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Criminal Law: The Grand Jury in Wisconsin

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THE GRAND JURY IN WISCONSIN

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The grand jury as an institution of Anglo-Saxon law has received extensive critical treatment.[1] While perhaps lacking in empirical foundation,[2] arguments both in support of and in opposition to the continuance of the system abound. Despite the exhaustive debate with over 800 years of operational experience from which to draw conclusions,[3] the issue of grand jury viability as reflected nationally remains unresolved. In more than half of the states, no person may be charged with the commission of a felony except by indictment returned by a legally constituted grand jury.[4] In most other states, the prosecutor has discretion either to seek a grand jury indictment or to commence a felony prosecution directly by filing an information.[5] Thus, although never made applicable to the states by the Fourteenth Amendment,[6] and although prone to arguments in its support which stress what the system is supposed to be rather than what it has become, the state grand jury system persists. The purpose of this article is to review the general criticism of the grand jury, to discuss its application to the grand jury in Wisconsin and to examine, without the context of the fundamental criticism, the operation of the Wisconsin system.

CRITICISM IN GENERAL

In analyzing any argument of grand jury utility, perhaps a critical consideration that should be examined against every propo-

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1. For a comprehensive bibliography see 10 AMER. CRIM. L. REV. 867 (1971-72).

2. The only significant study is contained in Moley, *The Initiation of Criminal Prosecutions By Indictment or Information*, 29 MICH. L. REV. 403 (1931) and Morse, *A Survey of the Grand Jury System*, 10 ORE. L. REV. 101 (1931).

3. Antell, *The Modern Grand Jury: Benighted Supergovernment*, 51 A.B.A.J. 153 (1965).

4. Spain, *The Grand Jury, Past and Present: A Survey*, 2 AM. CRIM. L. Q. 119, 126-42 (1964).

5. *Id.*

6. Hurtado v. California, 110 U.S. 516 (1884).

sition offered is which of three possible perspectives the assertion most benefits: that of the district attorney-law enforcement agency, the prospective defendant(s), and/or the public-at-large. This distinction warrants close scrutiny, for a comparison of the arguments offered by proponents and opponents of the grand jury often reveals exact opposite allegations, each ostensibly supported by "fact." The absence of recent empirical data precludes absolute identification of the "correct" allegation. To identify the interest benefited by a particular viewpoint would, very often, provide some basis for preferring one side to another. In addition, an awareness of which of the traditional functions of the grand jury is being considered should aid in drawing conclusions about whether the entire system, a part of it, or none of it should be abandoned or amended. This identification, coupled with an observation expressed in a recent, unpublished study conducted by the National Conference of Metropolitan Courts that the decisive factor in preferring one method of prosecution to another was the respondent's familiarity with a particular system probably supplies the most accurate scale for weighing the respective arguments.[7]

Historically, the grand jury has had three basic functions: (1) investigating any public offenses that may have been committed within the community; (2) determining who is responsible for an offense and deciding whether there is probable cause to charge him with the commission of a crime; and (3) making its findings public in an appropriate tribunal by submitting an indictment, presentment, or report.[8] Some commentators have divided the grand jury's functions into two general categories, investigatory and accusatory.[9] The distinction is one of degree not easily recognized, the investigatory often ripening into the accusatory.

Supporters of the grand jury find it a suitable system for fulfilling these functions based upon the premise that "the institution of the grand jury is the bulwark of protection for the innocent and the sword of the community against wrongdoers."[10] As the United States Supreme Court in *Wood v. Georgia*[11] stated:

7. *Report on the Grand Jury Indictment Process*, National Conference of Metropolitan Courts 33 (1974) (unpublished).

8. Brice, *Grand Jury Proceedings: The Prosecutor, the Trial Judge, and Undue Influence*, 39 CHI. L. REV. 763 (1971-1972).

9. Orfield, *The Federal Grand Jury*, 22 F.R.D. 343, 394 (1958).

10. Wickersham, *The Grand Jury*, 38 NEW YORK STATE B.J. 427 (1966).

11. 370 U.S. 375 (1962).

> . . . [T]his body has been regarded as a primary security to the innocent against hasty, malicious, and oppresive prosecution; it serves the invaluable function in our society of standing between the accusor and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.[12]

This basic premise, however, appears to be constructed upon dubious historical incident and to be reinforced by equally questionable contemporary experience.

The historical precedent to which grand jury proponents inevitably refer when tracing its protective function occured in 1681.

> The true independence of the grand jury, made possible by the institution of secrecy, was realized in 1681 in the Trial of Stephen Colledge (1681), and the Earl of Shaftesbury's Trial (1681). Each of these men was accused by the Crown of high treason. At the insistence of the King's counsel, the grand juries were required to hear the witness in open court. After doing so, the jury in each case demanded and was granted the opportunity to examine the witnesses again in private and to deliberate in private. In each case the jury then refused to indict. These two cases are celebrated as establishing the grand jury as a bulwark against the oppression and despotism of the Crown.[13]

Had these cases actually established what they are purported to have established, they would indeed have marked a change in what the grand jury was originally created to accomplish and who it was to serve. However, a closer examination of the circumstances surrounding the trials of Stephen Colledge and the Earl of Shaftesbury and subsequent incidents of political prosecution reveals that, if a premise is to be established which is to be reflective of what actually has occured, it must necessarily be different than the one that its proponents offer.

The Assize of Claredon in 1166 first established the criminal grand jury, a body of twelve knights, or other freemen whose function was to accuse those who, according to public knowledge, had committed crimes. The purpose was to supply the central government the benefit of local knowledge in the apprehension of those who violated the king's peace.[14] As one commentary analo-

12. *Id.* at 390.

13. In The Matter of Russo, 53 F.R.D. 564, 569 (C.D. Cal. 1971).

14. Alexander & Portman, *Grand Jury Indictment Versus Prosecution by Informa-*

gized, "the creation of the grand jury was the parallel in the field of criminal justice to the *Domesday Book* . . . . [t]he grand jury brought the royal presence into the lucrative field of the criminal law, where fines and forfeitures would provide new additions to the royal treasury."[15] From this initial role the grand jury is said to have evolved into a protectorate of the accused.

In an article aptly entitled *Demythologizing The Historic Role of the Grand Jury*,[16] the functioning of the grand jury during periods of political stress was examined. The conclusion reached is that the history of the grand jury "evidences the vulnerability of that institution to pressure, abuse and manipulation by determined partisans."[17] In support of its conclusion, the article discusses, among others, the cases of Colledge and Shaftesbury. As it happened, a second grand jury was convened in another county populated with more pliable citizens. In August of the same year in which he had initially been "acquitted," Colledge was executed. Shaftesbury, to escape a similar fate, was forced into exile.[18] Had this been nothing more than an unfortunate relapse in an ultimately successful move toward independence from political manipulation, perhaps the popular premise could be historically sustained. However, a study of Anglo-American history belies the theory that in past periods of political stress, the grand jury's protective aspects were intensified. Rather, the pattern that emerges is that of the grand jury not only failing in protection but aiding in exploitation.[19]

In addition to historic vulnerability to political manipulation, three other areas of contention relating to the grand jury as a "bulwark of liberty" concern procedural aspects of the system: the requirement of secrecy; the absence of defense counsel; and the presence of the district attorney.

Concerning the existence of secrecy, the general reasons given for the policy are:

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tion—An Equal Protection—Due Process Issue, 25 HASTINGS L.J. 999 (1971).

15. Tigar & Levy, *The Grand Jury as a New Inquisition*, 50 MICH. STATE B.J. 695 (1971).

16. Schwartz, *Demythologizing The Historic Role of the Grand Jury*, 10 AM. CRIM. L. REV. 701 (1971-72).

17. *Id.* at 703.

18. *Id.* at 710.

19. Winograd & Fassler, *The Political Question*, 9 TRIAL 10 (1973); Donner & Cerruti, *The Grand Jury Network: How the Nixon Administration Has Secretly Perverted A Traditional Safeguard of Individual Rights*, 214 THE NATION 5 (1972); Tigar & Levy, *supra* note 15, Schwartz, *supra* note 16.

1. To prevent the escape of those whose indictment may be contemplated;

2. To insure the utmost freedom to the grand jury in its deliberation, and to prevent persons subject to indictments or their friends from importuning the grand jurors;

3. To prevent subornation of perjury or tampering with the witnesses who may have testified before the grand jury and later appear at the trial of those indicted by it;

4. To encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; and

5. To protect an innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there is no probability of guilt.[20]

As held by the Wisconsin Supreme Court, the secrecy of the grand jury proceeding is for the benefit of the jurors and the public rather than the one who is indicted.[21] For this reason, only the grand jurors and the reporters are required by statute to take an oath of secrecy.[22] Witnesses do not take an oath of secrecy and after their testimony is completed, may relate the substance of both the questions put to them and their responses. The minutes or transcript of the grand jury remains secret unless and until a judge orders that they, in whole or part, be made public.[23] The names of those individuals on the jury list are secret and the manner in which the grand juror votes is likewise secret.[24] Proponents of the grand jury find its secrecy especially invaluable in combating organized crime, when such secrecy is combined with the power to compel the appearance and testimoney of reluctant witnesses and to require the production of evidence. They argue that

> a compulsory process is necessary to obtain essential testimony or material. This is most readily accomplished by an alternative mechanism through which the attendance of witnesses and production of books and records can be ordered.[25]

20. United States v. Badger Paper Mills, Inc., 243 F. Supp. 443, 445-446 (E.D. Wis. 1965), citing United States v. Rose, 215 F.2d 617, 628-629 (1954).

21. State v. Krause, 260 Wis. 313, 322, 50 N.W.2d 439 (1952).

22. WIS. STAT. §§ 255.11, 255.13(2) (1973).

23. WIS. STAT. § 255.21 (1973).

24. WIS. STAT. §§ 255.10(1), 255.20 (1973).

25. Lumbard, *The Criminal Justice Revolution and The Grand Jury*, 39 NEW YORK STATE B.J. 401 (1967).

There is a real question whether those public policy reasons are in fact valid, and whether grand jury proceedings are in fact secret. The evidence would indicate that a grand jury proceeding is secret in name only. The public is informed when the grand jury is called, the location of the grand jury proceeding is generally revealed, and the witnesses can relate their experiences before the grand jury. What remains is the potential for abuse resulting from the attempt to keep the grand jury proceeding secret. The Sixth Circuit Court of Appeals has examined the dangers and abuses of this vale of secrecy.[26]

> It is a serious thing for any man to be indicted for an infamous crime. Whether innocent or guilty, he cannot escape the ignominy of the accusation, the dangers of perjury and the errors at his trial, the torture of suspense and the pain of imprisonment, and the burden of bail. The secrecy of any judicial proceeding is a tempting invitation to the malicious, the ambitious, and the reckless to try to use it to benefit themselves and their friends and to punish their enemies. If malicious, ambitious or overzealous men, either in or out of office, may with impunity persuade grand juries without legal evidence, either by hearsay testimony, undue influence, or worse means, to indict whom they will, and there is no way in which the court may annul such illegal accustations, the grand jury, instead of that protection of "the citizen against unfounded accusation, whether it comes from government or be prompted by partisan passion or private enmity:" which it was primarily designed to provide, may become an engine of oppression and a mockery of justice.[27]

Consideration of the validity of the secrecy arguments requires that the remaining two procedural aspects be included in any decision. The primary abuse attributable to the grand jury system is the extent to which the grand jury can be manipulated by the prosecutorial officer. For once inside the grand jury room, a witness, having no right to counsel,[28] to confront his accusers,[29] to cross examine other witnesses[30] or to produce explanatory or rebuttal evidence,[31] is at the mercy of the prosecutor. Justice Na-

26. Schmidt v. United States, 115 F.2d 394 (1940), quoting from McKinney v. United States, 199 F.2d 25 (1912).

27. *Id.* at 397.

28. Orfield, *supra* note 9, at 425.

29. *Id.*

30. *Id.*

31. *Id.*

than R. Sobel of the New York Supreme Court, while noting that the grand jury system had been abolished in twenty-eight states, contends that "whenever it has been abolished the primary reason assigned was that the grand jury had committed itself to become a rubber stamp of the prosecutor."[32] This dependence upon the prosecutor in performing both its investigatory and accusatory functions is a direct consequence of the manner in which the grand jury procures its information.

> In the past, the grand jury often combed the community to uncover reprehensible activity, decided the scope and direction of its investigations, and issued general statements and findings concerning political and social questions. But grand jurors today lack the intimate knowledge of community activity possessed by grand jurors of preurban society. They also lack the investigative tools now necessary to find evidence of crime. Allowing professional investigative agencies to gather relevant facts and present them to the grand jury through the prosecutor has increased efficiency in investigation and decision making. At the same time, however, it has made the modern grand jury a generally more passive instrument than its precursors. Grand juries now conduct their investigations almost exclusively within the confines of the grand jury room, rely almost entirely on the prosecutor to determine the subject matter and general direction of the investigation, and seldom issue documents unrelated to some specific criminal activity or malfeasance in office.[33]

In addition to this dependence upon the prosecutor in its investigatory role, its reliance is equally apparent in its consideration of probable cause in its accusatory role.

> Though free to take part in the interrogation, the grand jurors must place enormous trust in the prosecutor's guidance. It is he, after all, who tells them what the charge is, who selects the facts for them to hear, who shapes the tone and feel of the entire case. It is the prosecutor alone who has the technical training to understand the legal principles upon which the prosecution rests, where individual liberty begins and ends, the evidential value of available facts and the extent to which notice may be taken of proposed evidence.

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32. *The Grand Jury: Protector Against the State or Prosecutor's Rubber Stamp*, New York Times, (Sept. 26, 1966) p. 44. Note: When saying the grand jury had been abolished in half the States, Mr. Sobel quite obviously meant as the exclusive method of finding probable cause. *See* Spain, *supra* note 4.

33. Brice, *supra* note 8, at 764.

> In short, the only person who has a clear idea of what is happening in the grand jury room is the public official whom these twenty-three novices are expected to check. So that even if a grand jury were disposed to assert its historic independence in the interest of an invidividual's liberty, it must, paradoxically, look to the very person whose misconduct they are supposed to guard against for guidance as to when he is acting oppressively.[34]

While grand jury proponents have come forth with a limited amount of statistical data in an attempt to refute prosecutor reliance by the grand jurors,[35] the only extensive empirical study, consisting of an examination of 7,414 indictments, found that in only 5.15 percent of the cases initiated by the prosecutor in which he expressed an opinion was there a disagreement between the opinion of the prosecutors and the grand jury dispositions.[36] "The Second Circuit recently described the grand jury as basically 'a law enforcement agency'—a conclusion supported by numerous studies."[37] Even the United States Supreme Court in the majority opinion of *United States v. Dionisio*,[38] acknowledged that "The grand jury may not always serve its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor. . . ."[39] To this, Justice Douglas, speaking for the minority, added: "It is, indeed, common knowledge that the Grand Jury, having been conceived as a bulwark between the citizen and the government, is now a tool of the executive."[40] These declarations of grand jury manipulation under a value of secrecy become all the more odious when coupled with the remaining procedural aspect—refusing a witness before the grand jury the presence of his counsel.

The purpose of excluding counsel from the grand jury room was examined in some length in *People v. Ianniello*:[41]

> . . . [I]t is, of course, a familiar proposition that the lawyer for a witness is not entitled to be present in the Grand Jury room. . . . This rule rests up on the statutory exclusion of all except certain authorized persons before the Grand Jury and the need

34. Antell, *supra* note 3, at 154.
35. Wickersham, *supra* note 10, at 429.
36. Morse, *supra* note 2, at 151.
37. Alexander & Portman, *supra* note 114, at 1001.
38. 410 U.S. 1 (1973).
39. *Id.* at 17.
40. *Id.* at 23.
41. 21 N.Y.2d 418, 288 N.Y.S.2d 462 (1968).

> to preserve the secrecy of Grand Jury proceedings. There remains, however, the further question whether the witness should not be entitled to leave the Grand Jury room to consult with his lawyer. . . . Such conduct by the witness does not violate the statutory policy of secrecy, for it has always been understood that the witness is at all times free to discuss his testimony outside the Grand Jury room. Whether and to what extent the witness ought to have a right to consult with his lawyer depends upon an analysis of the proper role of counsel in these circumstances, and the need to avoid procedural strictures which would impair the effectiveness of Grand Jury investigation.
>
> Since a Grand Jury proceeding is properly an investigation rather than a prosecution directed against the witness, the witness has no right to be 'represented' by counsel, in the technical sense. However, in light of current recognition of the importance of counsel in providing effective notice of rights, it is difficult to maintain that the witness is not entitled to the advice of his lawyer.[42]

Thus, two policy reasons are advanced for excluding presence of counsel—the need to maintain secrecy and the nonjudicial nature of the proceedings. Neither of the two withstand the slightest analysis.

With respect to the policy of secrecy, it cannot logically be contended that secrecy is preserved when counsel is permitted to stand just outside the jury room, and the witness is allowed to leave whenever legal advice is sought. Since a witness is not bound to secrecy in the first place, what principle is compromised in allowing counsel direct access to the information? Any anticipated problem of an attorney representing multiple witnesses so as to effectively hear a major portion of the proceedings could be prevented by limiting the number of clients an individual attorney may represent. Likewise, fear that presence of counsel would delay the proceedings through procedural maneuvering could be remedied by limiting the role of attorneys to that of advisor as opposed to advocate.

Regarding the nature of the proceedings as only investigatory and therefore not requiring counsel is to ignore the primary function of most grand juries—returning indictments. The rationale adopted by the United States Supreme Court in *Coleman v.*

42. *Id.* at 423-24.

Alabama[43] concerning the right to counsel in a preliminary hearing as required by the sixth amendment is just as applicable to a grand jury proceeding. It is applicable because the "two stages of the criminal process—the preliminary hearing and the indicting grand jury—perform the same function. They both lead to a determination of whether the prosecutor can establish a probable cause case against the accused. Moreover, there is absolutely no difference in the applicable standard of probable cause."[44] In *Coleman*, the court declared that:

> The determination whether the hearing is a 'critical stage' requiring the provision of counsel depends, as noted, upon an analysis 'whether potential substantial prejudice to defendant's rights inheres in the . . . confrontation and the ability of counsel to help avoid that prejudice.' *United States v. Wade*, [388 U.S. 218, 227 (1967)]. Plainly the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution.[45]

As one author has commented:

> The Court's opinion in *Coleman* must apply with equal if not greater force to the indicting grand jury. If the accused is in need of a lawyer to argue the probable cause issue before a judicial officer, the presence of counsel is even more indispensible when a body of laymen is called upon to apply this legal standard. Moreover, the same need exists before a grand jury as at the preliminary hearing for a defense lawyer to freeze the testimony of prosecution witnessessses for the purpose of impeachment at trial. Furthermore, since the Supreme Court concluded in *Coleman* that it is essential that the accused obtain through counsel some discovery of the prosecutor's case against him in a preliminary hearing, there is no possible rationalization for denying the accused his right to discovery at a probable cause grand jury proceeding where the prosecutor has denied him a preliminary hearing.[46]

The combined effect of imposed "secrecy," absence of defense counsel and domination by the prosecutor presents anything but an image of the grand jury as a "bulwark of protection for the inno-

43. 399 U.S. 1 (1970).

44. Dash, *The Indicting Grand Jury: A Critical Stage?* 10 AM. CRIM. L. REV. 808 (1971-1972).

45. Coleman v. Alabama, 399 U.S. 1, 9 (1970).

46. Dash, *supra* note 44, at 815.

cent." Certainly any fair evaluation should conclude that the institution of the grand jury is most benevolent in its treatment of the prosecutor. Such was the conclusion reached by the Committee of The National Conference of Metropolitan Courts.[47] Whether it can be said that the public is therefore also served is an attractive argument in a time plagued by civil disobedience. Nevertheless, the better, the required argument is that any institution that contributes to the likelihood of arbitrary or uneven enforcement of the law needs correction. The degree and form that such correction should take, however, must await further consideration of the remaining arguments and requires a distinction to be made between the two functions of the grand jury.

Criticism up to this point has largely focused upon the indicting function of the grand jury. The distinction is important, for often in the clamor that accompanies a demand for abolishment of the grand jury, the functions are not independently considered. Indiscriminate application undermines accurate evaluation. While already noted that a distinction exists more in theory than in practice, meaningful recommendation requires recognition of a standard.

In addition to the arguments involving the grand jury as the "bulwark of protection," a number of collateral reasons for continuing or abandoning the indicting grand jury have been advanced. These arguments are collateral, because they are not central to an analysis of the critical issue of the indicting grand jury—whether it has successfully struck a balance among the three interests to be served. They are properly relegated to a supportive role. The question of the viability of the indicting grand jury must be decided upon those considerations already discussed for therein lies the due process considerations. The remaining arguments, though few in number, address themselves to the investigatory function of the grand jury. The absence of any appreciable criticism of this function can probably be attributed to the fact that it is a function little used and a function whose objectives are better suited to the ex parte character of the proceedings.

Proponents of the grand jury report that: the public-at-large supports the continuance of the institution;[48] the system allows a

47. *Report on the Grand Jury Indictment Process, supra* note 7, at 74.

48. Brown, *Ten Reasons Why the Grand Jury in New York Should Be Retained and Strengthened*, 22 THE RECORD 476 (1967).

means of public participation in law enforcement;[49] it is a non-political and non-partisan group capable of objective evaluation;[50] it is the citizen's best means of access in the supervision of public officials and public agencies;[51] and that the system is economical.[52]

To this opponents reply that: "participation by the public in prosecution without experiencing the defense function is not particularly beneficial to an understanding of law and order, which contemplates not only the protection of society from criminal activity but a fair system for determining criminal guilt;"[53] the grand jury lacks impartiality because it is not representative of the community;[54] unnecessary delays prejudicial to the accused occur, denying him the constitutional right to a speedy trial;[55] the leverage of a grand jury indictment may be used to extract a guilty plea, even though the prosecutor does not feel he can win at trial;[56] in those states in which the prosecutor has an option to accuse by either indictment or information the unlimited discretion to choose is patently unfair and subject to abuse;[57] presentation before a grand jury provides the prosecutor with an opportunity to test a certain line of questioning, provides him with rehearsal and time to prepare his case;[58] "the prosecutor is able to obtain an indication from the grand jury of what the reaction of a petit jury might be to the charges;"[59] and that the system is expensive.[60]

The posture of the arguments is somewhat familiar. While most arguments offered by its proponents are applicable to both grand jury functions and are more public-oriented, rebuttal continues to stress the defense inequities of the indicting grand jury. Of particular interest are two arguments advanced by the proponents concerning the fact that the grand jury has public support and

49. *Id.* at 472.

50. *Id.*

51. *Id.* at 474.

52. *Report on the Grand Jury Indictment Process, supra* note 7, at 76.

53. *Id.* at 79-80.

54. *Id.* at 26. *See also* Boyarsky, *Just How Grand is the Grand Jury?*, 68 LOS ANGELES MAGAZINE (Ap. 71).

55. *Id.* at 25. *See also* Whyte, *Is the Grand Jury Necessary?*, 45 VA. L. REV. 461 (1959).

56. *Id.* at 28. *See also* Calkins, *Abolition of the Grand Jury Indictment in Illinois*, U. ILL. L. FORUM 423 (1966).

57. *Id. See also* Note, *Evaluating the Grand Jury's Role in a Dual System of Prosecution: An Iowa Case Study*, 57 IOWA L. REV. 1354 (1972).

58. *Id.* at 17.

59. *Id.* at 18.

60. *Id.* at 29.

provides political supervision. The latter probably explains the former and also provides a basis of recommendation, such recommendation to be discussed in the consideration of alternatives.

In evaluating the institution of the grand jury within the context of this criticism, a decisive factor is the availability of alternative method for fulfilling the traditional functions of the system. To the extent that such alternatives are better able to accomplish these functions and maintain a balance of interests, the grand jury should be abandoned.

Concerning its accusatory function of determining whether probable cause exists, the use of the information proceded by the preliminary hearing process provides a superior method. Not only is the information-preliminary hearing quicker, cheaper and more efficient,[61] it recognizes and preserves due process requirements. At a preliminary examination, an accused is allowed representation by counsel. The United States Supreme Court in *Coleman* outlined the importance of this right.

> First, the laywer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case, that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witness at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail.[62]

Also, a provision rather unique to Wisconsin of equal significance is the application of the rules of evidence to a preliminary examination. The judicial council committee's note of Chapter 911[63] stated:

> This subsection differs from the Proposed Federal Rules which

61. Moley, *supra* note 2, at 430.

62. Coleman v. Alabama, 399 U.S. 1, 9 (1970).

63. Ch. 911 WISCONSIN RULES OF EVIDENCE, 59 Wis. 2d R366 (1974); See also 56 MARQ. L. REV. 443 (1973).

> exclude preliminary examinations from the application of evidentiary rules. Federal criminal procedure relies heavily upon indictment which eliminates a preliminary examination. Wisconsin relies heavily upon a complaint which requires a preliminary examination unless waived. A preliminary examination is not a preliminary trial, *State v. Knudson*, 51 Wis. 2d 270, 280, 187 N.W.2d 321, 327 (1971), but does have a by-product benefit for the accused, *Whitty v. State, supra.* Although the judicial determination of probable cause is comparable to other proceedings referred to in this subsection which are excluded from the application of the rules of evidence, the reporter for the Criminal Rules Committee advises that in its revision of criminal procedure, the Committee intended the application of the rules of evidence to a preliminary examination.[64]

The ramifications of this provision should be obvious. While the quantum of proof remains unchanged, the quality of the proof is raised, requiring admissible evidence before the state may file criminal charges. Even without the application of the rules of evidence to the preliminary examination, the fact that the accused is represented by counsel who may actively participate in the determination of probable cause before a legally knowledgable magistrate and is entitled to a copy of the entire proceedings for use in preparation of trial places the parties on an equal basis.

In those instances in which the district attorney has knowledge of the commission of a crime but insufficient information concerning the identities and/or circumstances of its accomplishment, the use of the John Doe proceeding serves as a superior substitute for the investigatory function of the grand jury. The proceeding is before a judge only and is started by a complaint which may be initiated by any person.[65] "The extent of the investigation is a matter which falls within the discretion of the judge and it is rebuttably presumed that the judge has not abused his discretion 'both as to duration and scope of the proceedings.' "[66] Features of the John Doe proceeding include: the right to refuse answers based on the privilege against self-incrimination;[67] compelled testimony in exchange for immunity;[68] power to hold a witness in contempt for

64. *Id.* at 444-445.

65. WIS. STAT. § 968.26 (1973).

66. BROWN, THE WISCONSIN DISTRICT ATTORNEY AND THE CRIMINAL CASE 14 (1971), citing State ex rel Niedziejko v. Coffey, 22 Wis. 2d 392, 402, 126 N.W.2d 96 (1964).

67. *Id.*

68. *Id.* at 15 citing WIS. STAT. § 972.08(1) (1973).

failure to answer questions within the scope of the granted immunity;[69] the right to the presence of counsel (although counsel is not allowed to examine his client, cross-examine other witnesses, or argue before the judge);[70] the availability of secrecy of the proceedings which is binding on the witnesses as well as the judge, if the nature of the investigation would thereby be better served;[71] the inspection of the record and transcript is limited to the district attorney "unless it is used by the prosecution at the preliminary hearing or the trial of the accused and then only to the extent that it is so used;"[72] and the requirement of a preliminary examination if a complaint is issued based on the findings of the John Doe proceeding.[73] Thus, the John Doe retains those powers essential to criminal investigation while providing adequate safeguards for those required to participate in the proceeding. Add to this the fact that the John Doe investigation is more economical and the comparison is complete.[74]

The only remaining problem to be considered is the desirability of maintaining a grand jury system for the purpose of providing public supervision of the political process. In their study of the grand jury, the National Conference of Metropolitan Courts made two observations relevant to this question. While concluding that the indicting function of the grand jury "should be abolished because viable alternatives exist to ensure the fulfillment, in a more orderly way, of the objectives for which grand juries, as accusatory bodies, were originally created,"[75] continuance of the grand jury investigative function was advocated.

> We feel that exercise of the power to investigate and hold accountable governmental agencies is of extreme value to the public, and should be expanded and encouraged, but that it should be exercised within a procedural framework which, at the very least, rejects the presentation of hearsay evidence. Government is increasingly complicated and the public increasingly alienated from its operation. In a modern setting, the use of representative citizens to provide a check on their government may still prove beneficial.[76]

69. *Id. See also* WIS. STAT. § 972.08(2) (1973).
70. *Id.* citing WIS. STAT. § 968.26 (1973).
71. *Id.* at 16 citing WIS. STAT. § 968.26 (1973).
72. *Id.* citing WIS. STAT. § 971.23 (1973).
73. *Id.*
74. *Id.* at 17.
75. *Report on the Grand Jury Indictment Process, supra* note 7, at 72.
76. *Id.* at 80.

The exact nature of the procedural framework within which the grand jury serving in this capacity should work is beyond the scope of this article. It is sufficient to recognize the desirability of maintaining the system in this capacity and to reiterate the necessity of providing a system which balances the rights of all the interests involved.

THE CRITICISM AS APPLICABLE TO THE SYSTEM IN WISCONSIN

The grand jury in Wisconsin is subject to the criticisms offered in the preceding section. It is subject to those criticisms because the grand jury in Wisconsin has retained the identical operational provisions found to be repugnant to due process considerations. However, while the institution itself has remained unamended, one significant procedural right has been enacted and another introduced into the legislature which greatly diminish the abuses of the grand jury indictment power.

In 1973, the Wisconsin legislature amended section 971.02(1) to require, unless waived in writing or in open court, that a defendant indicted for a felony by a grand jury be entitled to a preliminary examination.[77] This provision goes a long way toward obviating many of the inequities associated with the grand jury. Since, in Wisconsin, the rules of evidence are applicable to preliminary hearings,[78] any indictment which is the product of a substantial amount of inadmissible evidence will be screened before the trial stage. The prosecutor, knowing that any indictment must withstand the scrutiny of a preliminary examination before a magistrate and the opposition of defense counsel operating under the rules of evidence, must become more receptive to the quality of evidence offered to the grand jury. Likewise, the difficulties presented to the defense in attempting to procure transcripts of the grand jury to support an allegation that illegally obtained evidence

77. WIS. STAT. § 971.02 (1973):

Preliminary examination; when prerequisite to an information or indictment. (1) If the defendant is charged with a felony in any complaint, including a complaint issued under s.968.26, or when the defendant has been returned to this state for prosecution through extradition proceedings under ch. 976, or any indictment, no information or indictment shall be filed until the defendant has had a preliminary examination, unless he waives such examination . . . in writing or in open court or unless he is a corporation. The omission of the preliminary examination shall not invalidate any information unless the defendant moves to dismiss prior to the entry of a plea.

78. *See* § 911.01 WISCONSIN RULES OF EVIDENCE, 59 Wis. 2d R366; *See also* 56 MARQ. L. REV. 444-445 (1973).

was used or other grounds of impropriety existed[79] in the indictment becomes less significant. The imposition of the preliminary hearing between the indictment and the trial provides an alternative method of discovery. The suspect will also be afforded an opportunity to discover with greater particularity the facts and circumstances surrounding the alleged commission of the crime.[80] This advantage is not insubstantial, especially when considering that a witness before a grand jury need not be informed of the topic of the investigation at the time of his testimony.[81] Thus, section 971.02 provides a measure of protection to one indicted by a grand jury in that a check on the persuasive quality of the evidence is made available. A second problem, often of equal importance to a witness appearing before a grand jury, is the preservation of the constitutional right against self incrimination. It was to this aspect that Representatives Sicula and Czerwinski addressed themselves when introducing Assembly Bill 1058 to the Wisconsin legislature, which was referred to the judiciary committee this past session.[82]

79. Such as prejudicial comments made by the district attorney or the judge, erroneous instructions prejudicial to defendant. *See* Brice, *supra* note 8.

80. *See* State v. Camara, 28 Wis. 2d 365, 373 N.W.2d 1 (1965).

81. Orfield, *supra* note 9, at 384. It should be noted however that if at the beginning of questioning it has already been determined that the witness is a "target," He must be given his Miranda warnings and be informed of the suspected charge. *See* United States v. Krebs, 349 F. Supp. 1049 (W.D. Wis. 1972).

82. An act to repeal and recreate § 968.06; and to create §§ 255.145, 255.147 and 972.08(3) of the statutes, relating to rights of witnesses and secrecy at grand juries.

SECTION 1. 255.145 and 255.147 of the statutes are created to read:

255.145 WITNESSES RIGHTS TO COUNSEL AND TRANSCRIPT. (1) Any witness appearing before a grand jury may have counsel present, and such counsel shall be allowed to examine his client, call and cross examine other witnesses.

(2) Any witness appearing before a grand jury shall be given a transcript of all testimony that relates to him given the grand jury prior to his testifying.

255.147 SECRECY. (1) All motions, including but not limited to those for immunity or a privilege, brought by a witness appearing before a grand jury shall be made, heard and decided in complete secrecy and not in open court if the witness bringing the motion or exercising the immunity or privilege so requests.

(2) Grand jury proceedings shall be held in complete secrecy and held in such a manner that no media coverage of witnesses coming and going is possible.

SECTION 2. 968.06 of the statutes is repealed and recreated to read:

986.06 INDICTMENT BY GRAND JURY. Upon indictment by a grand jury a complaint shall be issued, as provided by s. 968.02 upon the person named in the indictment, and such person shall be entitled to a preliminary hearing under s. 970.03 and all proceedings thereafter shall be the same as if the person had been initially charged under s. 968.02 and had not been indicted by a grand jury.

SECTION 3. 972.08(3) of the statutes is created to read: 972.08(3) Any witness appearing before a grand jury may be ordered confined under sub. (2) for not more

The bill would create a statute permitting any witness appearing before the grand jury to be represented by counsel who would be permitted to examine his client and call and cross-examine other witnesses. The witness would also be entitled to a transcript of all testimony relating to him given to the grand jury prior to his testifying. The importance of the presence of counsel as related to the preservation of a witness' rights was underlined quite descriptively by one writer.

> Regrettably, the common picture emerging from these investigations is one of a lone witness, thrust into the legal darkness of the grand jury, barricaded from his lawyer, threatened by all sorts of unseen dangers, who becomes hopelessly lost in this desolate and bewildering legal environment. There, the witness, often outnumbered by prosecutors who badger and bully him with endless questions, is required to pass between Scylla and Charybdis without any legal escort. A response to one question means the ultimate surrender of his privilege against self-incrimination, whereas his failure to reply means possible imprisonment for for contempt if he has been properly granted immunity.[83]

However melodramatic, the description does point out the complexities involved in asserting the privilege and, if granted, in determining the scope of the protection when answering questions. The presence of counsel would insure that legal ignorance would not result in deprivation of legal rights.

If the bill authorizing presence of counsel is enacted, the practical significance of the two provisions would be a grand jury system approximating the John Doe proceeding in its effective operation. The primary difference would be the authority empowered to determine the existence or absence of probable cause—seventeen laymen or a single magistrate. Since the John Doe investigation capably performed the functions of the grand jury before these enactments and in a more economical and efficient manner,[84] with pro-

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than one separate failure or refusal before that grand jury. In addition to his rights granted under s.885.15 and sub. (1) any witness compelled to testify or produce evidence before a grand jury shall have complete and unlimited immunity, except that no personal shall be exempted from prosecution and punishment for perjury or false swearing committed in so testifying.

83. Fahringer, *Lawyer for the Witness*, 9 TRIAL 12 (1973).

84. The grand jury may offer to the prosecutor two attractive procedures not available to him in a John Doe. First, the subpoena power is greater in that a witness can be extradited to this state to testify at a grand jury investigation from states which are parties to the

secutorial advantage dissipated the grand jury would most likely fall into disuse. In light of the available alternatives, this result is a good one.

THE OPERATION OF THE SYSTEM IN WISCONSIN

The statutory provisions dealing with the grand jury are Wisconsin Statute sections 255.10—255.26, which deal with procedural rather than substantive aspects of the grand jury. The procedural aspects, although important in terms of the efficient operation of the grand jury, do not insure that the grand jury will operate in accordance with constitutional standards. For this reason, a study of Wisconsin case law is a necessary supplement.

According to the procedure established by chapter 255 of the Wisconsin Statutes, upon a written order of a court the jury commissioner selects seventeen persons to constitute the grand jury.[85] The grand jury serves for the current term of the court but may, upon an order of the court, continue during the following term.[86] The court may discharge the grand jury at any time.[87] Once impaneled, the jury is sworn, a foreman and a clerk are selected, and a reporter is chosen and sworn.[88] The grand jury cannot transact business with less than fourteen members in attendance and no indictment can be returned unless at least twelve of the members concur.[89]

Uniform Act for the Extradition of Prisoners as witnesses and the Uniform Act for the Extradition of Witnesses in Criminal Actions. WIS. STAT. §§ 976.01, 976.02 (1973). Second, the prosecutor may also avoid statute of limitations problems. If a suspect cannot be located, no preliminary hearing may be held, and if the end of the statute of limitations period for the crime is near, the suspect may escape prosecution altogether. Since a potential defendent is not permitted to be present at grand jury proceedings, there is no deterrent to securing an indictment against him in his absence, thereby resolving the prosecutor's problem. Boyarsky, *supra* note 54, at 68.

85. Wisconsin Statute section 255.10(1) provides that the grand jury commissioner, upon written notification from any judge, shall select a jury list of not less than seventy-five nor more than 150 persons; section 255.10(2) provides that from the jury list, thirty-six names shall be selected pursuant to Wisconsin Statute section 255.05 to comprise the grand jury panel; pursuant to section 255.10(3) the impaneling judge conducts the voir dire to determine whether the members of the grand jury panel are qualified to sit on the grand jury. The district attorney or other prosecutorial officer has the option to also examine the grand jury panel at this time; section 255.10(4), provides the procedure for the addition of members to the grand jury panel, for such panel must at all times consist of at least twenty qualified members; section 255.10(5) provides for the selection of seventeen members for the grand jury from among those in the grand jury panel.

86. *See* WIS. STAT. § 255.10(6) (1973).

87. *Id.*

88. WIS. STAT. §§ 255.11, 255.12, 255.13 (1973).

89. WIS. STAT. § 255.16 (1973).

Other statutory provisions dealing with the procedural aspects of the grand jury are as follows: Section 255.14 deals with the oath to witnesses appearing before the grand jury which is administered by either the foreman, district attorney or other prosecuting officer. Section 255.15 sets forth the requirement that the district attorney attend all grand jury sessions when required for the purposes of questioning witnesses, advising the jury on legal matters, and issuing subpoenas and other processes to bring up the witnesses. Section 255.16 requires attendance of all seventeen grand jurors unless excused by the foreman for good and sufficient cause. Section 255.17 permits the grand jury to return progress reports and indictments to the court from time to time until its discharge. Section 255.18 provides that the jury clerk shall collect all records of the grand jury and deliver them as the grand jury directs, either to the attorney general, the district attorney, or upon approval of the court, to the clerk of courts. Section 255.19 provides that if the court so orders, neither a grand juror nor an officer of the court may disclose the names of any persons indicted until such persons have been arrested. Section 255.20 provides that the manner in which a grand juror votes shall not be disclosed in court. Section 255.21 permits the members of the grand jury and the grand jury reporter to testify in court as to testimony given by a witness before the grand jury. This section also provides that a certified transcript of the testimony taken at the grand jury proceeding may be used for impeachment purposes at the trial. Section 255.22 provides that even though the grand jury has been dismissed during a court term without having been directed to return on a certain day, the grand jury can nevertheless be resummoned to attend a further hearing during the same term of the court whenever the court may direct. Section 255.23 provides for a fine of up to $40.00 for any juror who shall fail to attend a session without sufficient excuse. Sections 255.24, 255.25, and 255.26 deal with compensation and reimbursement for the grand jury members. These statutory provisions, procedural in their content, do not provide sufficient detail to fully determine the functions and limitations within which the grand jury must operate, and therefore a review of Wisconsin case law is necessary.

The Wisconsin Supreme Court has discussed in general terms the qualifications of persons to sit on the grand jury and the justification for the requirement that the impaneling judge conduct a voir

dire of the grand jury panel. In *State v. Wescott*,[90] the court stated that the persons chosen for the grand jury panel should be those who will represent the public; that friendship, sympathy, or prejudice should not be a factor in a grand juror's decision to vote for or in opposition to an indictment; and that in order to adequately protect the rights of a potential defendant as well as the rights of the public, the courts must be vested with the power to determine in advance whether prospective jurors are in fact competent and impartial.[91] However, strict compliance with the statutory procedure for the impaneling of the grand jury is not required in order to return a valid indictment. In *Petition of Salen*,[92] the court held that merely demonstrating that there had been irregularities in a selection of the jury would not be sufficient grounds to support a motion to quash an indictment, but rather the defendant ". . . must establish the fact that such error has prejudiced him by affecting his substantial rights."[93] Accordingly, in *State v. Wescott*[94] the Wisconsin Supreme Court held that it was not prejudicial error for the impaneling judge to appoint the foreman of the grand jury notwithstanding a statutory provision to the contrary.

Also, in response to increasing charges of discriminatory imbalances in the composition of the grand jury, the Court of Appeals for the Seventh Circuit in *United States v. Gast*[95] determined that the grand jury did not have to be a statistical mirror of the community, that it need not conform to the proportionate strength of each identifiable group in the total population, and that the use of voter registration lists was a permissible means of selection.[96]

In Wisconsin the grand jury is merely an inquisitorial and accusatorial body and does not act as a quasi-judicial body.[97] The primary function of the grand jury is the determination of whether there is probable cause to hold a person for trial. The Wisconsin Supreme Court defined the criteria for the determination of probable cause in *State v. Lawler*,[98] where it stated that: "probable cause . . . is the existence of such facts and circumstances as would

90. 194 Wis. 410, 217 N.W. 283 (1928).
91. *Id.* at 421.
92. 231 Wis. 489, 286 N.W. 5 (1939).
93. *Id.* at 491, quoting State v. Wescott, *infra* note 94.
94. 194 Wis. 410, 217 N.W. 283 (1928).
95. 457 F.2d 141.
96. *Id.* at 142.
97. State v. Lawler, 221 Wis. 423, 430, 267 N.W.2d 65 (1963).
98. *Id.*

excite an honest belief in a reasonable mind, acting on all the facts and circumstances within the knowledge of the magistrate, that the charge made by the application for the warrant is true."[99]

The court in *Lawler*, concluded that equivalent information and evidence was required in order for the grand jury to be justified in returning the indictment. Despite this fact, the impaneling court need not instruct the jury as to probable cause, and even if instructions are given by the court, the jury, at its option may ignore the instructions.[100] The court has held, however, that although a failure of the court to instruct the grand jury does not invalidate the indictment returned, if the court goes beyond the giving of instructions and expresses an opinion as to the guilt of a particular person, the indictment may be quashed.[101]

When at least twelve members of the grand jury have determined that there is probable cause to believe that a crime has been committed and that there is probable cause to believe that the person responsible has been identified, the grand jury is obligated to return an indictment to the court charging the person with the crime. This is known as a "true bill."[102] And conversely, if there is not a finding of probable cause by at least twelve members of the grand jury, it returns a "no bill."[103]

There is a presumption in Wisconsin that the indictment supplies notice to the suspect so as to enable him to make a proper plea to the indictment.[104] But a certain degree of specificity is required without which the indictment may be quashed. The indictment must contain a statement of the offense in the language of the statute which will inform the accused of the particular statute allegedly violated.[105] The degree of particularity required has not been adequately defined. Earlier cases required that all the facts and circumstances which constituted the offense be stated in the indictment. The Wisconsin Supreme Court has held that the defendant should be able to judge whether the facts alleged constituted an indictable offense in order that he adequately prepare his de-

99. *Id.* at 434, citing State v. Baltes, 183 Wis. 545, 198 N.W. 282 (1924).

100. *Id.* at 427.

101. *Id.* at 428.

102. WRIGHT, 1 FEDERAL PRACTICE AND PROCEDURE 197 (1969).

103. *Id.*

104. *See* Steensland v. Hoppmann, 213 Wis. 593, 252 N.W. 146 (1943); and Havenor v. State, 125 Wis. 444, 104 N.W. 116 (1905).

105. Liscowitz v. State, 229 Wis. 636, 641, 282 N.W. 103 (1939).

fense.[106] The degree of particularity required was subsequently relaxed in later cases and indictments today merely quote the statute allegedly violated.[107] The reason for the lack of specificity would appear to be prosecutorial fear of disclosing relevant facts which the grand jury has discovered in the course of its investigation. Despite the relaxation of the rule that the indictment should contain all facts and circumstances which constitute the offense alleged, if the language is sufficiently ambiguous so that no offense is charged, the indictment will be quashed.[108]

Prior to the recently enacted statute providing for a preliminary hearing whenever one is charged with a felony in an indictment once the grand jury had returned the indictment, the accused had very little chance of getting the indictment reviewed by a magistrate prior to trial. The Wisconsin Supreme Court had held that, in accordance with the great weight of authority, the sufficiency of the evidence for the grand jury to warrant it in returning an indictment was not reviewable upon a plain abatement or a motion to quash the indictment.[109] The presumption of the validity of the

106. Fink v. City of Milwaukee, 17 Wis. 27, 29 (1863); *accord*, Alan v. State, 5 Wis. 329, 335 (1856).

107. State v. Kitzerow, 221 Wis. 436, 439, 267 N.W. 71, 72 (1936).

108. *Id.*

109. State v. Lawler, 221 Wis. 423, 267 N.W.2d 65 (1963).

> Although the cases have not always noticed it, the policy of secrecy is as a practical matter involved when the defendant seeks to find out what transpired in the grand jury room so that he can attack the competency or sufficiency of the evidence or misconduct in the grand jury room. Three devices have been used to attack the competency or sufficiency of the evidence, sometimes all in the same case: (1) motion to inspect the minutes, (2) plea in abatement, and (3) motion to quash. In practice it has proved very difficult if not impossible for the defendant to obtain evidence to support his plea in abatement or motion to quash . . . .
>
> Numerous procedural roadblocks make it virtually impossible for the defendant to attack the evidence before the grand jury. Many examples follow. When the record shows that the grand jury found the indictment on their oaths, there is a presumption that it was found on legal evidence, with due deliberation, and by the concurrence of twelve of their number. A court will not inquire into the sufficiency of the evidence if the proceedings of the grand jury are regular on their face. It has been held that a motion to quash lies only for defects appearing on the face of the record.
>
> The burden is on the defendant to establish his contention that no evidence or insufficient evidence was presented to the grand jury. An averment on information and belief will not support a plea in abatement on the ground that the grand jury did not know the contents of the indictment. A defendant's affidavit on information and belief that there was no competent evidence will not support a motion to quash. A defendant's offer to prove by an assistant United States Attorney that there was no competent evidence was held to be a mere conclusion not supporting a plea in abatement.

indictment adversely affected the person accused in that he could not ordinarily challenge the indictment and could not therefore obtain any information concerning the investigatorial process that had occurred. The Wisconsin Supreme Court in *State ex rel. Welsh v. Waukesha County Circuit Court*,[110] stated that:

> The sufficiency of the indictment, its alleged weaknesses or procedural defects upon which it might be founded were hard to discover because of the secrecy surrounding the grand jury, and for the most practical purposes such errors could not be effectively raised prior to trial. It was presumed the indictment was founded upon a sufficient legal basis although neither the common law nor our statutes required or now requires the judge conducting the grand jury proceeding to instruct the jury upon the quality or quantity of proof necessary to support the indictment.[111]

A motion to quash on the ground that the grand jury received certain incompetent evidence is insufficient, fails where it is not alleged nor shown that there was not other and competent evidence on the subject on which the indictment was based.

A plea in abatement that the defendant's private books and papers were wrongfully produced before the grand jury in violation of the privilege of self incrimination where it fails to show that there was no other competent evidence upon which the indictment was found. The same is true when the privilege against illegal searches and seizures is involved. It should be noted that these caeses do not say that if the only evidence before the grand jury was obtained in violation of constitutional rights the result would be the same. An indictment based on merely incompetent evidence does not violate the due process clause of the Fifth Amendment.

The Supreme Court in an opinion by Justice Holmes doubted how far, if at all, a court is warranted in inquiring into the nature of the evidence on which a grand jury has acted, and whether the discretion of the trial court is subject to review. Indictments should not be upset because some evidence, in its nature competent, but ruled incompetent by circumstances, was considered along with other evidence. A witness had testified as to admissions by the accused obtained under circumstances making them incompetent.

When a defendant has pleaded not guilty and a jury has been impaneled, the court will not interrupt the trial to determine whether there was sufficient evidence before the grand jury. A motion in arrest of judgment will not usually lie to attack the sufficiency of the evidence before the grand jury as it is necessary to contradict the record, and the showing must therefore be clear and convincing. Many cases have held that the denial of a motion to quash an indictment founded on incompetent evidence is a matter of discretion not to be reviewed on appeal. Objections that competent testimony was not presented to the grand jury cannot be raised by habeas corpus. This is true though the evidence may have been obtained by illegal search and seizure in violation of the Fourth Amendment.

Orfield, *supra* note 9 at 404 to 409.

110. 52 Wis. 2d 221, 189 N.W.2d 417 (1971).

111. *Id.* at 224.

The presumption of the validity of the indictment is rebuttable. The Wisconsin Supreme Court has held that if it appears that there was no evidence before the grand jury upon which the indictment could have been based, it may be quashed.[112] However, procuring the evidence in support of a challenge is often difficult. Wisconsin Statute section 255.21 contains a provision dealing with impeachment under which grand jury testimony may be disclosed. In addition, the Wisconsin Supreme Court has stated that there may be times when in the interest of justice the grand jury record may be looked into,[113] but the accused has no right to inspect the minutes in order to make a proper defense,[114] and the fact that the law permits the testimony to be available for use by the prosecutor does not mean that that same privilege is extended to defense counsel.[115] Consequently, there is very little chance for discovery of any aspect of the grand jury proceeding.

The Wisconsin Supreme Court has indicated its opposition to any discovery of the grand jury proceeding in *Steensland v. Hoppmann*,[116] in which the court stated:

> And there exists the very practical reasons, especially applicable to the situation where the jury is continuing to sit, that the inspection of the minutes if permitted to any defendant for the purpose of preparing his defense would advise the public of a subject under investigation, afford the opportunity to those interested in thwarting an inquiry in to their acts of secreting evidence, tampering with prospective testimony, and generally embarrassing the work to be done by the grand jury, if not entirely defeating the object for which the body is designed.[117]

The language of the Wisconsin Supreme Court is not very persuasive in the light of a recent United States Supreme Court decision in which that court identified what it considered to be a "growing realization that disclosure, rather than suppression of relevant materials ordinarily promotes the proper admininstration of criminal justice."[118] The court also noted that there is an expanding body of material, "judicial and otherwise" favoring disclosure

112. State v. Lawler, 221 Wis. 423, 267 N.W.2d 65 (1963).
113. Steensland v. Hoppmann, 213 Wis. 593, 595, 252 N.W. 146, 147 (1934).
114. Havenor v. State, 125 Wis. 444, 450, 104 N.W. 116, 118 (1905).
115. State v. Krause, 260 Wis. 313, 329, 50 N.W.2d 439, 447 (1951).
116. Steensland v. Hoppmann, 213 Wis. 593, 252 N.W. 146 (1934).
117. *Id.* at 598.
118. Dennis v. State, 384 U.S. 855, 870 (1966).

in criminal cases analogous to that in civil practice.[119] In that same case,[120] the court also stated that the trial judge could not be assumed to be able to go through the grand jury transcript to decide if there is any evidence that the defense should have to impeach witnesses because of the voluminous materials and because,

> in our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by the advocate.[121]

Nevertheless, the dilemma often facing defense counsel is how to overcome the presumption of the validity of the indictment in those instances in which the record itself provides the best source of proof, and the record is closed to inspection. In Wisconsin, the use of three statutory provisions may supply at least a basis for argument. Under section 971.31(5)(b) in any felony actions, motions to suppress evidence or motions under sections 971.23 to 971.25 may not be made at a preliminary examination but may be made as soon as the information has been filed.[122] Under section 971.23, upon demand the district attorney must supply to the defendant within a reasonable time before trial the names of witnesses to the written and oral statements of the defendant which the state plans to use in the course of trial.[123] Under section 971.24, the defendant may procure the production of any statement made by a witness either written or phonographically recorded for cause.[124] Thus, by procuring a list of the witnesses to be called by the district attorney

119. *Id.* at 871.

120. *Id.*

121. *Id.* at 875.

122. WIS. STAT. § 971.31(5)(b) (1971): In felony actions, motions to suppress evidence or motions under § 971.23 to 971.25 or objections to the admissibility of statements of a defendant shall not be made at a preliminary examination and not until an information has been filed.

123. WIS. STAT. § 971.23(1) (1973): (1) DEFENDANT'S STATEMENTS. Upon demand, the district attorney shall permit the defendant within a reasonable time before trial to inspect and copy or photograph any written or recorded statement concerning the alleged crime made by the defendant which is wthin the possession, custody or control of the state including the testimony of the defendant in an s. 968.26 proceeding or *before a grand jury.* Upon demand, the district attorney shall furnish the defendant with a written summary of all oral statements of the defendant which he plans to use in course of the trial. *The names of witnesses to the written and oral statements which the state plans to use in the course of the trial shall also be furnished.* (Emphasis added.)

124. WIS. STAT. § 971.24 (1973). Statement of witnesses. (1) At the trial, before a witness other than the defendant testifies, written or photographically recorded statements of the witness, if any, shall be given to the other party in the absence of the jury. *For cause, the court may order the production of such statement prior to trial.* (Emphasis added.)

under section 971.23, a prosecutor could interview them concerning anything they may have said before the grand jury concerning the defendant. A witness before the grand jury not being required to remain silent may divulge any information he desires. If any basis for challenge presents itself in the interview, a pretrial motion to produce the statements of the witness or witnesses may be made under 971.24. Thus, while the evidence would not be available at the preliminary, it would still be available before trial.

There are two obstacles to overcome in attempting to apply these statutes. First, there is quite obviously no mandate within the construction of this statutory approach requiring a judge presented with evidence based on witness interviews to apply the "interests of justice" test and penetrate the secrecy of the grand jury minutes. Second, the court in *Hoppmann, supra*, in discussing cases from other jurisdictions advanced by the defendant in attempting to convince the court to permit inspection of the minutes, rejected as being persuasive a New York case, *People v. Milineux*.[125] A decisive factor in *Milineux*, upon which the court permitted the inspection of the grand jury minutes, was the fact that the defendant had been deprived of a preliminary examination.[126] In light of the fact that the Wisconsin court refused inspection of the record when no right to a preliminary examination existed, the fact that a defendant now has a right to such a procedure makes discovery even less probable.

Some relatively recent developments, namely, the allowance of collateral attacks on an indictment, may have extensive impact on the grand jury. In *United States v. Kreps*,[127] the defendant had, prior to his appearance before the grand jury, been advised of his constitutional rights by members of the FBI and had signed a waiver of those rights. When he appeared before the grand jury, he was accompanied by counsel and had been advised by counsel regarding his appearnace before the grand jury. But, he was at no time either prior to nor during the course of his testimony before the grand jury told that he was a subject of the investigation nor was he advised of his constitutional rights nor requested to sign a waiver of those rights. The court, while noting that the Seventh Circuit Court of Appeals had held it permissible to compel even a

125. 27 Misc. 60, 57 N.W. Supp. 936 (1899) as discussed in Hoppmann, 595-596.
126. *Id.* at 62.
127. 349 F.Supp. 1049 (D.C. Wis. 1972).

"probable defendant" to appear before the grand jury and testify,[128] held that ". . . one as to whom criminal proceedings have become accusatory is entitled to some measure of protection of his privilege against self-incrimination when he appears before the grand jury."[129]

Counsel for the government in *Kreps* contended that the opportunity to consult an attorney prior to one's appearance before the grand jury and to have a lawyer available outside the grand jury room for consultation during the questioning was sufficient protection of the privilege against self-incrimination. The court found this contention, although not unreasonable, unacceptable. Accordingly, the indictment was dismissed for failure to give the Miranda warnings.[130]

A similar problem related to the constitutional privilege against self-incrimination was set forth in *State v. Ruggeri*[131] in which the court held that the target of the grand jury investigation must be informed that he is the subject of the investigation prior to his testimony before the grand jury.[132] The attorney general of the State of Wisconsin has recommended that the rules adopted in *Ruggeri* be followed in Wisconsin.[133] The Utah Supreme Court held that the target of the investigation is an accused within the meaning of the constitution, and when detained in any significant way, including appearances before the grand jury, he may not be interrogated unless advised of the charges against him then under consideration. The court held that the failure to warn the defendant that he was the subject of the investigation amounted to entrapment and violated his constitutional privilege against self-incrimination.[134] The court went on to hold that when a possible defendant or target is subpoenaed before a grand jury, whether he claims or asserts his privilege against self-incrimination or not, his constitutional privilege is being violated.

> An automatic result of the violation of this constitutional privilege is that the defendant is protected not only from the indict-

128. United States v. Cesalu, 338 F.2d 582, 584 (7th Cir. 1964).

129. United States v. Kreps, 349 F. Supp. 1049, 1052 (D.C. Wis. 1972).

130. *Id.*

131. 19 Utah 2d 216, 429 P.2d 969 (1967).

132. *Id.* at 225.

133. *See* BROWN, THE WISCONSIN DISTRICT ATTORNEY AND THE CRIMINAL CASE 9 (1971).

134. State v. Ruggeri, 19 Utah 2d 216, 223, 429 P.2d 969 (1967).

ment based on any incriminating testimony which he may have given, but also from the use of such evidence.[135]

The United States Supreme Court has recently ruled that a grand jury witness has standing to object to a question derived from illegal electronic surveillance of a telephone conversation thus opening another possible avenue for a collateral attack on the grand jury indictment. In *Gelbard v. United States*,[136] the Supreme Court did not go beyond the standing question to discuss the merits, but Mr. Justice Douglas in a concurring opinion[137] stated that the Fourth Amendment shields a grand jury witness from any question (or a subpoena) which is based upon information derived from searches which invaded the constitutionally protected right of privacy. The Third Circuit Court of Appeals sitting en banc[138] reached the merits of the issue involved in *Gelbard* and held that a witness subpoenaed before the grand jury could not be examined by way of questions based on information obtained through illegal and unconstitutional wiretapping.

Although there would seem to be a logical nexus between *Gelbard* and those principles and statements formally announced by the Wisconsin Supreme Court that an indictment may be quashed if "the sole evidence" upon which it (the grand jury) acted was illegal,"[139] the United States Supreme Court threw a wrench into the works in *United States v. Calandra*.[140] In *Calandra*, the Court refused to extend the exclusionary rule of search and seizure to grand jury proceedings. The basis of the challenge rested on the fact that evidence used to bring the defendant before the grand jury was seized in a search which exceeded the scope of the warrant. The majority rejected the application of the Fourth Amendment right finding that the rule's prime purpose of deterring future unlawful police conduct was effectuated by the fact that such evidence would be inadmissible at trial,[141] and that "the probable result would be 'protracted interruption of grand jury proceedings.' *Gelbard v. United States* . . . effectively transforming them

135. *Id.*

136. 408 U.S. 41, (1972).

137. *Id.* at 62.

138. In re Grand Jury Proceeding, Harrisburg, Pennsylvania, 450 F.2d 199 (3rd Cir. 1971), *cert. granted*, 92 S. Ct. 531 (1971).

139. State v. Lawler, 221 Wis. 423, 428, 267 N.W 65 (1936).

140. ___ U.S. ___, 94 S.Ct. 613 (1974).

141. *Id.* at 619-20.

[grand jury proceedings] into preliminary trials on the merits."[142] The *Gelbard* case is distinguished in a footnote of the majority opinion.

> The dissent's reliance on *Gelbard v. United States* . . . is misplaced. There, the Court construed 18 U.S.C. s. 2512, the evidentiary prohibition of Tit. III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 211 as amended, 18 U..S.C. s.s. 2510-2520. It held that s. 2515 could be invoked by a grand jury witness as a defense to a contempt charge brought for refusal to answer questions based on information obtained from the witness' communications alleged to have been unlawfully intercepted through wiretapping and electronic surveillance. The Court's holding rested exclusively on an interpretation of s.2515 and Tit. III, which represented a congressional effort to afford special safeguards against the unique problems posed by misuse of wiretapping and electronic surveillance. There was no indication in either *Gelbard* or the legislative history of Tit. III, that s. 2515 was regarded as a restatement of existing law. As Mr. Justice White noted in his concurring opinion in *Gelbard*, s. 2515 'unquestionably works a change in the law with respect to the rights of grand jury witness . . .' 408 U.S. 69, 70, 92 S.Ct. 2372.[143]

Thus, it appears that *Calandra* has stifled any expansion of Fourth Amendment challenges not provided for expressly by Congressional act by reaffirming a principle stated within the very language of the *Gelbard* case itself. As the Court had stated, relying on *Blue v. United States*,[144] it had no intention of retreating from the general rule that ". . . a defendant is not entitled to have his indictment dismissed simply because the Government acquire[d] incriminating evidence in violation of the [law]' even if the tainted evidence was presented to the grand jury."[145]

In *United States v. Estepa*,[146] the Second Circuit Court of Appeals reversed a federal heroin conviction and ordered that the indictment underlying that conviction be dismissed. The indictment had been obtained almost entirely on the basis of hearsay testimony, but the members of the grand jury had not been informed that the information was hearsay and therefore were left

142. *Id.* at 621.
143. *Id.* at 623.
144. 384 U.S. 251 (1966).
145. Gelbard v. United States, 408 U.S. 41, 60 (1972).
146. 471 F.2d 1132 (2d Cir. 1972).

with the impression that it was direct testimony. Although not setting forth any standard for the admission of hearsay evidence before a grand jury, the court in *Estepa* made it very clear that the grand jury must not be misled to thinking it is getting eye-witness testimony when, in fact, it is being given an account whose hearsay nature is concealed. At least within the Second Circuit, it would appear that a grand jury must be specifically informed that the nature of the evidence they are hearing is hearsay in order that the grand jury might judge the weight and credibility of such testimony.

Under the federal grand jury system, each witness has the right to confer with counsel after each question.[147] As a practical matter the same right is extended to witnesses before any Wisconsin grand jury. Indeed, it is doubtful whether a witness can be denied an opportunity to confer with counsel whenever he desires.[148] A witness appearing before the grand jury has the right to invoke the Fifth Amendment privilege against self-incrimination. This privilege was made applicable to the states through the due process clause of the Fourteenth Amendment.[149] By invoking this privilege, a witness can thereby refuse to answer certain questions directed to him. It has been held that this privilege does not extend to criminal acts, the prosecution for which is barred by the statute of limitations.[150] A witness at a grand jury proceeding may be in a dilemma concerning the timing of the assertion of his constitutional privilege against self-incrimination. Due to the fiction of secrecy surrounding the grand jury and the accompanying exclusion of the witness' lawyer from the grand jury room, a witness may assert his constitutional privilege prematurely thereby subjecting himself to contempt of court, and conversely, he may hestitate in the assertion too long and thereby waive the privilege altogether. The predicament in which a witness finds himself was articulated by Justice Black's dissent in *Rogers v. United States*:[151]

> . . . [T]oday's holding creates this dilemma for witnesses: On the one hand, they risk imprisonment for contempt by asserting the

147. United States v. Leighton, 265 F. Supp. 27, 37 (1967).

148. United States v. Uitich, an unpublished case from the Western District of Wisconsin, decided on February 24, 1970.

149. *See* Malloy v. Hogan, 378 U.S. 1 (1964).

150. State ex rel. Rizzo v. County Court, 32 Wis. 2d 642, 146 N.W.2d 499, *cert denied*, 386 U.S. 1035 (1966).

151. 340 U.S. 367 (1950).

> privilege prematurely; on the other hand, they might lose the privilege if they answer a single question. The Court's view makes the protection depend on timing so refined that lawyers, let alone laymen, will have difficulty in knowing when to claim it. In this very case, it never occurred to the trial judge that petitioner waived anything.[152]

Waiver of the privilege against self-incrimination may occur inadvertently, for the privilege must be claimed to be effective. The original rule in Wisconsin[153] was that the statute which granted immunity posed no condition on its application, and therefore persons were granted complete immunity from later prosecution arising out of the transactions or facts testified to. This decision was subsequently overruled,[154] and now the rule is that the statutory immunity created is coexistent with the constitutional privilege against self-incrimination, and therefore a claim of privilege is a condition precedent to receiving immunity.[155] Hence, if a witness answers incriminating questions without first claiming his privilege against self-incrimination, no immunity is conferred. If a witness claims the privilege against self-incrimination to questions put to him by the grand jury, he can be compelled to answer them only "by order of the court on motion of the district attorney."[156]

In *State ex rel Rizzo v. County Court*,[157] the court noted that a witness before a grand jury will be immune to prosecution as to the offense about which he testifies only if:

> 1. He was actually compelled to testify under the statute;
> 2. The testimony that he divulged while under compulsion was part of or led to the evidence which supports the prosecution from which he claims immunity;
> 3. He must have been compelled to testify "by order of the court on motion of the district attorney."[158]

This last requirement has been interpreted as meaning that the order must be issued from an open court sitting as such, and that

152. *Id.* at 378.
153. *See* Murphy v. State, 128 Wis. 201, 107 N.W. 470 (1906).
154. *See* Carchidi v. State, 187 Wis. 438, 204 N.W. 473 (1925); State v. Grosnickle, 189 Wis. 17, 206 N.W. 865 (1926); Ciolocomic v. State, 198 Wis. 18, 222 N.W. 825 (1929).
155. State ex rel. Rizzo v. County Court, 32 Wis. 2d 642, 646, 146 N.W.2d 499 (1966).
156. *See* WIS. STAT. § 972.08(1) (1973).
157. 32 Wis. 2d 642, 146 N.W.2d 499 (1966).
158. *Id.* at 646.

the order of a magistrate is insufficient.[159] The Wisconsin Supreme Court on at least one occasion has allowed partial disclosure of the grand jury minutes to allow the defendant at trial the opportunity to establish his defense of immunity.[160]

The problem of waiver of the right against self-incrimination, as stated before, is accentuated by the inability of the witness to have his attorney present during the questioning. The problem can be somewhat relieved if the witness consults with his attorney after each question. A witness who testifies to a matter before a grand jury does not thereby waive his right to claim the constitutional privilege against self-incrimination as to the subject matter when called as a witness in the subsequent trial of one indicted by that grand jury.[161] When one indicted is brought to trial, a member of the grand jury or its reporter can be brought before the trial court to testify as to the consistency of statements made by the witness at trial as compared with his testimony before the grand jury.[162]

The immunity that is granted pursuant to Wisconsin statute section 972.08(1) is the so-called transactional immunity as opposed to the "use" immunity granted by federal judges, pursuant to 18 U.S.C. Sec. 6002. The constitutionality of use immunity was recently upheld in *Kastigar v. United States*.[163] Once immunity has been granted and a witness is compelled to testify "by order of the court on motion of the district attorney," refusal of the witness to testify may result in civil or criminal contempt and the court has the power to confine the unwilling witness "until such time as the witness is willing to give such testimony or until such trial, grand jury term or John Doe investigation is concluded but in no case exceeding one year."[164] The potential for abuse abounds in this procedure also, for although the maximum jail sentence for refusing to testify is theoretically set, there is nothing to stop successive grand juries from subpoenaing a single witness again and again in an attempt to force the witness to testify.[165]

A witness before a state grand jury may not be compelled to

159. *See* State ex rel. Jackson v. Coffey, 18 Wis. 2d 529, 118 N.W.2d 939 (1963).

160. *See* Murphy v. State, 124 Wis. 635, 102 N.W. 1087 (1905).

161. *See e.g.*, In re Neff, 206 F.2d 149 (3rd Cir. 1953).

162. *See* WIS. STAT. § 255.21 (1973).

163. 406 U.S. 441 (1972).

164. *See* WIS. STAT. § 972.08(2) (1973).

165. For an account of such abusive practices on the federal level *see* Donner & Cerruti, *The Grand Jury Network, How the Nixon Administration Has Secretly Perverted the Traditional Safeguard of Individual Rights*, THE NATION (Jan. 3, 1972) at 5-20.

give testimony which may be incriminating under federal law unless the compelling testimony cannot be used in any manner by federal officials in connection with a criminal prosecution against the one so compelled.[166] The Wisconsin Supreme Court had previously held[167] that the state could compel testin:mony notwithstanding that a federal prosecution was imminent and that the individual would be incriminating himself to federal charges.

Lastly, despite the United States Supreme Court's decision in *Branzburg v. Hayes*,[168] the First Amendment may supply a witness

166. Murphy v. Waterfront Commission, 378 U.S. 52 (1964).

167. *See* State ex rel Jackson v. Coffey, 18 Wis. 2d 529, 118 N.W.2d 939 (1963).

168. 408 U.S. 665 (1971). The issue before the Court concerned the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime. The decision embraced three lower court decisions: United States v. Caldwell, 434 F.2d 1081 (9th Cir. 1970), Branzburg v. Pound, 461 S.W.2d 345 (Ky. 1971) and In re Pappas, 358 Mass. 604, 266 N.E.2d 297 (1971). The majority court in the 5-4 decision held that reporters, just as citizens, are not constitutionally immune from grand jury subpoenas and neither the First Amendment nor any other constitutional provision protects a reporter from disclosing to a grand jury information that he has received in confidence based on the assertion that the flow of news from informants would be stifled and news gathering thereby curtailed. [p. 682]. As the court noted:

> [A]t the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate. There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas. It goes without saying, of course, that we are powerless to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute.

Id. at 706. See in this regard State v. Knops, 49 Wis. 2d 647, 183 N.W.2d 93 (1971) (dictum).

Justice Powell, responding to the dissenting justices' concern that First Amendment rights had been dealt a serious blow emphasized the scope of the majority's opinion:

> If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the Court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interest on a case-by-case basis accords with the tried and traditional way adjudicating such questions.

Id. at 710.

before the grand jury a measure of protection. Although a predictable and generally applicable test has not been specified,[169] the balancing test as developed in cases checking governmental abuse of power in legislative investigations is still applicable.[170] There are a number of procedural devices available to an attorney whose client may suffer an unwarranted intrusion into a valid first amendment interest, among them being a motion to quash a subpoena,[171]

169. Weisman & Postal, *The First Amendment As A Restraint On The Grand Jury Process*, 10 AM. CRIM. L. REV. 689 (1971-1972).

170. *Id.* at 689.

> The balancing test had developed to require that before the state would be allowed to enforce compliance with its investigative demands which encroached on fundamental freedoms protected by the first amendment, it must show: (a) a subordinating state interest which is compelling; (b) a reasonable nexus or relationship between that interest and the defined subject under investigation; and (c) a reasonable means for pursuing the objective.

Id. at 687-688.

171. If a witness has been subpoenaed before a grand jury investigating an unspecified subject matter, the subpoena should be challenged on a motion to quash. Indefiniteness in the scope of governmental inquiry has consistently been regarded as fatal to investigations in the first amendment area. The requirement of strict definition of the scope and purpose of the investigation provides the necessary safeguard against overbroad and formless investigations which—like overbroad and formless laws—"lend themselves too readily to the denial of (first amendment) . . . rights." Where it appears that the grand jury investigation is pursuing a subject matter outside the scope of its legitimate function, or an area unrelated to the defined inquiry, prior judicial relief should be available.

If a witness had been subpoenaed before a grand jury investigating a defined subject, a motion to quash should lie where a demonstrated threat or injury to first amendment rights can be shown. The court will probably require a specific proffer before entertaining the motion. Such a requirement may be difficult to fulfill unless tangible evidence can be produced to support the assertion of a first amendment interest . . . . The state ought to be required to convincingly demonstrate a substantial relationship between the information sought and a subject of overriding and compelling state interest. The state must be prepared to establish a factual basis for the need to compel the particular witness' attendance or testimony, and must further provide a sufficient nexs between the individual whose first amendment rights are threatened by the state action and the particular activity under investigation. An investigation into alleged criminal activity of persons readily identified with dissident groups cannot provide a carte blanche for the investigation of all persons directly or indirectly connected with that political faction. The Supreme Court has held that courts cannot simply assume that every congressional investigation is justified by a public need that overbalances any private right asserted. A grand jury investigation should be subject to no lesser standard. . . . Where a witness applies for preliminary relief from compulsory process, the government will likely argue that any required showing on its part will seriously hamper the recognized need for flexibility in grand jury proceedings, result in the premature forced disclosure of the government's case, and substantially alter the widely accepted need for secrecy in the grand jury proceedings. These arguments have not prevented judicial intervention to safeguard other

a protective order prohibiting inquiry into areas of protected freedoms,[172] an appeal,[173] and refusal to answer qustions asked by the grand jury based on the First Amendment.[174]

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constitutional and nonconstitutional rights of witnesses to resist compulsory process. *Id.* at 690-694.

172. Where it appears that the court will be reluctant to quash the subpoena, the witness may seek a protective order prohibiting inquiry into areas of protected freedoms. A protective order could, in certain cases, obviate the case-by-case, question-by-question, judicial resolution of a proper balance. While such an approach does not fully protect against all resulting "chilling effects" on protected freedoms, several courts have attempted this limited safeguard where the first amendment's interest could not be ignored or subjugated to the state's need for the witness' attendance or testimony.

Id. at 692-693.

173. Where a valid first amendment interest is shown and the federal court refuses to either grant a motion to quash or issue a protective order, an emergency appeal should be considered. Ordinarily, no appeal lies from a motion to quash. Appellate resolution is generally available only after the witness has been held in contempt. However, appellate intervention should be sought by invoking the court's equitable jurisdiction to check a substantial and irreparable harm to first amendment interest without forcing the witness to first experience the penal stigma of a contempt judgment.

Id. at 693.

174. Where the court declines to preliminarily resolve the witness' first amendment claim or grant a protective order, and all other constitutional and nonconstitutional grounds for quashing the subpoena have been exhausted, the witness' attendance before the grand jury will be directed. When the questioning process begins, the witness, prior to rendering any answers, should insist on having the opportunity to consult with his counsel. At this point in the proceedings, an examination of the questions may reveal that the government is pursuing a line of questioning which encroaches on the rights of the witness. If it appears that the witness is being interrogated on topics within the ambit of the first amendment, the witness, and his counsel, will have to decide which means of resistance will be most successful. If the witness makes a determination that resistance should be based solely on first amendment grounds, a statement should be made to the grand jury that the questions will not be answered on the grounds that the questions posed are violative of his first amendment rights and that the witness reserves the right to his other constitutional and nonconstitutional privileges and immunities. At the hearing precipitated by the government's application for a judicial order to compel testimony, the arguments raised on an initial motion to quash may be far more persuasive. Armed with the specific questions propounded by the grand jury, which now serve as a substantial basis to establish an encroachment on activity protected under the first amendment, the witness, through counsel, must urge the court to compel the government to make a showing justifying compliance. At this stage, the test developed above may become a potent means for shielding the witness from unwarranted inquiries. If the questions reveal a general investigation into the area of first amendment activity, the government may well be unable to show an overriding and compelling state interest which subordinates the witness' first amendment rights. Moreover, the nexus requirement of a substantial relationship between the subject matter under inquiry and the particular testimony of the witness may serve to defeat the government's desire to interrogate this witness if such a nexus proves to be lacking. Finally, the questions them-

CONCLUSION

Whether the grand jury in Wisconsin, in light of the changes in the rights of individuals indicted thereby, remains a viable alternative for the prosecutor appears questionable. Nonetheless, as long as the federal courts are constitutionally mandated to use the indictment power of the grand jury to initiate the mechanisms of the criminal justice system, lawyers in Wisconsin will continue to find it necessary to cope with the institution. As due process and accompanying constitutional safeguards continue to develop, so must their application to grand jury procedure. While the arguments in opposition to the grand jury procedure have been advanced for over a hundred years, the growing awareness of individual rights provides a new receptiveness to their application. To insure that a client's rights are preserved, the Wisconsin attorney must continue to press for an intrusion of constitutional safeguards into the secret institution of the grand jury.

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selves may refute a government claim that no alternative means of obtaining the information is available.

Alternatively, the witness may resist the grand jury's inquiries into areas protected by the first amendment by refusing to answer on the grounds that the specific questions constitute a violation of his rights under both the first and fifth amendments. Emphasis should be put on the historical interdependence between the first and fifth amendments to safeguard the political activities and beliefs of citizens whose dissident political stance has rendered them the object of repressive reprisals by those holding the political power.

The Supreme Court has recognized the close relationship between the first and fifth amendments. But the first amendment has not been established as an independent privilege in resisting compulsory process. Instead, courts have found the fifth amendment adequate to protect whatever first amendment claims are raised.

In cases where the government wishes to pursue a grand jury inquiry after the fifth amendment privilege has been raised, an application for immunity is generally filed. Whichever immunity is invoked, the witness should resist the grant of immunity on first amendment grounds. Even where immunity would totally insulate a witness from future criminal prosecution, such immunity provides no safeguard against encroachment on first amendment rights. Thus, paradoxically, the government relies on the proscription of the fifth amendment to circumvent and defeat the mandate of the first amendment. Recently, the government's contention that immunity grants provide all the protection necessary has been rejected, the courts holding that a witness, immunity notwithstanding, retains the right to challenge the use of illegally obtained evidence and the impermissible application of the immunity statute. . . . An adverse resolution at any stage, even subsequent to a grant of immunity, should not preclude reapplication for judicial relief where, upon further questioning, it becomes clear that the government is now probing areas protected by the amendment. Resort to such reapplication is probably necessary where the court has refused to entertain an initial challenge to the subpoena as premature or where the earlier questions resisted on fifth amendment grounds do not reveal a discernible encroachment.

Id. at 693-696.