, the crime control perspective does not provide a legitimate external principle or policy to justify its doctrinal choice in cases of pre-accusation delay. This perspective may well have influenced the decisions—indeed, no other easily discernible justification presents itself—but it is unspeakable in a system that also espouses fundamental procedural fairness in criminal proceedings.³¹⁴

Lacking internal consistency with the legal system's rules, and lacking a legitimate external justification for the inconsistencies, the jurisprudence of pre-accusation delay appears to have no principled defense. It stands as an example of judicial failure to use analogical reasoning processes to respond to procedural problems when thwarted, as likely happened here, by a particular policy justification. That the courts left the external justification unarticulated is hardly startling. As stated above, it was essentially unarticulable due to its contradiction of other widely shared norms, such as the need for a high level of accuracy in criminal convictions as an elemental feature of procedural fairness.³¹⁵

ing of one man. . . . Since we know that the ascertainment of guilt cannot be made infallible and that we must leave room for a margin of error, we should take care to see that as far as humanly possible the margin is all on the side of the defense.

See also *Roviaro v. United States*, 353 U.S. 53, 62-65 (1957), in which the Supreme Court distinguished between procedures that courts must follow when guilt or innocence is at stake and procedures that they must follow when constitutional or other rights are at stake. Because the former is the overriding concern of criminal procedure, courts must realize higher standards in that context and make procedural accommodations. In *Roviaro*, the Court compelled the prosecution to disclose the identity of a confidential informant when the informant had information bearing directly on guilt or innocence. *Id.* at 61-62. The Court found law enforcement needs less weighty than the need for a reliable judgment of criminal culpability. *Id.* at 62-64.

314. See Goldstein, *supra* note 26, at 1192 ("If a procedural system is to be fair and just, it must give each of the participants in the dispute the opportunity to sustain his position.").

315. See J. FRANK, *supra* note 19, at 35, who wrote of the problem of mistaken fact-finding in criminal cases:

[A] defense of grave miscarriages of justice is legitimate only if they are inevitable—that is, only if everything practical has been done to avoid such injus-

VI. EXPANDING ANALOGICAL REASONING

One response to the abandonment of analogical reasoning in the pre-accusation delay cases is to urge that the doctrinal "mistake" be corrected, that the analysis of pre-indictment delay be incorporated into a speedy trial analysis or, as secondary and tertiary choices, into a compulsory process analysis or a genuine due process analysis. But given the ease with which courts avoided categorical analogies, in likely service of an unstated external objective, it might be valuable to step outside the structure of categorical thinking to speculate about new ways to use traditional analogical reasoning processes.

The world is ingeniously inventive about furnishing complex and varied factual circumstances that give rise to legal issues. From such complexity arises the allure of fixed categories of thought.³¹⁶ Defining the judicial role as assigning a problem to an appropriate category reduces the need to explore the problem in all its facets. Instead, the problem sheds its complicated features when put into a simplifying category. Placement in the category, not the initial problem, triggers a particular reasoning process, and that reasoning process, once set in motion, ultimately determines the appropriate legal response. Even if the doctrinal classification does not respond fully and sensitively to the problem presented, at least it produces a decision for which no decisionmaker must assume definitive responsibility. If a just outcome obtains, it might be simply an artifact of this convoluted process. Worse, unjust outcomes might hide behind the guise of this routine classification process.³¹⁷ Why make important judgments through such indirection?³¹⁸

tices Perfect justice lies beyond human reach. But the unattainability of the ideal is no excuse for shirking the effort to obtain the best available.

316. See Minow, *supra* note 260, at 90.

317. The essential relationship between substantive ideals and various styles and uses of legal doctrine is a central feature of critical theory. See, e.g., Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) (describing the relationship of arguments about use of rules to substantive social visions); Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 616-46 (1983) (describing the manner in which contract doctrine masks the conflicting social visions that underlie it).

318. Griffiths, *supra* note 310, at 378, phrases the question somewhat differently. He also hints at an answer, although clearly he finds it inadequate:

Why all of this kind of effort to fix the limits of the "criminal" process with a *priori* categorical limits for which no one has ever found a really persuasive

If we broaden our understanding of analogical reasoning, we may discover more direct approaches to legal decisionmaking. One approach, for example, might involve reasoning by analogy to societal norms. Through this method, judges would immerse themselves in the particularities of a dispute, as described by the parties before them, and tailor a resolution explicitly and directly reasoned, by analogizing to the conditions required by the broad substantive commitments of society.³¹⁹ When these substantive commitments are embodied in particular cases, this method of reasoning will converge with more traditional analogical reasoning methods. The resolution derived by reasoning from societal norms might be a matter of debate, but so too are the categorical resolutions of problems. At least, with respect to direct decisionmaking, we could focus debate squarely on the interests at stake. The alternative, allowing occasions to arise when the interests at stake seep into the categorical decisionmaking process and corrupt its implementation without acknowledgment, is both less honest and less trustworthy. At least through the suggested approach, judges would be properly attuned to the fact that they, not doctrines, make decisions. Judicial accountability for decisions, through an explicit reasoning process, would be required and biases would be more likely to be exposed and confronted.

Reasoning by analogy to societal norms might be called a harm-based approach to analogical reasoning, if it is not so far removed from traditional understandings of analogical reasoning to be so denominated. Rather than deciding which doctrinal category the problem represented, a judge faced with an issue of pre-accusation delay might explore, with the help of the parties, the myriad ways

function, except that it is a battleground which we want kept as limited as possible and whose boundaries we need to maintain by constant patrolling?

Id.

319. See generally Minow, *supra* note 260.

"We reflect on an incident not by subsuming it under a general rule, not by assimilating its features to the terms of an elegant scientific procedure, but by burrowing down into the depths of the particular, finding images and connections that will permit us to see it more truly, describe it more richly . . ."

Id. at 91 (quoting M. NUSSBAUM, *THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY* 69 (1986)). Other feminist theorists would concur. See, e.g., C. GILLIGAN, *IN A DIFFERENT VOICE* (1982) (exploring reasoning processes that do not depend on systems of rules).

in which charging delay is alleged to have harmed the defendant and analyze whether these harms represent the kinds of impediments to a fair fact-finding process that societal norms will not allow. This approach focuses directly and carefully on the primary interests at issue: the injury to the defendant's case and the integrity of the subsequent trial. If, after examining the detail and documentation of the allegations, a judge finds credible a claim that important evidence would have been available but for the delay, and finds also that the delay has damaged fact-finding beyond repair, then, in the name of the substantive commitment to fair procedure, the judge may dismiss the charges or take any other action she deems responsive to the problem.³²⁰

The harm-based approach is not free from potential deceptions: A judge consciously or unconsciously might still make unwarranted findings in order to accomplish unstated goals, a risk only partially addressed by mandating a full description and evaluation of the evidence. But at least the decision would be more expressly about what made the dispute matter. Decisionmakers would not be diverted into discussions of the breadth of various classifications, and would not be able to place responsibility for a decision on the doctrinal categories themselves. A judge would move between the details of a case and a substantive commitment to fairness in proceedings, and then make a decision applying the latter to the former, without asking doctrine to stand as intermediary.

This approach has other potential advantages as well, opening up a broader range of information than we might deem relevant to decision by doctrinal category. For example, comparative criminal procedure could become a more significant source of instruction if the decisionmaking process becomes more flexible and open ended. Examining other societies' norms by turning to comparative sources might prove valuable in expanding the decisionmakers' vision. The law of pre-accusation delay is an excellent example, one in which examining the continental practice of judicial supervision of the investigatory phase of criminal cases might prove a profitable inquiry.³²¹ By what principles do continental judges decide to

320. For consideration of other remedies short of dismissal, see *supra* note 287.

321. See, e.g., R. SCHLESINGER, *COMPARATIVE LAW* 441-43 (4th ed. 1980) (describing the practice in countries in which the pretrial investigation is conducted by a judge—known as

delay charging and protract an investigation? Exploring continental practice might help courts derive a workable set of rules that prevent the unnecessary harms of charging delay by guiding conscientious prosecutors in the timing of charging.³²² This possibility is much less likely under the current model of decisionmaking, unless a niche is found within doctrinal categories that makes such information germane.

In his small book *Structure and Relationship in Constitutional Law*,³²³ Professor Charles Black has also advocated a more straightforward approach to judicial decision.³²⁴ Asking where we would be if the framers had never inserted the due process clause into the Constitution, he suggests that the prospect would not be as bleak as we might first imagine. As a society, our substantive commitment to protection of individuals against state power is enshrined in the due process clause, but the commitment persists regardless of the language or the inclusion of the specific phrase in the constitutional text.³²⁵ In fact, Professor Black's thesis is that we can infer the commitment without reference to the due process clause, by reasoning from the relationships created by the logic of our constitutional structure itself.³²⁶

the *juge d'instruction* in France); see also L. WEINREB, DENIAL OF JUSTICE 119-37 (1977) (arguing for the establishment of an investigating magistracy in the United States, an argument derived from the French model). In many continental systems, prosecutorial discretion is much narrower than in the United States. *Id.*; see Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439 (1974) (discussing the merits of the prosecutorial function in Germany compared to the United States). These examples may provide insights worthy of consideration in reforming our own system.

322. The furor generated by the Supreme Court's opinion in *Miranda v. Arizona*, 384 U.S. 436 (1966), indicates that many commentators view the formulation of prophylactic rules to guide public officials as an excessive and illegitimate use of judicial authority. See, e.g., Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U.L. REV. 100 (1985) (discussing the appropriate identification of prophylactic rules and the legitimacy of such rules). Although mindful of this critique, I believe that courts, by virtue of their responsibility to translate the fundamental commitments of society into resolutions of specific problems, can appropriately provide guidance to public officials as to how to conform their behavior to those fundamental commitments.

323. C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969).

324. As Professor Black has been heard to say, in Texas twang, "No idea worth its salt can't be said in under 100 pages." (statement made during course entitled "Constitutional Law Revisited," Yale Law School, spring term 1981).

325. C. BLACK, *supra* note 323, at 33-34, 65-66.

326. *Id.* at 7.

Professor Black suggests that the procedural protections now linked to the language of procedural due process are best seen as arising from our government's organizing principle of ordered liberty and from the status of citizenship in a nation organized in such a fashion.³²⁷ The right to a fair trial and other refrains in the field of criminal procedure "would seem to be the least possible domestic implication of the conferral of citizenship" ³²⁸ Surely, Professor Black states, our precious freedoms have a deeper foundation in our political system and in our guaranteed enjoyment of citizenship than that the words of the fourteenth amendment commanded them.³²⁹

Professor Black's objection to reasoning from textual categories is that in some cases "it forces us to blur the focus and talk evasively, while the structural method frees us to talk sense."³³⁰ His conclusion is only this:

All I am suggesting is that a method not unknown in our constitutional law be brought more clearly into the conscious field of those who work in that law. I make this suggestion in the faith, fundamentally, that clarity about what we are doing, about the true or the truly acceptable grounds of judgment, is both a good in itself, and a means to sounder decision. . . .³³¹

. . . .

And I should hope that when some emergent problem might be solved by these means, we may show at least enough methodological flexibility to take a long look at this way to solution.³³²

Professor Black's constitutional perspective offers support for an expanded understanding of analogical reasoning processes. The approach that I suggest here does not exhaust the full spectrum of possibilities for enlarging our view of analogical reasoning beyond categorical uses, but is intended to generate further thinking about such possibilities. When viewed closely, the harm-based approach represents a modest reform, recommending merely that courts reason more directly about issues that a focus on doctrinal categories

327. *Id.* at 62-63.

328. *Id.* at 62.

329. *Id.*

330. *Id.* at 13.

331. *Id.* at 31-32.

332. *Id.* at 66.

often allows courts to avoid. But if, as is likely in the foreseeable future, our legal culture remains wedded to doctrinal categories, then the least we can do is challenge their faulty and erroneous uses.

VII. CONCLUSION

The problems posed by the languid pace of American criminal justice argue for the development of procedures to expedite the processing of criminal cases. Tinkering with the case law of pre-accusation delay is less likely to promote this goal than other institutional modifications.³³³ Nevertheless, because the Constitution does provide some protection to defendants from the hazards of charging delay, constitutional criminal law should be responsive to the harms that such delay can create. This Article has sought to demonstrate that the current body of law is poorly suited to that task.

Moreover, the law of charging delay defies mainstream understandings of analogical reasoning processes. Had legal reasoning operated as advertised, we would likely analyze charging delay as a speedy trial problem, or less preferably but still appropriately, as a compulsory process problem or a true due process problem, because each is analogous to charging delay in legally significant ways. Any of these doctrinal choices represents a sounder analysis of the underlying issues than the analysis the Supreme Court specially fashioned.

The abandonment of analogical reasoning in this situation is likely explained by psychological pressures derived from the decisionmakers' awareness of the need for crime control, although crime control needs are not well-served by sacrificing individual protections in these circumstances. Moreover, institutional integ-

333. Professor Amsterdam's partial list of such institutional modifications includes: improved deployment of the available resources of the courts, prosecutors' offices, public defenders' offices, police departments, and probation departments; considerable additions to all of these resources; considerable increases in the numbers of private practitioners willing and able to handle criminal cases, and of criminal-law paraprofessionals; and considerable diminution of the vast mass of largely wasteful intake that now impedes the capacity of the system to function effectively.

Amsterdam, *supra* note 137, at 525-26.

ality is undermined by inconsistency in the application of the internal logical rules of the legal system. Given the facility with which courts sidestepped such rules in the instant context, we should explore a less categorical and more straightforward approach to addressing the harms of pre-accusation delay. I have suggested one approach, a harm-based approach involving reasoning by analogy to societal norms, in the hope that it can stimulate thinking about improved methods of legal analysis. Until expansive approaches to analogical reasoning become more fashionable, analytic inconsistencies that threaten the legitimacy of the legal process should be highlighted and their damage repaired. In the meantime, some number of accused persons will continue to lose their liberties, potentially even their lives, when, after the ravages of time's passing, they are convicted at trials that cannot be trusted.