Substance, Form, and the Adversary System

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Abstract

Between 96 and 99 percent of criminal cases resolve by plea bargain; the jury trial is all but dead. Despite this, authors Chesa Boudin and Eric Fish believe we can resuscitate our adversarial system of justice by using the preliminary hearing ("prelim") instead of the jury trial as a means of challenging the state's allegations and evidence. However, the authors claim that several things stand in the way. To begin, prelims are too often waived. And even when the prelim is held, lax evidentiary standards greatly diminish its effectiveness, and the unwritten norms and procedures on the ground eviscerate any remaining value.

In this Article, I test their claims. Because unwritten norms and procedures are difficult to identify, such testing necessarily requires a narrow, immersive approach. I therefore examined the law on the books, the unwritten practices, and the details of all 1,716 felony cases from 2023 in the state and county where I practice criminal defense. My research confirms that prelims were waived 80 percent of the time; and, when they were held, both the written laws and unwritten practices rendered them meaningless. The numbers confirm this: Defense wins were so rare that, by comparison, four times as many defendants died before their prelim (8 cases) than won their prelim (2 cases).

The main reason for the utter failure of the prelim is that prosecutors have developed schemes which arguably comply with the letter of the law, but which obliterate the law's underlying policy and purpose. I therefore argue that courts must apply a substance-over-form doctrine to the prelim. This doctrine is better known in tax law, but it also permeates criminal law, albeit in less obvious ways. I demonstrate how the doctrine is ideally suited to the prelim; if applied, it could save the hearing and, in turn, our adversary system of justice.

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INTRODUCTION

Between 96 and 99 percent of criminal cases resolve via plea bargain; gone is the jury trial and, with it, our adversarial system of justice.[1] In a system of plea bargains, the defense rarely gets to challenge the state's allegations, prosecutors are almost never held accountable for what they write in their complaints, judges rarely decide pretrial legal issues or disputes, and impartial juries rarely determine the defendant's guilt or innocence.[2] Instead, criminal cases are typically resolved by the lawyers, often in the hallway right before a court hearing, with little thought or consideration of the actual evidence.[3]

What can be done about this state of affairs in which the superficial horse-trading of charges has replaced the adversarial testing of allegations in open court? With the jury trial unlikely to return, the answer, at least in felony cases, is for the defense to challenge the case at the preliminary hearing, or "prelim." The prelim is a pretrial, adversarial hearing designed to test the state's evidence, prevent improvident prosecutions, and serve as a check on prosecutorial power.[4] However, the authors of a recent law review article claim that three things prevent the prelim from fulfilling its purposes.[5]

First, too many prelims are being waived as part of the plea-bargaining process—the very process that eliminated the jury trial and led to the demise of the adversary system in the first place.[6] Second, when prelims are held, the law on the books has created such lax standards that the hearing has very little value.[7] And third, worse yet,

[1] *See infra* Part I.
[2] *See infra* Part I.
[3] *See infra* Part I.
[4] *See infra* Part II.A.
[5] *See infra* Part II.B.
[6] *See infra* Part II.B.
[7] *See infra* Part II.B.

the unwritten practices in court are so pro-prosecutor that they eviscerate any remaining value the hearing would otherwise have.[8]

In this Article, I test these three claims or hypotheses. Because unwritten practices are not evident in the statutes or case law, meaningful testing necessarily requires a narrow and immersive approach. I therefore examined the statutes and case law on the books, the unwritten practices on the ground, and the details of 1,716 felony cases filed in 2023 in the state and county where I practice law.[9]

My research confirmed all three of the authors' hypotheses. First, in about 80 percent of the cases, the defendant waived the prelim as part of the plea-bargaining process.[10] Second, when a prelim was held, the official law on the books (statutes and case law) made it incredibly easy for the prosecutor to win.[11] And third, the unwritten practices on the ground were even worse. Instead of calling witnesses with personal knowledge of the case, prosecutors were allowed to have a person, with no involvement whatsoever in the case, take the witness stand and answer questions about what the prosecutor wrote in the complaint.[12]

At best, this resembled a prelim in form only and stripped the hearing of all substance; it literally removed all checks on prosecutorial power. The numbers from the 1,716 cases support my conclusion that the prelim is a substance-free affair. Of the 353 hearings that were held, the defense prevailed in only one-half of one percent of them; in fact, more defendants actually *died* before their prelim (8 cases) than *won* their prelim (2 cases).[13] And for reasons I explain, those two "victories" actually overstate the hearing's value.[14]

How can the prelim be restored so it can resuscitate our adversary system of justice? Legislative reform is possible, but it is difficult to accomplish and has its limitations.[15] I therefore propose judicial reform that can be implemented on a widespread basis (such as binding appellate court decisions), or via a less ambitious, piecemeal approach (one trial court at a time). Specifically, I argue that courts at all levels of the judiciary must apply a substance-over-form doctrine to the prelim.[16]

The substance-over-form doctrine is a basic tenet of tax law.[17] But it also permeates criminal law, though in less obvious ways. Courts have applied the doctrine in criminal cases to construe statutes, analyze case law, and even interpret the constitution.[18] And if applied to the preliminary hearing, the doctrine would restore substance by blocking the prosecutor's artificial maneuvers which have no purpose other than to evade the law.[19] This, in turn, would restore meaning to our adversary system.

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[8] *See infra* Part II.B.
[9] *See infra* Part II.B.
[10] *See infra* Part II.B.1.
[11] *See infra* Part II.B.2.
[12] *See infra* Part II.B.3.
[13] *See infra* Part II.C.
[14] *See infra* Part II.C.
[15] *See infra* Part III.
[16] *See infra* Part III.
[17] *See infra* Part III.A.
[18] *See infra* Part III.B.
[19] *See infra* Part IV.

Part I of this Article discusses how plea bargaining has replaced our adversary system of justice. Part II discusses the preliminary hearing in theory and in practice by examining the law on the books, the practices on the ground, and the results of 353 prelims from the cases in the dataset.

Part III discusses legal reform by introducing the substance-over-form doctrine from tax law and examining its current uses in criminal law. With an understanding of substance over form, Part IV then applies the doctrine to the preliminary hearing and demonstrates how it would restore some substance to the prelim and, in turn, to our adversarial system of justice.

Part V explains the practical limits of legal reform, including the implementation of the substance-over-form doctrine to the prelim. In light of this stark reality, Part VI provides practical advice for the criminal defense lawyer who wants to protect the client and preserve the record when conducting prelims.

I. THE DEATH OF THE ADVERSARY SYSTEM

The criminal jury trial is dead—so say Chesa Boudin and Eric Fish in their recent law review article, *Towards Pretrial Criminal Adjudication*.[20] The authors argue that, instead of deciding guilt or innocence via the jury trial, "[c]riminal courts have become guilty-plea-processing machines."[21] And strong evidence exists to support their cynical claim. Many accounts put the percentage of cases resolved by plea bargain above 95 percent.[22] Some jurisdictions have a plea-bargain rate as high as 99 percent.[23] And in some venues in some years, the jury trial has temporarily vanished, as 100 percent of cases have been resolved via plea bargain.[24] This, in turn, alters the fundamental nature of our so-called adversary system:

> In a system of guilty pleas, neutral decision-makers do not screen cases. There is no adversarial in-court conflict where the defendant's rights are asserted and the state's evidence questioned. There is no publicly visible accounting of the crime or of the prosecutor's proof. The center of power in criminal cases moves from the judge's courtroom to the prosecutor's conference room (or e-mail account). A guilty-plea-based system sacrifices the dignity of adversary procedure, the law-preserving function of neutral courts, and the impartial sorting of guilt from innocence.[25]

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[20] Chesa Boudin & Eric S. Fish, *Towards Pretrial Criminal Adjudication*, 66 B.C. L. REV. 1135 (2025).
[21] Id. at 1137.
[22] *See* Julian A. Cook, III, *All Aboard! The Supreme Court, Guilty Pleas, and the Railroading of Criminal Defendants*, 75 U. COLO. L. REV. 863, 866 (2004) ("Current Department of Justice estimates indicate that in excess of 95 percent of all federal convictions are resolved via a guilty plea.").
[23] *See* Darryl K. Brown, Response, *What's the Matter with Kansas—and Utah?: Explaining Judicial Interventions in Plea Bargaining*, 95 TEX. L. REV. 47, 62 (2017) (citing statistics that show some "state and federal courts" with "guilty plea rates of 96 to 99 percent.").
[24] *See* Cynthia Alkon, *Hard Bargaining in Plea Bargaining: When Do Prosecutors Cross the Line?*, 17 NEV. L.J. 401, 403 (2017) (citing a news report that no criminal trials were held in Santa Cruz County, Arizona for more than one calendar year).
[25] Boudin & Fish, *supra* note 20, at 1138 (parenthetical in original) (internal citation omitted).

The above reference to the prosecutor's e-mail account rings true. In my own practice, nearly all cases are resolved via plea bargain right before trial, dismissed by the prosecutor right before trial, or simply delayed to a future trial date over my objection.[26] In this huge swath of settled, dismissed, and delayed cases, the only thing adversarial is my initial e-mail to the prosecutor in which I highlight the state's proof problems and explain why the prosecutor should accept the defendant's plea offer or even dismiss the case outright. There is rarely any adversarial testing of the evidence in court, let alone at a jury trial.[27]

What can be done about this state of affairs in which plea bargaining dominates, allegations are rarely challenged, and evidence is almost never tested? Many have advocated for the abolition of plea bargaining and the return of the jury trial.[28] Boudin and Fish, however, are more realistic. To begin, they "concede the death of the trial" and acknowledge that it is unlikely to be brought back to life.[29] And they're probably right. Even if the jury trial isn't dead yet, it is certainly on life support and will stay that way for a number of reasons, including the prosecutorial practice of charge-stacking.

Charge stacking works this way: our state legislatures create overlapping, largely duplicative crimes, and then prosecutors charge multiple counts in order to coerce a plea.[30] Given this power, why would a prosecutor charge one count for a single, alleged criminal act, when he or she can instead charge multiple counts, offer to dismiss most of them, and get a guaranteed conviction without the risk or work of a jury trial?[31] In light

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[26] Delay tactics are often associated with the defense, but it is actually a favorite tactic of the prosecutor. A delay will induce the *in-custody* defendant to accept the prosecutor's plea offer which often includes the possibility of immediate release to probation. *See* Samuel Wiseman, *Bail and Mass Incarceration*, 53 GA. L. REV. 235, 253-54 (2018) ("[D]efendants accept a plea if it 'entails a lower cost than going to trial,' and pretrial detention makes trial look far more costly to the average defendant."). Similarly, a delay creates the risk that an *out-of-custody* defendant will violate non-monetary bond conditions, thus allowing the prosecutor to charge a "bail jumping" case which can be used to re-incarcerate and as further leverage in plea bargaining. *See* Amy Johnson, Comment, *The Use of Wisconsin's Bail Jumping Statute: A Legal And Quantitative Analysis*, 2018 WIS. L. REV. 619, 637 (2018) ("[T]he purpose for charging bail jumping may be to create leverage against defendants to force them to plead to their original charges rather than for punishing them for violating their bond conditions.").

[27] I have had only 43 actual jury trials in my roughly quarter century as a criminal defense lawyer. My practice largely consists of *trial preparation*, only to have the cases dismissed, resolved, or adjourned at the metaphorical last minute. *See* CICCHINI LAW OFFICE, LLC: EXPERIENCE, www.Cicchinilaw.com/experience (last updated April 24, 2026).

[28] *See, e.g.*, Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1980 (1992) ("[A]bolition is necessary to avoid egregious injuries that the American plea bargaining system currently inflicts on both innocent defendants and the law-abiding public as a whole."); Robert Weninger, *The Abolition of Plea Bargaining: A Case Study of El Paso County, Texas*, 35 UCLA L. REV. 265 (1987); William Ortman, *Plea Bargaining Abolitionism: A History*, 20 OHIO ST. J. CRIM. L. 1, 29-36 (2023).

[29] Boudin & Fish, *supra* note 20, at 1138.

[30] *See* Michael L. Seigel & Christopher Slobogin, *Prosecuting Martha: Federal Prosecutorial Power and the Need for a Law of Counts*, 109 PENN. ST. L. REV. 1107, 1121 (2005) ("Redundant charging can skew plea bargaining . . . Most obviously, multiple charges intimidate defendants."); Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1313 (2018) ("[T]he prosecutor can inflate the quantity of charges the defendant faces, by piling on overlapping, largely duplicative offenses—increasing with each new charge the defendant's potential sentence, his risk of conviction, and the 'sticker shock' of intimidation that accompanies a hefty charging instrument.").

[31] Phil Locke, *Prosecutors, Charge Stacking, and Plea Deals*, WRONGFUL CONVICTIONS BLOG (June 12, 2015) ("[P]rosecutors will 'stack charges' against a defendant . . . and then approach the defendant with a

of this harsh reality, Boudin and Fish offer a different way to resuscitate the adversary system:

> [W]e propose a vision of criminal procedure aimed not at the trial but at the underlying commitment to adjudication. Every step of the criminal process, from initial appearance to disposition, should be understood as an opportunity for adjudication, even (perhaps especially) if a trial never occurs. There are many pre-trial procedures that can perform this function. These include *preliminary hearings*, grand jury proceedings, witness depositions, [and] suppression hearings . . . Such procedures involve (to varying degrees) lawyers for each side presenting and challenging evidence, judges considering legal arguments, and criminal charges getting modified or even dismissed.[32]

This proposal seems promising. When used properly, these pretrial procedures "can screen out bad charges, . . . provide a neutral forum for legal arguments, create a public record of the case, and satisfy defendants' dignitary interest in challenging the charges against them."[33] In short, using these pretrial procedures can breathe new life into the adversary system.

It is true that, under this approach, the vast majority of cases would still resolve by plea bargain. But by using these pretrial, adversarial procedures, the parties will at least test the evidence, and the resulting plea bargain is more likely to align with the actual, underlying facts.[34] Conversely, without such reliable evidence on which to base their negotiations, plea bargaining is nothing more than the superficial, uninformed horse-trading of charges.[35] In that case, the resulting plea deal is far less likely to reflect the reality of what if anything happened in the underlying event or non-event.[36]

Unfortunately, many of these pretrial procedures simply don't exist in most states. For example, a witness deposition is probably the most valuable tool—possibly including the jury trial itself—for testing a complaining witness's allegations.[37] It allows the defense lawyer to "lock down witnesses' stories, get a preview of the government's

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'plea deal' . . . If the defendant takes the deal, the prosecutor doesn't have to take the case to trial . . . This has become absolutely standard practice."), https://perma.cc/3PDC-BDV2 (last accessed Mar. 27, 2026).

[32] Boudin & Fish, *supra* note 20, at 1139-40 (emphasis added).

[33] Id. at 1140.

[34] Id. at 1144 ("All sides get a better picture of the evidence" which helps "with plea negotiations.").

[35] *See* Michael O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 415 (2008) (describing how plea bargaining may resemble "routine case processing" by which "cases are resolved quickly, with little or no haggling," right before a court hearing).

[36] Boudin & Fish, *supra* note 20, at 1147 (Without pretrial, adversarial testing of evidence, "prosecutors sometimes even fail to review the evidence in a case . . .").

[37] The deposition is a discovery tool and is presumably broad in scope, even in criminal cases; conversely, criminal defendants and their lawyers are often constricted *at trial* despite the supposed trial guarantees of confrontation and the right to present a defense. *See, e.g.*, State v. Koepp, 2012 WI App 73, ¶¶ 1–6 (prohibiting a third-party guilt defense even though another male's DNA was found on all three of the murder weapons); *see also* Brett C. Powell, Comment, Pe*rry Mason Meets the "Legitimate Tendency" Standard of Admissibility (and Doesn't Like What He Sees)*, 55 U. MIAMI L. REV. 1023, 1051 (2001) (arguing that, in the context of the wrong-person defense, "the more significant the defense's evidence, the more courts would be compelled to exclude it.").

evidence, and convince prosecutors to drop charges or offer better deals. And prosecutors benefit from depositions as well, using them to get a clearer view of the evidence and the likelihood of conviction."[38] However, barring unusual circumstances, the criminal-case deposition is available only in six states.[39]

Similarly, suppression hearings are only applicable in limited cases, such as, for example, cases in which the police are alleged to have illegally searched the defendant's property and discovered contraband.[40] And grand juries, where they are used, aren't really adversarial at all; instead, they are secret proceedings in which the defense isn't even allowed to participate.[41]

This leaves the preliminary hearing—also known as the preliminary examination or simply the "prelim"—as the most promising of the pretrial, adversarial procedures which, in light of the unfortunate demise of the trial, might be used to breathe some life back into our dying system.[42]

II. THE PRELIMINARY HEARING: THEORY AND PRACTICE

Before we can declare the prelim to be the savior of the adversary system, we first have to know what the hearing is. And because criminal courts are among the most lawless places in the country,[43] this requires getting to know the prelim both in theory, i.e., what the law on the books says it should be, and in practice, i.e., what prosecutors and judges actually do (and get away with) in court.

A. *The Prelim in Theory*

Our nation's plea-bargain-driven system of criminal law is like an assembly line: it efficiently churns out convictions much like a factory churns out its products.[44] In felony cases, however, the prelim is supposed to serve as the brakes on that conviction-producing machinery.

An Oregon court explained it this way: "A charge that one has committed a felony and should undergo a trial on the charge is, short of a conviction and sentence, the gravest

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[38] Boudin & Fish, *supra* note 20, at 1178-79.

[39] Id. at 1178 ("Only six states give defendants a broad right to depose witnesses. The remaining 44 states and the federal system . . . restrict depositions to narrow circumstances.").

[40] *See* Herring v. United States, 129 S. Ct. 695, 700 (2009) (Exclusion is intended to deter police misconduct, yet that remedy should be "our last resort, not our first impulse.").

[41] Boudin & Fish, *supra* note 20, at 1160 ("A quintessential feature of grand juries is secrecy. . . . there is virtually no adjudicative value.").

[42] While only six states give the defendant the "unqualified right to a preliminary hearing in felony cases," as a practical matter the hearing is often used in 39 of the other states; in only five states is the prelim not allowed or held only in rare circumstances. Boudin & Fish, *supra* note 20, at 1166-67. As an example of use of the prelim when it is not legally required, "[p]rosecutors in California normally opt for preliminary hearings over grand juries." *Id*. at 1165.

[43] More than a century ago, an American author and journalist recognized that a legal "precedent" has "whatever force and authority a Judge may choose to give it, thereby greatly simplifying his task of doing as he pleases." Ambrose Bierce, *The Devil's Dictionary*, THE COLLECTED WORKS OF AMBROSE BIERCE (1911), http://www.ambrosebierce.org/dictionary.htm (last accessed Nov. 10, 2025).

[44] I have borrowed the concept of litigation machinery from Ambrose Bierce, who defined "litigation" as "[a] machine which you go into as a pig and come out of as a sausage," and "litigant" as "[a] person about to give up his skin for the hope of retaining his bones." *Id*.

act by which the state confronts one of its citizens. Whether or not a conviction follows, prosecution alone imposes heavy burdens on the defendant."[45] And that is why we have the prelim, to serve "as a check on the prosecutorial power of the executive branch."[46] Its purpose is "to prevent hasty, malicious, improvident and oppressive prosecutions, to protect the person charged from open and public accusations of crime, [and] to avoid both for the defendant and the public the expense of a public trial"—unless the state's evidence at the prelim reveals that "there are substantial grounds upon which a prosecution may be based."[47]

Prelims are statutory in nature; consequently, "there are variations in each state's preliminary-examination procedures."[48] Yet some common features run through most states' hearings. In fact, certain features are necessary if the prelim is to effectively serve as the brakes on the assembly line of criminal litigation. This description of Utah's prelim is widely, if not universally, applicable.

> [T]he preliminary hearing in felony cases is an adversarial proceeding. Generally, the hearing parallels a trial: the state must satisfy its burden to prove the elements of the crime charged . . . by presenting evidence and calling witnesses. The defendant can cross-examine the state's witnesses, and then present his or her own case by testifying, offering evidence, and calling defense witnesses. However, . . . consistent with its function as a screening mechanism, the standard of proof at the hearing is only probable cause—"a reasonable belief that an offense has been committed and that the defendant committed it."[49]

Although the prelim itself is rooted in statute, the Supreme Court has declared it a "critical stage" of the proceedings; the defendant therefore has the constitutional right to counsel at the hearing.[50] And while most states agree that the defendant does not have the constitutional right of confrontation at the prelim,[51] the defense is certainly permitted to cross-examine the state's witnesses.[52] As a Colorado court explained, this means that defense counsel is not permitted to challenge general credibility[53]—e.g., whether the

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[45] State v. Freeland, 667 P.2d 509, 514 (Or. 1983), *overruled by* State v. Savastano, 309 P.3d 1083 (Or. 2013) (emphasis added).
[46] State v. Schaefer, 746 N.W.2d 457, 467 (Wis. 2008).
[47] State v. Williams, 544 N.W.2d 400, 404 (Wis. 1996) (quoting State v. Richer, 496 N.W.2d 66, 68–69 (Wis. 1993)).
[48] People v. Lewis, 903 N.W.2d 816, 819 (Mich. 2017).
[49] Paul G. Cassell & Thomas E. Goodwin, *Protecting Taxpayers and Crime Victims: The Case for Restricting Utah's Preliminary Hearings to Felony Offenses*, 4 UTAH L. REV. 1377, 1382-83 (2011).
[50] Coleman v. Alabama, 399 U.S. 1, 10 (1970) ("[T]he Alabama preliminary hearing is a critical stage of the State's criminal process at which the accused is as much entitled to such aid of counsel as at the trial itself.") (internal punctuation omitted); Edward H. Hunvald, Jr., *The Right to Counsel at the Preliminary Hearing*, 31 MO. L. REV. 109 (1966) (discussing pre-Coleman law on the right to counsel).
[51] *See* State v. Lopez, 314 P.3d 236 (N.M. 2013) ("The majority of . . . states reject constitutional interpretations that would inject confrontation rights into pretrial probable cause determinations.").
[52] *See* Cassell & Goodwin, *supra* note 49, at 1382-83.
[53] *See* People v. Fry, 92 P.3d 970, 977 (Colo. 2004) ("[D]efense counsel has no legitimate motive to engage in credibility inquiries and may be prohibited from doing so.").

witness has a reputation for untruthfulness or has prior criminal convictions[54]—but certainly may attack the plausibility of the witness's story and their ability to have seen or heard the things about which they've testified.[55]

Many states permit the use of hearsay evidence at the prelim, though often with limitations. For example, a Florida law holds that the prosecutor's evidence must not consist entirely of hearsay;[56] similarly, a Kansas law requires that the witness must have personal knowledge of the hearsay, thus limiting the layers of hearsay that may be introduced;[57] likewise, a Wisconsin law requires that the prosecutor first establish the reliability of the hearsay before the magistrate may consider it.[58]

Such requirements are necessary, of course, as "[t]he degree of probable cause required for a bind-over [after a prelim] is greater than that required to support a criminal complaint."[59] That is necessarily true, or the prelim wouldn't even exist. In other words, if the criminal complaint could be used as a substitute for the prelim, it would effectively erase the prelim statutes from the statute book.

The preliminary hearing, unavoidably if not expressly, also serves as a "discovery tool."[60] When the prosecutor questions witnesses, and the defense lawyer cross-examines them and challenges the plausibility of their stories, both sides are bound to learn something. As a New York court described it, "the preliminary hearing conceptually and pragmatically may serve as a virtual minitrial" for the parties.[61]

Finally, the prelim also serves a highly valuable notice function. As a New Mexico court explained, if the prosecutor prevails at the prelim, the "information" (the charging document that supercedes the complaint) must "conform to the bind-over order."[62] That way, the defendant only has to stand trial on "charges of which he has been apprised and which have been reviewed by a neutral authority."[63] Conversely, if the court were to allow the prosecutor to add charges that "were not included in the bind-over order, the defendant has not been afforded due process."[64]

With an understanding of those features of the prelim, it seems that Boudin and Fish's proposal is a good one. The prelim surely can serve as a screening mechanism, weed out bad cases, aid in plea bargaining, and breathe some life back into our adversary system of justice. In fact, that seems so uncontroversial that one might wonder why the

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[54] *See* Fed. R. EVID. 608 & 609.
[55] *See* State ex rel. Funmaker v. Klamm, 317 N.W.2d 458, 460–61 (Wis. 1982) ("[T]he court's role [is] simply to ascertain the plausibility of [the witness's] story . . . .") (quoting Vigil v. State, 250 N.W.2d 378, 384 (Wis. 1977)); WIS. STAT. § 906.02 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.").
[56] *See* Evans v. Seagraves, 922 So. 2d 318, 319 (Fla. Ct. App. 2006) ("hearsay testimony . . . does not, by itself, meet the state's burden at an adversary preliminary hearing").
[57] *See* State v. Cremer, 666 P.2d 1200, 1203 (Kan. Ct. App. 1983), *aff'd*, 676 P.2d 59 (Kan. 1984) (discussing the personal knowledge requirement).
[58] *See* State v. O'Brien, 850 N.W.2d 8, 22 (Wis. 2014) (quoting State v. O'Brien, 836 N.W.2d 840, 843 (Wis. Ct. App. 2013) (requiring the hearsay to be "reliable")).
[59] Id. "Bind-over" is a post-prelim finding of probable cause; the result is that the case moves forward.
[60] State v. Graves, 126 S.W.3d 873, 877 (Tenn. 2003) (stating that the prelim's "importance to the defense as a discovery tool could not be ignored.").
[61] People v. Hodge, 423 N.E.2d 1060, 1063 (N.Y. Ct. App. 1981) (citations omitted).
[62] State v. Rodriguez, 215 P.3d 762, 765–66 (N.M. Ct. App. 2009) (quoting State v. Coates, 707 P.2d 1163, 1166 (N.M. 1985)).
[63] Id.
[64] Id.

authors wrote an article in support of what appears to be an obvious claim. The reason they did so, as the next section explains, is that things (including prelims) aren't always as they seem.

B. *The Prelim in Practice*

While the prelim appears to be a highly valuable pretrial hearing, the devil is in the details. And Boudin and Fish provide three ways in which the prelim may fail to serve its adversarial purposes.

First, the prelim can get swept up in the gravitational pull of plea bargaining—the same metaphorical black hole that devoured the jury trial itself.[65] In other words, prelims can't serve their purpose or reverse the dominance of plea bargaining if defendants are induced to waive the prelim as part of a plea bargain.

Second, despite the high-minded, grandiose prelim features discussed earlier, the hearing's value may be diminished by the statutes and case law that actually govern it. For example, prelims can be "made impotent by lax evidentiary rules."[66] And despite those broad similarities discussed earlier, not all prelims are created equal.[67]

Third, even when the law on the books—i.e., statutes and case law—provides for a substantive, meaningful prelim, "there are myriad ways [the hearing] can be rendered meaningless."[68] The prelim's value, therefore, "depends not just on the written law, but also on norms and procedures on the ground."[69]

In this Article, I will serve as the metaphorical boots "on the ground" in order to test the authors' three claims, which I will formally restate as follows:

a. The prelim is ineffective because defendants typically waive their prelims to preserve plea offers;

b. The prelim is ineffective because the official law on the books consists of "lax evidentiary rules" for the hearing; and

c. The prelim is ineffective because, even if the law on the books is strong, the "norms and procedures on the ground" have stripped the hearing of any remaining value.

Testing the authors' third claim requires more than looking at high-level data (e.g., the percentage of prelims that are waived) and the official law on the books (e.g., whether the statutes or case law permit hearsay). Instead, it requires an insider's knowledge, as the "norms and procedures on the ground" are unwritten and unknowable to outsiders. Testing this third claim therefore requires a narrow but deep inquiry, rather than a broad,

[65] Boudin & Fish, *supra* note 20, at 1167-68.
[66] Id. at 1151.
[67] *See* id. at 1172 (discussing California's prelim which has "real adversarial value.").
[68] Id. at 1195.
[69] Id. at 1145.

multi-state-survey approach.[70] In order to learn what is really happening "on the ground," the metaphorical boots gathering the information can only be in one place at a time. I will therefore test these three claims by looking at the law on the books, the unwritten practices on the ground, and the actual data from the 1,716 felony cases filed in 2023 in Kenosha, Wisconsin, where I practice criminal defense.

I selected 2023 because, when I collected the data between January 11, 2025 and February 3, 2025, many of the 2024 cases had not yet progressed to the prelim stage; conversely, the vast majority of the 2023 cases *had* progressed that far. Also, 2023 was just recent enough not to be too old. That is, when a case is dismissed, it will be removed from the public database two years after dismissal.[71] Even with this short timeframe, all of the 2023 cases, including those that were dismissed, were still publicly available when I collected the data in the early days of 2025.[72]

To begin, in 2023 there were 1,996 criminal felony (CF) cases filed, ranging from case number 23-CF-1 through 23-CF-1996.[73] Of these cases, 115 were extradition matters, meaning that another state was seeking to have the defendant returned to face charges.[74] Because the underlying charges are not being prosecuted in Wisconsin, these cases do not have prelims. Therefore, of the CF cases, 1,881 of them (1,996 – 115) were prelim eligible, meaning that the defendant was entitled to a prelim to have or waive.

Of these 1,881 prelim-eligible cases, 165 of them had not yet reached the prelim stage, had been dismissed before the prelim,[75] or, in rare instances, simply had no record of the case or of the prelim being held or waived. The most common reason for not yet reaching the prelim was that the defendant failed to appear for court and the case was in warrant status, thus suspending the proceedings (62 cases).[76] Interestingly, a few cases had yet to reach the prelim because the public defender or the court had yet to appoint

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[70] For an excellent example of a narrow and immersive inquiry, see Miguel D. Figueiredo, et al., *Unwarranted Warrants? An Empirical Analysis of Judicial Review in Search and Seizure*, 138 HARVARD L. REV. 1959 (2025) (exploring warrant legitimacy by examining only Utah warrants and related data).

[71] *See* Joe Forward, *Dismissed Criminal, Eviction, and Other Cases No Longer Displayed on Court Website After Two Years*, WIS. BAR INSIDE TRACK (Feb. 21, 2018), https://www.wisbar.org/NewsPublications/InsideTrack/pages/article.aspx?Volume=10&Issue=3&ArticleID=26182 (last accessed Nov. 10, 2025).

[72] To access the data, see WISCONSIN COURT SYSTEM: CASE SEARCH: PUBLIC ACCESS TO WISCONSIN COURT RECORDS: CIRCUIT COURT, https://www.wicourts.gov/casesearch.htm (last accessed for data collection on Feb. 3, 2025).

[73] In addition to being available in the public database—subject to the short, two-year retention period for dismissed cases—a spreadsheet that includes the data for all 1,996 CF cases in the dataset is on file with the author.

[74] *See, e.g.*, State v. Warner, 23-CF-1025 (Wis. Cir. Ct., Kenosha Cty., July 19, 2023) ("DE waives extradition hearing. Court signs waiver of extradition and revokes bond.").

[75] The notes in the public record typically do not indicate *why* a case was dismissed, but I know from experience that cases can be dismissed before the prelim when the defense challenges the complaint itself for a lack of probable cause. In other words, because there isn't even probable cause in the complaint, the case never should have been filed and, therefore, certainly shouldn't reach the prelim stage of the process. *See* Wis. Stat. § 971.31 (5) (c) ("In felony actions, objections based on the insufficiency of the complaint shall be made prior to the preliminary examination or waiver thereof or be deemed waived.").

[76] *See, e.g.*, State v. Segura, 23-CF-1450 (Wis. Cir. Ct., Kenosha Cty., Sept. 14, 2023) ("Arrest warrant issued").

counsel, even though the case was filed in 2023 and was quite old (7 cases).[77] Even more interesting—in a morose sort of way—in some cases the prelim was simply a moot point: the case was dismissed because the defendant died *before* the prelim (8 cases).[78]

Deducting these 165 cases, in which the prelim had yet to be or will never be held, therefore leaves 1,716 cases (1,881 – 165) with which to test Boudin and Fish's three hypotheses or claims.

1. Prelims Waived in Plea Bargaining

Boudin and Fish's first claim actually has two parts. To begin, the authors claim that prelims are frequently waived, rather than held. Frequency is a matter of degree, of course. For a comparative basis, they observe that California prelims are often held, rather than waived, because they are meaningful hearings.[79] In fiscal year 2021-22, California prelims were held in 34.3 percent of cases.[80] With that number providing some context, it is safe to say that, with regard to the 2023 data collected for this Article, this part of the authors' first hypothesis is confirmed:

	No.	**Pct.**
Prelim Held	353	20.6%
Prelim Waived	1,363	79.4%
Total Cases	**1,716**	**100.0%**

Out of 1,716 cases, in only 353 cases did the defendant elect to have the prelim. Statistically, while prelims were held in 34.3 percent of California cases during the fiscal year studied, prelims were held in only 20.6 percent of Wisconsin cases during the calendar year studied—a highly significant difference.

The next aspect of the authors' first hypothesis concerns *why* defendants waive their prelims. The authors claim that prelims are waived because they are being engulfed

[77] *See, e.g.*, State v. Daniel, 23-CF-656 (Wis. Cir. Ct., Kenosha Cty., Jan. 7, 2025) ("Defendant is eligible for Public Defender representation but SPD has not yet appointed an attorney to represent. Court adjourns to allow time for SPD to appoint an attorney.").

[78] *See* State v. Campion, 23-CF-190 (Wis. Cir. Ct., Kenosha Cty., Feb. 21, 2023) ("On motion of the State court dismisses case. DE is deceased."); State v. Franklin, 23-CF-418 (Wis. Cir. Ct., Kenosha Cty., Oct. 31, 2023) ("[D]ismissed outright on State's motion, defendant is deceased."); State v. Hohl, 23-CF-1257 (Wis. Cir. Ct., Kenosha Cty., Jan. 26, 2024) ("State moves to dismiss case as DE is deceased."); State v. Flores, 23-CF-1668 (Wis. Cir. Ct., Kenosha Cty., Feb. 16, 2024) ("State moves to dismiss this case as the DE deceased."); State v. Mireles, 23-CF-1774 (Wis. Cir. Ct., Kenosha Cty., Jan. 9, 2024) ("State moves to dismiss as DE is deceased."); State v. Mireles, 23-CF-1828 (Wis. Cir. Ct., Kenosha Cty., Jan. 9, 2024) ("State moves to dismiss as DE is deceased."); State v. Matthews, 23-CF-1838 (Wis. Cir. Ct., Kenosha Cty., Oct. 4, 2024) ("DE deceased. State dismisses case."); State v. Phillips, 23-CF-1977 (Wis. Cir. Ct., Kenosha Cty., May 17, 2024) ("Defendant is deceased. Court dismisses.").

[79] Boudin & Fish, *supra* note 20, at 1176.

[80] "[I]n fiscal year 2021-2022, California courts reported that of 25,349 cases, approximately 8,694 had received a preliminary hearing, or more than a third." *Id*. The precise number is 34.3 percent (8,694 prelims / 25,349 cases).

in the plea-bargain process. More specifically, in order to preserve a plea offer, the defendant must waive the prelim.[81] Such an offer is also known, quite accurately, as a "prelim waiver offer."[82]

This is one area where an insider's knowledge, i.e., boots on the ground, is helpful and possibly even necessary, as the public database almost never indicates *why* a prelim is being waived. But as a criminal defense lawyer in Kenosha County, I know firsthand (and secondhand, simply by observing other cases while waiting for my own cases to be called) why prelims are being waived.

It used to be the case that the prosecutor would routinely make a specific plea offer to induce the defendant to waive the prelim. For example, the prosecutor may offer something like this: "If the defendant waives the prelim, the state would make the following plea offer, which would expire at the final pretrial hearing: plead to count one, the state would recommend probation and dismiss all remaining counts."[83] The written offer would even be made part of the public court record.

By 2023, however, when defendants waived prelims they would nearly always do so for the mere promise of a future offer and future negotiations[84]—this is stated in open court, but is not written or entered into the public record. In fact, when collecting the 2023 data, I identified only 14 cases in which the public record indicated why the defendant waived the prelim: in those rare cases, a specific plea offer had been extended.[85] Regardless, both scenarios confirm the Boudin and Fish hypothesis: prelims are waived because they are being engulfed in the plea-bargain process, whether waiver is for a specific offer (which is part of the record) or merely for the promise of a future offer and future negotiations (which is spoken in court but not part of the record).

While Boudin and Fish's first hypothesis is confirmed in its entirety, the dataset raises an interesting question: Why would a defendant waive the prelim merely for the promise of a future offer and future negotiations? After all, with between 96 and 99 percent of cases resolving by plea bargain,[86] the prosecutor is going to make an offer and negotiate even if the defendant elects to hold the prelim. As the testing of the next two hypotheses demonstrates, the reason defendants waive the prelim for next to nothing, i.e., the promise of a future offer that the prosecutor is probably going to make anyway, is that the hearing itself isn't worth what it used to be.

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[81] Id. at 1167-68 ("The prosecutors would require defendants to waive the preliminary hearing as a condition of keeping the first plea bargain offer open.").
[82] *See* Michael D. Cicchini, *Preliminary-Hearing Waivers and the Contract to Negotiate*, 2023 PEPP. L. REV. 35, 43 (2023) ("[P]rosecutors often give defendants early plea offers, called prelim waiver offers, to induce them to waive their hearings.").
[83] Id. at 43.
[84] Id. at 45 ("[O]ften due to prosecutorial procrastination or pure laziness, the prosecutor may make the following prelim waiver offer: "waive the prelim in exchange for future negotiations."). It was this change in practice which prompted me to write the *Pepperdine Law Review* article, arguing that such a waiver offer, though vague and open-ended, creates an obligation for the prosecutor to negotiate in good faith. *Id.* ("The promise of future negotiations has legal meaning: it is a contract in and of itself, and it is called a contract to negotiate.").
[85] *See, e.g.*, State v. Davis, 23-CF-1359 (Wis. Cir. Ct., Kenosha Cty., Dec. 20, 2023) ("Preliminary Hearing Waiver / Plea Offer read into record. DE waives preliminary hearing; probable cause found. Bound over.").
[86] *See supra* Part I.

2. Lax Evidentiary Standards

Boudin and Fish's second hypothesis is that prelims are ineffective because "lax evidentiary standards" have stripped them of their value.[87] Examining Wisconsin law, which formally governs the prelims in the dataset, confirms this claim as well.

First, the legislature passed a statute permitting the use of hearsay at prelims,[88] and it also allows courts to bind cases over based entirely on hearsay.[89] The prosecutor now routinely uses this law to shield the state's witnesses from cross-examination. How? A police officer testifies and simply repeats what the witness previously told them.[90] This prevents defense counsel from cross-examining the key witnesses, thus dramatically limiting the ability to test the plausibility of the allegations.[91] But the other rules of evidence are, in theory, supposed to apply, including the requirement that the officer-witness have personal knowledge of the hearsay statement that he or she repeats.[92]

Second, the courts have also created lax evidentiary standards for the prelim; in fact, the case law goes much further in this regard than does the legislature's statutes. The courts have made things so easy for the prosecutor that the prelim, which was intended to be a check on prosecutorial power, has been transformed into a prosecutorial weapon for charge-stacking.[93]

To begin, in order to satisfy due process and notice requirements—or, to borrow the words of a New Mexico court, to ensure that the defendant stands trial only on "charges of which he has been apprised and which have been reviewed by a neutral authority"[94]—the Wisconsin prelim statute was enacted to read (and still reads) as follows: "In multiple count complaints, the court shall order dismissed any count for which it finds there is no probable cause."[95]

Despite that clear language, Wisconsin courts have feigned confusion and decided that it really means the opposite. Instead of reviewing each charged count, as required by statute, the magistrate "is not restricted to the charges set forth in the complaint or argued by counsel during the preliminary hearing. A probable-cause showing of *any* felony will justify bindover."[96] In another and even stranger 180-degree turn away from the statute, the courts decided that the magistrate is supposed to keep secret the count for which he or

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[87] Boudin & Fish, *supra* note 20, at 1145.
[88] WIS. STAT. § 970.038 (1) (2011-12) ("hearsay is admissible in a preliminary examination").
[89] Id. at (2) ("A court may base its finding of probable cause . . . in whole or in part on hearsay admitted under sub. (1).").
[90] *See* State v. O'Brien, 850 N.W.2d 8 (Wis. 2014).
[91] The statute specifically permits the defendant to call witnesses, so in theory the defendant could subpoena and call the eyewitness that the state refuses to call. *See* WIS. STAT. § 970.03 (5). However, theory and practice diverge; as discussed later in this section, contrary to statute the courts prevent defendants from calling their own witnesses.
[92] WIS. STAT. § 906.02 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.").
[93] For a discussion of charge-stacking and what enables it, see *supra* Part I.
[94] State v. Rodriguez, 215 P.3d 762, 765–66 (N.M. Ct. App. 2009) (quoting State v. Coates, 707 P.2d 1163, 1166 (N.M. 1985)).
[95] WIS. STAT. § 970.03 (10).
[96] Christine M. Wiseman & Michael Tobin, WISCONSIN PRACTICE SERIES: CRIMINAL PRACTICE & PROCEDURE §8.3 (West, 2019) (emphasis original) (citing Wittke v. State ex rel. Smith, 259 N.W.2d 515 (Wis. 1977)).

she finds probable cause: "[I]t is both unnecessary and inadvisable for the [magistrate] to opine as to exactly what felony was probably committed."[97]

In addition to these lax (and even bizarre) evidentiary standards, Wisconsin courts have gone a step further, turning the prelim into a prosecutorial weapon. Once the case is bound-over after the prelim, the courts allow the prosecutor to add any counts he or she wishes, even if those counts are not supported by the prelim testimony, as long as the added counts are "not wholly unrelated" to that testimony.[98]

The upshot is that courts have rewritten the clear language of the prelim statute and made the standards so lax that felony defendants now have fewer rights than misdemeanor defendants with regard to notice of the charges and the requirement of probable cause.[99] This, of course, is the exact opposite of what the prelim statute requires, as the hearing was undisputedly created to give more protection to felony defendants due to the seriousness of the allegations.[100]

In a final example of judicial activism for the benefit of prosecutors, courts have also rewritten the statute governing the defendant's right to present evidence. The statute reads that, at the prelim, "[t]he defendant . . . may call witnesses on the defendant's own behalf who then are subject to cross-examination."[101] The courts have overridden the statute by holding that the defense is *not* permitted to call witnesses if the state first establishes probable cause through its witnesses.[102] This creates a logical conundrum:

> The glitch in this reasoning, and the problem with mid-hearing probable cause determinations, is this: the defendant would only be able to exercise his statutory right to call witnesses if the state first failed to establish probable cause; but in that scenario, the defendant would also be unable to call witnesses because the case would be dismissed for lack of probable cause. The defendant, therefore, would never have the right to call witnesses which is directly at odds with the statute granting that very right.[103]

This sort of pro-state judicial activism is not unique to Wisconsin, nor is it new; the legal critic Ambrose Bierce complained about this problem well over a century ago:

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[97] Id. (internal quotation marks omitted) (quoting State v. Williams, 544 N.W.2d 406, 414-15 (Wis. 1996)).
[98] State v. Richer, 496 N.W.2d 66, 74 (Wis. 1993).
[99] Misdemeanor cases do not have prelims, but they at least require that the complaint provide notice to the defendant of each charge, and further require that the complaint alleges facts constituting probable cause for each charge. *See* Wiseman & Tobin, *supra* note 96, at § 1.12 (The complaint must "state essential facts, preferably concisely and clearly, describing exactly what the defendant is alleged to have done"; it must "enable a neutral and detached magistrate to ascertain that the charges are not capricious and are sufficiently supported . . .") (citing State ex rel. Evanow v. Seraphim, 161 N.W.2d 369, 272 (1968)).
[100] *See Williams*, 544 N.W.2d at 404.
[101] WIS. STAT. § 973.03 (5).
[102] *See* State v. O'Brien, 850 N.W.2d 8, 18 (Wis. 2014) (denying the defendant the right to call witnesses); State v. Hull, 867 N.W.2d 419, 421 (Wis. Ct. App. 2015) (same).
[103] Michael D. Cicchini, *Improvident Prosecutions*, 12 DREXEL L. REV. 465, 505 (2020); *see also* State v. Essman, 403 P.2d 540, 542 (Ariz. 1965) (criticizing the court's denial of the defendant's right to call witnesses).

> J. Gordon Hylton explains that "[f]or Bierce, 'law' properly meant statutes (which, he insisted, were bad enough). What he objected to was the body of additional 'law' created by judicial interpretations of existing statutes." Bierce realized that these "superingenious writings" could then be used "as authority for setting aside any statute (i.e., legitimate law) with which the judge hearing a case might disagree."[104]

And when a pro-state judicial ruling—such as the one denying defendants their statutory right to call a witness—appears in the case law, one can rest assured that it will trickle down into practice. While "norms and procedures on the ground" are the subject of the next section, it is worth noting here that the denial of the statutory right to call witnesses is now standard practice; as a result, I failed to note even a single case in the dataset in which the defense lawyer attempted to call a witness.[105] And the magistrate shut down a *pro se* defendant who, obviously unaware of the customs of practice, unsuccessfully attempted to call a witness.[106]

In sum, the second Boudin and Fish hypothesis is confirmed. The law on the books has made things so lax for the state—and so difficult for the defense—that the prelim has been rendered largely ineffective.

3. Norms and Procedures on the Ground

I now turn to Boudin and Fish's third hypothesis: Even when there is some favorable written law on the books, the "norms and procedures on the ground" have stripped the prelim of any remaining value.[107] My study also confirms this, their third claim. There would be no way to know this from reading Wisconsin's prelim statute and the relevant case law—in fact, anyone who does so would conclude that the following norms and procedures are illegal. And they are. However, the law only matters if it is enforced. And it isn't.

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[104] Michael D. Cicchini, *A Lawless Judiciary: The Gilded Age and Today*, 3 GA. CRIM. L. REV. 165, 178-79 (2025) (internal footnotes omitted) (quoting J. Gordon Hylton, *The Devil's Disciple and the Learned Profession: Ambrose Bierce and the Practice of Law in Gilded Age America*, 23 CONN. L. REV. 705, 738 (1991)).

[105] Personally, I have tried to call a witness at the prelim twice in my quarter century of criminal defense practice; I was prevented from doing so both times. I am only aware of one defense lawyer who was ever allowed to call a witness at the prelim, and that was more than 15 years ago.

[106] *See* State v. Melchor-Catalan, 23-CF-1462 (Wis. Cir. Ct., Kenosha Cty., Jan. 9, 2024) ("DE wishes to proceed with the Preliminary Hearing pro se. ST called [reader] witness KPD Officer Luke Hofmann; . . . DE wishes to call witness, State objects, Court denies request for witness to be called."). Coincidentally, I recently witnessed something similar while waiting in court for another case. The pro se defendant ahead of me wanted to call a witness in his case, but the commissioner, who seemed befuddled by the request, wouldn't let him. The defendant's family was audibly disgruntled; they no doubt left with a negative impression of the criminal justice system. Interestingly, although I witnessed that fiasco firsthand, there is no record of the commissioner shutting down the defendant's attempt to present evidence. *See* State v. Lee, 25-CF-1539 (Wis. Cir. Ct., Kenosha Cty., Nov. 5, 2025) (noting merely that the defendant proceeded without an attorney).

[107] Boudin & Fish, *supra* note 20, at 1145.

More specifically, the law on the books includes the following: (a) the state must call an actual witness at the prelim[108] and that witness must have "personal knowledge" of the matters about which he or she testifies;[109] (b) any hearsay used at the prelim must be deemed "reliable" before the magistrate may rely on it for bind-over;[110] and (c) the "degree of probable cause required for a bind over is greater than that required to support a complaint."[111]

Despite these formal legal requirements, the courts actually permit prosecutors to substitute their own criminal complaint for the preliminary hearing, without calling any witness with personal knowledge of the case. And the courts refuse to conduct any reliability analysis with regard to the hearsay in the complaint. This violates, at least in substance if not also in form, all of the on-the-books legal requirements. I have labeled this "the preliminary-hearing swindle."[112]

This swindle takes one of two forms. In the original version, which was used in the cases in the dataset, the prosecutor utilizes a law enforcement officer who had no involvement whatsoever in the case, but who is assigned to sit in the courtroom for the day. This officer reads the complaint to him or herself and memorizes as much of it as possible. The prosecutor then calls that officer—known as the "reader-witness" or simply the "reader"—to the witness stand to answer the prosecutor's questions about what the prosecutor's office wrote in the complaint.[113] Here is a short example of such "testimony" from a real-life prelim that will be discussed in greater detail later:

> Q *Does that Complaint indicate* that on August 5, 2024, the defendant was an inmate here in the Kenosha County Jail located at 1000 55th Street here in the City and County of Kenosha, State of Wisconsin?
>
> A It does. . . .
>
> Q And *according to the Complaint*, what happened between the defendant and [the victim]?[114]

This is a sham, of course, as the lawyers are both capable of reading and, in fact, have a copy of the complaint sitting in front of them. The magistrate is also literate and, in fact, has already read the complaint—a prerequisite to even reaching the prelim.[115] In this version of the swindle, meaningful cross-examination does not exist as the reader-

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[108] WIS. STAT. § 970.03 (5) (Requiring, at the prelim, that "[a]ll witnesses shall be sworn and their testimony reported by a phonographic reporter.").
[109] Id. at § 906.02 (2) ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.").
[110] State v. O'Brien, 850 N.W.2d 8, 22 (Wis. 2014) ("It remains the duty of the trial court to consider the apparent reliability of the State's evidence at the preliminary examination . . .").
[111] Id.
[112] *See* Michael D. Cicchini, *The Preliminary-Hearing Swindle: A Crime Against Procedure*, 58 LOY. L.A. L. REV. 117 (2025).
[113] Id. at 134-37.
[114] T'script of Prelim. H'ring at 5-6, State v. Borg, 24-CF-1204 (Wis. Cir. Ct., Kenosha Cty., Nov. 7, 2024) (emphasis added). For more from this transcript, see *infra* Part V.
[115] *See* Cicchini, *supra* note 112, at 140-42.

witness has no personal knowledge of the case and essentially is only able to answer a single question: "What did the prosecutor write in the complaint about [insert topic]?"[116]

In version 2.0 of this swindle, the prosecutor simply dispenses with the pretext of a witness and does not even question a reader-witness about what the prosecutor wrote in the complaint; instead, the prosecutor simply moves the document into "evidence," at which time the state rests.[117] Just as in the first version of the swindle, the complaint substitutes for the prelim. But in a perverse sort of way, version 2.0 is more intellectually honest: the prosecutor does not pretend to be eliciting testimony from a witness, and the magistrate does not pretend to hold an evidentiary hearing that is supposed to "parallel a trial."[118] The prosecutor and court are still acting in concert to cheat the defendant out of the prelim, certainly, but at least they're not pretending otherwise.[119]

In sum, Boudin and Fish's third hypothesis is confirmed. The "norms and procedures on the ground"—things which could never be detected by studying the statutes and case law that supposedly govern the prelim—have completely stripped the hearing of all remaining value. These unwritten norms and procedures have reduced the prelim to a mere review of the complaint; however, a magistrate has already reviewed the complaint or the case wouldn't have even reached the prelim stage,[120] and the law-on-the-books holds that a prelim requires more than a review of the criminal complaint.[121] The prelim is, therefore, a form-over-substance swindle.[122]

C. *The Bind-Over Numbers: Literal Death Before Dismissal*

As demonstrated above, the lax evidentiary standards and the norms and procedures on the ground confirm the second and third of the Boudin and Fish

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[116] For the full, real-life example of this bizarre form of theater, i.e., lawyers questioning the witness about what the prosecutor wrote in the complaint when the lawyers and the magistrate have already read the complaint and even have a copy of it in front of them, see *infra* Part V.

[117] Cicchini, *supra* note 112, at 137-38.

[118] Cassell & Goodwin, *supra* note 49, at 1382 ("[T]he preliminary hearing in felony cases is an adversarial proceeding. Generally, the hearing parallels a trial: the state must satisfy its burden to prove the elements of the crime charged . . . by presenting evidence and calling witnesses.").

[119] However, from the prosecutor's perspective, both versions of the swindle are bold, lawless moves, given their ethical obligation to ensure "procedural justice" for the defendant. MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2017) ("A prosecutor has the responsibility of a *minister of justice* and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant *is accorded procedural justice* . . .") (emphasis added).

[120] Cicchini, *supra* note 112, at 140-42 (discussing how various laws require the magistrate to review the complaint for probable cause long *before* the preliminary hearing is held, regardless of whether the defendant is brought to court pursuant to a summons, a warrant, or an arrest without a warrant).

[121] State v. O'Brien, 850 N.W.2d 8, 22 (Wis. 2014) (The "degree of probable cause required for a bind over is greater than that required to support a complaint.").

[122] After this Article was written, but before it was published, the preliminary hearing swindle in Wisconsin finally reached the appellate courts about 15 years after the legislature first allowed hearsay at the prelim. *State v. Robinson*, No. 2025AP983-CR (Wis. Ct. App. 2026). In that case, yet another version of the swindle emerged—call it version 3.0. In this equally ridiculous sham, the prosecutor takes a middle ground: instead of having the reader memorize the complaint and answer the prosecutor's questions about it (version 1.0) or simply moving the complaint into evidence (version 2.0), the prosecutor instead has the reader-witness *literally* read the complaint into evidence. *Id.* at ⁋ 2 (The reader's "testimony consisted of reading, verbatim, the entire probable cause section of the criminal complaint.") As expected by the defense bar, the appellate court blessed the practice. *Id.* at ⁋ 5.

hypotheses: even when the prelim is held, these things eviscerate its effectiveness, stripping it of all value. And the bind-over numbers in the dataset will provide another level of confirmation. With regard to the 353 prelims that were actually held in cases filed in 2023, bind-over was virtually automatic:

	No.	Pct.
Bind-Over	351	99.43%
Dismissed	2	0.57%
Total Prelims	**353**	**100%**

Out of the 353 prelims that were held and completed,[123] only two resulted in the denial of bind-over, i.e., the case (or at least the felony count) was dismissed.[124] In other words, the prelim screened out only about one-half of one percent of cases (0.0057, or 0.57 percent) in which the hearing was held. Conversely, in 99.43 percent of cases in which the hearing was held, the magistrate rubber-stamped the case and it moved down the highly efficient assembly line to the next stage of the process based *solely* on the prosecutor's filing of a criminal complaint.

These statistics add numeric support for the earlier conclusion that the prelim—thanks to the law on the books and unwritten practices on the ground—is ineffective in weeding-out bogus cases or providing a meaningful, adversarial challenge to the state's allegations. In fact, four times as many defendants *died before* their prelim (8 cases) than *prevailed at* their prelim (2 cases),[125] which paints a truly dismal picture. "Death before dismissal" could well be this venue's official and literal mantra.

But as depressing as that is, it actually paints too rosy of a picture. The 0.0057 (or 0.57 percent) victory rate for the defense, while shockingly low, actually overstates the prelim's value. Because the hearing is based entirely on the criminal complaint—whether memorized and recited back by a reader-witness as in these hearings, or simply moved into evidence without the pretense of a witness[126]—the two dismissals out of the

[123] In three of the 1,716 prelim-eligible, calendar year 2023 cases, the prelims were started and the prosecutor, realizing some error in the state's charging, voluntarily moved to dismiss. Because the prelim was not completed, and the magistrate never had to make a bind-over decision, these three cases were not included in the 353 cases where prelims were held to completion.

[124] *See* State v. Reed, 23-CF-302 (Wis. Cir. Ct., Kenosha Cty., Mar. 3, 2023) ("ST called witness PPPD Brandon Matz; sworn in and testified; cross-examination by Atty Foster. ST rested and moved for bind over; arguments heard. Court does not find probable cause . . . Court dismisses complaint without prejudice."); State v. Lott, 23-CF-1815 (Wis. Cir. Ct., Kenosha Cty., Apr. 12, 2024) ("ST called witness KPD detective Jason Melichar; sworn in and testified; cross-examination by Atty Shamali. ST rested and moved for bind over; arguments heard. DE motions to dismiss Ct 1. State objects. Court dismisses Ct 1.").

[125] *See supra* note 78 and accompanying text, listing the *eight cases* that were dismissed due to the defendant's untimely demise before the prelim. However, two of those cases involved the same defendant. To be precise, then, eight times as many cases were dismissed due to the death of the defendant than were dismissed due to the prelim's screening function. Yet, the fact remains that seven different individual defendants died before their prelims and only two defendants were able to prevail at their prelims.

[126] *See supra* Part II.B.3.

353 prelims could have also been obtained by moving to dismiss the complaint *before* the prelim.

More specifically, motions to dismiss the criminal complaint for lack of probable cause have to be filed in writing at least five days before the prelim.[127] In the two defense victories (out of the 353 prelims that were held), the defense lawyers probably didn't have enough time to file such a motion, given their dates of appointment.[128] In those two cases, the prelim was essentially an alternative way to challenge the sufficiency of the complaint instead of seeking an adjournment to file a written motion.[129]

This proves that the prelim has failed even in those two rare, apparent defense "victories." Challenging the sufficiency of the complaint, which is what those two prelims likely were successfully used for, is not the purpose of the hearing. Rather, the prelim is an adversarial hearing at which the state must call, and the defense may challenge, actual witnesses who have personal knowledge of the alleged crime.[130] The hearing's purpose is to go beyond the prosecutor's complaint,[131] and to prevent "improvident prosecutions" by determining whether "there are substantial grounds upon which a prosecution may be based."[132]

None of that is accomplished with a second review of the complaint for probable cause, even when that second review ultimately shows, as it did in the two defense "victories" out of the 353 hearings in the dataset, that a magistrate erred when conducting the earlier, legally-required review of the complaint for probable cause.[133]

III. LEGAL REFORM: THE SUBSTANCE-OVER-FORM DOCTRINE

What can be done about this disastrous state of affairs? Legislative reform is the obvious way to restore value to the prelim and, in turn, to our adversary system of justice.

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[127] WIS. STAT. § 971.31 (5) (c) ("In felony actions, objections based on the insufficiency of the complaint shall be made *prior to the preliminary examination* . . . or be deemed waived.") (emphasis added); *Id.* at § 801.15 (4) ("A written motion . . . shall be served not later than 5 days before the time specified for the hearing").

[128] For example, in State v. Reed, 23-CF-302 (Wis. Cir. Ct., Kenosha Cty.), one of the two cases in which the bind-over was not granted, the defense attorney was first appointed to the case five days before the prelim, which didn't leave enough time to do the necessary legal work and still comply with the five-day notice rule, thus leaving the prelim as an alternative means to effectively challenge the complaint. In the other case that the defense won, the record is unclear, and in fact is internally inconsistent, as to when the lawyer was appointed.

[129] In fact, given that the complaint is used as a substitute for the prelim, we know that challenging the sufficiency of the complaint is all the defense lawyer *can possibly do* at the prelim—especially given that the courts have stripped the defense of the statutory right to call its own witnesses. *See generally* State v. O'Brien, 850 N.W.2d 8 (Wis. 2014) (upholding the magistrate's denial of the defendant's right to call the complaining witness to the stand). For a specific example in the dataset, see State v. Melchor-Catalan, 23-CF-1462 (Wis. Cir. Ct., Kenosha Cty., Jan. 9, 2024) ("DE wishes to call witness, State objects, Court denies request for witness to be called.").

[130] Cassell & Goodwin, *supra* note 49, at 1382-83.

[131] That the prelim must go beyond the complaint is both commonsense and specifically stated in the case law, as the "degree of probable cause required for a bind over is greater than that required to support a complaint." *O'Brien*, 850 N.W.2d at 22.

[132] State v. Williams, 544 N.W.2d 400, 404 (Wis. 1996) (quoting State v. Richer, 496 N.W.2d 66, 68–69 (Wis. 1993)).

[133] Cicchini, *supra* note 112, at 110-42 (discussing how the law requires the magistrate to review the complaint for probable cause *before* the prelim is held).

Unfortunately, there is probably very little appetite for such reform. Politicians are far more interested in change—even if counterproductive or harmful—when they can tie it to a high-profile individual or group, thus making it a political movement,[134] which in turn can aid in their reelection.

Another problem is that in several instances, including some discussed in this Article, the statutes are already clear; the judiciary just chooses to feign confusion and then effectively rewrite them through their decisions.[135] In this situation, there is little else a legislature can do—assuming that legislators even pay attention to how the judiciary abuses their clearly-worded statutes.

Nonetheless, sound legislative reform could be achieved by simply adopting California's prelim statute.[136] Meaningful reform could also consist of a rewrite of a state's own existing statute. For example, returning to Wisconsin's prelim statute which has subsequently been decimated by case law, legislative rewrites could even more clearly articulate: (a) the defense's right of cross-examination; (b) the defense's right to call witnesses before the magistrate makes a finding of probable cause; (c) the requirement that the court dismiss all counts for which there is no probable cause; and (d) the requirement that hearsay be deemed reliable before it may be used to bind the defendant over for trial.[137]

This, however, would require the action of a unified legislature, something that is no doubt difficult to achieve in most instances, and particularly when trying to give the accused some form of procedural justice which would, in turn, create more work (at least in the short term) for prosecutors and judges.

On the other hand, judicial reform could be implemented far more easily, at any level of the court system, and even on a judge-by-judge basis without a unified judiciary.[138] Unlike the prospect of legislative reform, judicial reform is not an all-or-nothing affair. On one hand, it certainly could include a unanimous, published, and binding appellate court decision; but on the other hand, it could also consist merely of an

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[134] *See* Rachael A. Powers & Jacquelyn Burckley, *Justice for None: How Marsy's Law Undermines the Criminal Legal System*, NAT. ASSOC. OF CRIM. DEF. LAW. (2024) (discussing how so-called victims' rights laws conflict with and override defendants' rights, including constitutional rights such due process), https://www.nacdl.org/getattachment/435ad820-94e0-417d-91b2-17dc7373e9c5/justice-for-none-how-marsys-law-undermines-the-criminal-legal-system.pdf (last accessed Nov. 10, 2025). By comparison, it is difficult to obtain any level even of compliance, let alone reform, when it comes to basic constitutional rights for the very large but politically unpopular group known as criminal defendants. *See, e.g.,* Mary Sue Backus, *The Adversary System is Dead: Long Live the Adversary System: The Trial Judge as the Great Equalizer in Criminal Trials*, 2008 MICH. ST. L. REV. 945, 948 (2008) ("[T]here is near universal agreement that on the whole states have failed to honor the constitutional mandate of *Gideon* to provide poor criminal defendants with adequate defense counsel.").

[135] *See supra* Part II.B.2.

[136] *See* Boudin & Fish, *supra* note 20, at 1172 ("California regularly provides robust pretrial adjudication in its felony cases through preliminary hearings. Its approach to preliminary hearings thus provides a useful case study.").

[137] *See* Cicchini, *supra* note 103, at 511-519 (rewriting the prelim statute and related statutes for the legislature).

[138] This call for judicial reform, including for reform on an individual, judge-by-judge basis, is common. *See, e.g.*, Backus, *supra* note 134, at 951 ("This Article argues that trial court judges must step into the breach and restore the integrity and fairness of the adversary system and, ultimately, the legitimacy of criminal convictions.").

individual trial court judge or court commissioner who wants to rebel by actually following the law.[139]

More specifically, piecemeal reform, if not full blown appellate-level reform, could be accomplished by focusing on *substance over form* in the context of the preliminary hearing. As the following sections explain, there is no need to reinvent the wheel, as the substance-over-form doctrine already exists.

A. *A Formal Doctrine from Tax and Accounting*

The substance-over-form doctrine is often invoked in law and discussed in the literature.[140] It is perhaps most commonly used by the government to prevent taxpayers from artificially minimizing their tax bills.[141] That is, taxpayers often structure business events to comply with the strict letter of the tax code, but the IRS may then contend that "the transaction should not generate the tax benefits attendant to its *form* because that form does not reflect its *substance* or because the transaction *has no substance*."[142]

In perhaps the most famous case analyzing substance over form—and certainly the case that is widely credited for creating the doctrine—an individual taxpayer was the sole owner of Corporation A, which in turn owned valuable property.[143] The individual wanted that property for herself, but if Corporation A were to distribute it to her, she would incur a large tax liability.[144] Consequently, the individual structured a "tax-free reorganization": she created Corporation B, which first took the property from Corporation A and *then* transferred it to her, thus greatly reducing her tax bill.[145] She then promptly liquidated Corporation B after it served its purpose.[146]

It is true that the above transaction "was in literal compliance with the rules regarding reorganizations."[147] However, literal compliance was not enough to satisfy the underlying policy and purpose of the tax law. "In other words, though the form of the

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[139] For an example of piecemeal legal reform in which at least 24 individual trial court judges used their discretion to modify a clearly defective jury instruction on the burden of proof despite the state supreme court's refusal to do so, see CICCHINI LAW OFFICE, LLC: JI 140, https://cicchinilaw.com/ji-140 (last accessed Nov. 10, 2025).

[140] For an example somewhat analogous to criminal law, see Mark Nixdorf, Note, *Substance over Form: Corporate Liability under the Alien Tort Statute*, 78 BROOK. L. REV. 1553, 1555 (2013) (arguing that, instead of focusing "on the [business] form of the perpetrator," courts should focus on "the substance of the abuse" when determining corporate civil liability).

[141] *See* Richard Schmalbeck & Jay A. Soled, *Substance over Form in Transfer Tax Adjudication*, 55 LOY. L.A. L. REV. 609, 611-12 (2022) (The principle "is an effective tool in controlling taxpayers' efforts to skirt their income tax obligations.").

[142] Peter C. Canellos, *A Tax Practitioner's Perspective on Substance, Form and Business Purpose in Structuring Business Transactions and in Tax Shelters*, 54 SMU L. REV. 47, 49 (2001) (emphasis added).

[143] *See* Schmalbeck & Soled, *supra* note 141, at 613-15 (discussing *Helvering v. Gregory*, 69 F.2d 809 (2d Cir. 1934), *aff'd* 293 U.S. 465 (1935)).

[144] Id. at 614 (Distribution "would constitute a taxable dividend of the full fair market value of [the property], taxable at ordinary income tax rates.").

[145] Id. (Thanks to the reorganization, the distribution to the taxpayer would be taxable "only on the gain and at [the lower] capital gains rates.").

[146] Id.

[147] Id.

transaction was a tax-free reorganization, the substance was not—and the latter [its substance] controlled the tax consequences associated with the transaction."[148]

To put it another way, a transaction "that complies with the text of the statute but contradicts the intent of the law it purports to follow" will be disregarded.[149] One way of characterizing these transactions-in-form-only is to call them "artificial maneuvers."[150] Less kind characterizations include a "sham," a "fiction," or a "scheme."[151] The word "devious" has also been invoked.[152]

Such schemes can also be found in disciplines closely related to tax, such as accounting; the Enron accounting scandal of the early 2000s comes to mind. In that case, some of Enron's executives wanted to inflate earnings on the company's income statement and avoid recognizing debt on its balance sheet; this, in turn, led to oversized bonuses for the executives.[153] Their plan was to comply with the strict letter of the accounting rules (form) while completely bypassing the rules' underlying policy, purpose, and intent (substance). This insightful analogy involving dogs and ducks is informative.

> Here's how another former [Enron] employee describes the process: "Say you have a dog, but you need to create a duck on the financial statements. Fortunately, there are specific accounting rules for what constitutes a duck: yellow feet, white covering, orange beak. So you take the dog and paint its feet yellow and its fur white and you paste an orange plastic beak on its nose, and then you say to your accountants, 'This is a duck! Don't you agree that it's a duck?' And the accountants say, 'Yes, according to the rules, this is a duck.' Everybody knows that it's a dog, not a duck, but that doesn't matter, because you've met the rules for calling it a duck."
>
> And there was the ultimate problem. With Enron's financial team working feverishly to exploit the rules, *there was no one willing to say that the duck was still a dog*. . . .[154]

This is where the substance-over-form doctrine would intervene to say, metaphorically, that the duck was still a dog. Because "strictly rule-based" systems like the tax code and accounting rules are susceptible to exploitation, the judiciary must assume "a gap-filling function" to ensure fidelity to the law's substance.[155] Application of the substance-over-form doctrine is a "judicial remedy" used to set aside artificial maneuvers and sham transactions.[156]

But what does any of this have to do with criminal procedure? The desire to gain an advantage by complying with the law, in form, while skirting its substance, is not

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[148] Id. at 615.
[149] Id. at 616 (quoting Orly Sulami, *Tax Abuse—Lessons from Abroad*, 65 SMU L. REV. 551, 558 (2012)).
[150] Joseph Isenbergh, *Musings on Form and Substance in Taxation*, 49 U. CHI. L. REV. 859, 863 (1982).
[151] Higgins v. Smith, 308 U.S. 473, 477-78 (1940).
[152] Gregory v. Helvering, 293 U.S. 465, 470 (1935).
[153] *See* BETHANY MCLEAN & PETER ELKIND, THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON (Penguin Books 2004).
[154] Id. at 142-43 (emphasis added).
[155] Summer Desloge, *Clarity or Confusion?: The Common Law Economic Substance Doctrine and Its Statutory Counterpart*, 46 J. LEGIS. 326, 327 (2020).
[156] Id. at 329.

limited to taxpayers trying to cut their tax bill or devious corporate executives looking to beef up their financial statements. It is also inherent in criminal law—but so too is the substance-over-form doctrine.

B. *Hiding in Plain Sight: Informal Doctrines in Criminal Law*

Substance-over-form analyses are scattered throughout criminal cases, and the courts have applied the doctrine when a party's actions or arguments, while technically correct, don't comport with the purpose and policy of the law. The only difference is that, in criminal law, unlike in tax and accounting, the courts usually don't announce that they are applying a formal, revered doctrine called "substance over form"; instead, they simply apply it without much fanfare, and sometimes without even acknowledging it as an official doctrine.

For example, in the Hawaii case of *State v. Naititi*, one of the issues on appeal was whether the state even had the right to appeal in the first place.[157] The defense was technically correct in arguing that "the prosecution may only appeal from a pretrial order *granting* a motion for the *suppression* of evidence."[158] And in this case, the prosecutor was trying to appeal from an adverse ruling on the state's own motion, which had been denied rather than granted, and which sought the admission, rather than the suppression, of evidence.[159] In other words, there was never a "pretrial order granting a motion" of any kind, let alone a motion "for the suppression of evidence."[160]

The statute was clear, and the court even acknowledged the canon of construction that "statutes granting the State the right to appeal in criminal cases must be strictly construed" and may not be "enlarged by construction and cannot be extended beyond their plain terms."[161] Nonetheless, the court examined "the substance, not the form, of the matter," and determined that the prosecutor had the right to appeal.[162] The court held that whether the trial judge's ruling had granted or denied a motion, and whether that motion sought suppression or admission of evidence, were matters of mere form; substantively, the state should be allowed to appeal the adverse ruling.[163]

The substance-over-form doctrine not only overrides clear statutory language; it has also been used to trump the clear language of the Constitution. In the Wisconsin case of *State v. Moeser*, for example, the defendant sought to suppress evidence because the affidavit used to obtain the search warrant was not supported by oath or affirmation.[164]

> The oath or affirmation requirement is not simply a matter of good practice. It is a *constitutional imperative* and an essential check on

[157] State v. Naititi, 87 P.3d 893 (Haw. 2004).
[158] Id. at 902 (emphasis added) (internal quote marks omitted) (citing HRS § 641-13 (7)).
[159] Id.
[160] Id. (emphasis added).
[161] Id. (internal quote marks omitted) (citing State v. Kirn, 767 P.2d 1238, 1240 (Haw. 1989)).
[162] Id. (citing State v. Poohina, 40 P.3d 907, 911 (Haw. 2002). The court stated that it was not using substance over form to trump strict construction; rather, it claimed that determining the substance of what was written was an essential part of the strictly construing a statute. *Id.* Either way, the point is the same for purposes of this Article.
[163] Id.
[164] State v. Moeser, 982 N.W.2d 45 (Wis. 2022).

> governmental power. . . . Yet in this case, it is undisputed that the first sentence of Sergeant Brown's affidavit was not true. It says Sergeant Brown was "first duly sworn on oath." He wasn't.[165]

Despite this, the court used a substance-over-form analysis to deny the defendant's motion to suppress evidence. "[C]ase law consistently elevates substance over form when it comes to the administration of an oath or affirmation, and courts across the country have declined to impose rigid rules, 'magic words' requirements, or formal procedures."[166] In support of its substance-over-form approach, the court cited cases from California, Iowa, Nebraska, Ohio, Washington, and Utah, among other states, along with federal cases from the First, Fifth, and Ninth Circuits.[167]

Given the nationwide focus on substance rather than form, the court then looked to the substance of what transpired in the case before it. While no formal procedures were followed and no oath of any kind was administered, the oath requirement was still satisfied in substance: "the facts and circumstances demonstrate that Sergeant Brown executed this affidavit in a form calculated to awaken Sergeant Brown's conscience and impress his mind with his duty to tell the truth."[168]

In an even more extreme example of using substance over form to benefit the state, consider *State v. Burns*, in which the defendant appealed on the grounds that he was "sentenced . . . without ever having pled to the offense."[169] Despite this undisputed fact, the court upheld the conviction, holding that "the defendant's position in this case is one of form rather than of substance."[170]

That is, even though the defendant never had a trial and *never pled guilty or no contest*, the substance of what had transpired, including his earlier completion of a plea form, indicated that "he *intended* to enter a plea of no contest when he came to court."[171] Once again, a Wisconsin court went to great lengths to elevate what it believed to be the substance of what transpired over literal form. And the court is not alone; numerous courts, including the high courts of Tennessee[172] and Oregon,[173] find it unnecessary for the defendant to actually plead to be convicted.

The use of substance over form in criminal cases is not limited to situations in which the doctrine benefits the state. In the case of *State v. Locke*, for example, the prosecutor induced the defendant to plead guilty in exchange for the state's promise not to make any specific sentence recommendation to the judge.[174] But after the defendant

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[165] Id. at 59 (Bradley, J., dissenting).
[166] Id. at 51.
[167] Id. at 53-54.
[168] Id. at 46.
[169] State v. Burns, 594 N.W.2d 799, 806 (Wis. 1999).
[170] Id. at 804.
[171] Id. (emphasis added).
[172] *See* Lane v. State, 316 S.W.3d 555, 568 (Tenn. 2010) (defendant's argument that his conviction is invalid because he never entered a plea "values form over substance").
[173] *See* State v. Gray, 549 P.2d 1112, 1113 (Or. 1976) (to require that the defendant actually plead in order to be convicted "would be a victory of form over substance").
[174] State v. Locke, 2013 WI App. 105. The prosecutor's sentence recommendation was constrained by the PSI writer's recommendation, and the PSI writer did not give a recommendation. However, this does not matter for our purposes, as both the sentencing judge and the prosecutor agreed that the prosecutor was to make no recommendation under the plea deal. *Id*. at ¶ 3.

fulfilled his end of the bargain by pleading guilty, the prosecutor asked for the maximum sentence, apparently violating the plea agreement.[175]

The defense objected, but the sentencing judge found no fault with the prosecutor's remarks; the defendant then appealed.[176] On appeal, the state argued that the prosecutor did not breach the plea deal, as he had been clear with the sentencing judge that his request for the maximum sentence was not a recommendation. Before asking for that specific sentence, he told the judge that this "is a *non-recommendation* as far as what I can say to lock Mr. Locke—lock Mr. Locke—up for 50 years."[177] But the appellate court analyzed the statement's substance, not its form, and concluded: "Surely, labeling the recommendation a 'non-recommendation' does nothing to change the nature of the statement itself."[178]

Therefore, the appellate court reversed and remanded the case for a new sentencing hearing.[179] Although not explicitly labeled as such, the basis for the reversal was a substance-over-form analysis of the prosecutor's "non-recommendation" of a fifty-year sentence. The court looked to the statement's substance (it served as a recommendation to the court), not its form ("a non-recommendation" request), and the defendant prevailed on appeal because the state had failed to substantively comply with its obligations at the sentencing hearing.[180]

IV. SUBSTANCE, FORM, AND THE PRELIM

As demonstrated above, in criminal law the substance-over-form doctrine already protects the defendant from a prosecutor's use of made-up labels ("non-recommendation") designed to bypass the substance of a plea bargain. And the doctrine even goes so far as to protect the government from a defendant's invocation of clear statutory and constitutional language, if the use of such language would thwart the states' alleged substantive rights to appeal, to search the defendant's property, or to uphold the defendant's conviction even though he never pled to a crime.

Looking at it from a different dimension, i.e., the category of legal analysis, the substance-over-form doctrine already permeates statutory construction,[181] constitutional

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[175] Id.

[176] After the defense objected, the sentencing judge told the prosecutor that "it appears you cannot give a recommendation." The prosecutor nonsensically responded, "Right that's what I'm saying." This seemed to satisfy the judge who "proceeded to sentence Locke, and he now appeals." *Id*.

[177] Id. (emphasis added).

[178] Id. at ¶ 6.

[179] Id. at ¶ 9.

[180] In a case of "be careful what you wish for," or what you ask for on appeal, the defendant was eventually re-sentenced. It took two more tries for the state to do it legally, and his ultimate sentence was worse than his first sentence (though not as bad as his second sentence). *See* State v. Locke, 10-CF-162 (Wis. Cir. Ct. Oconto Cty.). Despite winning the metaphorical battle on the prosecutorial breach of the plea deal, the defendant was eventually punished for asserting his rights under the plea bargain and therefore lost the metaphorical war. But for our purposes, the lesson is that the *substance* of the prosecutor's statement was what mattered, not the *form* of the statement or the label attached to it.

[181] *See* State v. Naititi, 87 P.3d 893, 902 (Haw. 2004) (Criminal statutes "must be strictly construed. . . . In applying the rule of strict construction, this court examines the substance, not the form, of the matter . . .").

interpretation,[182] and simple case law analysis. So why shouldn't the doctrine also protect the defendant from the prosecutor's artificial maneuvers—which take the form of "norms and procedures on the ground"[183]—that are designed to bypass the substance of the preliminary hearing as set forth in the statutes and case law?

The substance-over-form doctrine is ideally suited to protect the defendant's right to a meaningful prelim and restore some substance to our adversary system—regardless of the jurisdiction.

To begin, in the most basic sense, the prelim takes the following form: (1) the prosecutor calls an actual witness who is sworn and testifies; (2) the defense then cross-examines the witness; and (3) the magistrate then decides whether the state established probable cause that the defendant committed a felony.[184] That is straightforward enough, and is applicable in nearly every state.[185] But as described earlier, here is how some prosecutors conduct the hearing to comply its requirements in form only:

> Before the preliminary hearing, the prosecutor will hand the criminal complaint to a police officer who is assigned to the courtroom for the day, and who *had nothing whatsoever to do with the investigation of the case that is the subject of the hearing*. This officer then reads the complaint to himself and memorizes as much of it as he can. The prosecutor then calls the officer to the witness stand and asks him questions about what he just read in the complaint. On cross-examination, this reader-witness freely admits that his entire knowledge of the case is based on what he just read. Then, based solely on this reader-witness's "testimony" about what the prosecutor wrote in the previously-filed complaint, the court binds the defendant over for trial.[186]

Recall the Enron executive who metaphorically painted the dog's feet yellow, painted his fur white, and slapped a plastic, orange beak on him. The executive then proudly proclaimed, "This is a duck! Don't you agree this is a duck?"[187] The accountants and auditors quickly agreed. "Everybody knows that it's a dog, not a duck, but that doesn't matter, because you've met the rules for calling it a duck."[188]

Similarly, in the above-described preliminary-hearing swindle, the prosecutor called a witness to testify, the defense got to cross-examine that witness, and the magistrate found probable cause. The prosecutor then proudly proclaimed: "That was a

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[182] *See* State v. Moeser, 982 N.W.2d 45, 46-51 (Wis. 2022) (The Constitution's oath or affirmation requirement can be fulfilled without either an oath or affirmation, provided a "substance over form" analysis of the "facts and circumstances" reveals that the person was aware of the "duty to tell the truth.").
[183] Boudin & Fish, *supra* note 20, at 1145.
[184] *See supra* Part II.A.
[185] For a very similar description of Illinois' preliminary hearing, see John C. Robison Jr., *The Determination of Probable Cause in Illinois—Grand Jury or Preliminary Hearing*, 7 LOYOLA U. L.J. 931, 938 (1976).
[186] Cicchini, *supra* note 103, at 493-94 (2020) (discussing the tactics used by prosecutors in Wisconsin). The other version of the swindle, described earlier, involves the prosecutor simply moving the complaint into evidence. For purposes of this Part, however, I discuss the version of the swindle that most closely resembles the prelim in form.
[187] McLean & Elkind, *supra* note 153, at 142-43.
[188] Id.

preliminary hearing! Don't you agree, magistrate, that was a preliminary hearing?" The magistrate, much like the Enron accountants and auditors, dutifully agreed and then bound the case over for trial.

Of course, just as everyone at Enron knew that the dog wasn't a duck, everybody involved with the criminal case knows the sham that was just perpetrated wasn't a preliminary hearing. But that doesn't matter, because the prosecutor arguably met the rules for calling it a prelim: there was a witness, cross-examination, and a finding of probable cause. Despite those features, however, the so-called prelim was merely a devious, artificial maneuver to bypass the substance of the hearing. And it was a rudimentary scheme; any licensed attorney involved in this process should be embarrassed.

Yes, the prosecutor called a *witness*, in the sense that there was a warm body in the witness chair. But a witness, in substance and as defined by statute, is a person with "personal knowledge" of the events about which he or she testifies.[189] And the entire purpose of calling witnesses at the hearing is to serve "as a check on the prosecutorial power of the executive branch."[190] But in this case, the so-called witness merely read, memorized, and recited what the prosecutor had written in the complaint. How is that a "check on the prosecutorial power" when the magistrate blindly accepts the prosecutor's word, as typed in the complaint and then memorized and recited by an uninvolved person who is also an agent of the state?

Yes, the defense got to *cross-examine* the witness, in form. Yet the only thing the defense could elicit was that the witness had no personal knowledge of the case whatsoever. In effect, the only thing the defense was able to ask was, "What did the prosecutor write in the complaint about [insert topic here]?" But the purpose of cross-examination is to meaningfully test probable cause[191] and even to discover things about the case[192]—including the accuser's motives[193] and whether there is a basis for future motions.[194] How is that possible when the warm body in the witness's chair is, by intent and design, completely ignorant of the case?

In this situation, the state's "witness" is the equivalent of Corporation B in the previously-discussed corporate reorganization example.[195] Corporation B was created

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[189] *See* FED. R. EVIDENCE 602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."); WIS. STAT. § 906.02 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.").

[190] State v. Schaefer, 746 N.W.2d 457, 467 (Wis. 2008).

[191] *See supra* Part II.A.; *see also* People v. Gutierrez, 153 Cal. Rptr. 3d 832, 839 (Cal. Ct. App. 2013) (discussing meaningful cross-examination and, therefore, the need for pretrial discovery before the preliminary hearing).

[192] *See supra* Part II.A.; *see also* State v. Essman, 403 P.2d 540, 542 (Ariz. 1965) (The hearing's "principal purpose in practice is to afford defense counsel an opportunity to learn the nature of the prosecutor's case.").

[193] *See* State v. Berby, 260 N.W.2d 798, 803 (Wis. 1978) (At the preliminary hearing, "evidence of motive is relevant . . . Motive is an evidentiary circumstance which may be given as much weight as the fact finder deems it entitled to.")

[194] *See* Hayes v. State, 175 N.W.2d 625, 628 (Wis. 1970) ("Hayes had a right on cross-examination [at the preliminary hearing] to find out the basis for the witnesses' in-court identification so he could . . . move before trial to have the evidence suppressed").

[195] *See supra* Part III.A.

and used solely to take the property from Corporation A and immediately transfer it to the taxpayer in order to avoid taxes.[196] Similarly, why do the prosecutor, magistrate, and defense lawyer need a "witness" to memorize and recite the complaint when the prosecutor, magistrate, and defense lawyer have already read it and even have a copy of it sitting in front of them? The state's reader-witness at the prelim, like Corporation B, has no purpose other than to evade the law.

Finally, yes, the magistrate found *probable cause*, but the finding was based entirely on the criminal complaint. However, before the case can even progress to the prelim stage, the magistrate must have previously found probable cause in the complaint.[197] How does repeating that exercise satisfy the substance of the law regarding prelims? And if probable cause in a complaint was sufficient for bind-over at a prelim, then why would we even need the prelim?

In fact, at the prelim "[t]he degree of probable cause required for a bindover is *greater than* that required to support a criminal complaint."[198] The difference is in "the very different kinds of evidence or information that a court uses in making the probable-cause determination in various contexts."[199] Whereas a complaint consists of multiple levels of uncorroborated hearsay, "[a] preliminary hearing . . . is a public adversarial hearing conducted in accordance with the rules of evidence"[200]—with the exception of the hearsay rule being relaxed to permit "reliable" hearsay.[201]

It should now be obvious that the preliminary-hearing swindle—in which the criminal complaint is dressed up as an adversarial hearing the same way the Enron dog was dressed up as a duck—fails the substance-over-form test. Judges need to step in, stop this devious sham, and declare that the act of calling an uninvolved government agent to read the prosecutor's own complaint (or simply moving that complaint into "evidence") does not satisfy the prelim's requirement of using witnesses with personal knowledge of the case in order to meaningfully test the state's allegations and check the prosecutor's power.

Tax law, accounting, and criminal procedure are all rule-based systems. "The principle of looking through form to substance" is not only "the cornerstone of sound taxation,"[202] but also of sound criminal procedure. In fact, in criminal law the "principle of looking through form to substance" already dominates constitutional interpretation, statutory construction, and case law analysis.[203] Individual judges just need to recognize that and then also apply the doctrine in the context of the prelim statutes and case law.

The substance-over-form principle is badly needed at the preliminary hearing. Unlike the taxpayer seeking merely to reduce tax payments to the government, the

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[196] *See* id.

[197] For example, when a complaint is based on an arrest without a warrant, no less than the United States Supreme Court has held that "the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." Gerstein v. Pugh, 420 U.S. 103, 114 (1975). Other situations, e.g., bringing the defendant to court via summons or arrest warrant, also require a pre-preliminary-hearing review of the complaint for probable cause. *See* Cicchini, *supra* note 112, at 140-42.

[198] State v. O'Brien, 850 N.W.2d 8, 22 (Wis. 2014) (emphasis added).

[199] Wiseman & Tobin, *supra* note 96, at §8.3.

[200] Id.; *see also* Part II.A.

[201] *See O'Brien*, 850 N.W.2d at 8.

[202] Est. of Weinert v. Comm'r, 294 F.2d 750, 755 (5th Cir. 1961).

[203] *See supra* Part III.B.

prosecutor is seeking to convict the defendant of a crime. Not only is individual liberty more significant than tax revenue, but the prosecutor, unlike the taxpayer, has an ethical obligation to ensure that the other party is afforded "procedural justice" and due process of law.[204] When prosecutors skirt that obligation and bypass the substance of the law, judges need to step in and tell them that their metaphorical duck is still a dog.[205] Doing so would restore substance to the prelim and, in turn, to our adversarial system of justice.

V. ON THE LIMITS OF LEGAL REFORM

Legislative reform has its limits. A judge can bypass a new statute just as he or she bypassed its predecessor statute. As we have seen with modern judges, and as the legal critic Ambrose Bierce wrote about judges more than a century ago, "[l]anguage can not be used with sufficient lucidity and positiveness to land them."[206]

Similarly, judicial reform through the substance-over-form doctrine would have its limits as well. Chief among them, it would be limited by the individual judge's desire to bypass the law's policy and purpose, i.e., its substance, to benefit the state.[207] As discussed earlier with regard to "the norms and procedures on the ground," a judicial action can be illegal, but that really only matters if the law is enforced. In some sense, it isn't a penalty if the ref doesn't call it.

Consider, for example, the following prelim held in 2024. The main issue here is *not* the sham structure of the hearing, i.e., that the reader-witness had no personal knowledge of the facts and was merely repeating what the prosecutor wrote in the complaint. Instead, focus on the gist of the reader's testimony.

This case charged a single count of "battery by prisoner," which requires allegations that satisfy, among other things, all three of the following elements: (a) "[t]he defendant was a prisoner"; (b) "[t]he defendant intentionally caused bodily harm" to another person; and (c) "the defendant caused bodily harm without the consent of" that person.[208]

With regard to first element, that the defendant must be a "prisoner," the prosecutor questioned the reader-witness as follows:

> Q Does that Complaint indicate that on August 5, 2024, the defendant was an inmate here in the Kenosha County Jail located at 1000 55th Street here in the City and County of Kenosha, State of Wisconsin?
>
> A It does.[209]

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[204] MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2017) (the prosecutor's responsibility "carries with it specific obligations to see that the defendant is accorded procedural justice").
[205] McLean & Elkind, *supra* note 153, at 142-43.
[206] Ambrose Bierce, *Some Features of The Law*, THE SHADOW OF THE DIAL AND OTHER ESSAYS (1909), https://www.gutenberg.org/files/25304/25304-h/25304-h.htm#link2H_4_0022 (last accessed Nov. 10, 2025).
[207] However, as discussed earlier, providing a judicial tool that is used only by *some* judges, even without appellate-level reform, is far better than the status quo.
[208] WIS. J.I. CRIM. 1228 (2012) (listing the elements of "battery by prisoner" in WIS. STAT. § 940.20 (1)).
[209] T'script of Prelim. H'ring at 5, State v. Borg, 24-CF-1204 (Wis. Cir. Ct., Kenosha Cty., Nov. 7, 2024).

That was the end of the inquiry on that point, and the prosecutor therefore failed to establish the first element. The prosecutor established that the defendant was an "inmate," but in order to commit "battery by prisoner," one must be a "prisoner," i.e., confined "pursuant to a penological or a correctional objective,"[210] rather than merely an inmate, e.g., one who is presumed innocent, awaiting trial, but unable to post bail.[211]

With regard to the second and third elements, that the defendant caused bodily harm without consent, the prosecutor elicited the following testimony from the reader-witness. (For simplicity, I will use the titles defendant and victim, rather than their names, throughout.)

> Q And according to the Complaint, what happened between the defendant and [the victim]?
>
> A Um, video showed that they're – they were in the jail or the dorm room and that [the victim] had grabbed a plastic chair and threw it at the defendant.
>
> Q What happened after that?
>
> A Um, the defendant walked away – or, yeah, the defendant walked away and [the victim] walked up on him and they began to fist fight between each other.
>
> Q Did the defendant strike [the victim]?
>
> A He did.[212]

The complaint, repeated by the reader-witness, indicates that the supposed victim actually started the fight by throwing a chair at the defendant, and then pursued the defendant after the defendant tried to get away. The strike that the reader-witness said the defendant landed would seem to have been thrown in self-defense. Further, there is no allegation that the strike caused bodily harm or that it was done without consent (elements b and c of the charged crime). And with regard to consent, it is commonsense that when a person (here, the supposed victim) throws a chair at another (here, the defendant), and then pursues them when they try to retreat, the chair-throwing person is consenting to the battle.

But then things got even better for the defense when defense counsel cross-examined the reader-witness about whether he was correctly remembering what the prosecutor wrote in the complaint:

> Q Okay, so it doesn't say that [the defendant] hit [the victim], does it?

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[210] In re C.D.M., 370 N.W.2d 287, 289 (Wis. Ct. App. 1985) (citing Meyer v. City of Oakland, 166 Cal. Rptr. 79, 84 (1980)).
[211] *See* WIS. STAT. § 969.01(4) (2021) ("If bail is imposed, it shall be only in the amount found necessary to assure the appearance of the defendant.").
[212] T'script of Prelim. H'ring at 6, State v. Borg, 24-CF-1204 (Wis. Cir. Ct., Kenosha Cty., Nov. 7, 2024).

A Just multiple, yeah, just that multiple punches were directed at each other.

Q Okay, but again, but if you would just specifically answer my question. There's no evidence that [the defendant] hit [the victim], is there?

A Based on from the Criminal Complaint, I could just see that it just says directed, so I can't say for sure if any had been hit.

Q Okay, let me ask it a different way. In what you reviewed, is there anything that you can testify to today that [the defendant] hit [the victim]?

A No, I can't.

Q So then, your testimony would be [the defendant] did not hit [the victim], correct?

A Correct.[213]

The defense lawyer just got the reader-witness to admit that the defendant did *not* actually make contact—an admission that eviscerates every type of battery allegation. To cap it off, defense counsel then asked questions tailored directly to the two elements of harm and consent:

Q Okay, and is there anything that you reviewed that you can testify that [the defendant] caused harm to [the victim]?

A No.

Q And is there anything that you reviewed that you can testify that [the victim] did not consent to this interaction between [the defendant] and [the victim]?

A No.[214]

There is no imaginable way this case could be bound-over after the state failed to establish *any* of the three elements of the charged crime. In fact, the state did not even allege any of the elements in its complaint, so the case shouldn't have even made it to the prelim stage. And at the prelim, the prosecutor couldn't bring himself to make an argument or even to ask for bind-over. He merely said: "Your Honor, I rest on the

[213] Id. at 8-9.
[214] Id. at 9.

testimony."[215] The defense lawyer then explained how the state failed to establish bodily harm and lack of consent, the two simplest elements of the charge:

> Mr. [David] Berman [Defense Counsel]: Commissioner, I move to dismiss. One of the elements of battery by a prisoner is that bodily harm was caused. There's been no testimony as to bodily harm. One of the elements of battery by a prisoner is that the harm was caused without consent of [the victim]. Even if the Court finds harm[,] from what testimony I don't know, there's no evidence of lack of consent. For that reason I believe the matter should be dismissed.[216]

The magistrate's decision sounded like a broken record to those of us in the trenches of criminal practice: "I do find the State has demonstrated probable cause that a felony was committed and probable cause that this defendant committed that felony."[217] Defense counsel then asked, "Commissioner, would you—would you, please, for me[,] at least provide some indication as to the testimony of [the witness] that you found as to probable cause of the lack of consent as well as the evidence that you found probable cause as to the harm?"[218] The magistrate's reply: "Well, Counsel, the testimony is what it is."[219]

It "is what it is," indeed. In a situation like this, it simply doesn't matter whether the prelim statute or the related case law creates lax evidentiary standards, or what unwritten norms and procedures on the ground are being employed, or whether the court has the substance-over-form doctrine at its disposal to rein in the prosecutor's artificial maneuvers. If the above case is, in essence, what defense lawyers are dealing with—as is routinely the case in Kenosha County, Wisconsin—then the quest for procedural justice is doomed. Lawless chaos reigns. And no level of legal reform will be able to save the prelim or our adversarial system of justice.

VI. FOR THE DEFENSE: CREATING A RECORD

When the defense decides to hold rather than waive the preliminary hearing,[220] what can defense counsel do to protect the defendant? Given the prosecutor's blatant disregard of the law and the magistrate's complicity in it, there is likely nothing the defense lawyer can do to ensure a substantively meaningful prelim. But that does not mean that defense counsel should tolerate prosecutorial and judicial lawlessness. For

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[215] Id. at 10.
[216] Id.
[217] Id. at 11.
[218] Id.
[219] Id.
[220] The question of who decides whether to have or waive the prelim, the defendant or the defense lawyer, is beyond the scope of this Article. *See* Michael D. Cicchini, *Defense Lawyer Decision-Making and the Preliminary Hearing*, 119 NW. U. L. REV. ONLINE 165 (2024). Regardless of who makes the decision, there can be good reasons for waiving the prelim, including to preserve a specific plea offer or at least to ensure a future plea offer and good faith plea negotiations. *See* Cicchini, *supra* note 82.

reasons as simple as professional pride and personal protection,[221] defense counsel should make the appropriate objections, ask the relevant questions, and make the proper legal arguments. In short, defense counsel should at least pretend as though law still matters in the practice of law.

How to do this is, of course, highly dependent on the facts of the case, the ostensible law of the jurisdiction, and the unofficial practices in the trenches. Drafting a checklist similar to the sample checklist below could aid defense counsel in consistently preparing for and conducting preliminary hearings.[222] The sample checklist is based on Wisconsin law and assumes that the prosecutor will employ a reader-witness to memorize and "testify" about what the prosecutor wrote in the complaint.

PRELIMINARY HEARING CHECKLIST

Defendant: _____
Case Number: _____

Preparation for the Prelim:

- ☐ Review the complaint's charges and supporting factual allegations. If legally warranted and strategically sound, file a motion to dismiss individual charges or the entire complaint for lack of probable cause. Sec. 971.31 (5) (c), Wis. Stats. ("In felony actions, objections based on the insufficiency of the complaint shall be made prior to the preliminary examination or waiver thereof or be deemed waived.").[223]
- ☐ Prepare cross-examination questions (for the prelim) substantively challenging each element of the charged crimes or showing the unreliability of the hearsay in the complaint, e.g., due to the declarant's delay in reporting, the declarant's motive, the declarant's lack of firsthand knowledge of what he or she reported, the internal inconsistency of the allegations in the complaint, and other reliability factors. *See State v. O'Brien*, 850 N.W.2d 8, 22 (Wis. 2014).
- ☐ Consider calling witnesses for the defense, which is theoretically still permitted. *See State v. Robinson*, No. 2025AP983-CR at ⁋⁋ 71-72 (Wis. Ct. App. 2026) (defendant may "call any witness who could rebut probable cause by shedding light on essential facts regarding the probability that a felony occurred and that the defendant committed the felony."); Sec. 970.03 (5), Wis. Stats. ("The defendant . . . may call witnesses on the defendant's own behalf").

Objections Before and During the Prelim:

- ☐ If a motion to dismiss was previously filed, obtain a ruling before the prelim commences.
- ☐ At the prelim, object to the reader-witness's testimony due to lack of personal knowledge. Sec. 906.02, Wis. Stats. ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.").[224]

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[221] Defense counsel will often be blamed by the appellate court for the judge's errors and the prosecutor's misconduct. *See* Michael D. Cicchini, *Constraining Strickland*, 7 TEX. A&M L. REV. 351 (2020).
[222] For ideas on how to challenge a commissioner's bind-over decision to the circuit court, post-prelim, see Cicchini, *supra* note 112, at 156-66 (providing a sample motion).
[223] Alternatively, because the prelim is now nothing more than a review of the complaint, it is certainly possible to use the hearing as a *de facto* motion to dismiss the complaint, as was done in the two defense "victories" in the dataset. *See supra* Parts II.B. & II.C. However, depending on the facts and number of felonies charged, it may be strategically wise to file a formal, written motion to dismiss the complaint or certain charges before the prelim.
[224] *Robinson* seems to ignore this statutory requirement when holding that a mere reading of the complaint, by a person with no personal knowledge of the case, can be sufficient for bind-over at the prelim.

- ☐ At the prelim, object to the prosecutor using the complaint to "refresh" the reader-witness's memory under sec. 906.12, Wis. Stats., as the reader-witness has no personal knowledge of the incident and therefore has no memory to refresh.

Cross-Examination and Examination of Witnesses:

- ☐ Establish that the reader-witness's knowledge is based solely on his or her reading of the prosecutor's criminal complaint, and not on witness interviews, police reports, or other sources.
- ☐ Question the reader-witness regarding the complaint's failure even to allege facts establishing some or all of the elements of the charged crimes.
- ☐ Question the reader-witness regarding facts that establish the *unreliability* of the hearsay that he or she just read from the complaint.
- ☐ If strategically sound, attempt to call defense witnesses to rebut probable cause.

Post-Hearing Arguments Opposing Bind-Over:

- ☐ If warranted, oppose bind-over based on the prosecutor's failure to establish:
  - ☐ Venue and/or jurisdiction;
  - ☐ Timeframe of the alleged crimes; and
  - ☐ Elements of the alleged crimes.
- ☐ Oppose bind-over for lack of identification of the defendant.
  - ☐ A "witness" uninvolved in the case told the court the defendant's name after looking at a booking photo of unidentified date and origin, but how does that establish that the defendant is the person who committed the crime? The state failed to establish "probable cause to believe a felony has been *committed by the defendant*." Sec. 970.03 (1), Wis. Stats. (emphasis added).
  - ☐ More specifically, "the inability of the State to produce sufficiently reliable information identifying the charged defendant as the alleged perpetrator whose conduct is described in a complaint would prevent bindover, no matter how strong the evidence might be that *someone* committed a felony." *Robinson*, No. 2025AP983-CR at ¶ 56 (emphasis original).
- ☐ Oppose bind-over for the state's exclusive reliance on unreliable hearsay:
  - ☐ "Wisconsin Stat. § 970.038 does *not* set forth a blanket rule that all hearsay be admitted." *O'Brien*, 850 N.W.2d at 13. "*Reliability* is the hallmark of admissible hearsay." *Id*. at 22 (emphasis added). Even if admitted, the magistrate "must still consider, on a case-by-case basis, the reliability of the State's hearsay evidence in . . . assessing whether the State has made a plausible showing of probable cause." *Id*. at 13. Factors bearing on reliability / unreliability may include the following:
    - ☐ The reader-witness had no personal knowledge of the case, e.g., did not examine "police reports," was not "present" during the interviews of the declarants, and did not "speak directly" to any of the complaining witnesses. *Id*. Unlike *O'Brien*, the reader-witness was not "assigned to investigate the case," and therefore was unable to answer questions about how or under what circumstances the hearsay or other evidence was collected. *Id*. at 14. "Hearsay statements vary greatly in their reliability. For example, the degrees of attenuation from declarant to witness will fluctuate in both number and particular circumstances." *Robinson*, No. 2025AP983-CR at ¶ 48.
    - ☐ Nothing adduced at the prelim indicated a "motivation of the speaker [of the hearsay] to tell the truth." *O'Brien*, 850 N.W.2d at 22.
    - ☐ Nothing adduced at the prelim indicated that the hearsay statement was made close in time to the event being described. *Id*.
    - ☐ Nothing adduced at the prelim indicated that the declarant had firsthand knowledge, as opposed to merely repeating something that he or she heard. *Robinson*, 2025AP983-CR

at ⁋ 44 (relying on "timely accounts by people with first-hand information, given with what could be appropriate motivations to provide accurate information to police.").

- ☐ The allegations adduced at the prelim included those that "make no sense" and "are flat-out contradictory," providing specific examples. *Id*. at ⁋ 31.

- ☐ The state's exclusive use of hearsay, with no indication of its reliability, is what *O'Brien* warned about: "the hearsay nature of evidence may, in an appropriate case, undermine the plausibility of the State's case." *O'Brien*, 850 N.W.2d at 22.

☐ Oppose bind-over because the prosecutor's use of a reader-witness at the prelim served no purpose other than to review the complaint for probable cause:

- ☐ First, the complaint had already been reviewed by a magistrate for probable cause, otherwise the case never would have reached the prelim stage. *See, e.g., Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) ("[T]he Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest."). Doing this a second time, in place of the prelim, serves no purpose.

- ☐ Second, "The degree of probable cause required for a bind over *is greater than that required to support a complaint.*" *O'Brien*, 850 N.W.2d at 22 (emphasis added). This mandate is not satisfied by having a reader-witness memorize the complaint and answer the prosecutor's questions about what the prosecutor wrote in it, as if the defense lawyer and magistrate were unable to read the document themselves.[225]

☐ Argue that the court must do one of the following:

- ☐ "If the court finds that it is probable that only a misdemeanor has been committed by the defendant, it shall amend the complaint to conform to the evidence. The action shall then proceed as though it had originated as a misdemeanor action." Sec. 971.03 (8), Wis. Stats.

- ☐ "In multiple count complaints, the court shall order dismissed any count for which it finds there is no probable cause. The facts arising out of any count ordered dismissed shall not be the basis for a count in any information . . ." *Id*. at (10).[226]

- ☐ "If the court does not find probable cause to believe that a crime has been committed by the defendant, it shall order the defendant discharged forthwith." *Id*. at (9).

CONCLUSION

Plea bargaining has killed the jury trial and, along with it, our adversarial system of justice.[227] The best way to breathe some life back into the system is to use the preliminary hearing to challenge the state's evidence before trial; the hearing is, after all, designed to prevent improvident prosecutions and serve as a check on prosecutorial power.[228] But several things arguably prevent it from fulfilling these objectives: prelims are too often waived and, when they are held, both the law on the books and the unwritten practices on the ground strip the hearing of its value.[229]

First, this Article tests the accuracy of these claims by examining the law, practices, and actual prelim data in Kenosha County, Wisconsin. The law on the books

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[225] *Robinson* seems to ignore this mandate when holding that a mere reading of the complaint may be sufficient for a finding of probable cause at the prelim.
[226] This rule may have been rewritten, to *some extent*, by case law and the transactional relation test. *See* State v. Williams, 544 N.W.2d 406 (1996).
[227] *See supra* Part I.
[228] *See supra* Part II.A.
[229] *See supra* Part II.B.

has made it incredibly easy for the prosecutor to win the prelim.[230] On top of that, the unwritten practices on the ground allow the prosecutor to substitute the state's criminal complaint for actual witnesses with personal knowledge; while arguably still resembling a prelim in form, this ploy has stripped the hearing of all substance.[231] And the numbers confirm this: in 1,716 felony cases, 353 prelims were held and the defense won only one-half of one percent of those hearings; in fact, four times as many defendants died before their prelim could be held (8 cases) than won their prelim (2 cases).[232]

Second, in order to resuscitate the prelim and, in turn, save our adversary system of justice, this Article advocates for the application of a substance-over-form doctrine. Although it is better known in tax law,[233] the doctrine already exists in criminal law: courts currently use it for purposes of statutory construction, case law analysis, and even constitutional interpretation.[234] Extending the doctrine to the prelim would prevent the state from using its criminal complaint as a substitute for an adversarial, evidentiary hearing.[235] Instead, substance over form would deliver what the statutes and case law require: that the state call witnesses with personal knowledge who are then subject to meaningful cross-examination by the defense.[236]

This proposed reform has the added benefit of easy implementation: while the substance-over-form doctrine could certainly be applied to the prelim via a binding appellate court decision, it could also be imposed on a case-by-case basis, one court commissioner or trial judge at a time.[237] But unless and until that happens, defense counsel is left to operate within the current, lawless system in which the prosecutor's hollow, artificial maneuvers trump substance. Therefore, this Article also offers a practical, model checklist for defense counsel to adapt in order to prepare for and conduct the prelim within the existing, defective framework.[238]

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[230] *See supra* Part II.B.2.
[231] *See supra* Part II.B.3.
[232] *See supra* Part II.C.
[233] *See supra* Part III.A.
[234] *See supra* Part III.B.
[235] *See supra* Part IV.
[236] *See supra* Part IV.
[237] *See supra* Part IV.
[238] *See supra* Part VI.