Missouri Law Review

Volume 36
Issue 2 *Spring 1971*

Article 3

Spring 1971

Right to Counsel at the Grand Jury Stage of Criminal Proceedings

Walter W. Steele Jr.

RIGHT TO COUNSEL AT THE GRAND JURY STAGE OF CRIMINAL PROCEEDINGS

WALTER W. STEELE, JR.*

I. INTRODUCTION

Criminal justice in the United States is administered in a series of stages, ranging from the arrest stage at the beginning, to the parole stage at the end. A person accused of crime is processed by being passed from one stage to another. At any stage the accused person may be screened out of the system altogether, or he may be passed along to the next stage for further processing. For example, at the trial stage the accused is either acquitted (screened out of the system) or he is convicted, and bound over for sentencing (passed along to the next stage for further processing). In most jurisdictions the grand jury is one of these stages in felony cases.[1] Histori-

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*Associate Professor of Law, Southern Methodist University; LL.B. Southern Methodist University; LL.M. University of Texas.

1. The fifth amendment states: "[n]o person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury." However, this aspect of the fifth amendment has never been made applicable to the states. In Hurtado v. California, 110 U.S. 516 (1884), the Supreme Court held that due process of law did not require an indictment in all cases. *See also* Oregon v. Miller, 458 P.2d 1017 (Ore. 1969). Since the decision in Hurtado some states have dispensed with the necessity of indictments by grand juries. See Younger, *The Grand Jury Under Attack,* 46 J. CRIM. L.C. & P.S. 214 (1955).

The following states provide that the prosecution of criminal cases may be commenced by the filing of an information or indictment at the option of the prosecutor.

Arizona*—ARIZ. REV. STAT. ANN. R. CRIM. P. 78 & 79 (1956); Arkansas—ARK. CONST. amend. XXI (1956); California*—CAL. PENAL CODE §§ 737 & 738 (West 1970); Colorado—COLO. REV. STAT. § 39-4-1 (1963); Connecticut†—GEN. STATS. CONN. § 54-46 (1968); Florida†—FLA. STAT. ANN. § 932.47 (1944); Idaho†—IDAHO CODE § 19-1301 (1948); Indiana—IND. STAT. ANN. § 9-908 (1956); Iowa—IOWA CODE ANN. § 769.1 (1950); Kansas*—KAN. STAT. ANN. §§ 62-801 & 62-804 (1964); Louisiana—LA. STAT. ANN., CODE CRIM. PROC. § 382 (1967); Michigan*—MICH. COMP. LAWS ANN., CODE CRIM. PROC. §§ 767.1 & 767.42 (1968); Minnesota*—MINN. STAT. ANN. §§ 628.29, 628.31 & 628.32 (1963); Missouri—MO. CONST. art. I, § 17; § 545.010, RSMo (1969); Montana*—MONT. REV. CODE §§ 95-1501—95-1502 (1969); Nebraska*—REV. STAT. NEB. §§ 29-1601 & 29-1607 (1965); Nevada*—NEV. REV. STAT. §§ 171.196 & 172.015 (1967); New Mexico*—N.M. STAT. ANN. § 41-6-1 (1963), *amending* § 35-4401 (1925). *See also* N.M. CONST. art. 2, § 14; North Dakota*—N.D. CENTURY CODE ANN. § 29-09-02 (1960); Oklahoma—OKLA. STAT. ANN. § 22-301 (1969); South Dakota*—S.D. COMP. LAWS ANN. §§ 23-2-5 & 23-36-1 (1967); Utah*—UTAH CODE ANN. §§ 77-16-1 & 77-17-1 (1953); Vermont†—VT. STAT. ANN. tit. 13 § 5651 (1958), *as amended* (Supp. 1969); Washington—REV. CODE WASH. § 10.37.015 (1961), *as amended,* (Supp. 1969); Wisconsin*—WIS. STAT. ANN. §§ 955.12 & 955.18 (1958); Wyoming—WYO. STAT., § 7-118 (1957).

*These states by statute specifically require a preliminary hearing as a prerequisite to prosecution by information rather than grand jury indictment.

cally, the grand jury performed a number of functions,[2] but its essential purpose now is to indict or no-bill an accused. Therefore, from the standpoint of both the accused and the community the grand jury stage is quite significant, because it is the gateway to the heart of the criminal justice system—the trial and sentencing stages.

Since the grand jury proceeding can be the last hurdle prior to the prosecution of a felony case, two questions naturally arise: (1) Is it a "critical stage" where the accused must be afforded right to counsel, and the appointment of counsel if he is indigent?[3] (2) What functions can counsel perform at the grand jury stage? The purpose of this article is to search for answers to both of those questions. Admittedly, both questions are somewhat dialectic because there is no right to counsel at the grand jury stage according to the presently accepted rule of law in most jurisdictions.[4] One commentator has summed up the law of right to counsel at the grand jury stage as follows:

> The institution of the grand jury frankly does not embrace the concept of a defense counsel. There is no provision which includes him in any facet of the proceedings, and in fact many of the rules have been deliberately drawn to exclude him. At no stage of the grand jury process is there a legal right to counsel. It is not too much to say that at its very essence the grand jury system is based on the idea of preventing a defense.[5]

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†These states by statute allow the information to be substituted for indictment only in non-capital cases.

The following states require a grand jury indictment in felony cases, but specifically provide by statute that a defendant may waive indictment. Most of these states allow a waiver only in non-capital cases and some of them require the presence of counsel, consent of the prosecuting official, or a waiver by the defendant in writing before the defendant will be allowed to waive the indictment by grand jury.

Alabama—CODE OF ALA., TIT. 15, §§ 227 & 260 (1958); Alaska—ALAS. STAT. § 12.80.020 (1962); Delaware—DEL. CODE ANN., Vol. 13A, RULES SUPERIOR COURT (CRIMINAL No. 7 (1953); Georgia—CODE OF GA. ANN. § 27-704 (1953); Illinois—ILL. ANN. STAT. § 38-111-2 (1970); Maine—ME. REV. STAT. ANN., TIT. 15, §§ 701 & 811 (1964); Maryland—ANN. CODE MD. RULES Nos. 708 & 709 (1963); New Hampshire—N.H. REV. STAT. ANN. §§ 601:1 & 601:2 (1968); New Jersey—N.J. STAT. ANN. §§ 2A:152-3 and 2A:7-25 (1952); North Carolina—N.C. GEN. STAT. §§ 15-137 & 15-140.1 (1965); Ohio—OHIO REV. CODE ANN. § 2941.021 (1953), *as amended,* (Supp. 1969); Oregon—ORE. REV. STAT. § 131-010 (1969) and ORE. CONST. art. VII, § 5, *as amended,* (1958); Pennsylvania—PA. STAT. ANN. CODE CRIM. PROC. RULES Nos. 213 & 215 (1964), *as amended,* (Supp., 1970); Rhode Island—GEN. LAWS R.I. § 12-12-19 (1956); South Carolina—CODE OF LAWS OF S.C. §§ 17-401 & 17-516 (1962); Tennessee—TENN. CODE ANN. §§ 40-1703 (1956) and 40-2015 (1956), *as amended,* (Supp., 1969); Virginia—CODE OF VA. § 19-1-162 (1969).

Statutes in the following states require a grand jury indictment in felony cases.

Hawaii—HAWAII REV. STAT. § 711-6 (1968); Kentucky—KY. REV. STAT. ANN. RULES CRIM. PROC. 6.02 (1969); Massachusetts—ANN. LAWS MASS. Ch. 277, § 15 (1968); Mississippi—MISS. CODE ANN. § 2440 (1956), *see also* MISS. CONST. art. 3, § 27; New York—N.Y. CODE CRIM. PROC. 4 (McKinney 1958); Texas—TEX. CONST. art. 1, § 10; West Virginia—W. VA. CODE § 62-2-1 (1966).

To some extent, then, this paper will argue for a change in the present state of the law. The argument will be presented in three parts. First, the doctrine of right to counsel as a whole will be reviewed with particular emphasis given those cases calling for counsel at various "critical stages" in the criminal justice process. The next part of the paper will examine the nature of grand jury proceedings from the standpoint of what, if any, aspects of those proceedings are similar to other stages that have previously been declared critical. The third part of the paper will evaluate and analyze some of the case law dealing specifically with the question of right to counsel at the grand jury stage.

II. The Critical Stage Rationale

What factors induce a court to extend the doctrine of right to counsel to a particular stage in the criminal justice process? The answer to that question is crucial to any discussion of whether or not the right should be extended to the grand jury stage. In 1932 in *Powell v. Alabama,*[6] the Supreme Court made the rather grand statement that a person accused of crime, "requires the guiding hand of counsel at every step in the proceedings against him."[7] If the Court had followed its own rhetoric and actually extended the right to counsel to "every step in the proceedings against him" this article would not be necessary. In fact, extending the doctrine of right to counsel has been a slow and uncertain process, still developing today, thirty-eight years after the decision in *Powell.*[8] Some of the uncertainty and confusion comes from the fact that the Supreme Court has applied different constitutional rationales in the process of extending the doctrine to different stages. Thus, the fifth amendment was the basis for the decision in *Miranda v. Arizona,*[9] (right to counsel at custodial interrogation); the sixth amendment was applied in *Wade v. United States*[10] (right to counsel at line-up); the due process clause of the fourteenth amendment was used in *Powell v. Alabama*[11] (right to counsel at trial); and finally,

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2. *See* Kaufman, *The Grand Jury—Its Role and Its Powers,* 17 F.R.D. 331 (1955) for a concise and interesting account of the history of the grand jury as an institution in criminal justice administration.

3. *E.g.,* Mempa v. Rhay, 389 U.S. 128 (1967); *See also* note 17 *infra.*

4. *E.g.,* only three states specifically provide for the right to counsel at a grand jury proceeding and this right is limited. *See* Mich. Comp. Laws Ann., Code Crim. Proc. 767.3 (1968); Utah Code Ann. 77-18-3 (1953), *as amended,* (Supp. 1969); Rev. Code Wash. 10.28.075 (1961), *as amended,* (Supp. 1969).

5. Treadwell, *Representation of the Grand Jury Subject,* in Criminal Defense Techniques § 6.02[1] (R. Cipes ed. 1969).

6. 287 U.S. 45 (1932).

7. *Id.* at 69.

8. "The courts have had great difficulty in deciding in what cases, and at what stage of a case, the right to counsel accrues." Capler v. City of Greenville, 298 F.Supp. 295, 299 (N.D. Miss. 1969).

9. 384 U.S. 436 (1966).

10. 388 U.S. 218 (1967).

11. 287 U.S. 45 (1932).

the equal protection clause of the fourteenth amendment has been cited by the court as justification for extending the right in such cases as *Douglas v. California*[12] (right to counsel on appeal).

One part of the doctrine of right to counsel about which there is no uncertainty is that it is not limited to the trial stage. As stated in a concurring opinion in *Spano v. New York*:[13]

> Depriving a person, formerly charged with a crime, of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself.[14]

Likewise, the doctrine has been extended to some post-trial stages, as in *Mempa v. Rhay*[15] where the Supreme Court extended the right to counsel to the sentencing stage.[16] Extending the doctrine beyond the trial stage has been troublesome for the courts, because the only *explicit* constitutional justification for right to counsel is the somewhat circumscript language of the sixth amendment. The sixth amendment provides for "Assistance of Counsel for his Defence" in "all criminal prosecutions." The phrases "counsel for his defence" and "all criminal prosecutions" simply do not readily lend themselves to the construction that counsel is required at all of the pre and post-trial stages where it has been required thus far, because there is no manifest indication of any real prosecution or defense at these stages.[17]

The seemingly restrictive language of the sixth amendment, and the resulting confusion over which amendment to apply in any given case, may have been what motivated the courts to devise the critical stage principle. However it came about, the notion of a critical stage provides a sort of unifying bridge between all of the various approaches to the right to counsel doctrine. Even in such early cases as *Powell* the Supreme Court gave passing reference to the idea of a stage being so critical that right to counsel must be extended to it:

> [D]uring perhaps the most critical period of the proceedings . . . from the time of their arraignment until the beginning of their trial . . . the defendants did not have the aid of counsel in any real

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12. 372 U.S. 353 (1963).
13. 360 U.S. 315 (1959).
14. *Id.* at 325.
15. 389 U.S. 128 (1967).
16. The facts in Mempa v. Rhay involved a hearing to revoke probation. However, the decision has been interpreted to encompass sentencing in its broader aspects. *See* Cohen, *Sentencing, Probation, and the Rehabilitative Ideal: The View from Mempa v. Rhay*, 47 TEX. L. REV. 1 (1968). *Contra*, Shaw v. Henderson, 430 F.2d 1116 (5th Cir. 1970).
17. [T]he appointment of counsel may sometimes be mandatory even in those areas in which the Sixth Amendment does not apply. This is true when the circumstances of a defendant or the difficulties involved in presenting a particular matter as such that a fair and meaningful hearing cannot be had without the aid of counsel.
Dillon v. United States, 307 F.2d 445, 446-47 (9th Cir. 1962).

> sense, although they were as much entitled to such aid during that period as at the trial itself.[18]

Within the last few years the critical stage rationale has been the most often used approach to expanding the doctrine of right to counsel. Critical stage is a functional approach to the problem rather than a definitional approach. In other words, counsel is extended to a stage because what happens to a defendant at that stage critically affects his rights. Using this approach, courts have made the sixth amendment phrase, "all criminal prosecutions" synonomous with "all critical stages."[19] Thus, the following expression is commonly found in many cases dealing with right to counsel:

> [T]he Sixth Amendment, which is made applicable to the states by the Fourteenth Amendment, requires that an accused be permitted counsel at every "critical stage" of the proceedings against him.[20]

The ubiquity of the critical stage rationale provides a useful medium for forecasting the expansion of the doctrine of right to counsel. If the elements that make some stages critical are isolated they may then provide the basis for arguing that right to counsel should—or should not—be extended to some other stage under consideration.

Most cases holding a stage to be "critical" are based upon a synthesis of two factors: the inherent nature of the stage itself; and the court's perception of the role of a lawyer at that stage. This two-factor formula was given by the Supreme Court in *Wade v. United States*:[21]

> It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation [stage] *and* the ability of counsel to help avoid that prejudice.[22]

Apparently, therefore, a stage is "critical", and right to counsel must be provided, if the possibility of substantial prejudice to the defendant's rights is inherent to the nature of the proceedings, *and if* a lawyer at that stage could help avoid that prejudice.

The first part of the formula, dealing with the inherent potential for prejudice, is the easiest to apply. If the proceedings will have a lasting impact upon the eventual outcome of the case, then the first part of the formula is satisfied.[23] As stated by one court:

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18. Powell v. Alabama, 287 U.S. 45, 57 (1932).
19. "[O]ur cases have construed the Sixth Amendment guarantee to apply to 'critical' stages of the proceedings." United States v. Wade, 388 U.S. 218, 224 (1967).
20. Petition of Croteau, 234 N.E.2d 737, 738 (Mass. 1968).
21. 388 U.S. 218 (1967).
22. *Id.* at 227 (emphasis added).
23. [I]f the effectiveness of legal counsel ultimately furnished an accused is *apt*, or *likely*, to be impaired by prior denial of counsel, the time when such denial occurred was a "critical stage" in the judicial process, at which time counsel should have been available to protect the constitutional rights of the accused.
Sigler v. Bird, 354 F.2d 694, 697 (8th Cir. 1966).

> A critical stage in the criminal process is thus one in which defendants' rights may be lost, defenses waived, privileges claimed or waived, or which in some other way substantially may affect the outcome of the case.[24]

Miranda v. Arizona is a perfect example of the point under consideration. Although *Miranda* dealt with the arrest stage, right to counsel was extended only to that part of the arrest stage where custodial interrogation occurs.[25] Apparently, the court so restricted the right because the other events that take place at the arrest stage are not likely to permanently affect the eventual outcome of the case.[26]

Once the court finds that events commonly transpiring at some stage might prejudice the defendant, the formula then calls for a further look to see if the presence of a lawyer would serve to mitigate or avoid the potential prejudice.[27] If the court determines that the presence of a lawyer would not serve to mitigate or avoid the prejudice, then right to counsel is not likely to be extended. Since a lawyer can play a multitude of roles, if a court is inclined to extend the doctrine it seldom experiences any difficulty in finding a lawyer's presence essential. Courts have found a lawyer's presence beneficial at a significant number of stages for an unclassifiable variety of reasons: to protect the accused from coercive compulsion;[28] to argue for a psychiatric examination;[29] to investigate the facts;[30] to cope with intricate legal problems;[31] to ascertain the appropriate defense;[32] to explain available defenses;[33] to protect against improper or erroneous prosecution;[34] to discover the prosecution's evidence;[35] to preserve favorable testimony;[36] to lay a predicate for impeachment of unfavorable witnesses

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24. State v. Williams, 97 N.J. Super. 573, 601, 235 A.2d 684, 698 (1967).

25. If authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person's Fifth Amendment privilege so long as they do not question him during that time. Miranda v. Arizona, 384 U.S. 436, 474 (1966).

26. "Of prime importance in determining whether a stage is critical is whether information to be elicited from one at that stage will be used or is sought to be used against him at the adjudicatory stage." Freeman v. Wilcox, 119 Ga. App. 325, 328, 167 S.E.2d 163, 166 (1969); *see generally* Steele, *The Doctrine of Right to Counsel: Its Impact on the Administration of Criminal Justice and the Legal Profession,* 23 Sw.L.J. 488 (1969).

27. " 'Critical stage' is understood to mean prosecutorial activity which has some effect on the determination of guilt or innocence which could properly be avoided, or mitigated, by the presence of counsel." Michigan v. Killebrew, 16 Mich. App. 624, 627, 168 N.W.2d 423, 425 (1969).

28. Miranda v. Arizona, 384 U.S. 436, 466 (1966).

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

30. In re Gault, 387 U.S. 1, 36 (1967).

31. *Id.*

32. *Id.*

33. Hamilton v. Alabama, 368 U.S. 52, 55 (1961).

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

35. *Id.*

36. *Id.*

at later stages in the proceedings;[37] to prepare and submit the case to the judge or jury;[38] to cross examine witnesses;[39] to poll the jury;[40] and to enter an intelligent plea to the charges.[41] The lesson to be learned from these cases, and others like them, is that the critical stage rationale can be as flexible and as expansive as the courts care to make it. This is not to malign the recent expansion of the doctrine of right to counsel; to the contrary, the point to be made is that the only barrier to even further expansion of that doctrine is the willingness of the courts to investigate the need for, and the role of, a lawyer at various stages in the criminal justice process.

III. The Grand Jury Proceeding As A Critical Stage

> Although the grand jury has been a part of the criminal law for many centuries, its procedures and power are nowhere clearly defined owing to its origin in the common law, a development influenced by non-legal factors, and lack of statutory clarification.[42]

As an institution, the grand jury originated in the Assize of Claredon in 1611, and it eventually proved to be a bulwark between the authority of the Crown and individual liberty.[43] By 1681 the grand jury had gained enough independence from the Crown to refuse to indict Lord Shaftsbury for treason, in spite of the urging of King Charles II.[44] Eventually, the functions of the grand jury were expanded beyond those of simply accusing individuals of crime. Particularly in the United States, the grand jury became an enterprising investigative agency, looking into both the public and private aspects of all sectors of life in the community.[45]

Over the years the use of the grand jury has diminished, largely because of statutory enactments or constitutional provisions in many states making the grand jury an *optional* stage in criminal procedure.[46] However, when it is employed, the potential of the grand jury as a critical stage has

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37. *Id.*
38. In re Gault, 387 U.S. 1, 36 (1967).
39. Coleman v. Alabama, 399 U.S. 1, 9 (1970).
40. United States v. Smith, 411 F.2d 733, 736-37 (6th Cir. 1969).
41. Hamilton v. Alabama, 368 U.S. 52, 55 (1961).
42. 37 Minn. L. Rev. 586, 587 (1953).
43. R. Younger, The People's Panel 1 (1963); State v. Barker, 107 N.C. 913, 12 S.E. 115 (1890).
44. R. Younger, The People's Panel 2 (1963).
45. For a general discussion of the development of the grand jury's investigative powers, see Kuh, *The Grand Jury "Presentment": Foul Blow or Fair Play?*, 55 Col. L. Rev. 1103 (1955). *Special* grand juries are sometimes set up to investigate matters like organized crime over a long period of time. *See* Organized Crime Control Oct. of 1970, 18 U.S.C. § 3331-34 (1970).
46. *E.g.*, Arizona, Colorado, Indiana and Missouri; *see* Ariz. Rev. Stat. Ann. R. Crim. P. 78 & 79 (1956); Colo. Rev. Stat. § 39-4-1 (1963), and Ind. Stat. Ann. § 9-908 (1956); Mo. Const. art. 1, § 17.

not diminished.[47] The Supreme Court made that fact clear in *Coleman v. Alabama*[48] where they expressly held that a stage can be critical, even though it is not an essential step in the prosecution.[49]

Somewhere along the way, as the use of the grand jury has declined, there has been a shift away from it being an independent investigative body towards becoming a mere ritualistic part of the accusatory process. Now the prosecutor commonly helps to organize the daily work of the grand jury and serves as its legal counsellor.[50] In fact, it has been said that grand juries of today are mere putty in the hands of the prosecution,[51] an accusation that is not altogether unfounded, considering the fact that most modern grand juries merely review the evidence as gathered and presented by the prosecutor's office.[52]

Despite the fact that the thrust of the grand jury has changed from investigative to denunciative it can still provide an individual citizen with some protection from overzealous prosecution. In the words of the United States Supreme Court:

> [T]he most valuable function of the grand jury was not only to examine into the commission of crimes, but to stand between the prosecutor and the accused, and to determine whether the charge was founded upon creditable testimony or was dictated by malice or personal ill will.[53]

Thus, for the defendant being harassed by the state, the grand jury stage is obviously crucial, or it can be, if the grand jury is aloof from the prosecutor's office, and performs its functions independently. When the grand jury functions as it was designed it is one of the most important stages in the criminal process, because it constitutes the defendant's last opportunity

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47. Many states continue to require grand jury indictment in all felony cases: *e.g.*, Texas, New York, and Virginia—*see* TEX. CONST. art. 1, § 10; N.Y. CODE CRIM. PROC. § 4 (McKinney 1958); and CODE OF VA. § 19-1-162 (1969). Other states leave the matter up to the defendant; *e.g.*, Alabama and Illinois—*see* CODE OF ALA., TIT. 15, § 260 (1958); and ILL. ANN. STAT. § 38-111-2 (1970). Still other states use a combination of these alternatives; *e.g.*, Alaska and North Carolina—*see* ALAS. STAT. § 12.80.020 (1962); and N.C. GEN. STAT. § 15-137 (1965). See statutes cited note 1 *supra*.

48. 399 U.S. 1 (1970).

49. *Id.* at 8, 9. The court states: The preliminary hearing is not a required step in an Alabama prosecution. The prosecutor may seek an indictment directly from the grand jury without a preliminary hearing. . . . However, from the fact that in cases where the accused has no lawyer at the hearing the Alabama courts prohibit the State's use at trial of anything that occurred at the hearing, it does not follow that the Alabama preliminary hearing is not a 'critical stage' of the State's criminal process.

50. *See generally*, 37 MINN. L. REV. 586 (1953).

51. Elliff, *Notes on the Abolition of the English Grand Jury*, 29 J. CRIM. L. CRIM. & P. S. 37 (1938).

52. *See* Jack v. U.S., 409 F.2d 522, 524 (9th Cir. 1969) where the following statement is made: "and the government need not produce before the Grand Jury evidence which tends to undermine the credibility of its witnesses."

53. Hale v. Henkel, 201 U.S. 43, 59 (1906).

to be screened out of the system without reaching the trial court where most defendants are eventually found guilty and punished.[54]

What are some aspects of a grand jury proceeding that might have a prejudicial effect on the outcome of the case? In one sense, a grand jury proceeding in its entirety can be prejudicial to the defendant. Consider these facts: the prospective defendant and/or witnesses, all without counsel, are subpoenaed to appear behind closed doors, to be questioned by a prosecutor before a body of men who are to decide, almost at will, whether or not to indict for some serious crime. All of the testimony given at this proceeding is under oath and can be stenographically recorded. Completely unfettered by the rules of evidence or the restraints of a public hearing, the prosecutor is free to interrogate, cross examine, discredit, or magnify the testimony. The prosecutor is virtually at liberty to turn the grand jury proceeding into a kind of prosecutor's practice court. On the other hand, the defendant is denied this opportunity to preview the facts and the witnesses because neither he nor his lawyer has an absolute right to be present at the grand jury proceeding.

Perhaps the most prejudicial aspect of the proceeding, insofar as it effects the defendant, is the way in which the privilege against self-incrimination is treated. The law seems to be that although a person under arrest has the right to insist upon the appointment and presence of a lawyer before he answers any questions put to him by the police, he does not have a similar right before he answers any questions put to him by a prosecutor in the grand jury room.[55] Of course, persons appearing before the grand jury are entitled to the privilege against self-incrimination.[56] But how effective is the privilege without having the right to counsel to go along with it? A review of a few pertinent cases demonstrates how the privilege against self-incrimination can be essentially useless if not bolstered by the presence of counsel. In the first place, the average person who appears before a grand jury is not qualified to decide for himself whether to exercise or waive his privilege against self-incrimination. In fact, his very manner and tone of voice before the grand jury may be incriminating.[57] A person without counsel at his side could unwittingly offer decisive testimony to the grand jury which he might have a perfect right to withhold if he understood the extent of his privilege against self-incrimination. Clearly, such an occurrence is likely to have a prejudicial effect on the eventual outcome of the case.[58] In some jurisdictions the matter is made

54. TASK FORCE ON ADMINISTRATION OF JUSTICE, THE PRESIDENT'S COMMISSION OF LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 134 (1967).

55. *Compare* Miranda v. Arizona, 384 U.S. 436 (1966), *with* Gollaher v. United States, 419 F.2d 520 (9th Cir. 1969), *cert. denied*, 396 U.S. 960 (1969).

56. Counselman v. Hitchcock, 142 U.S. 547 (1892).

57. Jones v. U.S., 342 F.2d 863 (D.C. Cir. 1964); U.S. v. Degarzia, 213 F.Supp. 232 (N.D. Ill. 1963).

58. "Mere interrogation before a grand jury may harm the accused as much as mere interrogation at a trial." Jones v. U.S., 342 F.2d 863, 868 (D.C. Cir. 1964).

even worse by rulings that a grand jury witness is not even entitled to be *informed* of his privilege against self-incrimination, although that witness may be indicted upon his own testimony.[59] The recent spate of cases dealing with the defendant's right to be furnished a copy of all or parts of the grand jury minutes may be taken as an implicit recognition of the fact that grand jury proceedings can have a prejudicial effect upon the eventual outcome of the case.[60] For instance, recorded grand jury testimony is always available to the prosecution, and is particularly useful in impeaching a witness whose testimony at trial is even slightly inconsistent with his prior testimony before the grand jury.[61] Furthermore, the defendant himself can be subpoenaed to the grand jury, and while sequestered away from his own lawyer, he may be asked to testify. Any testimony gained in this fashion can be introduced at the trial to impeach the defendant if he takes the stand.[62]

Other features of the grand jury proceeding can have a prejudicial effect. In a recent Nevada case,[63] two suspects were ushered into the grand jury room while the prosecutrix was testifying about an alleged rape. After a few moments, the two suspects were taken out of the room, whereupon the prosecutrix identified both of them for the grand jury as the guilty parties. With this tactic the prosecutor was able to successfully avoid the requirements for the use of a line-up set by the Supreme Court in the case of *Wade v. United States*.[64] As long as the defendant is without counsel there is no end to the imaginative use that can be made of the grand jury by a reasonably intelligent prosecutor who desires to "cinch" his case. Surely, the grand jury proceeding must be characterized as an anomaly in the criminal justice process, for it is a stage with all the inherently prejudicial features that make other stages "critical", and yet the right to counsel has not been extended to it.

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59. The mere possibility that the witness may later be indicted furnishes no basis for requiring that he be advised of his rights under the V Amendment when summoned to give testimony before a Grand Jury . . . [w]hile the government may not practice deception, fraud or duress upon an accused to obtain evidence, it is not required to advise him of his rights as to self-incrimination.

United States v. Gilboy, 160 F. Supp. 442, 461 (N.D.Pa. 1958); *see also* United States v. Luxenberg 374 F.2d 241 (6th Cir. 1967); United States v. Scully, 225 F.2d 113 (2d Cir. 1955); *contra,* N.Y. v. Dudish, 5 Misc.2d 856, 166 N.Y.Supp.2d 810 (1957).

60. Dennis v. United States, 384 U.S. 855 (1966); Palermo v. United States, 360 U.S. 343 (1959); United States v. Battaglia, 410 F.2d 279 (7th Cir. 1969); FED. R. CRIM. P. 16 (a) (3).

61. United States v. Insana, 423 F.2d 1165 (2d Cir. 1970); Gutgesell v. State, 43 S.W. 1016 (Tex. Crim. App. 1898). *But see* United States v. Franklin, 429 F.2d 247 (8th Cir. 1970).

62. Gollaher v. United States, 419 F.2d 520 (9th Cir. 1969), *cert. denied,* 396 U.S. 960 (1969); *see generally,* Comment, *The Rights of a Witness Before the Grand Jury,* 1967 DUKE L.J. 97.

63. Maiden v. State, 442 P.2d 902 (Nev. 1968).

64. 388 U.S. 218, 224, 233 (1967) (the Court criticizing the practice of allowing an eye witness to identify a suspect alone in a suggestive situation).

Since courts will not extend the doctrine of right to counsel to a stage where presence of counsel serves no useful purpose, some attention must be given to defining the role a lawyer might play if right to counsel was extended to grand jury proceedings. Without any doubt, one of the major counter indications to the appointment of a lawyer at the grand jury stage is that his presence might (and probably would) disrupt the traditional order and format of the proceedings. If the prosecutor was confronted with the presence of a lawyer for the defendant, it would tend to diminish his unbridled domination of the grand jury. Therefore, when searching for potential lawyer roles at the grand jury stage, one must consider the locus of the performance. Should the lawyer be physically present in the grand jury room, or should he be relegated to a seat in the hallway outside the grand jury door? The answer to that question ultimately affects the kind of role the lawyer can play at the grand jury stage.[65]

Some jurisdictions have already informally adopted the practice of allowing witnesses appearing before the grand jury to confer with their lawyers in the hallways.[66] Furthermore, that practice has been expressly approved by a few courts,[67] although explicit court approval does not seem necessary to its existence. The only way to judicially insure the presence of a lawyer in *every case* is to hold that a grand jury proceeding is a critical stage. But it can not be a critical stage unless the lawyer has a significant role to play, and how can a lawyer play a significant role if he is barred from the room where the proceedings are taking place? The notion of restricting the lawyer to the hallway is excessively mechanistic, if not altogether absurd. Wherever he might be located, what services could a lawyer perform for his client at the grand jury stage? A list of such services might provide some insight into the necessity (or lack of necessity) for having a lawyer present. A speculative, and merely partial, list of such services follows:[68]

1. Assist the witness in the exercise or waiver of his privilege against self-incrimination.

2. Protect any testimonial privilege that may be threatened, such as attorney-client, doctor-patient.

3. Guard against unwarranted intrusion into the witness's privacy from questions having no bearing on the matter under investigation.

4. Police the proceedings and record or attempt to prevent unfair practices, such as using the proceedings to avoid the import of the *Miranda* or *Wade* decisions.

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65. See pp. 210-11 for a discussion of the traditional secrecy of the grand jury proceedings as it affects the question of whether or not counsel should be allowed in the grand jury room.

66. U.S. v. Corallo, 413 F.2d 1306, 1330 (2d Cir. 1969); 26 WASH. & LEE L. REV. 97 (1969).

67. *E.g.,* People v. Ianniello, 21 N.Y.2d 418, 235 N.E.2d 439 (1968), *cert. denied,* 393 U.S. 827 (1968).

68. *See generally,* People v. Ianniello, 21 N.Y.2d 418, 235 N.E.2d 439 (1968), *cert. denied,* 393 U.S. 827 (1968).

5. Observe the demeanor of all witnesses and discover their testimony.[69]

6. Search for any elements of the alleged offense that are missing from the evidence presented, and perhaps advise the grand jury of these missing elements.

7. Enhance the client's chances of being no-billed by pointing up all exclupatory or mitigating evidence.

A lawyer could certainly perform some of these services from the hallway outside the grand jury room. But such an arrangement would in all probability lessen the effectiveness of the proceedings due to the constant need of the defendant to leave the room to consult with his lawyer. The relative merits of having the lawyer remain outside the grand jury room, as opposed to being present inside the grand jury room, were discussed in the case of *Sheriden v. Garrison.*[70] The district attorney argued that Sheriden's lawyer should remain outside because Sheriden would be allowed to step out from time to time to consult with him. The court responded as follows:

> The problem here is that Sheriden will be forced outside the presence of counsel to match legal wits with the District Attorney, Charged as a criminal, he will sit before a grand jury, forced to undergo interrogation outside the presence of his lawyer, required to decide at his peril and without the benefit of counsel present at the time whether any particular question relates to [the crime with which he is charged.][71]

Should the lawyer be barred from the grand jury because of the repercussions his presence would have on the proceedings? It can be argued that hearings before the grand jury will become adversary proceedings—a kind of mini pre-trial. Such dire predictions are faintly reminiscent of comments once made after the *Miranda* and *Wade* decisions about the demise of custodial interrogations or line-ups, all of which were refuted by subsequent experience.[72] Presence of a lawyer at a hearing does not necessarily turn it into a contentious or adversary proceeding, anymore than presence of a physician at an execution turns it into a medical treatment.

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69. This particular role of the lawyer would undoubtedly offend those who feel that the defendant should be denied access to the statements of witnesses against him, at least until trial, under the "particularized need" doctrine; Dennis v. United States, 384 U.S. 855 (1966). However, it is submitted that the present right of the defendants to discover grand jury testimony prior to trial is really no right at all, because it may be effectively sabotaged by simply failing to record the grand jury testimony: "Furthermore, there is no requirement that grand jury proceedings be recorded or transcribed." Jack v. U.S., 409 F.2d 522 (9th Cir. 1969).

70. 273 F.Supp. 673 (E.D. La. 1967), *reversed on other grounds,* 415 F.2d 699 (5th Cir. 1969).

71. *Id.,* at 684.

72. Miranda v. Arizona, 384 U.S. 436 (1966); United States v. Wade, 388 U.S. 218 (1967). *See* Comment, *Interrogations in New Haven: The Impact of Miranda,* 76 YALE L.J. 1519 (1967), where the conclusion is drawn, after an eleven week period of observation and study of interrogations in New Haven, that Miranda

Any tendency of the lawyer to "interfere" with the grand jury could be avoided completely by rules of procedure, just as there are presently rules for that very purpose at the trial stage. For instance, rules might deny the lawyer the right to ask questions during the proceedings but provide that he may submit a list of suggested questions to the foreman, to be used at his discretion. Although the lawyer might be granted some opportunity to give his opinion as to the chances of conviction, the rules could be written so as to deny him the opportunity to make a pyrotechnic summation. Currently, the grand jury is informed (implicitly at least) of the prosecutor's estimate of the chances of conviction when he recommends indictment. The validity of that recommendation would certainly be enhanced if the grand jury had the benefit of a reasoned opinion from the suspect's own lawyer in those cases where he cared to comment. Such a procedure would force the prosecutor to exercise more responsibility in screening cases before presenting them to the grand jury and would also improve the grand jury's capacity to weed out cases that should not have been presented.

In many instances the person under investigation by the grand jury is never called to testify.[73] Should such a person have the right to counsel? Admittedly, this is a difficult issue. Some of the reasons for appointing counsel in other cases are no longer valid when the client is not present. But the prejudicial nature of a grand jury proceeding is not substantially altered by the absence of the person being investigated. A person's entitlement to the services of a lawyer should not be dependent upon the whims of the grand jury in calling, or not calling, that person to appear. If the grand jury receives what it considers to be sufficient evidence to indict without even hearing from the person under investigation, then that may well be the time of greatest need for protection from possible prejudice.

Secret indictments could no longer be obtained if right to counsel was extended to every person under investigation by the grand jury. Any conclusion about the value of secret indictments to law enforcement, as compared to the value of right to counsel to protection of individual liberty,

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warnings "will not silence suspects and therefore will not cripple law enforcement as critics have claimed." 384 U.S. at 1577. For a psychological study of some of the reasons why suspects confess even where *Miranda* warnings are given, see Driver, *Confessions and the Social Psychology of Coercion,* 82 HARV. L. REV. 42 (1968). *See also* Medalie, Zeitz & Alexander, *Custodial Police Interrogation in our Nation's Capitol: The Attempt to Implement Miranda,* 66 MICH. L. REV. 1347 (1968).

For a general discussion of the effect on *Wade* on the line-up process, see Read, *Lawyers at Lineups: Constitutional Necessity or Avoidable Extravagance,* 17 U.C.L.A. L. REV. 339 (1969-1970). The author concludes that the lawyer is largely impotent at the lineup even in those jurisdictions which seek to fully implement *Wade,* and that *Wade* has had little impact on the lineup process.

73. "There is no right on the part of one whose conduct is being investigated by a grand jury to petition the grand jury or to appear before it, which is guaranteed by the Constitution or otherwise. . . ." Duke v. United States, 90 F.2d 840, 841 (4th Cir. 1937). *Accord,* United States *ex-rel.* McCann v. Thompson, 144 F.2d 604 (2d Cir. 1944); Steigler v. Superior Court, 252 A.2d 300 (Del. 1969).

must necessarily rest upon personal viewpoints.[74] The dilemma of protecting individual rights while protecting society is the essence of criminal law and procedure. Perhaps all that can fairly be said at this point in the development of Anglo-American criminal jurisprudence is that individual rights are often favored over the power of the State, so there is nothing revolutionary in the idea of sacrificing secret indictments in favor of right to counsel.

One final comment should be made before this discussion of lawyer roles at the grand jury stage is closed. There is reason to believe that most people would waive right to counsel if it were extended to the grand jury stage. That has been the experience at some other stages where right to counsel has been extended.[75] And when given the opportunity, people seem inclined to waive the grand jury proceeding itself.[76] Therefore, extending the right to counsel might make very little over-all difference in present grand jury procedures. Then why bother? Because, the choice of whether or not to have counsel should lie with the defendant who is, after all, the one with the most at stake in the grand jury proceeding. If the stability of the grand jury is actually so delicate that it will be adversely affected by the presence of a lawyer, then the grand jury as an institution is suspect, and the arguments for the presence of a lawyer are enhanced by that fact.

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74. In balancing the interests of the accused and the state it is interesting to note that the secret indictment process has been severely criticized, see Dession & Cohen, *The Inquisitional Functions of Grand Juries,* 41 YALE L.J. 687 (1932). In considering the merits of the secret indictment it should also be borne in mind that while the functions of grand juries have diminished, the activities of other groups such as legislative committees have increased. Although these other proceedings are also subject to abuse, the fact that they are public does give the accused an opportunity to learn who is making the charges and some idea of what kind of charge is being made against him. *See generally,* Konowitz, *The Grand Jury As an Investigating Body,* 10 St. JOHN'S L. REV. 219 (1936).

75. As was indicated in the post-*Wade* and post-*Miranda* studies (*supra* note 72), defendants often waive their right to counsel at the interrogation and lineup stages for various reasons. Defendants also waive their right to counsel at trial and may often do so through the device of a guilty plea. For a good discussion of the waiver of counsel by defendants through the means of a guilty plea, including statistical studies, see L. SILVERSTEIN, DEFENCE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS 89-104 (1965).

One of the factors which induce defendants to waive counsel, as discussed by Mr. Silverstein, is the fact that the defendant may not be offered counsel until comparatively late in process of criminal justice administration (*e.g.,* after indictment) and by this time he may have already decided to waive counsel and plead guilty. Also, as pointed out by Mr. Silverstein, some defendants are unaware of what the court means when it advises them they are entitled to "counsel". Other factors involved in the waiver of right to counsel are the cost, the feeling on the part of the defendant that he can defend himself adequately, and the desire to "get it over with" and start the sentence to be imposed so that parole can be obtained earlier. *See* 49 MINN. L. REV. 1133 (1965).

76. *See* Orfield, *The Trend: The Constitutionality of Waiver of Indictment in Federal Criminal Cases,* 21 ROCKY MT. L. REV. 76 (1948), in which the author lists cases in which defendants have waived the grand jury under state statutes permitting such waivers.

IV. The Case Law

The previous sections of this writing centered upon a theoretical construct for extending the doctrine of right to counsel to the grand jury stage. Now the emphasis will shift to the statutory and case law as it actually exists today. The attempt is to demonstrate that what has been presented herein as a proposal is, in fact, already the law in a few jurisdictions at least. At the outset it must be admitted that most court decisions expressly deny the right to counsel at the grand jury stage.[77] That denial is usually couched in such language as: "it has never been held"[78] or "it is familiar law that witnesses [before a grand jury] have no right to counsel."[79] The implicit assumption in these cases is that appointment of counsel at the grand jury stage is not a tenable concept. One gets the feeling from the opinions that extending counsel to the grand jury stage would somehow do violence to the fundamental precepts of Anglo-American criminal procedure. In that light it might be helpful to re-examine the historical development of the notion that a person is not entitled to a lawyer at the grand jury stage.

One of the earliest cases on the subject is *In re Black*,[80] decided by the United States Circuit Court of Appeals for the Second Circuit in 1931. Right to counsel at the grand jury stage was denied in that case because "[a] witness is not entitled to be furnished with facilities for evading issues or concealing true facts."[81] The court further stated: "A witness must rely for any needed protection upon his personal privilege against self incrimination to be invoked when the occasion arises."[82] Twenty-six years later, the Supreme Court of the United States considered the problem in *In re Groban*.[83] Following the same philosophy used by the Second Circuit in *Black*, the Supreme Court made this statement in the *Groban* opinion:

> A witness before a grand jury cannot insist, as a matter of constitutional right, on being represented by his counsel, nor can a witness before other investigative bodies. . . . Obviously in these situations evidence obtained may possibly lay a witness open to criminal charges. When such charges are made in a criminal proceeding, he then may demand the presence of his counsel for his defense. Until then, his protection is the privilege against self incrimination.[84]

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77. *E.g.*, Harris v. State, 450 S.W.2d 629 (Tex. Crim. App. 1970), "We note further that we are aware of no authority giving an accused who voluntarily appears before the grand jury the right to be accompanied by his counsel." 450 S.W.2d at 630. Presley v. State, 6 Md. App. 419, 251 A.2d 622 (1969), "Presley's complaint that it was error to deny his request to appear before the Grand Jury is without merit since an accused has no such right." *Id.* at 428, 251 A.2d at 626-27.

78. United States v. Levinson, 405 F.2d 971, 980 (6th Cir. 1968).

79. Perrone v. United States, 416 F.2d 464, 465 (2d Cir. 1969).

80. 47 F.2d 542 (2d Cir. 1931).

81. *Id.* at 543.

82. *Id.* at 544.

83. 352 U.S. 330 (1957). Although *Groban* actually involved a fire marshal's inquest, the Court made liberal allusions to grand jury proceedings.

84. *Id.* at 333.

One may reasonably conclude that the denial of right to counsel was originally based upon the proposition that the opportunity to invoke the privilege against self-incrimination obviated any need for presence of counsel.

Taken in the context of the law as it existed in 1957, when *Groban* was decided, there can be no quarrel with the Supreme Court decision. That was an era when right to counsel was occasioned by a need for "fundamental fairness essential to the very concept of justice."[85] To further obfuscate matters, "fundamental fairness" was measured on a case by case basis by "the sum total of the circumstances."[86] The Supreme Court was of the opinion that right to counsel should not exist at any stage if it "would constrict state police activities in a manner that in many instances might impair their ability to solve difficult cases."[87]

Even the casual student of criminal law is aware of the shift in attitudes concerning the right to counsel since *Groban* was decided in 1957. One example of this shifting emphasis is the birth of the critical stage rationale as explained above. The Supreme Court opinion in *Miranda v. Arizona,*[88] decided in 1966, further exemplifies the change in the thinking of the Court since *Groban.* The significance of the *Miranda* case is shown by the following quotation taken from it:

> Even preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process. Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires. [citations omitted][89]

Although *Miranda* is limited to interrogations where the witness is in custody, the Supreme Court subsequently held that a person in his own bedroom could be in custody.[90] The pressures upon a person subpoenaed to testify before a grand jury are certainly as decisive as those operating upon a person undergoing any other type of custodial interrogation. In other words, it can be argued that a person subpoenaed before a grand jury needs counsel for exactly the same reasons that a person being interrogated by the police needs counsel. In fact, some courts are already applying that analogy.[91] The older holdings in *Black* and *Groban* that a witness before a grand jury is amply protected by his ability to exercise his privilege against

85. Crooker v. California, 357 U.S. 433, 439 (1958).
86. *Id* at 440.
87. Cicenia v. Lagay, 357 U.S. 504, 509 (1958).
88. 384 U.S. 436 (1966).
89. *Id.* at 470.
90. Orozco v. Texas, 394 U.S. 324 (1969).
91. State v. Ruggeri, 19 Utah 216, 429 P.2d 969 (1967), *Compare* Sheridan v. Garrison, 273 F.Supp. 673 (E.D.La. 1967), *reversed on other grounds,* 415 F.2d 699 (5th Cir. 1969), *with* State v. Nelson, 202 So.2d 232 (Fla. 1967).

self-incrimination are simply out of character when juxtaposed against cases like *Miranda* and *Coleman*.[92] As one court pointed out:

> It imposes a serious problem for the witness to determine at his peril whether the questions put to him are themselves innocuous, or incriminatory, or may potentially lead to the discovery of incriminating evidence. Certainly no one would elect to fence with the District Attorney and the grand jury with their own foils at the peril of a possible term in prison.[93]

Several federal circuits are now following a practice of advising witnesses of a right to consult with an attorney during their grand jury testimony.[94] At least one case has recognized that a modern grand jury may be no more than an arm of the prosecutor's office, thus creating a necessity for presence of counsel to assist an accused during the proceedings.[95] *Jones v. United States*[96] is also instructive on that issue. In *Jones* the defendant was arrested and taken before a magistrate and a lawyer was appointed. However, when the defendant was subsequently taken before the grand jury, the lawyer was not notified. Three of the circuit judges voted to reverse the conviction that resulted, stating:

> Indictment is a crucial "step in the proceedings against" the accused. The right which he has at other crucial stages does not jump the time just before indictment. . . . By failing to inform counsel of the impending examination, the prosecution deprived [the defendant] of his assistance at a crucial time and greatly to [his] prejudice.[97]

At the state level, a few legislatures have taken the initiative away from the courts by passing statutes creating a right to counsel at the grand jury stage.[98] The language of the Utah statute is typical:

> . . . Any person called to testify before a grand jury must be advised of his constitutional right to be represented by counsel and his right not to say anything that may incriminate himself. Upon a demand by such person for representation [by] counsel the proceedings must be delayed until counsel is present. In the event that counsel of his choice is not available, said individual shall be re-

92. 399 U.S. 1 (1970) (right to counsel extended to preliminary hearings to insure that rights of accused are fully protected at that stage).

93. Sheridan v. Garrison, 273 F.Supp. 673, 679 (E.D.La. 1967), *reversed on other grounds*, 415 F.2d 699 (5th Cir. 1969).

94. *E.g.*, Perrone v. United States, 416 F.2d 464 (2d Cir. 1969); United States v. Corallo, 413 F.2d 1306 (2d Cir. 1969); United States v. Irwin, 354 F.2d 192 (2d Cir. 1965).

95. Sheridan v. Garrison, 273 F.Supp. 673, 676-77 (E.D. La. 1967), *reversed on other grounds*, 415 F.2d 699 (5th Cir. 1096).

96. 342 F.2d 863, 870 (D.C. Cir. 1964).

97. *Id.* at 870-71.

98. See MICH. COMP. LAWS ANN. § 767.3 (1968); UTAH CODE ANN. § 77-19-3 (1953), *as amended*, (Supp. 1969); REV. CODE WASH. § 10.28.075 (1961), *as amended*, (Supp. 1969).

> quired to obtain other counsel in order that the work of the grand jury go forward. . . . [99]

In summary, it appears that a few cases and statutes extend the right to counsel to the grand jury stage, but they clearly represent a minority viewpoint. In the main, courts continue to follow the historical precept that the fifth amendment is adequate protection for a witness before the grand jury.

No case has been found dealing with the right to counsel of a person being investigated by the grand jury, but not called to appear before it. As discussed previously, the desirability of allowing counsel to be present when a case is considered, *whether the client is present or not,* depends upon the conclusion reached after balancing the equities between protecting the individual on the one hand and preserving the secrecy of grand jury proceedings on the other. It might be helpful to examine the traditional idea that grand jury proceedings must be secret.[100] At least three separate reasons are usually given for preserving the secrecy of grand jury proceedings.

1. Secrecy allows the grand jurors to meet and deliberate without fear of retaliation.[101]
2. Secrecy encourages witnesses to come forward and testify fully.[102]
3. Secrecy protects the accused from irreparable damage if no in-indictment is found.[103]

These reasons may have been valid at one time. Today they seem unrealistic if not altogether ridiculous. For example, the fact that named grand jurors meet to consider a particular case is usually a matter of public record and is frequently the subject of newspaper coverage. Therefore, the mere fact that deliberations are secret is no guarantee against retaliation directed towards the grand jury members. Similar reasoning applies to the notion that secrecy encourages witnesses to testify. Witnesses are just that; and as such must necessarily expect to be contacted by persons interested in the case. If an indictment is returned (as is usually the case) they will have to face the defendant and his lawyer sooner or later. In fact, it could be argued that the grand jury would be better assured the truth from witnesses if their testimony was given in the presence of the defendant's lawyer than in

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99. UTAH CODE ANN. § 77-19-3 (1953), *as amended,* (Supp. 1969).

100. It is, of course, a familiar proposition that the lawyer for a witness is not entitled to be present in the Grand Jury room [citations omitted]. This rule rests upon the statutory exclusion of all except certain authorized persons before the Grand Jury and the need to preserve the secrecy of the Grand Jury proceedings.

People v. Ianniello, 21 N.Y.2d 418, 423, 235 N.E.2d 439, 442 (1968), *cert. denied,* 393 U.S. 827 (1968).

101. *See* State v. Rothrock, 45 Nev. 214, 222, 200 P. 525, 527 (1921).

102. Howard v. State, 60 Ga. App. 229, 235, 4 S.E.2d 418, 423-24 (1939).

103. For other possible reasons for secrecy *see* Calkins, *Abolition of the Grand Jury in Illinois,* 1966 U. ILL. L. F. 423. Bennett v. Stockwell, 197 Mich. 50, 163 N.W. 482 (1917).

the usual case where they testify without that restraining influence. The last reason in the list—that secrecy protects the accused from irreparable damage where no indictment is found—is no less than patently absurd. As previously mentioned, the public is usually well aware of the fact that a person is under investigation by the grand jury, so the suspicion is already cast. If it is ever removed, it is because the suspect is ultimately no-billed, and not because the proceedings are secret. And since the reason for secrecy is to protect the suspect, there should be no reluctance to grant that suspect the right to waive his so-called protection to the extent of having his own counsel present.

There never has been a great deal of unanimity over the issue of secret grand jury proceedings. Exceptions have always been made in one form or another when the interests of justice seem to call for it. Even as early as 1902 one court commented:

> Independent of statutory regulation, courts in different states hold widely divergent views upon the question as to whether it is competent for members of a grand jury to testify as to what occurred in the grand-jury room.[104]

Courts have declared the right of the father of a timid young girl to accompany her into the grand jury room during the investigation of a rape case,[105] and the right of private counsel for the deceased's estate to be present during the investigation of the death.[106] Many courts have recognized that secrecy does not prohibit a witness from discussing the grand jury proceedings with his own attorney.[107] The liberalizing of discovery practice in criminal cases has neutralized many of the old arguments in favor of grand jury secrecy. Now a defendant is entitled to a copy of the grand jury minutes if they are needed to insure the full and fair cross-examination of a witness.[108] In addition, recent amendments to Rule 16 (a) of the Federal Rules of Criminal Procedure indicate that a defendant is entitled in all cases to a copy of his own testimony before a grand jury.[109]

As discussed earlier, cases denying right to counsel at the grand jury stage are usually based upon the proposition that the fifth amendment is adequate protection for a witness. There is a conflict between that historical approach and the newer critical stage concept. Some courts and legislatures have broken with tradition by recognizing the desirability of providing counsel at the grand jury stage. But one should not expect a

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104. Pritchett v. Frisby, 112 Ky. 503, 504, 66 S.W. 503, 504 (1902). *Cf.* Misso v. State, 61 TEX. CRIM. 135 S.W. 1173 (1911).
105. People v. Arnold, 248 Ill. 169, 93 N.E. 786 (1910).
106. Tiner v. State, 109 Ark. 138, 158 S.W. 1087 (1913).
107. *E.g.* Goodman v. United States, 108 F.2d 516 (9th Cir. 1939).
108. Dennis v. United States, 384 U.S. 855 (1966); United States v. Tanner, 279 F.Supp. 457, 472 (N.D. Ill. 1967).
109. United States v. Projansky, 44 F.R.D. 550 (S.D.N.Y. 1968); 68 COL. L. REV. 311 (1968).

growing movement toward uniform recognition of a right to counsel at the grand jury stage. To the contrary, the forecast is for continued denial of that right in most instances. This pessimism results from two recent Supreme Court cases—*Hannah v. Larche*[110] and *Jenkins v. McKeithen*.[111]

Hannah v. Larche dealt with the power of the Civil Rights Commission to deny a person access to the names of those who accused him of violating their civil rights and to also deny him the right to confront and cross-examine those persons before the Commission.[112] The Supreme Court found that the purpose of the Commission was to find facts, not to "indict, punish, or impose any legal sanctions."[113] The Court concluded that the full panoply of due process rights was not necessary because "the requirements of due process frequently vary with the type of proceeding involved . . ."[114] *Hannah* stands for the proposition that something less than complete due process is required before certain tribunals, but what makes it particularly important to the topic under discussion is that the Supreme Court characterized the grand jury as one such tribunal:

> Undoubtedly, the procedural rights claimed by respondents have not been extended to grand jury hearings because of the disruptive influence their injection would have on the proceedings, and also because the grand jury merely investigates and reports. It does not try.[115]

If there was any doubt about the meaning of *Hannah* vis-a-vis the grand jury it was dispelled in the subsequent case of *Jenkins v. McKeithen*. In that case the Supreme Court was called upon to decide the constitutionality of a Louisiana statute creating the Labor-Management Commission of Inquiry. The purpose of the Commission was the "investigation and findings of facts relating to violations or possible violations of criminal laws of the state of Louisiana or of the United States arising out of or in connection with matters in the field of labor-management relations. . . ."[116] The Court found that the Commission "clearly exercises an accusatory function; it is empowered to be used and allegedly is used to find named individuals guilty of violating the criminal laws of Louisiana and the United States and to brand them as criminals in public."[117] The Court went on to hold that *all* of the requirements of due process, such as right to confrontation and cross-examination and the right of the accused to present evidence in his

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110. 363 U.S. 420 (1960).
111. 395 U. S. 411 (1969).
112. Right to counsel was not an issue in *Hannah*, because the rules of the Commission allowed any witness to be accompanied by his own counsel, 363 U.S. at 431-432.
113. *Id.* at 441.
114. *Id.* at 440.
115. *Id.* at 449.
116. 395 U.S. at 414.
117. *Id.* at 428.

own behalf, must be afforded by the Commission.[118] The Court did not reach the question of right to effective assistance of counsel,[119] but it did make a comment about the applicability of the decision to grand jury proceedings:

> We do not mean to say that this same analysis applies to every body which has an accusatory function. The grand jury, for example, need not provide all the procedural guarantees alleged by appellant to be applicable to the Commission. As this court noted in *Hannah,* "The grand jury merely investigates and reports. It does not try." Moreover, "[t]he functions of that institution and its constitutional prerogatives are rooted in long centuries of Anglo-American history." [citations omitted][120]

Reading the *Hannah* and *Jenkins* opinions together, there is little room to doubt what the Supreme Court would do if directly confronted with the problem of whether or not to extend the doctrine of right to counsel to the grand jury stage—it would undoubtedly decline to do so. Both in *Hannah,* and again in *Jenkins,* the Court has shown its predilection to avoid any "disruptive influence" upon the grand jury, a body the Court sees as having "constitutional prerogatives . . . rooted in long centuries of Anglo-American history." In other words, the Court has chosen to treat the grand jury as unique—an exception to the entire catena of cases that have superimposed constitutional rights, such as right to counsel, upon various stages of the criminal process. If the Supreme Court holds to the view that the grand jury is sacrosanct because of its historical origins, it will remain a no-man's land insofar as individual constitutional rights are concerned. At this point in time perhaps the only hope for improvement lies in the fact that over the years the Supreme Court has distinguished itself by decisions that have enlarged upon Anglo-American history and tradition, rather than being limited by it.

Conclusion

> *No doubt it would be a boon to prosecutors if they could summon before a Grand Jury a person against whom an indictment is being sought and there interrogate him, isolated from the protection of counsel and presiding judge and insulated from the critical observation of the public. But there is a serious question whether our jurisprudence, fortified by constitutional declaration, permits that procedure. Powell v. United States.*[121]

Despite numerous expressions of concern, similar to the above quotation, the law of right to counsel at the grand jury stage remains essentially

118. *Id.* at 429.
119. *Id.* at 430.
120. *Id.*
121. 226 F.2d 269, 274 (D.C. Cir. 1955).

unchanged. For some vague and undefined reason, conceptions about the grand jury have remained static although our perceptions about other stages of the criminal process, and the individual rights appurtenant to them, have undergone significant changes. In 1967 the Supreme Court of the United States said, "today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pre-trial proceedings where the results might well settle the accused's fate and reduce the trial to a mere formality."[122] From the standpoint of the accused, the grand jury proceeding is just such a "critical confrontation." The potential for lasting prejudice inherent in any particular grand jury proceeding will vary from case to case, but as the Supreme Court itself has said, "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."[123]

We have reached a phase where we grant a suspect right to counsel if he is placed in a line-up or interrogated by a police department, but we deny a suspect counsel if he is paraded before, or interrogated by, a grand jury. The justification for that apparent incongruity is historical precedent. And yet, most of the grand jury's historical function has withered from disuse. Given the cadre of trained police available today, there is practically no need for investigation by a grand jury. In today's world the grand jury has become a screening mechanism instead of an investigative body. This shift in emphasis from a body that investigated to a body that screens should be recognized and considered whenever decisions are being made about right to counsel at the grand jury stage. Too often the continued denial of right to counsel is justified with rhetoric reminiscent of the old, traditional conceptions of the grand jury function. Now that the grand jury serves a new and modern purpose, it behooves us to re-examine some of the rationale that has led to the general accepted proposition that there is no right to counsel at the grand jury stage of criminal proceedings.

122. United States v. Wade, 388 U.S. 218, 224 (1967).
123. Glasser v. United States, 315 U.S. 60, 76 (1942).