

THE MYTH OF PRELIMINARY DUE PROCESS FOR MISDEMEANOR PROSECUTIONS IN NEW YORK

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“A prudent magistrate should proceed with the utmost caution when he has reason to suspect that a criminal proceeding was commenced before him, not to vindicate public justice, but to serve some private purpose, and should withhold process until satisfied that the complainant is acting in good faith in behalf of the people, and not to aid personal objects.”¹

ABSTRACT

The existing criminal procedure laws of New York do not afford the misdemeanor accused any meaningful preliminary opportunity to fight the substantiation of the accusations against them. This is problematic given that a criminal prosecution can have extreme consequences on an individual’s life, including the loss of liberty, employment, housing, child custody or freedom from immigration removal proceedings. This article therefore analyzes the weaknesses in the existing criminal procedure laws for these prosecutions, and assesses how historical protections dissolved into the myth of preliminary due process for misdemeanor cases today. Ultimately, since the current procedures are ineffective in protecting against unwarranted misdemeanor prosecutions, the solution lies in reintroducing preliminary hearings in all misdemeanor prosecutions to better provide due process for all in the State of New York.

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¹ People *ex rel.* Livingston v. Wyatt, 79 N.E. 330, 333 (N.Y. 1906).

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I.

INTRODUCTION

In 1906, the Court of Appeals of New York described one of society's most fundamental principles of the justice system: that one should not be criminally prosecuted on an unsupported or unsubstantiated accusation.² In New York, however, the existing criminal procedure laws do not afford the misdemeanor accused any meaningful preliminary opportunity to fight the substantiation of the accusations against them. This is problematic given that a criminal prosecution can have extreme consequences on an individual's life at the very onset of their case. This article therefore analyzes the weaknesses in the existing criminal procedure laws for misdemeanor prosecutions, and discusses how historical protections dissolved into the myth of preliminary due process for misdemeanor cases today. Ultimately, since the current procedures are ineffective in protecting against unwarranted misdemeanor prosecutions, the solution lies in reintroducing preliminary hearings in all misdemeanor prosecutions to better provide due process for the accused in the State of New York.

The problem with weak due process provisions at the commencement of a case is that any prosecution can have extreme consequences for the accused, no matter how minor the offense.³ For example, the accused can be incarcerated after the commencement of the prosecution,⁴ and can lose income during the arrest, booking time, and court appearances.⁵ Similarly, the accused's employment can be

² See *id.*; see also *People v. Scott*, 143 N.E.2d 901, 903–05 (N.Y. 1957).

³ See MOLLY KOVEL, *THE CONSEQUENCES OF CRIMINAL PROCEEDINGS IN NEW YORK STATE: A GUIDE FOR CRIMINAL DEFENSE ATTORNEYS* 2–3 (Civil Action Practice of The Bronx Defenders ed., Apr. 2015), available at https://www.reentry.net/ny/library/item.76898-Consequences_of_Criminal_Proceedings_in_New_York_State_August_2014_The_Bronx [https://perma.cc/29H3-2UY8] [hereinafter *THE CONSEQUENCES OF CRIMINAL PROCEEDINGS IN NEW YORK STATE*].

⁴ See N.Y. CRIM. PROC. LAW § 530.20 (McKinney 2016).

⁵ “Employment is at risk from the moment a client is taken into custody—regardless of whether or not the arrest results in a conviction. Unemployed individuals who are looking for work are also at

terminated for the criminal accusations alone,⁶ and a prosecution can affect one's ability to find employment in the future.⁷ A prosecution can also effect the accused's ability to maintain custody of children,⁸ to return home,⁹ to see family,¹⁰ or to even stay in the country if not a United States citizen.¹¹

These effects of a prosecution can force individuals into family, housing, or immigration court, thereby activating a host of additional civil consequences to the detriment of the individual and at a cost to society.¹² Moreover, a prosecution is public information in New York,¹³ and an arrest can never be expunged from the accused's record, even if the accusation was unfounded in the first place.¹⁴ These

risk during the pendency of a case.” THE CONSEQUENCES OF CRIMINAL PROCEEDINGS IN NEW YORK STATE, *supra* note 3, at 30.

⁶ Due to automatic notifications by the New York State's Division of Criminal Justice Services, an arrest can lead to immediate employment suspension. Most public employers have immense discretion to terminate or suspend based on any 'immoral conduct,' and since "the employer only has to satisfy an administrative burden of proof, the employer can terminate based only on hearsay (e.g., a criminal complaint)." *Id.* at 31.

⁷ Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 313–314 (2016) (citing Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, WALL ST. J., Aug. 18, 2014) (describing individuals who had difficulty obtaining jobs because of their arrest records, even when the charges against them were ultimately dropped).

⁸ THE CONSEQUENCES OF CRIMINAL PROCEEDINGS IN NEW YORK STATE, *supra* note 3, at 39 ("If your client is charged with a crime involving a child (such as Endangering the Welfare of a Child) or charged with any crime that may have put her children at risk, it is likely that she will also have an Article 10 case in Family Court.").

⁹ *Id.* at 59 ("Incarceration almost invariably leads to loss of stable housing. Then, when a person returns from prison or jail, she usually finds herself homeless, relying on local shelter systems or the generosity of family members or friends.").

¹⁰ N.Y. CRIM. PROC. LAW §§ 530.12–13 (McKinney 2016).

¹¹ THE CONSEQUENCES OF CRIMINAL PROCEEDINGS IN NEW YORK STATE, *supra* note 3, at 79 ("If your client is a noncitizen, arrest alone can lead to detention by Immigration and Customs Enforcement (ICE) and the start of deportation proceedings. If your client is out of status or undocumented, his fingerprints will be sent to an immigration database upon arrest. ICE may lodge an immigration 'detainer,' or warrant, at the arraignment. An immigration detainer may also be lodged by ICE officials while your client is in jail, regardless of the type of charges.").

¹² *See id.* at 3–4.

¹³ The New York State Unified Court System website gives detailed information on all pending cases in all criminal courts in New York City, Nassau County, Suffolk County, the County Courts in the Ninth Judicial District including Westchester, Rockland, Orange, Putnam and Dutchess Counties, the County Court in Erie County, and the Buffalo City Court. *See eCourts: WebCriminal*, NEW YORK STATE UNIFIED COURT SYSTEM, https://iapps.courts.state.ny.us/webcrim_attorney/AttorneyWelcome [<https://perma.cc/TJ6J-JL4B>] (last visited March 4, 2018).

¹⁴ "New York has no laws to erase or 'expunge' criminal records. New York uses a process called sealing for some cases. Sealing means that the record still exists, but all related fingerprint and palmprint cards, booking photos, and DNA samples are returned to you or destroyed." *Court Help: Find the Help You Need to Represent Yourself in NY Courts, Sealed Criminal Records*, NEW YORK STATE UNIFIED COURT SYSTEM, <https://www.nycourts.gov/courthelp/Criminal/sealedRecords.shtml> [<https://perma.cc/C89R-QGRT>] (last visited March 4, 2018).

consequences acutely impact individuals accused of misdemeanors,¹⁵ which make up the majority of prosecutions in the State of New York.¹⁶ In 2015, for example, 70 percent of all criminal arrests in New York were for misdemeanor offenses.¹⁷ In that same year, however, 39 percent of New York's misdemeanor prosecutions were ultimately dismissed.¹⁸ Thus, in 2015 alone, more than 127,000 individuals suffered prosecution for criminal charges that did not result in trials, guilty pleas or convictions.¹⁹

Given the significant consequences of misdemeanor prosecutions for the accused, the law should defend against the unnecessary and prolonged prosecution of any individual in the criminal justice system. Regrettably, however, the New York State Criminal Procedure Law (C.P.L.) fails to protect individuals accused of misdemeanors from unexamined and oftentimes unsupportable accusations. This results in countless unnecessary entanglements with the justice system for individuals who have no procedural protection to assert the lack of probable cause for their prosecution. The only viable solution to this problem is for the New York State Legislature to reenact a misdemeanor preliminary hearing into the C.P.L. Authorizing the right to a misdemeanor preliminary hearing would give the accused a meaningful opportunity to contest the probable cause for his or her prosecution, and eliminate prolonged prosecutions and wasted judicial resources on misdemeanor prosecutions that will never be pursued to trial.

¹⁵ See Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 277 (2011).

¹⁶ *Computerized Criminal History System (as of 2/17/2017), Adult Arrests: 2007–2016*, NEW YORK STATE DIVISION OF CRIMINAL JUSTICE SERVICES, <http://www.criminaljustice.ny.gov/crimnet/ojsa/arrests/nys.pdf> [<https://perma.cc/2XC8-SBHR>] (last visited March 4, 2018).

¹⁷ *Id.* (in 2015, there were 490,930 total arrests in New York State; 342,932 of those were for misdemeanor offenses).

¹⁸ *New York State Adult Arrests Disposed*, NEW YORK STATE DIVISION OF CRIMINAL JUSTICE SERVICES, <http://www.criminaljustice.ny.gov/crimnet/ojsa/dispos/nys.pdf> [<https://perma.cc/Z9U5-RRX9>] (last visited March 4, 2018) (in 2015 the total misdemeanor dispositions were 326,025, where 84,636 were dismissed through an Adjournment in Contemplation of Dismissal and 42,772 were dismissed not through an Adjournment in Contemplation of Dismissal).

¹⁹ *Id.* An Adjournment in Contemplation of Dismissal (ACD) is “an adjournment of the action without date ordered with a view to ultimate dismissal of the accusatory instrument.” Once the accused individual is offered and accepts an ACD, he/she has either six months or a year—depending on the charges alleged—to meet whatever conditions are imposed on him/her by the judge. If the accused individual meets those obligations, and neither the prosecution nor the judge move to restore the case to the active criminal docket, the accusatory instrument is deemed to have been dismissed by the court in furtherance of justice. N.Y. CRIM. PROC. LAW § 170.55 (McKinney 2016).

II.

THE EXISTING CRIMINAL PROCEDURE TO COMMENCE A MISDEMEANOR PROSECUTION

A. Arrest and Arraignment Procedures in New York

In New York, a misdemeanor prosecution most commonly begins with an arrest.²⁰ A lawful arrest is authorized when an officer has “reasonable cause” to believe that the individual committed a crime, regardless of whether the crime was committed in the officer’s presence.²¹ Under the C.P.L., “reasonable cause” exists when information, appearing to be reliable, collectively persuades an ordinary person that it is reasonably likely that the individual committed an offense.²² Thus, an officer can effectuate an arrest based entirely on hearsay,²³ which a prosecutor can subsequently rely upon to begin the prosecution.²⁴

To commence the misdemeanor prosecution, the prosecutor must file an accusatory instrument with a Criminal Court, upon which the accused is arraigned on the non-felony offenses.²⁵ An accusatory instrument can either be in the form of an information or a misdemeanor complaint.²⁶ The difference between an information and a misdemeanor complaint is that the latter may contain uncorroborated hearsay statements to form the basis of the prosecution.²⁷ That said, an accused cannot be convicted on hearsay allegations,²⁸ the complaint must be “converted” into an information by corroborating the hearsay with verified supporting depositions from the accusers.²⁹ If the prosecution cannot corroborate the

²⁰ N.Y. CRIM. PROC. LAW § 140.10 (McKinney 2016).

²¹ N.Y. CRIM. PROC. LAW § 140.10(1) (McKinney 2016).

²² N.Y. CRIM. PROC. LAW § 70.10(2) (McKinney 2016).

²³ The hearsay rule forbids the use of an assertion, made out of court, as testimony to the truth of the fact asserted. *See* RICHARDSON T. FARRELL, RICHARDSON ON EVIDENCE § 8-101 (Richardson Farrell, 11th ed. 1995); N.Y. CRIM. PROC. LAW § 70.10(2) (McKinney 2016).

²⁴ *See* N.Y. CRIM. PROC. LAW § 100.05 (McKinney 2016); *see also* *People v. Settles*, 385 N.E. 612, 619 (N.Y. 1978) (citing WIGMORE ET AL., EVIDENCE IN TRIALS AT COMMON LAW § 1361–62 (Little, Brown ed., 5th ed. 1974)); RICHARDSON T. FARRELL, *supra* note 23, at § 201 (holding that the inherent dangers in hearsay evidence are obvious because “the person who made the statement is not called as a witness at trial, the adversary of the party offering the proof is afforded no opportunity to cross-examine the declarant or impeach his credibility”).

²⁵ N.Y. CRIM. PROC. LAW § 100.05 (McKinney 2016).

²⁶ N.Y. CRIM. PROC. LAW § 170.10 (McKinney 2016).

²⁷ Essentially, the misdemeanor complaint is served as a surrogate for an arrest warrant, where the prosecution may have enough information to show reasonable cause to believe an offense has been committed, but is not yet prepared to furnish evidence of a legally sufficient case. *See* N.Y. CRIM. PROC. LAW §§ 1.20(1); 100.10(1); 100.10(4) (McKinney 2016); *see also* PETER PREISER, PRACTICE COMMENTARIES, MCKINNEY C.P.L. § 100.10 (2016) (citing *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991); *People v. Dumas*, 497 N.E.2d 626 (N.Y. 1986)) [hereinafter PREISER 2016].

²⁸ N.Y. CRIM. PROC. LAW § 100.10(4) (McKinney 2016) (a defendant may waive prosecution by information pursuant to C.P.L. § 170.65(3)).

²⁹ A supporting deposition is a written instrument filed with an information or complaint, which is verified by a person other than the complainant of the accusatory instrument and contains evidentiary

hearsay within the statutorily permissible speedy trial time, the accusations must be dismissed.³⁰

Until conversion takes place, however, a person suffers criminal prosecution based solely on hearsay evidence that has not been sworn to by any first-hand witness of the alleged offense.³¹ Moreover, the consequences of the prosecution take immediate effect as early as at arraignments, despite any weaknesses in the complaint. As soon as the accusatory instrument is filed in court, a judge can incarcerate the accused pre-trial, or can issue orders of protections banning the individual from returning to his or her home or family.³² The accused can immediately lose his or her employment by the mere fact of having an open criminal case,³³ or be thrown into immigration removal proceedings.³⁴ Thus, even if the prosecutor never corroborates the hearsay in the complaint, the accused may suffer the consequences of the prosecution for several weeks or months.³⁵

B. Verification Under the Existing C.P.L.

One of the few preliminary procedural safeguards for misdemeanor prosecutions in the existing C.P.L. is the “verification” requirement.³⁶ Regardless of whether the prosecution commences on a complaint or an information, every accusatory instrument and supporting deposition must be “verified” by the accuser in the document.³⁷ The accuser, often referred to as the deponent or complainant, does not have to be someone with personal knowledge of the allegations; the deponent could be someone who has mere “information and belief” that the allegations occurred, despite having no first-hand knowledge on the matter.³⁸ Essentially, any person can be the deponent in an accusatory instrument, including a prosecutor or police officer, as long as their accusations are “verified.”³⁹

factual allegations that supplement those in the accusatory instrument to support the charges alleged. If those factual allegations are true, the supporting deposition and accusatory instruments establish that the accused committed every element of the offense charged. *See* N.Y. CRIM. PROC. LAW §§ 100.20; 100.40 (McKinney 2016).

³⁰ The misdemeanor case must be dismissed if the prosecutor is not ready for trial within: (i) 90 days of the commencement of the action where the defendant is accused of one or more class A misdemeanors and no felonies; or (ii) 60 days of the commencement of an action where the defendant is accused of one or more offenses, at least one of which is a B misdemeanor or less, and none are A misdemeanors or felonies. N.Y. CRIM. PROC. LAW §§ 30.30(1); 170.30(e); 170.30(g) (McKinney 2016).

³¹ *See* N.Y. CRIM. PROC. LAW § 100.20 (McKinney 2016).

³² *See* N.Y. CRIM. PROC. LAW §§ 530.12; 530.13; 530.20 (McKinney 2016).

³³ *See supra* note 3, at 30–38.

³⁴ *Id.* at 79–81.

³⁵ *See* N.Y. CRIM. PROC. LAW §§ 30.30(1); 170.30(e); 170.30(g) (McKinney 2016).

³⁶ *See* N.Y. CRIM. PROC. LAW § 100.15(1) (McKinney 2016).

³⁷ *See id.*

³⁸ N.Y. CRIM. PROC. LAW § 100.15(3) (McKinney 2016).

³⁹ *See* N.Y. CRIM. PROC. LAW § 100.15 (McKinney 2016); PREISER 2016, *supra* note 27, § 100.15 (citing N.Y. CRIM. PROC. LAW § 100.10 (McKinney 2016); *People v. Shapiro*, 61 N.Y.2d 880 (1984)).

As one of the only protections against unfounded misdemeanor prosecutions, however, the standards for verification are surprising low. In order to verify an allegation, one may either (i) swear in person to the facts before a court or officer, or (ii) merely sign to the truth of the facts asserted on a document that contains a form notice that “false statements therein are punishable as a class A misdemeanor.”⁴⁰ Unless expressly specified by the judge, the deponent may choose which method of verification they prefer,⁴¹ and does not have to “actually verbalize an intention to swear to any sort of oath.”⁴² Thus, the statute allows for complainants to lodge allegations without ever making any solemn oath in the presence of witnesses or in the formal forum of a court to the truth of the matters they assert.⁴³

Under the existing procedures, it is sufficient for a deponent to merely read and sign the accusatory instrument, with the untested assumption that the person appreciates the significance of his or her actions. The misdemeanor accused has no preliminary opportunity to contest the verification of the allegations, and thus “the People need not, at any time prior to trial, present actual evidence demonstrating a prima facie case.”⁴⁴ Instead, once a complaint is verified, the information is deemed to establish a prima facie case and the accused individual has no right to testify or cross-examine the accuser at any preliminary probable cause hearing.

C. *Prima Facie Procedural Requirements*

Since the misdemeanor accused has no legislative right to a probable cause hearing, the verified information or complaint is the sole instrument upon which the accused can be prosecuted.⁴⁵ As such, the factual allegations in the information must at least meet a minimal evidentiary standard to be deemed sufficient under the C.P.L.⁴⁶ This minimal standard is referred to as a prima facie case. A prima facie case exists when the prosecutor has put forth the low burden of “legally sufficient evidence.”⁴⁷ Legally sufficient evidence is “competent evidence which, *if accepted as true*, would establish every element of an offense charged and the defendant’s commission thereof.”⁴⁸ However, this term is a purely legal concept that focuses on

(commenting that “any person can file a complaint or an information with a criminal court (other than a simplified information) and thus commence a criminal action”).

⁴⁰ N.Y. CRIM. PROC. LAW § 100.30(1) (McKinney 2016); N.Y. PENAL LAW § 210.45 (McKinney 2017).

⁴¹ See N.Y. CRIM. PROC. LAW § 100.30(2) (McKinney 2016).

⁴² PETER PREISER, PRACTICE COMMENTARIES, MCKINNEY C.P.L. § 100.30 (2017) [hereinafter PREISER 2017].

⁴³ See *People v. Holmes*, 711 N.E.2d 965, 966 (1999) (citing *People v. Stewart*, 706 N.E.2d 739 (N.Y. 1998)); N.Y. CRIM. PROC. LAW §§ 100.40(1); 100.15 (McKinney 2016); *In re Edward B.*, 606 N.E.2d 1353 (N.Y. 1992)).

⁴⁴ *People v. Alejandro*, 511 N.E.2d 71, 74 (N.Y. 1987).

⁴⁵ *Id.* at 73; see N.Y. CRIM. PROC. LAW § 70.10 (McKinney 2016).

⁴⁶ *Id.*

⁴⁷ N.Y. CRIM. PROC. LAW § 70.10(1) (McKinney 2016).

⁴⁸ *Id.* (emphasis added).

whether the factual accusations address every element of the offense, without requiring any assessment on the quality or weight of that evidence.⁴⁹ Thus, a prima facie case can be founded on unsubstantiated or unsupported allegations that would be considered unreliably inadmissible at a trial or before a grand jury.⁵⁰

This criminal procedure results in some prosecutions where it is reasonably unlikely that the accused committed the crimes charged. For example, this circumstance occurs when “evidence of robbery consists solely of the testimony of a complainant who holds a grudge against the defendant, and eight impartial witnesses, who were present during the incident in issue, testify that all that occurred was a fight between the parties without any semblance of robbery.”⁵¹ Essentially, a prosecutor may pursue a legally sufficient case without ever evaluating whether the allegations are convincing or outweighed by contradictory evidence, and despite the evidence being wholly inadequate to prove that the accused actually committed the offense.⁵²

III.

THE HISTORICAL DILUTION OF PRELIMINARY DUE PROCESS FOR MISDEMEANORS

A. The Principle of Protecting Against Unfounded Accusations

Over a century ago, the New York Court of Appeals (the Court) understood the importance of protecting the accused from unsupported prosecutions in *People ex rel. Livingston v. Wyatt*.⁵³ Acknowledging confusion about the meaning of an “information,” the Court articulated that an information must state enough facts to show that the complainant was “acting in good faith, and that he ha[d] reasonable grounds to believe that a crime ha[d] been committed by some person named or described.”⁵⁴ Drawing on analogies in civil and criminal law, the Court held that all informations should be made upon an oath, “for otherwise an unfounded accusation could be set on foot and an investigation instituted upon unsupported assertion without any proof whatever.”⁵⁵

The Court also warned that “the sole foundation for a useless and oppressive proceeding” could be based on “the worst of motives,” and would result in the accused’s private matters being invaded because of “[m]alice, civil actions, business rivalry, speculation, or curiosity.”⁵⁶ Intimating that magistrates must fill the role of

⁴⁹ See PREISER 2016, *supra* note 27, § 70.10 (2016) (citing *People v. Swamp*, 646 N.E.2d 774 (N.Y. 1995); ROBERT A. BARKER & VINCENT C. ALEXANDER, EVIDENCE IN NEW YORK STATE AND FEDERAL COURTS § 1.2 at 3 n.4 (2001); *People v. Jennings*, 504 N.E.2d 1079, 1084 (N.Y. 1986)).

⁵⁰ *Id.*

⁵¹ PREISER 2017, *supra* note 42, § 70.10.

⁵² See *id.*; see also *People v. Warner-Lambert Co.*, 414 N.E.2d 660, 661 (N.Y. 1980), *cert. denied*, 450 U.S. 1031 (1981).

⁵³ 79 N.E. 330, 332 (1906).

⁵⁴ *Id.*

⁵⁵ *Id.* at 333 (emphasis added).

⁵⁶ *Id.*

the grand jury,⁵⁷ the Court instructed judges to search for good faith accusations and reasonable grounds to believe a crime was committed before the accused is “prosecuted on the mere chance that some crime may be discovered.”⁵⁸ Pressing magistrates to only accept evidence under sanctions of oath and perjury, the Court reminded that:

A prudent magistrate should proceed with the utmost caution when he has reason to suspect that a criminal proceeding was commenced before him, not to vindicate public justice, but to serve some private purpose, and should withhold process until satisfied that the complainant is acting in good faith in behalf of the people, and not to aid personal objects.⁵⁹

The New York legislature has supported this fundamental principle throughout the better part of the 20th Century. In 1957, the Court reiterated that verification is required for misdemeanor offenses when the accused could be sentenced to imprisonment and penalties “such as loss or suspension of a license to drive an automobile, to practice one’s profession or to engage in a licensed business.”⁶⁰ Citing the Supreme Court of the United States, the Court held that “[t]he requirement that a prosecution for misdemeanor be based upon a sworn information . . . is an essential guarantee to a defendant of a fundamental right, namely, that he be not punished for a crime without a formal and sufficient accusation.”⁶¹

Similarly, in 1975, the Court reminded that, although the oath had become somewhat formalistic and perfunctory, it still served two important purposes: “(1) to awaken the witness to his moral duty to tell the truth, and (2) to deter false testimony by providing a legal ground for perjury prosecutions.”⁶² In *People v. Parks*,⁶³ the Court reiterated that to achieve these two principles, the oath must be a “meaningful exercise,” where the witness “has sufficient intelligence to understand

⁵⁷ Grand juries have “inquisitorial powers and, of their own motion, may make full investigation to see whether a crime has been committed, and, if so, who committed it. They may investigate on their own knowledge, or upon information of any kind derived from any source deemed reliable, may swear witnesses generally, and may originate charges against those believed to have violated the criminal laws.” *Id.* (citing N.Y. CODE CRIM. PROC. § 259; *Hale v. Henkel*, 201 U.S. 43, 55 (1906); Francis Wharton, WHARTON’S CRIMINAL PLEADING & PRACTICE § 337 (8th ed. 1880); THOMPSON & MERRIMAN ON JURIES §§ 614, 617).

⁵⁸ *Id.* at 334.

⁵⁹ *Id.* at 333.

⁶⁰ *People v. Scott*, 143 N.E.2d 901, 904 (N.Y. 1957).

⁶¹ *Id.* (citing *Albrecht v. United States*, 273 U.S. 1, 8 (1927); *Weeks v. United States*, 216 F. 292, 293 (2d Cir. 1914); *People ex rel. Battista v. Christian*, 164 N.E. 111, 111 (N.Y. 1928)).

⁶² *Brown v. Ristich*, 325 N.E.2d 533, 538 (1975) (citing *Hecht v. Monaghan*, 4121 N.E.2d 421, 428 (N.Y. 1954); *Greenebaum v. Bingham*, 95 N.E.2d 853, 854 (N.Y. 1911)).

⁶³ 41 N.Y.2d 36 (1976).

the nature of the oath and to give a reasonably accurate account of what he has seen and heard.”⁶⁴

Even in the 1990s, the Court stressed the importance of an assurance “that there exists a sound and supportable basis for subjecting the accused to a trial,” particularly when the accusatory instrument is the sole basis for the prosecution and there is no independent grand jury body to review the claims.⁶⁵ Relatedly, in *Neftali D.* the Court held:

A verification attesting to the truth of the contents of a document on penalty of perjury is of the same effect as a testimonial oath, which at once alerts a witness to the moral duty to testify truthfully and establishes a legal basis for a perjury prosecution. This verification procedure is intended to assure a measure of reliability regarding the contents of the petition.⁶⁶

B. Consolidating the Criminal Procedure Laws & the Bartlett Commission

Clearly, the Court recognized the importance of protecting against complaints lodged without complainants fully appreciating the weight of their accusations. Until the 1970s, however, New York was largely governed by unconsolidated and differing criminal procedure laws throughout the State.⁶⁷ Thus, different areas of the State had differing preliminary due process procedures for the misdemeanor accused. Notably, New York City provided the right to a preliminary hearing for misdemeanor prosecutions in Municipal Courts until the 1970s.⁶⁸ The City since repealed New York City Municipal Courts Act, which specifically charged magistrates with the authority to conduct misdemeanor preliminary hearings by taking authenticated, signed and certified testimony from witnesses, before the State could proceed with the prosecution.⁶⁹ Unfortunately, these preliminary hearings were exclusively provided in New York City; no similar preliminary due process protections existed for the misdemeanor accused in the rest of the State.

⁶⁴ *Id.* at 45–46 (1976) (quoting *People v. Rensing*, 14 N.Y.2d 210, 213 (1964)) (citing *District of Columbia v. Armes*, 107 U.S. 519, 521–22 (1883)).

⁶⁵ See *In re Edward B.*, 606 N.E.2d 1353, 1356 (N.Y. 1992) (citing *In re David T.*, 554 N.E.2d 1263, 1264 (N.Y. 1990); *People v. Alejandro*, 511 N.E.2d 71, 73–74 (N.Y. 1987)) (analogizing N.Y. FAM. CT. ACT § 311.2(3) to N.Y. CRIM. PROC. LAW § 100.49).

⁶⁶ *In re Neftali D.*, 651 N.E.2d 869, 871 (N.Y. 1995).

⁶⁷ The unconsolidated Code of Criminal Procedure, which had governed practice for almost a century, was replaced with the Criminal Procedure Law in 1970. See, e.g., PREISER 2017, *supra* note 42, § 1.

⁶⁸ FOR YOUR INFORMATION: MAJOR PROVISIONS OF THE PROPOSED CRIMINAL PROCEDURE LAW, OFF. OF LEGISLATIVE RESEARCH 5 (June 17, 1969) [hereinafter FOR YOUR INFORMATION, OFF. OF LEGISLATIVE RESEARCH], available at http://www.nycourts.gov/library/nyc_criminal/Penal-law-Bartlett/101.pdf [<https://perma.cc/P8PA-UETB>] (“At present, a preliminary hearing is required for most misdemeanor charges in New York City under the New York City Criminal Court Act [§ 40(2)] while a preliminary hearing for misdemeanors is not required elsewhere in the State.”).

⁶⁹ CITY CRIM. CT. ACT § 204 (repealed 1971).

In 1961, Governor Nelson A. Rockefeller called for the consolidation and revision of New York's Penal Law and Code of Criminal Procedure.⁷⁰ The Governor established the State of New York Temporary Commission on Revision of the Penal Law and Criminal Code, known as the Bartlett Commission.⁷¹ The Bartlett Commission (the Commission) was charged with studying the State's unconsolidated criminal laws to create a uniform penal and criminal procedure code throughout New York.⁷² Under this charge, the Commission drafted interim reports on their tentative proposals throughout the 1960s, and conducted hearings after each publication to gather feedback from the public.⁷³ The transcripts of these public hearings provide the greatest illumination on how the laws of verification were shaped, and how misdemeanor preliminary hearings were eliminated in New York City. The Commission ultimately submitted their proposed Criminal Procedure Law to the Legislature in 1968, with the announced goal "to achieve justice, provide fair trials and speedy dispositions and see that defendants are sentenced properly" with balance and fairness.⁷⁴ On September 1, 1971, the new Code of Criminal Procedure became the law throughout the State.⁷⁵

C. The Commission's Debate on Preliminary Due Process Procedures

The existing laws of verification and initiating misdemeanor prosecutions were formed by the Bartlett Commission after much debate. In a public hearing on February 1, 1968,⁷⁶ Judge Frederick M. Marshall of Erie County first proposed the idea "of eliminating the necessity of presenting every case to a grand jury."⁷⁷ The

⁷⁰ *Timeline of The Bartlett Commission, 1961–1971*, HISTORICAL SOC'Y OF THE NEW YORK COURTS, available at <https://www.nycourts.gov/history/programs-events/images/Past-Event-20120924-Bartlett-Commission.pdf> [<https://perma.cc/473D-76J5>] (last visited March 4, 2018).

⁷¹ On the recommendation of Joseph F. Carlino, Speaker of the Assembly, Governor Rockefeller designated Richard J. Bartlett as Chairman of the Commission. Other Commission appointees included Timothy N. Pfeiffer as Vice-Chairman, and Howard A. Jones, William B. Mahoney, Justice Philip Halpern, Professor Herbert Wechsler, John J. Conway Jr., Assemblyman William Kapelman, and Nicholas Atlas as members. Richard D. Denzer was appointed as Counsel to the Commission, and Peter J. McQuillan joined as Assistant Counsel. *Id.*; see also *Schaffer Law Library's Guide on New York State Legislative History Materials*, ALBANY LAW SCH., available at <http://www.albanylaw.edu/media/user/librarypdfs/guides/nyleghist.pdf> [<https://perma.cc/D6MV-UDQ6>] (last visited March 4, 2018).

⁷² See, e.g., David Badertscher & Peter J. McQuillan, *Records of the Temporary Commission on Revision of the Penal Law and Criminal Code (1961–1970)*, available at https://www.nycourts.gov/library/nyc_criminal/Temporary%20Commission.pdf [<https://perma.cc/2Q3S-T75W>] (last visited June 21, 2017).

⁷³ See *Timeline of The Bartlett Commission, 1961–1971*, *supra* note 70.

⁷⁴ *Id.* at 2 (citing Lacey Fosburgh, *New Criminal Process Law in Effect*, N.Y. TIMES, Sept. 5, 1971, at 34, available at <http://www.nytimes.com/1971/09/05/archives/new-criminal-process-law-in-effect.html> [<https://perma.cc/NF6H-YHJD>]).

⁷⁵ *Id.*

⁷⁶ *Minutes of a Public Hearing Held by the Temp. Comm'n on Revision of the Penal Law and Criminal Code*, 177th Leg., 191st Sess. (N.Y. Feb. 1, 1968), available at http://www.nycourts.gov/library/nyc_criminal/Penal-law-Bartlett/149.pdf [<https://perma.cc/7YCS-PNMR>].

⁷⁷ *Id.* at 87–88.

next day in Rochester, Legal Adviser to the Police Bureau, Robert Aulenbacher, discussed the procedure for complainants to sign informations.⁷⁸ Aulenbacher argued that “it is not important as to who administers the oath but rather that the oath has been administered and that the person makes the allegation under oath.”⁷⁹ Instead of requiring a magistrate or judge to issue the oath and take witness statements before commencing the prosecution, Aulenbacher suggested that “if the officer, a ranking officer and a responsible officer, were granted that authority to take the statement under oath, it would go some way in inconveniencing the citizens who have already been the victim of an unlawful act or alleged unlawful act.”⁸⁰ In apparent agreement, Commissioner Bartlett suggested that a revision could be included to “provide that a statement submitted by an officer in support of an information or the information itself perhaps . . . need not be sworn to at all but that the statute provide that such a statement submitted by a police officer have the same penalty for false statement as perjury.”⁸¹ Citing to the penalty of perjury used for income taxes as equally reliable to verify criminal allegations, the Commission improbably took the Aulenbacher’s suggestion under advisement for the next draft of the proposed C.P.L.⁸²

On February 8, 1968, the Commission convened for more public hearings in Albany.⁸³ That morning, Morris Zweig, known as “Mr. Magistrate of New York,” orated that the C.P.L. should include “the manner of verification and before whom such verification of the information or deposition should be made.”⁸⁴ In response, Commissioner Bartlett acknowledged the importance of knowing that a prosecution “isn’t frivolously undertaken,” and that “if the Court acts upon such a statement or

⁷⁸ *Minutes of a Public Hearing Held by the Temp. Comm’n on Revision of the Penal Law and Criminal Code*, 177th Leg., 191st Sess. 19–21 (N.Y. Feb. 2, 1968), available at http://www.nycourts.gov/library/nyc_criminal/Penal-law-Bartlett/150.pdf [<https://perma.cc/CJY2-LQCD>]

⁷⁹ *Id.*

⁸⁰ Mr. Aulenbacher also said “the police officer has no desire to do anything wrong. Really, he doesn’t. He likes to make it as efficient within the law as possible and as simple as possible. Sometimes the officer gets so complicated in procedural matters that he’s not enforcing the law.” *Id.* at 22.

⁸¹ *Id.* at 20. Commission members reaffirmed that this method of oath “would be in place of swearing,” which would save the police officers more time since they would only have to come into court to sign an information rather than conduct an actual hearing. *Minutes of a Public Hearing Held by the Temp. Comm’n on Revision of the Penal Law and Criminal Code*, 177th Leg., 191st Sess. 42–43 (N.Y. Feb. 17, 1968), http://www.nycourts.gov/library/nyc_criminal/Penal-law-Bartlett/155.pdf (last visited March 4, 2018) [<https://perma.cc/4TTN-NFRA>].

⁸² *Minutes of a Public Hearing Held by the Temp. Comm’n on Revision of the Penal Law and Criminal Code*, 177th Leg., 191st Sess. 7 (N.Y. Feb. 8, 1968), available at http://www.nycourts.gov/library/nyc_criminal/Penal-law-Bartlett/151.pdf [<https://perma.cc/PWB2-G4V2>].

⁸³ *Id.* at 1.

⁸⁴ *Id.* at 6–7.

charge that the person making it is subject to some penalty for outright lying.”⁸⁵ Again, however, he returned to his perjurious income tax analogy:

[T]hat we might consider for the purposes of verifying pleadings in criminal justice matters by police officers of whatever rank, that we consider imposing the same liability for truthfulness as is the case with a number of filings with government today which are not sworn to. Income tax returns, for example, the statement is under penalty of perjury, I do state or affirm that the foregoing is true, and it’s not sworn to before anybody. The penalty is precisely the same as if it were.⁸⁶

The following week, on February 15, 1968, the acting President of the New York State District Attorneys Association, Michael Dillon, expressed concern that it was too difficult to expect misdemeanor informations to not contain hearsay allegations at arraignments.⁸⁷ In reply, the Executive Director of the Commission, Mr. Denzer, suggested creating another instrument, something akin to a “short affidavit,” that could “show reasonable cause but that had to be replaced by a regular information” before trial.⁸⁸ Mr. Denzer further suggested that this new short affidavit could statutorily allow the misdemeanor prosecution to go forward on uncorroborated accusations.⁸⁹ This discussion surely contributed to the existing C.P.L. authorization to commence misdemeanor prosecutions with hearsay-riddled, uncorroborated complaints.

Conversely, and in protection of due process, Mr. Fabricant spoke on behalf of the New York Civil Liberties Union (NYCLU) during the same February 15 public hearing.⁹⁰ During his appearance, Mr. Fabricant expressed serious objection to the removal of preliminary hearings in misdemeanor prosecutions.⁹¹ Highlighting that the accused’s opportunity for a preliminary hearing is “one of the most valuable rights in the Code of Criminal Procedure,” Mr. Fabricant reiterated that “[t]here are many, many people . . . who are arrested during the course of a year where the [e]vidence against them is wholly insufficient. They may be arrested on the complaint of a single witness where the evidence is insufficient.”⁹² He stressed that without a preliminary hearing, the accused (i) could be incarcerated for an

⁸⁵ *Id.* at 9.

⁸⁶ *Id.* at 7.

⁸⁷ *Minutes of a Public Hearing Held by the Temp. Comm’n on Revision of the Penal Law and Criminal Code*, 177th Leg., 191st Sess. 61–64 (N.Y. Feb. 15, 1968), available at http://www.nycourts.gov/library/nyc_criminal/Penal-law-Bartlett/153.pdf [<https://perma.cc/HL3L-P8VG>].

⁸⁸ *Id.* at 62–63.

⁸⁹ *Id.* at 64.

⁹⁰ *Id.* at 193–94.

⁹¹ *Id.* at 194.

⁹² *Id.*

indeterminate length of time before formal charges were filed,⁹³ (ii) would suffer the consequences of the criminal accusation,⁹⁴ or (iii) could even take a plea while being innocent of the charges,⁹⁵ without there ever being a decision on whether “the complaint is wholly insufficient.”⁹⁶

In response, the Commission members reminded Mr. Fabricant that only those accused in New York City were entitled to a misdemeanor preliminary hearing at the time, and even there, the provision was rarely used in practice.⁹⁷ To that, Mr. Fabricant countered that “[t]here are many, many hearings held in the Criminal Court of the City of New York . . . and the fact is that there are many, many people dismissed at the conclusion of the preliminary hearing where the evidence is considered inadequate.”⁹⁸ Mr. Fabricant continued that “[t]he fact is that before a defendant will take the risk of going to trial on the basis of a complaint which may be wholly insufficient,” the accused should be afforded a preliminary hearing to assert that insufficiency.⁹⁹

Ten months later, after the Commission incorporated the first round of public comments, they held another set of public hearings.¹⁰⁰ On December 13, 1968, Mr.

⁹³ Mr. Fabricant summarized that “[t]he real problem here is where a defendant is held in jail on the basis of a complaining witness and under [the proposed] procedure a hearsay complaint would be sufficient, held in jail until the matter got out of a Grand Jury proceeding, which may take one, two or three months and during that time there is no determination that there is probable cause to hold him.” *Id.* at 197–98. Similarly, on February 16, 1968, Mr. Edward Carr of The Legal Aid Society of New York highlighted the importance of providing at least every detained person with a hearing to determine whether the case was legally sufficient to continue holding the person incarcerated. *Minutes of a Public Hearing Held by the Temp. Comm’n on Revision of the Penal Law and Criminal Code*, 177th Leg., 191st Sess. 452–53 (N.Y. Feb. 16, 1968), available at http://www.nycourts.gov/library/nyc_criminal/penal-law-Bartlett/154.pdf [<https://perma.cc/6ZLH-74RK>].

⁹⁴ Even the accused out on bail for a misdemeanor charge “is forced to go through the expense and anxiety of an uncertain outcome of a criminal trial on the basis of evidence which might be wholly insufficient.” *Minutes of a Public Hearing Held by the Temp. Comm’n on Revision of the Penal Law and Criminal Code*, 177th Leg., 191st Sess. 198–99 (N.Y. Feb. 15, 1968), available at http://www.nycourts.gov/library/nyc_criminal/penal-law-Bartlett/153.pdf [<https://perma.cc/HL3L-P8VG>].

⁹⁵ NYCLU criticized the abolition of preliminary hearings for misdemeanor cases, favoring “giving every defendant a prompt preliminary hearing to determine probable cause on grounds it would serve to weed out unfounded or malicious cases and prevent the detention of a person without requiring any showing. The organization believes the proposal would cause some accused persons to plead guilty to a reduced sentence in order to avoid extended custody while awaiting the outcome of a trial.” FOR YOUR INFORMATION, OFF. OF LEGISLATIVE RESEARCH, *supra* note 68, at 6.

⁹⁶ *Minutes of a Public Hearing Held by the Temp. Comm’n on Revision of the Penal Law and Criminal Code*, 177th Leg., 191st Sess. 201 (N.Y. Feb. 15, 1968), available at http://www.nycourts.gov/library/nyc_criminal/penal-law-Bartlett/153.pdf [<https://perma.cc/HL3L-P8VG>].

⁹⁷ *Id.* at 199.

⁹⁸ *Id.* at 201 (emphasis added).

⁹⁹ *Id.*

¹⁰⁰ *Minutes of Proceedings at a Public Hearing of the N.Y. Temp. Comm’n on Revision of the Penal Law and Criminal Code*, 177th Leg., 191st Sess. 2–3 (N.Y. Dec. 6, 1968), available at http://www.nycourts.gov/library/nyc_criminal/penal-law-Bartlett/157.pdf [<https://perma.cc/8V2N-38B5>].

Irving Lang spoke on behalf of the Bar of the City of New York.¹⁰¹ The Bar Association's position was that, considering (i) the problem of obtaining a trial quickly in Criminal Court and (ii) the fact that a "substantial number of these misdemeanor cases [were] dismissed after a preliminary hearing," the preliminary hearing should not be eliminated as the Commission proposed.¹⁰² When the Commission repeated that New York City was alone in providing preliminary hearings for misdemeanor prosecutions, Mr. Lang countered that "the fact that New York has a higher standard of justice than other States should not be looked upon negatively."¹⁰³

Subsequently, the Committee on Criminal Courts, Law and Procedure of the Association of the Bar of the City of New York issued a Special Report on the proposed C.P.L. within their 1969 Legislative Bulletin.¹⁰⁴ In that report, the Committee made clear that "the misdemeanor preliminary hearing is an essential and critical part of the misdemeanor procedure in New York City and should be retained."¹⁰⁵ Citing that the misdemeanor preliminary hearing serves both the accused and the people of New York, the Committee articulated that:

In New York City, the hearing serves to promptly remove from the criminal process those cases which do not belong in the courts. Out of 119,000 non-traffic misdemeanor arraignments in 1967, the Criminal Court was able to dismiss 22,000 cases without trial and another 12,000 upon consent of the district attorney. Although it is impossible ascertain from these reports how many of the 22,000 dismissals were because of the failure of the complainant to appear, the death of the defendant, etc., it seems clear that the majority of the dismissals were due to the failure to make out a prima facie case at a preliminary hearing. It would appear that the estimate made by the Legal Aid Society of a dismissal rate of slightly more than 10% of the total complaints is a modest estimate.

The prompt removal of over 10% of the misdemeanor charges is absolutely essential to the continued functioning of a system already strained to the breaking point.

First and foremost it gives the defendant against whom even a prima facie case cannot be proven, the opportunity to be relieved of

¹⁰¹ *Minutes of Proceedings at a Public Hearing of the N.Y. Temp. Comm'n on Revision of the Penal Law and Criminal Code*, 177th Leg., 191st Sess. 17 (N.Y. Dec. 13, 1968), available at http://www.nycourts.gov/library/nyc_criminal/Penal-law-Bartlett/159.pdf [<https://perma.cc/4AMG-59V8>].

¹⁰² *Id.* at 39–40.

¹⁰³ *Id.* at 48.

¹⁰⁴ THE ASS'N OF THE BAR OF THE CITY OF N. Y., 1969 LEGISLATIVE BULLETINS: SPECIAL REPORT ON PROPOSED CRIMINAL PROCEDURE LAW (1969 BILL) (1969).

¹⁰⁵ *Id.* at 13.

the spectre of a pending criminal charge and gives him prompt justice.

Secondly, it prevents the unjust incarceration of such a defendant if he is unable to raise bail—with the concomitant easing of overcrowding in the jail facilities.

Thirdly, it saves the repeated trial and motion calendaring of a case that would most assuredly result in eventual acquittal or dismissal at trial.

Fourthly, even in the case of the defendant held for trial after a preliminary hearing, there would appear to be a substantial time saving to everyone concerned. It has been demonstrated time and again that it is only the rare defendant who insists upon going to trial after he has been confronted at a preliminary hearing with the evidence against him. There is perhaps no factor more significant in the determination by a defendant to plead guilty than the realization that the prosecution has the evidence necessary to convict. This realization generally can be only by a preliminary processing where the defendant is brought face-to-face with reality.¹⁰⁶

These debates highlight that one of the most controversial sections of the proposed C.P.L. was the elimination of the misdemeanor preliminary hearing in New York.¹⁰⁷ Criticism of its proposed abolition continued to flow in from the NYCLU, the Legal Aid Society, the Vera Institute of Justice, the Citizens Union, and the like.¹⁰⁸ The NYCLU, for example, declared the abolishment of the preliminary hearings in misdemeanor cases as “perhaps, the most critical in the entire Code” because the preliminary hearing “weeds out unfounded or malicious complaints” in a manner consistent with the adversary system of criminal justice.¹⁰⁹

Unfortunately, however, these preliminary due process arguments were overpowered. In September of 1969, the Bartlett Commission released its final Proposed New York Criminal Procedure Law,¹¹⁰ and eliminated New York City’s preliminary hearings “by the simple process of not providing for it” in the final proposal.¹¹¹ To justify their step backwards from due process, the Commission fell on judicial efficiency, stating that “[e]specially in urban communities where volume of cases is a significant factor in the administration of criminal justice, that rule has

¹⁰⁶ *Id.* at 13–15.

¹⁰⁷ FOR YOUR INFORMATION, OFF. OF LEGISLATIVE RESEARCH, *supra* note 68, at 2.

¹⁰⁸ *Id.*

¹⁰⁹ See Memorandum from the New York Civil Liberties Union on the Proposed Criminal Procedure Law to the New York State Legislature 8 (Feb. 6, 1969), available at http://www.nycourts.gov/library/nyc_criminal/Penal-law-Bartlett/099.pdf [<https://perma.cc/K44U-GM8M>].

¹¹⁰ TEMP. COMM’N ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, PROPOSED NEW YORK CRIMINAL PROCEDURE LAW (1969), available at http://www.nycourts.gov/library/nyc_criminal/penal-law-bartlett/196.pdf [<https://perma.cc/V4DA-QYS8>].

¹¹¹ *Id.* at XV.

caused much practical difficulty.”¹¹² In the end, despite the interest of justice concerns supporting the importance of misdemeanor preliminary hearings, the New York legislature enacted C.P.L. § 100.30 and codified the uncontested verification of misdemeanor prosecutions without any meaningful preliminary due process protection.¹¹³

IV.

THE CONSEQUENCE OF MINIMAL PRELIMINARY DUE PROCESS PROTECTIONS IN MISDEMEANOR PROSECUTIONS

A. The Illusion of Prosecutorial Trial Readiness

After the enactment of the C.P.L., preliminary hearings were eliminated from the State of New York. This void, coupled with the correspondingly low standards for verification, had several concerning repercussions on the State’s misdemeanor criminal practice. First, verification became synonymous with “trial readiness” in many of New York’s Criminal Courts. Trial readiness, under the law, requires that the district attorney make a non-illusory statement that they are in fact ready to proceed to the trial, after having done all that is required to bring the case to a point where it may be tried.¹¹⁴ In reality, however, district attorneys routinely announce readiness for trial upon the moment they file a verified, non-hearsay accusatory instrument, without regard for whether they are actually prepared to try the case.¹¹⁵ In fact, many prosecutors announce that they are ready for trial at the moment of conversion, even if that moment is at arraignments and before the trial prosecutor has talked to the complainant in the case.¹¹⁶ It is to the detriment of, and frankly dangerous to, the unprotected accused that the prosecution is only required to obtain an unexamined verification signature from the complainant—not subject to cross-examination or contradiction—to meet the prima facie requirements of a prosecution.

¹¹² *Id.* at XIX–XX.

¹¹³ N.Y. CRIM. PROC. LAW § 100.30 (McKinney 2016).

¹¹⁴ *People v. Carter*, 699 N.E.2d 35, 37–38 (N.Y. 1998); *People v. England*, 646 N.E.2d 1387, 1389 (N.Y. 1994); *People v. Kendzia*, 476 N.E.2d 287, 289–90 (N.Y. 1985) (holding that “the statute contemplates an indication of present readiness, not a prediction or expectation of future readiness”); *see also* *People v. Hamilton*, 388 N.E.2d 345, 346 (N.Y. 1979) (holding that the People must assert readiness for trial on the record in court, and not simply that they had been previously ready in response to defendant’s motion to dismiss).

¹¹⁵ *See, e.g., People v. Callender*, 422 N.Y.S.2d 611, 613 (Crim. Ct. 1979), *aff’d*, 448 N.Y.S.2d 92 (App. Div. 1981) (holding that “[a]ll that was required for the People to answer that they were ready for trial on a misdemeanor information was to have a proper supporting deposition, thereby converting the accusatory instrument into a non-hearsay instrument”).

¹¹⁶ *Id.*

This problem is compounded by the C.P.L.'s speedy trial laws. Once the prosecutor announces readiness for trial, the speedy trial clock can be tolled for months,¹¹⁷ without any intervening opportunity for the accused to contest the authenticity of, or motivation for, the complainant's accusations.¹¹⁸ After the complaint is converted, the misdemeanor case is calendared for a variety of pre-trial procedures.¹¹⁹ These include demands to produce discovery, requests for bills of particulars, pre-trial motions and suppression hearings, and requests for continuances by either party.¹²⁰ Months pass before the case is even calendared for trial.¹²¹ Even then, once the case is finally ripe for trial—many months after the accused was arraigned on the accusations—the witnesses oftentimes fail to appear in court and the prosecutors find themselves not ready to proceed for lack of witnesses to testify to the allegations.¹²²

In *People v. Ramos*, for example, Ms. Ramos was arraigned on a verified misdemeanor information on July 5, 2013 and the prosecutor announced ready for trial on that date.¹²³ For the next four and a half months, the case was adjourned for pre-trial procedures, during which time the speedy trial clock was tolled.¹²⁴ On November 19, 2013, Ms. Ramos returned to court for trial but the prosecutors were not ready to proceed.¹²⁵ She subsequently returned to court for trial five times over the next ten months, before the case was ultimately dismissed on November 5, 2014.¹²⁶ During the fifteen months she suffered her misdemeanor prosecution, Ms. Ramos never had an opportunity to confront her accuser or testify to her

¹¹⁷ See N.Y. CRIM. PROC. LAW § 30.30(4) (McKinney 2016).

¹¹⁸ See, e.g., *People v. Alejandro*, 511 N.E.2d 71, 73–74 (N.Y. 1987).

¹¹⁹ See N.Y. CRIM. PROC. LAW § 30.30(4) (McKinney 2016).

¹²⁰ See *id.*

¹²¹ See, e.g., William Glaberson, *Faltering Courts, Mired in Delays*, N.Y. TIMES (Apr. 13, 2013), http://www.nytimes.com/2013/04/14/nyregion/justice-denied-bronx-court-system-mired-in-delays.html?pagewanted=all&_r=0 [<https://perma.cc/VAK6-P54X>].

¹²² See, e.g., *People v. Johnson*, 987 N.Y.S.2d 813, 817 (Crim. Ct. 2014) (noting that the People were not ready for trial on December 2, 2013 because the complaining witness had supposedly not received the People's subpoena and requested an adjournment to December 5, 2013, although the People had already failed to be ready to proceed to trial on this case since May 14, 2013, more than six months prior); *People v. Seepersad*, 30 N.Y.S.3d 519, 526 (Crim. Ct. 2016) (noting that on July 7, 2015, the People answered "not ready" because a necessary police officer was unavailable, and the Court adjourned the case to September 10th); *People v. McLeod*, 988 N.Y.S.2d 436, 441 (Crim. Ct. 2014) (noting that on October 9, 2013, the People answered "not ready" for trial, and the Court adjourned the case to November 20, 2013); *People v. Farrell*, 863 N.Y.S.2d 579, 584 (Sup. Ct. 2008) (noting that on April 28, 2008, the People once again stated not ready for trial in open court, ostensibly because the "arresting officer" was on his "regular day off" and was not authorized to appear and testify by the Police Department); *People v. Walker*, 865 N.Y.S.2d 530, 532 (Crim. Ct. 2008) (noting that on September 20, 2007, the People were not ready for trial and requested a 14-day adjournment because the arresting officer was not available).

¹²³ 5 N.Y.S.3d 329, 329 (Crim. Ct. 2014).

¹²⁴ *Id.* (reminding that no time is chargeable to the People during pre-trial procedures).

¹²⁵ *Id.*

¹²⁶ *Id.*

innocence.¹²⁷ Importantly, Ms. Ramos' experience was not an isolated situation; New York prosecutors play with the C.P.L. § 30.30 speedy trial clock in countless prosecutions throughout the state, dragging the accused through seemingly endless prosecutions that ultimately result in pre-trial dismissals.¹²⁸

While this may seem like a small price to pay in the pursuit of justice, months of unnecessary and uncontested criminal prosecutions fall on the shoulders of New Yorkers. New York State taxpayers foot the bill for judges, court attorneys, court clerks, court officers, prosecutors, public defenders and the department of corrections to participate in months of misdemeanor prosecutions for cases that are ultimately dismissed.¹²⁹ Moreover, when the misdemeanor prosecution forces the accused into civil court systems or social services, such as housing, family and immigration courts, or homeless shelters, unemployment services and food banks, the exponential expense to society becomes unjustifiable and incomprehensible.¹³⁰

B. *The Illusion of Penalty for Verification Perjury*

Stranger still is the fact that the authenticity of any verification is rarely questioned in court, and the penalty of perjury, designed to protect against untruthful attestations, is largely unenforced in the context of accusatory instruments. Under the New York State Penal Law § 210.45: "A person is guilty of making a punishable false written statement when he knowingly makes a false statement, which he does not believe to be true, in a written instrument bearing a legally authorized form notice to the effect that false statements made therein are punishable."¹³¹ This form of perjury is a class A misdemeanor, punishable by up to one year of incarceration.¹³² In practice, this crime is often charged when a person lies directly to the police and upon investigation, the police catch the liar before they arrested the falsely accused.¹³³ Rarely, however, is a complainant, who falsely signed an accusatory instrument or supporting deposition, ever prosecuted for their perjurious offense.

¹²⁷ *Id.*

¹²⁸ See, e.g., Thomas M. O'Brien, *The DA: Not Ready When You Are*, N.Y. L.J. (Mar. 25, 2009), available at <http://www.legal-aid.org/en/mediaandpublicinformation/inthenews/thedanotreadywhenyouare.aspx> [<https://perma.cc/VPV8-NLYS>].

¹²⁹ For example, in 2015, the New York Courts submitted a request for \$1.9 billion for the 2016-17 General Fund State Operations budget to meet the obligations of the judiciary. THE STATE OF N.Y. UNIFIED COURT SYSTEM, FISCAL YEAR 2016–2017 BUDGET (2015), available at <https://www.nycourts.gov/admin/financialops/BGT16-17/2016-17-UCS-Budget.pdf> [<https://perma.cc/2W76-TTN5>].

¹³⁰ See THE CONSEQUENCES OF CRIMINAL PROCEEDINGS IN NEW YORK STATE, *supra* note 3, at 3.

¹³¹ N.Y. PENAL LAW § 210.45 (McKinney 2017) (stating that such offense is a class A misdemeanor).

¹³² N.Y. PENAL LAW § 70.15(1) (McKinney 2017).

¹³³ See, e.g., *People v. Panaro*, 937 N.Y.S.2d 547, 548 (Crim. Ct. 2012) (authorizing arrest when the defendant signed a written statement, bearing a form notice of penalty of perjury pursuant to New York Penal Law § 210.45, that a car was missing and implicated another person as the likely offender, when the police later determined that the defendant was likely involved in the crime and untruthful in the statement).

In fact, it is common prosecutorial practice to file a superseding misdemeanor information on the eve of trial,¹³⁴ where: (i) the complainant initially signs a supporting deposition under penalty of perjury, (ii) the accused endures a lengthy prosecution based on false or inaccurate statements, and (iii) just before trial, the prosecution files a superseding information with altered allegations that are again verified by the very same complainant.¹³⁵ The courts accept these superseding informations, without recognizing and examining the concern that the original accusations were verified—either fraudulently or unwittingly—by the central witness in the case.¹³⁶ Ultimately, since the penalty of perjury is not enforced in reality,¹³⁷ the threat of perjury prosecution is largely meaningless as a protection against baseless accusations lodged against the accused.

C. Evidentiary Reliability Standards are Higher Elsewhere

Notably, New York State does not accept such minimal standards of reliability in other areas of criminal law. As the Court of Appeals summarized in *People v. Brensic*, “[o]ut-of-court statements introduced to prove the truth of the matters they assert are hearsay. They may be received in evidence only if they fall within one of the recognized exceptions to the hearsay rule, and then only if the proponent demonstrates that the evidence is reliable.”¹³⁸ “Reliability” is only established if the hearsay evidence falls within a specific categorical exception.¹³⁹ Hearsay exceptions in New York include present sense impressions,¹⁴⁰ dying declarations,¹⁴¹ business records,¹⁴² and excited utterances.¹⁴³ Unless the out-of-court statement falls into one of these accepted categories, the statement is deemed too unreliable to present at a

¹³⁴ N.Y. CRIM. PROC. LAW § 100.50(1) (McKinney 2016).

¹³⁵ See, e.g., *People v. Twine*, 468 N.Y.S.2d 559, 560 (Crim. Ct. 1983); *People v. McBride*, 482 N.Y.S.2d 203, 204 (Mt. Vernon City Ct. 1984); *People v. Geraldino*, 845 N.Y.S.2d 727, 728 (Crim. Ct. 2007).

¹³⁶ See, e.g., *Geraldino*, 845 N.Y.S.2d at 729 (permitting the state to supersede information so long as it met the statutory requirements of joinder); see also N.Y. CRIM. PROC. LAW § 200.20 (McKinney 2016).

¹³⁷ Author’s Note: The author represented over 2,000 indigent individuals who were accused of misdemeanor offenses from 2013–2017, irrespective of the crimes charged. Not one of those individuals was prosecuted for the crime of perjury. Moreover, during those years of representation, countless complainants changed their sworn versions of the facts alleged against the accused. At no point were any of those witnesses reprimanded, penalized or prosecuted for their perjurious statements in their sworn complaints or supporting depositions.

¹³⁸ 509 N.E.2d 1226 (N.Y. 1987).

¹³⁹ *People v. Nieves*, 492 N.E.2d 109, 112 (N.Y. 1986) (“We are not prepared . . . to abandon the well-established reliance on specific categories of hearsay exceptions in favor of an amorphous ‘reliability’ test, particularly in criminal cases where to do so could raise confrontation clause problems.”) (citations omitted).

¹⁴⁰ *People v. Brown*, 610 N.E.2d 369, 372 (N.Y. 1993).

¹⁴¹ *Nieves*, 492 N.E.2d at 112.

¹⁴² See, e.g., *People v. Kennedy*, 503 N.E.2d 501, 505 (N.Y. 1986).

¹⁴³ *Nieves*, 67 N.Y.2d at 135.

misdemeanor trial or in front of a felony grand jury.¹⁴⁴ Moreover, even if the evidence falls within a hearsay exception, the accused cannot be denied their Confrontation Clause rights to cross-examine the witnesses against them through an adversarial process.¹⁴⁵

Despite these evidentiary protections against hearsay evidence at trial or in the grand jury, hearsay is accepted for misdemeanor accusatory instruments. When a prosecutor files a verified misdemeanor information or supporting deposition with the court, the statements within that document are hearsay by definition: they are out-of-court statements offered to the court for the truth of the matters asserted.¹⁴⁶ In any other criminal forum, unless they qualify for a hearsay exception, these statements would be inadmissible due to their unreliability.¹⁴⁷ The declarants of those statements would have to present themselves in court to testify in person, under a sworn oath, and be subject to cross-examination.¹⁴⁸ Astonishingly, however, no comparable reliability standard exists for misdemeanor informations, as long as the document or its supporting depositions have been verified according to the C.P.L. Thus, a complainant can make any accusations within the four corners of the accusatory instrument and, as long as he or she signs the document under an impotent penalty of perjury, the court may accept the hearsay and proceed with the prosecution as if the unreliability has been cured.¹⁴⁹

V.

THE SOLUTION: ENACT THE MISDEMEANOR PRELIMINARY HEARING INTO THE C.P.L.

New York must reevaluate the lack of any meaningful preliminary due process protections for the misdemeanor accused. The detrimental consequences of the myth of preliminary due process for misdemeanor prosecutions are too great, particularly given how many misdemeanor charges are ultimately dismissed without a conviction or trial. Of course, the most responsive solution would be to reinstate preliminary hearings for all misdemeanor prosecutions throughout the

¹⁴⁴ See *People v. Mitchell*, 626 N.E.2d 630, 657 (N.Y. 1993); N.Y. CRIM. PROC. LAW §§ 190.30; 190.65 (McKinney 2016).

¹⁴⁵ See, e.g., *Nieves*, 492 N.E.2d at 112 n.2 (citations omitted).

¹⁴⁶ See, e.g., FED. R. EVID. 801(c).

¹⁴⁷ See, e.g., *People v. Burns*, 844 N.E.2d 751, 752 (N.Y. 2006) (holding that a signed statement by declarant placing persons other than defendant at scene of shooting was inadmissible as hearsay that lacked any indicia of reliability).

¹⁴⁸ *People v. Pealer*, 985 N.E.2d 903, 905 (N.Y. 2013) (“The Confrontation Clause of the Sixth Amendment to the United States Constitution prohibits the ‘admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant ha[s] had a prior opportunity for cross-examination.’”) (citing *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004)).

¹⁴⁹ See generally N.Y. CRIM. PROC. LAW § 100.40 (McKinney 2016); *People v. Alejandro*, 511 N.E.2d 71, 133 (N.Y. 1987).

State. At the very least, preliminary hearings should be afforded to all misdemeanor accused who are incarcerated pre-trial or who can show they suffer notable hardship due to the prosecution.

If New York's legislators need an example, they can turn to the Federal Rules of Criminal Procedure (F.R.C.P.). Under the F.R.C.P., all criminal complaints must be sworn under oath before a magistrate judge.¹⁵⁰ Even if the complainant does not appear in person before a magistrate judge, a judicial officer must administer a formal oath or affirmation before the prosecution can go forward.¹⁵¹ In federal court, it is not enough for a complainant to merely sign an accusatory instrument without any form of review or oversight.

Once the federal magistrate administers the formal oath upon the complainant and the misdemeanor prosecution commences, the judge must inform the accused of their rights.¹⁵² This often includes the right to a preliminary hearing under F.R.C.P. § 5.1.¹⁵³ Under F.R.C.P. § 5.1, the accused is entitled to a public, preliminary hearing before a federal magistrate, as long as the individual is charged with a "non-petty offense."¹⁵⁴ With a few exceptions, these preliminary hearings must take place "within a reasonable time, but no later than 14 days after the initial appearance if the defendant is in custody and no later than 21 days if not in custody."¹⁵⁵

This preliminary hearing "is a formal, adversarial hearing at which the defendant is entitled to be represented by an attorney, to cross-examine witnesses, and to introduce evidence."¹⁵⁶ The hearing is required unless waived by the defendant or the prosecutor files an indictment or information before the hearing, which renders the preliminary hearing unnecessary because a formal probable cause determination has already taken place.¹⁵⁷ Once the magistrate judge has heard the preliminary hearing, the court must either find that there is probable cause to prosecute the defendant for the offense, or must dismiss the complaint outright.¹⁵⁸ This is the practice in the District of Columbia, for example, where any misdemeanor prosecution filed by a complaint requires that the accused is afforded a preliminary hearing.¹⁵⁹ Since a misdemeanor complaint is "merely sworn to by a complaining

¹⁵⁰ FED. R. CRIM. P. 3.

¹⁵¹ See FED. R. CRIM. P. 3 advisory committee's notes to 2011 amendment (articulating that "the complaint and supporting material may be submitted by telephone or reliable electronic means . . . [but] . . . requires that the judicial officer administer the oath or affirmation in person or by telephone").

¹⁵² FED. R. CRIM. P. 58(b)(2).

¹⁵³ FED. R. CRIM. P. 58(b)(2)(G).

¹⁵⁴ *Id.*; see also 18 U.S.C.A § 19 (1988) (defining a "petty offense" as a Class B or C misdemeanor, or an infraction).

¹⁵⁵ FED. R. CRIM. P. 5.1(c).

¹⁵⁶ Abbe David Lowell & Christopher D. Man, *Federalizing Corporate Internal Investigations and the Erosion of Employees' Fifth Amendment Rights*, 40 GEO. L.J. ANN. REV. CRIM. P. 243, 250 (2011).

¹⁵⁷ FED. R. CRIM. P. 5.1(a); Lowell & Man, *supra* note 156, at 249.

¹⁵⁸ Lowell & Man, *supra* note 156, at 251.

¹⁵⁹ See, e.g., *Freeman v. Smith*, 301 A.2d 217, 218 (D.C. Dist. Ct. App. 1973).

witness, who may or may not have firsthand knowledge of the facts asserted,”¹⁶⁰ the accused has the right to a preliminary hearing to contest the probable cause for the prosecution in the first place.

Of course, instating the right to a formal and adversarial preliminary hearing in misdemeanor prosecutions would require legislative action. Thus, while waiting for the political will to afford the accused adequate due process, there is a tool—albeit rarely used and at high risk—available to the defendant within the existing criminal code. C.P.L. § 170.25 authorizes divestiture of jurisdiction by indictment, meaning that the accused can move to transfer their case from a Criminal Court to a Superior Court to have their case presented to a grand jury.¹⁶¹ Upon a motion by the accused “showing good cause to believe that the interests of justice so require,” the Superior Court can order the prosecutor to present the misdemeanor case to the grand jury to be prosecuted by indictment.¹⁶² Once the misdemeanor case is in Superior Court, the allegations must either be indicted by a grand jury’s finding of probable cause or be dismissed.¹⁶³

There are significant risks to calling upon this divestiture statute, however. First, the motion for grand jury action suspends the speedy trial clock and could prolong the prosecution.¹⁶⁴ Second, by requesting a probable cause determination by the grand jury, the accused is exposing him or herself to the possibility of an indictment on felony charges instead.¹⁶⁵ Third, there is no appellate authority on what constitutes a showing of “good cause to believe that the interests of justice so require.”¹⁶⁶ Thus, after making the C.P.L. § 170.25 motion, the accused may experience a longer prosecution and increased pre-trial detention, only to find that the Superior Court does not agree that there is good cause to remove the case from

¹⁶⁰ *Id.* at 218. A complaint is different from an indictment or information. “It does not require arraignment, plea, or trial. It is not signed by the public prosecutor but merely sworn to by a complaining witness, who may or may not have firsthand knowledge of the facts asserted. Accordingly, if the prosecution charges a misdemeanor by way of complaint . . . [the] Superior Court Criminal Rule 5(c)(1) comes into play.” *Id.*

¹⁶¹ New York’s Superior Courts have concurrent trial jurisdiction over misdemeanor prosecutions as Criminal Courts, but that authority is only triggered if the accused is indicted of the offenses by a grand jury. N.Y. CRIM. PROC. LAW § 10.20.

¹⁶² N.Y. CRIM. PROC. LAW § 170.25(1) (emphasis added).

¹⁶³ N.Y. CRIM. PROC. LAW § 170.25(3)(c) (McKinney 2016).

¹⁶⁴ See N.Y. CRIM. PROC. LAW § 30.30(4)(a) (McKinney 2016).

¹⁶⁵ PREISER 2016, *supra* note 27, § 170.25 (citing *People v. Ryback*, 3 N.Y.2d 467 (1957)) (reminding that after indictment, whether for a misdemeanor or a felony, the charge must be prosecuted in accordance with the Supreme Court procedures, regardless of whether the indictment charges a felony or not).

¹⁶⁶ There is little case law on what this good cause showing requires because “a Superior Court ruling on the motion is not subject to direct appellate review” so the “only appellate review would be after a judgment of conviction, in which case the substantive errors, if any, that resulted in a denial of a fair trial, free from reversible error, would serve to show whether the interests of justice were abused.” PREISER 2016, *supra* note 27, § 170.25, (citing *In re Cross*, 87 N.Y.S.2d 338 (2d Dept. 1949), *cert. denied*, 338 U.S. 859 (1949); *Legal Aid Soc’y of Sullivan Cty. v. Scheinman*, 422 N.E.2d 12 (1981); *People v. Charles F.*, 458 N.E.2d 801 (N.Y. 1983), *cert. denied*, 467 U.S. 1216 (1984)).

the misdemeanor Criminal Court. Finally, even if the court grants the C.L.P. § 170.25 motion, the accused is only afforded the right to a non-adversarial grand jury proceeding, where there is no right to cross-examination.¹⁶⁷

Ultimately, in the interest of justice, fairness and resource efficiency, the New York Legislature should reinstate and expand the misdemeanor preliminary hearing to the entire State. A preliminary hearing would give the accused the opportunity to establish, at the onset of the prosecution, whether or not there is probable cause for his or her continued detention and prosecution, and give him or her the chance to question the foundation upon which the allegations have been lodged. Although the preliminary hearing would add a procedural step to an overburdened criminal justice system, it would also eliminate prolonged prosecutions and unnecessary court appearances for all those cases that are ultimately dismissed. The formal questioning, cross-examination and introduction of contradictory evidence in a preliminary hearing would elicit (i) which allegations will never succeed at trial, and (ii) which witnesses will never assert their allegations under oath in a court. Essentially, the hearing would protect against complainants who make initial uncontested allegations, with no intention of ever pursuing the accusations to trial.

If almost 40 percent of all misdemeanor prosecutions are ultimately dismissed in New York,¹⁶⁸ the State's criminal justice system could benefit from the early removal of frivolous prosecutions from the courts. Moreover, "[t]o rely entirely upon the goodwill or the discretion of the prosecutor in selecting for prosecution only those complaints which are based upon sufficient evidence is wholly inconsistent with an adversary system of criminal justice."¹⁶⁹ Therefore, rather than continue to waste public resources on baseless misdemeanor charges that drag the accused through the prolonged and compounding detrimental consequences of prosecution, New York should reenact the misdemeanor preliminary hearing "to assure that every defendant a prompt, judicial determination of probable cause prior to trial."¹⁷⁰

¹⁶⁷ See, e.g., *People v. Brewster*, 63 N.E.2d 686, 687 (1984) (reminding that a grand jury proceeding is not intended to be an adversary proceeding, except to give a defendant the right to testify and or request for witnesses to testify); *People v. Copney*, 969 N.Y.S.2d 898, 900 (Sup. Ct. 2013) (holding that "since grand jury proceedings are not adversary proceedings, the right to confrontation contained in the Sixth Amendment is not implicated as there is no right to cross-examination") (citations omitted).

¹⁶⁸ NEW YORK STATE ADULT ARRESTS DISPOSED, N.Y. ST. DIV. OF CRIM. JUST. SERV'S (Apr. 21, 2017), available at <http://www.criminaljustice.ny.gov/crimnet/ojsa/dispos/nys.pdf> [<https://perma.cc/98CF-DD2A>].

¹⁶⁹ Memorandum from the New York Civil Liberties Union on the Proposed Criminal Procedure Law to the New York State Legislature 8 (Feb. 6, 1969) (on file with the Criminal Law Library of NYC).

¹⁷⁰ *Id.*