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# The Grand Jury: A Critical Evaluation

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Lewis: The Grand Jury  
**THE GRAND JURY: A CRITICAL EVALUATION\***

OVIO C. LEWIS\*\*

INTRODUCTION

**I**T SEEMS in retrospect that our grand jury was a microcosm of grand juries generally in that many of the problems noted in the literature were manifest throughout our term. This supports the proposition that the weaknesses and defects of grand juries are not reflective of lack of zeal or devotion to duty on the part of individual members of the juries, but rather are indicative of systemic and institutional dysfunctionalities that are inherent in the grand jury system as it is presently constituted and organized. Thus, the critical comments that appear herein ought not to be taken as an attack upon the competence or integrity of a particular prosecutor, judge or grand jury, but rather as directed at reformation of the current institutional arrangement.

At the outset it is important to place this grand jury in perspective. The individual members were dedicated, bright persons, who diligently and intelligently executed their duty throughout the term. None, however, were lawyers, and thus they were unfamiliar initially with the criminal code, evidence law, constitutional law, grand jury rules, and other relevant legal material. Throughout the term I was most favorably impressed with the skill and ability of the jurors as laymen to interrogate witnesses and to analyze the facts and relevant law in the cases brought before us.

When approached about acting as foreman, I was somewhat reticent, primarily because of the heavy workload confronting me from September to January: a full teaching load at the Law School at Case Western Reserve University; completion of briefs and arguments at the Federal District Court, Federal Court of Appeals, and United States Supreme Court; and a visit of a week to El Paso, Texas, with subsequent submission of a report on the El Paso delivery system of legal services for the indigent to the National Defender Association in Washington, D. C. Nonetheless, the opportunity for significant community service and a chance to experience the grand jury in action—to feel it in my gizzard rather than merely know it as an abstraction in my head—was too much for me to resist. Thus, the foreman for the term was a law professor who, although not admitted to the Ohio Bar, did on occasion practice in the Federal Courts, filing civil rights actions and habeas corpus petitions for indigents. This meant that the foreman came to the grand jury with a special concern for protecting the rights of the accused.

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\*This article is an outgrowth of the report done by the author while foreman of the Cuyahoga County Grand Jury in September 1975.

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In my constitutional law course I often expressed the view that the requirement of an indictment by a grand jury was one of the most fundamental rights guaranteed by the Constitution, since without an indictment the individual was spared the ordeal of a trial—an ordeal whose cost in terms of money and emotional trauma was not cancelled out by a not guilty verdict. However, I knew that the United States Supreme Court had never held that the fifth amendment's guarantee of requiring a grand jury indictment or presentment was applicable to state prosecutions<sup>1</sup> even though the Court had held almost all the other contemporarily significant guarantees in the federal Bill of Rights applicable to the states through the Due Process Clause of the fourteenth amendment of the United States Constitution. Perhaps it is this second-class treatment by the Court of the grand jury provision that leads us to de-emphasize analysis of the institution in law schools—which in turn may account for the general ignorance of lawyers concerning the powers and attributes of grand juries (three county prosecutors I asked were unable to tell me the meaning of a grand jury presentment as opposed to an indictment).

Your naive and disingenuous foreman therefore approached the term viewing the grand jury as the “people’s panel” and a bulwark of protection for the accused.<sup>2</sup> As the “people’s panel”, of course, the jurors could investigate and indict where for political and other reasons the prosecutor’s office might not act. At about the time of my appointment several areas seemed likely candidates for such investigations: gratuities given to judges, the Hill Properties fiasco, and the irregularities in the County Sheriff’s Department reported extensively in the *Plain Dealer*. In each instance, I thought, for obvious reasons, the prosecutor’s office might find great difficulty in proceeding independently—but with the backing of an autonomous and non-political grand jury which had conducted an in-depth investigation appropriate and effective action would more likely occur.

After due consideration I decided the irregularities in the Sheriff’s Department reported in the news was the most apt area for a grand jury investigation primarily because maintaining public confidence in the law enforcement and criminal justice system is crucial. The commentary in the Knapp Commission Report seemed most persuasive:

There are sound reasons for . . . a special concern with police corruption. The police have a unique place in our society. The policeman is expected to “uphold the law” and “keep the peace.” He is charged with everything from traffic control to riot control. He is expected to protect our lives and our property. As a result, society gives him special powers and prerogatives, which include the right and obligation

<sup>1</sup> *Hurtado v. California*, 110 U.S. 516, 538 (1884); *Beck v. Washington*, 396 U.S. 541 (1962).

<sup>2</sup> *Rodis, A Lawyer’s Guide to Grand Jury Abuse*, 14 CRIM. L. BULL. 123 (1978).

to bear arms, along with the authority to take away our liberty by arresting us.<sup>3</sup>

At a time when the rate of crime is exponentially increasing<sup>4</sup> it is imperative that the crime fighting forces operate efficiently and with the cooperation of all citizens. This is not possible where the public has little or no confidence in the criminal justice system. Although we focused on the Sheriff's Department, it is unfair to assume that corruption and a variety of troublesome problems may not exist in other aspects of the criminal justice system.

A frequent concern in our "era of accountability" is with procedural due process—and the grand jury is one of the institutions which appears to provide the accused with the process he is due. Yet, it is possible to provide the appearance without the reality. One recalls only too well Rabelais' Judge Bridlegoose who was a most respected magistrate, especially because of the time and diligent study he apparently gave to the briefs filed before him, often resulting in a long delay in arriving at a decision. In actuality, the great judge in making his decisions rolled dice—large ones for easy cases and small ones for difficult cases—a classic case of a deceptive appearance of justice. Based on my study and experience with the institution of the grand jury, I reluctantly must conclude that Rabelais could well have used this respected body instead of Bridlegoose to make his point. It bears emphasizing that this conclusion was reached after careful study and consideration by one who previously was most sympathetic to the institution.

### I. ORIGIN AND DEVELOPMENT

Sometimes historical treatment of an institution reveals its strengths and weaknesses more clearly than contemporary events which cannot receive the same dispassionate and objective evaluation that is facilitated by distance in time. Further, the value of historical insight is invaluable since as Santayana put it: "He who does not know the past, is doomed to repeat it."

There is no dearth of praise for the grand jury,<sup>5</sup> characterized by Thomas Jefferson as the "true tribunal of the people"<sup>6</sup> and the "sacred palladium of liberty."<sup>7</sup> Frequently it is identified as the "bulwark of justice"<sup>8</sup>

<sup>3</sup> THE KNAPP COMMISSION REPORT ON POLICE CORRUPTION 5 (1973). (Hereinafter referred to as KNAPP COMMISSION.)

<sup>4</sup> See UNITED STATES DEPT. OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 479-482 (1979).

<sup>5</sup> See Lee, *The Grand Jury in Ohio: An Empirical Study*, 4 U. DAY. L. REV. 325 (1979); Note, *The Grand Jury System Defended*, N.Y.L.J. January 22, 1976, at 1.

<sup>6</sup> THE COMPLETE JEFFERSON 128 (S. Padover ed. 1943).

<sup>7</sup> *Id.* at 121. It should be noted that by 1791 Jefferson changed his opinion and charged that the Federalists had transmuted the palladium of liberty into a political engine with the jurors acting as inquisitors into freedom of speech.

<sup>8</sup> Dewey, *Grand Jury, The Bulwark of Justice*, 19 THE PANEL 3 (1941).

or "bulwark against the tyranny of dictatorship."<sup>9</sup> Governor Dewey admonished New York Legislators in 1946 not to diminish the autonomous power of grand juries so that they could continue to act as "the bulwark of protection for the innocent and the sword of the community against wrongdoers."<sup>10</sup>

Unfortunately history teaches that the grand jury was generally used as an instrument to effect political ends. Indeed, the progenitor of the grand jury, as originally conceived and constituted in 1166 by Henry II in the Assize of Clarendon,<sup>11</sup> certainly did not deserve encomiums or accolades of praise as a protector of the people's rights.<sup>12</sup> Rather it was better described as an administrative agency of the King, designed by him to enhance his power over and against that of the barons and the church by vesting in his agency jurisdiction over the crimes (previously that jurisdiction was solely within the province of baronial and ecclesiastical courts) which would thereby generate judicial revenue for him from fines and court costs. Helene Schwartz concludes:

<sup>9</sup> Weyrauch, *Grand Jury, A Bulwark Against the Tyranny of Dictatorship*, 20 THE PANEL 5 (1942).

<sup>10</sup> New York Times, March 3, 4, 15, 19, 27, April 4, 1946, quoted in R. YOUNGER, THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES 1634-1941 241 (1963).

<sup>11</sup> The Assize of Clarendon was presaged by the Constitutions of Clarendon signed reluctantly by Thomas Becket in January 1164, which authorized the early grand jury to charge sinners in ecclesiastical courts. The Assize of Clarendon, in pertinent part, provided:

#### Chapter I

First the aforesaid King Henry established by the counsel of all his barons for the maintenance of peace and justice, that inquiry shall be made in every county and in every hundred by the twelve most lawful men of the hundred and by the four most lawful men of every vill, upon oath that they shall speak the truth, whether in their hundred or vill there be any man who is accused or believed to be a robber, murderer, thief, or a receiver of robbers, murderers, or thieves since the King's accession. And this the justices and sheriffs shall enquire before themselves.

.....

#### Chapter V

In the cause of those who have been arrested through the aforesaid oath of this assize, no one shall have court or judgment, or chattels, except the lord king in his court before his justices, and the lord king shall have all their chattels.

<sup>12</sup> The early progenitors of the American grand jury are not easily identified. It is, of course, possible that there is a connection with analogous accusatory bodies in early Athens. It is known that such bodies existed among the Saxons (who came to England in the Fifth Century), the Scandinavians, and the Franks. Prof. Morse suggests that the main precursor was the Carolingian inquisitio brought to England by the Normans, "which consisted of a group of neighbors who were called upon by a public officer to answer, on oath, some question." Morse, *A Survey of the Grand Jury System*, 10 OREGON L. REV. 101, 116 (1931). See also ADAMS, THE ORIGIN OF THE ENGLISH CONSTITUTION 106-35 (2d ed. 1920); EDWARD'S, THE GRAND JURY (1906); FORSYTHE, HISTORY OF TRIAL BY JURY (1875); 1 HOLDSWORTH, A HISTORY OF ENGLISH LAW (3d ed. 1922); STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND (1883); THAYER, A PRELIMINARY TREATISE ON EVIDENCE 24-84 (1898); CRIMINAL PRACTICE AND PROCEDURE COMMITTEE, ANTITRUST SECTION, ABA HANDBOOK ON ANTITRUST GRAND JURY INVESTIGATIONS (J. Welch ed. 1978); GREEN, *the Centralization of Norman Justice Under Henry II*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 111-38 (1907); Schwartz, *Demythologizing the Historic Myth of the Grand Jury*, 10 AM. CRIM. L. REV. 701 (1972).

Henry's grand jury was not intended to be a protector of the people. Indeed, the idea that Henry would willingly concede a protective measure to the people as against his own royal excesses simply does not make sense and attributes to Henry a most unlikely beneficence. The thrust of Henry's grand jury was to effectuate his desire for absolutism by rendering powerless the traditional baronial courts and by weakening the ecclesiastical courts, to say nothing of the added benefit of the large income which the courts contributed to the royal treasury.<sup>13</sup>

Over the centuries the grand jury continued as an accusatory body, charging citizens with crime based on the jurors' own knowledge of community affairs, or later, accusations brought by private parties or the state. By the Seventeenth Century trial by ordeal, which normally had followed an indictment, was replaced by a trial by a petit jury so that the grand jury was by then, in fact as well as theory, only an accusatory and not guilt-determining body. In 1681, two cases that came before grand juries appeared to herald the development of the institution as one with great potential for protecting the individual from arbitrary prosecution by the state: the cases of Stephen Colledge, and Lord Ashley, Earl of Shaftesbury. Richard Kuh succinctly notes the political climate:

By 1681, the Puritan dictatorship of Cromwell had been replaced for some twenty-one years by the Restoration of the Stuart rulers. In 1679, the Exclusion Bill had been introduced; it was designed to bar succession to the throne of Charles II's younger brother, James, a Catholic. It barely missed becoming law in 1680 when, passed by the House of Commons, it was rejected by the Lords. At the same time rumors of a plot to assassinate the King and to establish his bastard son, the Protestant Duke of Monmouth in his stead, discredited his opponents and strengthened his pro-Catholic government.<sup>14</sup>

It was in this setting that the Protestant Stephen Colledge was charged by numerous witnesses, who appeared before a Middlesex grand jury, with threatening and conspiring to kill the King. The King's prosecutor drew up and presented an indictment of Colledge to the grand jury. The grand jurors, who were Whigs and sympathetic with Colledge, refused to indict. The foreman, Wilmore, who subscribed upon the indictment "*ignoramus*" ("we know nothing of it"—the equivalent of today's "no bill") was later arrested for his boldness and subsequently fled the country to save his life. Colledge did not escape since the King merely went to Oxford where he could count on a more receptive grand jury. This second grand jury heard the same evidence presented in Middlesex and acceded to the prosecutor's wish, indicting Colledge who was subsequently convicted and executed.

<sup>13</sup> See Schwartz, *supra* note 12, at 701.

<sup>14</sup> Kuh, *The Grand Jury "Presentment" Foul Blow or Fair Play?* 55 COLUM. L. REV. 1103, 1107 n. 15 (1955). For additional background on the period see ADAMS, *CONSTITUTIONAL HISTORY OF ENGLAND* 334-61 (1920).

Three months after Colledge's execution, Lord Ashley, Earl of Shaftesbury, was charged with high treason by the royal prosecutor who presented the state's case before a London grand jury. Again a Whig-dominated grand jury refused to indict. However, when the Royalists rigged the election of two Tory sheriffs (who would be given the duty of selecting grand jurors) and a Tory Mayor of London was elected, the King was assured of Royalist control over grand juries. Seeing that the handwriting on the wall was no longer "ignoramus," Shaftesbury fled and later died unhappily in exile in Amsterdam. Schwartz' evaluation of the case is eminently sound:

Far from epitomizing the often praised independence of the grand jury in political cases, the Earl of Shaftesbury's case, like that of Colledge, only serves to prove the extreme vulnerability of that body to the cynical machinations of the executive.<sup>15</sup>

Nonetheless, these cases were extolled as manifestations of grand jury autonomy and examples of how the people's panel could protect the individual from unjust persecution by the state. Recently, a federal judge observed that "[t]hese two cases are celebrated as establishing the grand jury as a bulwark against the oppression and despotism of the Crown."<sup>16</sup>

Regardless of the ugly realities, the Colledge and Shaftesbury cases were cited as examples of how the grand jury could provide security from malicious and unwarranted prosecution by the State in a series of influential tracts published contemporaneously with the decisions.<sup>17</sup> Each tract received broad distribution in the American Colonies.<sup>18</sup> This literature, along with the tradition of independence and resistance displayed by colonial grand juries that refused to indict those who opposed the English rule,<sup>19</sup> enhanced immensely the prestige of the institution<sup>20</sup>—so much so that the guarantee of an indictment or presentment by a grand jury was included in the federal Bill of Rights<sup>21</sup> and in state constitutions,<sup>22</sup> including that of Ohio.<sup>23</sup> The

<sup>15</sup> Schwartz, *supra* note 12, at 719-20.

<sup>16</sup> *In re Russo*, 53 F.R.D. 564, 568 (C.D. Calif. 1971).

<sup>17</sup> CARE, ENGLISH LIBERTIES OR FREE BORN SUBJECT'S INHERITANCE (1698); HAWLES, THE ENGLISHMAN'S RIGHTS (1680); SOMERS, THE SECURITY OF ENGLISHMEN'S LIVES OR THE TRUST, POWER AND DUTY OF GRAND JURIES OF ENGLAND (1682).

<sup>18</sup> See R. YOUNGER, *supra* note 10, at 21-22. Kuh suggests that Somers may have been offering counterfeit praise. See Kuh, *supra* note 14, at 1108 n. 18.

<sup>19</sup> See R. YOUNGER, *supra* note 10.

<sup>20</sup> The grand jury entered the post-Revolutionary period high in the esteem of the American people. The institution had proved valuable indeed in opposing the imperial government and indictment by a grand jury had assumed the position of the cherished right. Francis Hopkinson, Revolutionary pamphleteer, reflected this feeling when he pictured the grand jury as "a body of truth and power inferior to none but the legislature itself." *Id.* at 41.

<sup>21</sup> The fifth amendment of the United States Constitution provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . ."

<sup>22</sup> ILL. CONST. art 1, § 7 provides:

No person shall be held to answer for a criminal offer unless on indictment of a grand jury, except in cases in which the punishment is by fine or by imprisonment

Ohio Supreme Court long ago recognized the basis for including such a provision in the Bill of Rights.<sup>24</sup>

Sadly, the history of grand jury abuse and manipulation was repeated in these United States. The Federalists used grand juries to indict Republicans, such as Matthew Lyon for expressing anti-Federalist views. (Lyons had the effrontery to suggest that President John Adams had an "unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice.")<sup>25</sup> And Republicans in turn used biased panels to indict Federalists. The refusal of a Louisiana grand jury to indict Aaron Burr, and the government's ultimate success in obtaining an indictment on the same charges from a Virginia grand jury gives one a *déjà vu* feeling vis-a-vis the Shaftesbury case<sup>26</sup> In our own time we have frequently witnessed the pliability of grand juries,<sup>27</sup> manipulated like putty in the hands of experienced prosecutors. The most notorious recent example was provided by the Watergate episode.<sup>28</sup>

## II. FUNCTION

Although it is clear that historically the Grand Jury was designed as an agency of the executive, and in fact generally acted like a ventriloquist's dummy, the myth of the institution as a bulwark to protect the

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other than in the penitentiary, in cases of impeachment, and in cases arising in the militia when in actual service in time of war or public danger. The General Assembly by law may abolish the grand jury or further limit its use.

No person shall be held to answer for a crime punishable by death or by imprisonment in the penitentiary unless either the initial charge has been brought by indictment of a grand jury or the person has been given a prompt preliminary hearing to establish probable cause.

<sup>23</sup> The Constitution of the State of Ohio Article 1, in the Bill of Rights, subsection 10, provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury; . . ."

<sup>24</sup> State, *ex rel. Doerfler v. Price*, 101 Ohio St. 50 (1920).

This constitutional provision at the time of its adoption assumed the grand jury to be an existing institution in Ohio; or, in short, recognized the grand jury as it existed at common law. It is unnecessary to trace the earliest history of the grand jury further than to say that it has existed under the common law for centuries, and, while originally it was a body not only of accusers but of tryers, for centuries at least it has acted only in the former capacity. Its adoption in this country both in federal and state jurisdictions has no doubt been upon the theory that it was one of the most substantial and serviceable guarantees against official tyranny, malicious prosecution, and ill-advised and expensive trials, which might generally be avoided if the formal accusation of crime were first made by one's peers, as represented by the grand jury. One's individual rights are those safeguarded against private malice, party passion, or governmental abuse.

*Id.* at 54.

<sup>25</sup> Schwartz, *supra* note 12, at 722-727.

<sup>26</sup> *Id.* at 732-738.

<sup>27</sup> *The Grand Jury Network: How the Nixon Administration Has Secretly Perverted a Traditional Safeguard of Individual Rights*, NATION, Jan. 3, 1972, at 5; Solowey, *The Grand Jury: Making Trouble for Movement Lawyers?*, JURIS DOCTOR, March, 1976 at 36; *How to Get Your Man*, NEWSWEEK, Dec. 1, 1976, at 113.

<sup>28</sup> See Solowey, *The Grand Jury and Post-Watergate*, 10 TRIAL 32 (1974).



individual from despotic and arbitrary prosecution led to placing in the Bill of Rights the requirement of a presentment or indictment of a grand jury as a prerequisite to prosecution. Although common law grand juries had from the earliest times exercised investigatory and other powers,<sup>29</sup> placing the guarantee of grand jury intervention in bills of rights underscored the drafters' intention that it act as a protector of individual rights.<sup>30</sup> As the Supreme Court observed:

Historically, [the grand jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser 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.<sup>31</sup>

True, when an indictment or presentment is returned the grand jury does charge an individual with a crime, but the tail wags the dog to conclude that the grand jury's "dominant purpose [is] the charging of crime."<sup>32</sup> The grand jury is properly viewed as "[a]n important instrument of effective law enforcement"<sup>33</sup> only in that public confidence in the fairness of the criminal justice system is an essential prerequisite to effective law enforcement. Clearly, a body charged primarily with the charging of crime is a most unlikely bulwark for protecting the innocent. Although the same stringent standards of due process applicable to the trials are not binding

<sup>29</sup> It has been noted that the "ancestors of our 'grand jurors' are from the first neither exactly accusers, nor exactly witnesses; they are to give voice to common repute." 2 F. POLLOCK & F. MAITLAND, *HISTORY OF THE ENGLISH LAW* 642 (2d ed. 1909). See also Bracy v. United States, 435 U.S. 1301 (Rehnquist, Circuit Justice 1978); Hannah v. Larche, 363 U.S. 420 (1960); Beavers v. Henkel, 194 U.S. 73 (1904).

<sup>30</sup> [T]he grand jury's most important function became the task of standing "steadfast between the crown and the people in the defense of the liberty of the citizen..." considered in the light of its history in American law, the more important of the grand jury's roles would appear to be its protective function. In addition to the fact that, at the time the institution was enshrined in the Constitution, English law stressed the protective feature, the placement of the grand jury guarantee in our Bill of Rights as a restraint upon governmental prerogative—accompanied by the guarantees against self-incrimination, double jeopardy and deprivation of due process—convincingly indicates the dominant character of the protective role. Note, *The Rights of a Witness before a Grand Jury*, 1967 DUKE L.J. 97, 100-101 (1967).

<sup>31</sup> Wood v. Georgia, 370 U.S. 375, 390 (1962). See also Hoffman v. United States, 341 U.S. 479, 485 (1951); Hale v. Henkel, 201 U.S. 43, 59 (1906); L. ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* 144-146 (1947). See also Sterlich & Jastovice, *Grand Juries, Grand Jurors and the Constitution*, 1 HASTINGS CONST. L.Q. 63 (1974).

<sup>32</sup> Kuh, *supra* note 14, at 1125. Lester Orfield also appears on occasion almost to turn the purpose of the grand jury on end. "The Grand Jury serves two great functions. One is to bring to trial persons accused of crime upon *just* grounds. The other is to protect against unfounded or malicious prosecutions by insuring that no criminal proceedings will be undertaken without a disinterested determination of probable guilt." Orfield, *The Federal Grand Jury*, 22 F.R.D. 343, 394 (1958). (emphasis added).

<sup>33</sup> Branzburg v. Hayes, 408 U.S. 665, 701 (1972). The grand jury's function is as an investigative body; it is not the final arbiter of guilt or innocence. United States v. Wash-

on grand jury proceedings, nonetheless, the same psychological processes can operate, unfairly weighting the institution against the individual the guarantee was designed to protect in favor of the prosecutor. The Supreme Court's comment on the Michigan "one-man grand jury" in *In re Murchison*<sup>34</sup> is, therefore, quite relevant.<sup>35</sup>

For the individual accused of crime, the indictment signals the onset of an inevitable series of humiliating and costly ordeals.

[M]erely to be charged with a crime is a punishing experience. The defendant's reputation is immediately damaged, usually irreparably, despite an ultimate failure to convict. Anguish and anxiety become a daily presence for the defendant, and for the defendant's family and friends. The emotional strains of the criminal trial process have been known to destroy marriages and to cause alienation or emotional disturbance among the accused's children. The financial burden can be enormous, and may well include loss of employment because of absenteeism due to pretrial detention or time required away from work during hearings and the trial, or because of the mere fact of having been named as a criminal defendant. The trial itself, building up to the terrible anxiety during jury deliberations, is a torturing experience.<sup>36</sup>

Perhaps every prospective grand juror should sit through a trial, and talk with defendants so that he could come to appreciate the onerous nature of the impact of an indictment on the accused.<sup>37</sup>

Given the critical significance of an indictment, is the grand jury generally, and was our particular grand jury, an effective institution for filtering out of the system those who should not be charged with commission of a crime? And if it is not, then are there reforms that can make it into an effective screening institution? To answer these basic questions requires examination of the powers and the weaknesses of the grand jury as it is currently conceived.<sup>38</sup>

<sup>34</sup> 349 U.S. 133 (1955).

<sup>35</sup> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered.

349 U.S. at 136.

<sup>36</sup> M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 84 (1975).

<sup>37</sup> Our grand jury did, of course, take a tour of the County Jail and talk with inmates.

<sup>38</sup> Although references often pertain to the attributes of federal grand juries, it must be noted that state grand juries traditionally have exercised broader powers. See Justice Stephen Field's Charge to Grand Jury, 30 Fed. Cas. No. 18, 255 at 994 (C.C.D. Calif. 1872); R. YOUNGER, *supra* note 10, at 46. Congress has not developed many guidelines delineating federal grand jury powers. See *In re Grand Jury*, 315 F. Supp. 662, 673 (D. Md. 1970). See generally, *FED. R. CRIM. P.* 6; Title I of the Organized Crime Control Act of 1970, 18 U.S.C. §§ 3331-3333 (1970).

### III. ATTRIBUTES AND POWERS

John Chipman Gray once observed that statutes are not law but only sources of law since until construed by a court you really don't know what they mean. His point is especially applicable to the law regarding the grand jury in Ohio due to the sketchy and vague nature of the relevant statutes, and the complicating fact that the statutes are superseded by the Ohio Criminal Rules where there is any inconsistency.<sup>39</sup>

The rules provide for one or more grand juries composed of nine regular members and as many as five alternates.<sup>40</sup> The foreman is appointed by the court, but the other jurors are randomly selected qualified electors.<sup>41</sup>

This selection process produces a grand jury of laymen, with a foreman who is generally a "community leader,"—on occasion a lawyer. Since virtually no training or instruction is offered,<sup>42</sup> other than some brief introductory comments by the presiding judge and the prosecutor, the state of the institution created is one without a specific well-defined goal, no identifiable constituency (other than the amorphous "public"), no motivating institutional self-interest, no professionals with even a modicum of experience (especially since continuity of membership is generally unheard of), no mechanism for modifying and improving its procedures and structure, and, as we shall see, few resources under its control.<sup>43</sup>

Nonetheless, the grand jury in Ohio, as elsewhere, appears to possess enormous power. Pursuant to its subpoena power it can require individuals from anywhere in the state to appear before it and to produce documents.<sup>44</sup> and compel this testimony under threat of contempt citations.<sup>45</sup> The grand jury may exclude all persons from its proceedings pursuant to the following language:

Who may be present: The prosecuting attorney, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than

<sup>39</sup> A reading of Elder, *Grand Jury*, 26 OHIO JUR. 2d 249-294 (1963) requires further study of Ohio Criminal Rules to determine the extent to which they have rendered much of the commentary inaccurate and misleading.

<sup>40</sup> OHIO R. CRIM. P. 6(A).

<sup>41</sup> OHIO R. CRIM. P. 6(c); OHIO REV. CODE ANN. § 2939.03 (Page 1975).

<sup>42</sup> See discussion *infra* at notes 30 & 31. The presiding judge is required by statute to inform the jury of its duties, but there is no requirement that he instruct them concerning their powers. OHIO REV. CODE ANN. § 2939.07 (Page 1975).

<sup>43</sup> For an excellent analysis of these systematic problems, see Bickner, *The Grand Jury . . . A Layman's Assessment*, 48 CALIF. S.B.J. 660, 662 (1973). See also McGaughey, *Trials of a Grand Juror*, 65 A.B.A.J. 725 (1979). "Our little green book specifically said 'an accused may be given the opportunity by the grand jury to appear before it, and the grand jurors may always seek the advice of the judge.' Neither proved to be possible for our jury." *Id.* at 726.

<sup>44</sup> See OHIO REV. CODE ANN. § 2939.12 (Page 1975); OHIO R. CRIM. P. 17(f).

<sup>45</sup> OHIO REV. CODE ANN. §§ 2939.14, .15 (Page 1975).

the jurors may be present while the grand jury is deliberating or voting.<sup>46</sup>

When this language is contrasted with that of the statutory provision it replaced, the rule could be construed to authorize the grand jury to exclude assistant prosecutors, and even to preclude the prosecutor from interrogating witnesses.<sup>47</sup> It could also be read as an exclusive listing of those permitted in the jury room while testimony is taken, thus precluding parents from entering while their small children testified.

But enlightened jurists know that statutes and rules are not to be read literally where the effect would be absurd or unreasonable. Interpreting Rule 6(D) in light of its manifest purpose, and to permit the grand jury to operate effectively and fairly, during our term the assistant prosecutors assigned by the county prosecuting attorney were permitted to be present during the taking of testimony and to interrogate witnesses. On occasion the assistant prosecutors were instructed not to make statements concerning the horrendous deleterious impact on society of certain criminal activities. Such comments in a trial would constitute grounds for a mistrial, and have no valid relevance to a determination of whether a particular individual ought to be indicted. The foreman did permit, with the concurrence of the assistant prosecutors, parents of small children to be present while the children-complainants testified. But for the presence of the parent, these small and frightened victims of sexual assaults would have been unable to testify and those who allegedly committed these crimes would escape prosecution—surely an unreasonable result produced by a wooden reading of the rule.<sup>48</sup>

The grand jury also has the power to obtain a grant of use immunity for a witness who refuses to testify and thereby compel his testimony even though the witness has invoked the fifth amendment privilege against self-incrimination.<sup>49</sup> On several occasions during the term witnesses did

<sup>46</sup> OHIO R. CRIM. P. 6(D).

<sup>47</sup> The earlier statutory provision had provided:

The prosecuting attorney or *assistant prosecuting attorney* may at all time appear before the grand jury to give information relative to a matter cognizable by it, or advise upon a legal matter when required. Such prosecuting attorney may interrogate witnesses before such jury when the jury or the prosecuting attorney may find it necessary . . . (emphasis added).

OHIO REV. CODE ANN. § 2939.10 (Page 1975). Under this section the Attorney General and his special counsel have and exercise the rights, privileges, and powers of prosecuting attorneys. *Hammond v. Brown*, 323 F. Supp. 326, 352 (1971) *aff'd*. 450 F.2d 480 (6th Cir. 1971).

<sup>48</sup> Nor did the presence of the parents violate the secrecy requirement of OHIO R. CRIM. P. 6(E).

<sup>49</sup> See OHIO REV. CODE ANN. § 2945.44 (Page 1975); *State v. Prato*, 2 Ohio App. 2d 115 (Mahoning Ct. 1965). Use immunity, as opposed to transactional immunity, does not mean the witness compelled to testify cannot be prosecuted for the crime about which he testifies.

It merely means that neither his own testimony nor any evidence obtained as a result of his testimony can be used against him. Transactional immunity is not constitutionally

invoke the privilege and immunity was obtained, whereupon they testified fully.

In *United States v. Calandra*,<sup>50</sup> Mr. Justice Powell, writing for a six to three majority, stated that a witness called before a grand jury may not refuse to answer questions on the "grounds that they are based on evidence obtained from an unlawful search and seizure."<sup>51</sup> In most instances the grand jury may conduct broad investigations unhindered by the technical evidentiary rules governing criminal trials.<sup>52</sup>

Full *Miranda* warnings need not be given to a witness called to testify before a grand jury about criminal activities in which he may have been involved.<sup>53</sup> Subsequently, a citizen's privilege against self-incrimination will not allow him to perjure himself before a grand jury.<sup>54</sup> Newsmen, however, cannot be compelled to reveal the names of informants,<sup>55</sup> although they can be forced to relate to the grand jury the information given to them by the informants.<sup>56</sup>

The investigatory power of the grand jury is extremely broad.<sup>57</sup> An indictment may even be returned by a properly impaneled grand jury based on evidence obtained in violation of the defendant's constitutional rights.<sup>58</sup> This is because the grand jury has traditionally been an investigative body;

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required. *Kastigar v. United States*, 406 U.S. 441 (1972). See also *United States v. Nobles*, 422 U.S. 225, 230 (1974); *United States v. Rocco*, 587 F.2d 144, 147 (1978). Note *This Sixth Amendment Right to Have Use Immunity Granted to Defense Witnesses*, 91 HARV. L. REV. 1266 (1978).

<sup>50</sup> 414 U.S. 338 (1974).

<sup>51</sup> *Id.* at 339.

<sup>52</sup> *Id.* at 343.

<sup>53</sup> *United States v. Mandujano*, 425 U.S. 564 (1975).

Under settled principles, the Fifth Amendment does not confer an absolute right to decline to respond to a grand jury inquiry; the privilege does not negate the duty to testify but simply conditions that duty . . . Accordingly, the witness, though possibly engaged in some criminal enterprise, can be required to answer before a grand jury, so long as there is not compulsion to answer questions that are self-incriminating; the witness can, of course, stand on the privilege, assured that its protections is as broad as the mischief against which it seeks to guard.

*Id.* at 572, 574.

<sup>54</sup> *United States v. Wong*, 431 U.S. 174 (1977).

<sup>55</sup> The newsman's privilege is based on OHIO REV. CODE ANN. § 2739.04 (Page Supp. 1978). See also *New Jersey v. Jascavech* (Farber), 78 N.J. Super. 259, 394 A.2d 330 (1978), cert. denied, sub. nom. *New York Times Co. v. New Jersey*, 99 S. Ct. 241 (1978); *Branzburg v. Hayes*, 408 U.S. 665 (1972). See also *Piercing a Newsmen's "Shield,"* TIME, Aug. 7, 1978, at 74; Comment, *The Supreme Court and the Press: Freedom or Privilege?* 12 AKRON L. REV. 261 (1978); Note, 12 AKRON L. REV. 291 (1978).

<sup>56</sup> See *Forest Hills Utility Co. v. City of Health*, 66 Ohio Ops. 2d 66, 302 N.E.2d 593, 596 (1973). In *Jascavech* reporter Farber was jailed for forty days (he was released when *Jascavech* was acquitted October 24, 1978) and fined. The *New York Times* paid \$285,000 in fines. The Supreme Court refused to review the case. See also White, *WHY THE JAILING OF FARBER TERRIFIES ME*, N.Y. Times Mag., Nov. 26, 1978, at 27.

<sup>57</sup> See *Grand Jury*, § 32, OHIO JUR. 2d (1963).

<sup>58</sup> *United States v. Washington*, 431 U.S. 181 (1977).

"it is not the final arbiter or guilt or innocence."<sup>59</sup> The Supreme Court has observed:

[The Grand Jury] is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime.<sup>60</sup>

This broad power to investigate is generally founded on the common law tradition,<sup>61</sup> statutory authority,<sup>62</sup> and the presentment language in the constitution.<sup>63</sup> Although this constitutional language has not been implemented, and a defendant clearly can demand an indictment rather than a presentment,<sup>64</sup> it is not clear that a grand jury cannot issue a presentment based on the constitutional mandate.<sup>65</sup>

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Thus a member of the grand jury can personally inquire into matters in the community, hear complaints, and bring such of these matters as he deems desirable, before the grand jury.<sup>66</sup> During the term the foreman and deputy foreman met with the Citizens Bar Association on several occasions to hear complaints from members who felt that the County Prosecutor's Office would not give them a fair hearing.<sup>67</sup> The same type of distrust was

<sup>59</sup> *Id.* at 191.

<sup>60</sup> *Blair v. United States*, 250 U.S. 273, 283 (1919), cited with approval in *United States v. Calandra*, 414 U.S. 338, 343 (1974).

<sup>61</sup> The Supreme Court has stated that the fifth amendment grand jury has the "same powers that pertained to its British prototype." 250 U.S. at 282. The reliance on common law tradition to define the grand jury's power is often seen. 406 U.S. at 443.

<sup>62</sup> OHIO REV. CODE ANN. § 2939.06 (Page 1975).

<sup>63</sup> OHIO CONST. art. I, § 10.

<sup>64</sup> OHIO R. CRIM. P. 7(a).

<sup>65</sup> During the term the grand jury did consider issuing presentments, but realizing that no criminal prosecutions could proceed without indictment, the idea was dropped. See generally *United States v. Cox*, 342 F.2d 167 (5th Cir. 1965); L. CLARK, *THE GRAND JURY: THE USE AND ABUSE OF POLITICAL POWER* (1975); Kuh, *supra* note 14, at 1103.

<sup>66</sup> The scope of the grand jury's investigation is not only to consider the cases of those persons bound over by magistrates, but to take in charge matters presented by the court or the prosecuting attorney, and other matters disclosed and brought to light in the jury room during the investigations. It may investigate matters of which fellow jurors are witnesses, or to which jurors may call attention. All these things come within the purview of the oath prescribed by statute to be administered to the grand jury. *State v. Laning*, 7 Nisi Prius & Gen. T. Rep. 281, 290 (Huron Cty. 1908).

<sup>67</sup> The feeling that the prosecutor's office is biased and reluctant to act concerning complaints about corruption in government, especially the judicial and law enforcement branches, is frequently expressed. See L. CLARK, *supra* note 65, at 116.

manifested by law enforcement officers who brought complaints to the foreman. Some asked to testify without the presence of the assistant prosecutor, but did nonetheless testify with him in the room after it was explained that under the law he had the right to be present. This distrust and fear of establishment agents was accompanied often by a view of the legal establishment akin to that expressed by Charles Dickens who characterized it as the "circumlocution office." This was not an isolated instance, but part of a general lack of confidence in our government that antedates, and was exacerbated by Watergate.

We saw much evidence of this distrust. Many people . . . brought the Commission evidence of serious corruption which they said they would not have disclosed to the police or to a District Attorney or to the City's Department of Investigation. It makes no difference whether or not this distrust is justified. The harsh reality is that it exists. This distrust is not confined to members of the public. Many policemen came to us only upon our assurance that we would not disclose their identities to the Department or to any District attorney.<sup>68</sup>

The Citizens' complaints were analyzed to ascertain if they were more than frivolous and if substantiated would involve felonies.<sup>69</sup> This screening was especially significant where the complaints involved matter publicized in the news media since as soon as the witnesses were called by the grand jury the media would know and most assuredly would publicize the fact of the grand jury investigation. When the allegations were not frivolous, and appeared to involve charges of felonious conduct, the foreman asked the complainants to come before the grand jury to present the charges. Until that time such complaints were not considered matters occurring before the grand jury.<sup>70</sup>

The grand jury proceedings are secret,<sup>71</sup> in accordance with the language of Ohio Rule of Criminal Procedure 6(E).<sup>72</sup>

<sup>68</sup> See KNAPP COMMISSION, *supra* note 3, at 14.

<sup>69</sup> Although the grand jury can return indictments for misdemeanors (our grand jury did indict, at the request of the prosecutor, three persons for non-support of dependents, a misdemeanor of the first degree under OHIO REV. CODE ANN. § 2919.21 (Page 1975) traditionally indictments are restricted to charges constituting felonies.

<sup>70</sup> Thus the constraints of OHIO R. CRIM. R. 6(E) were not applicable and the presence of persons other than grand jurors while listening to complaints was unobjectionable.

<sup>71</sup> Rule 6(e) of the FED. RULES CR. PROC. was amended by Congress in 1977 to rectify some of the confusion caused by the original rule. See S. REP. No. 95-354, 95th Cong., 1st Sess. 6 (1977); reprinted in [1977] U.S. CODE CONG. & AD. NEWS 527, 529-30. Rule 6(e) provides:

(1) General Rule. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the Government, or any person to whom disclosure is made under paragraph 2(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of rule 6 may be punished as a contempt of court.

The final sentence of the Ohio rule makes it clear that neither the prosecutor, court, nor grand jury can impose an obligation of secrecy on a witness who desires to relate to the news media or others the nature and content of his testimony before the grand jury. This aspect of the rule is apparently not understood or appreciated by some grand jurors,<sup>73</sup> and even some judges. It is true that the prohibition against imposing even an *obligation* of secrecy on a witness would yield to the constitutional demand for due process, but only where the court first determines that the disclosure

(2) Exceptions—

- (A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—
- (i) an attorney for the government for use in the performance of such attorney's duty; and
  - (ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce Federal criminal law.
- (B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce Federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.
- (C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made.
- (i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or
  - (ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

<sup>72</sup> Deliberations of the grand jury and the vote of any grand juror shall not be disclosed. Disclosure of other matters occurring before the grand jury may be made to the prosecuting attorney for use in the performance of his duties. A grand juror, prosecuting attorney, interpreter, stenographer, operator of the recording device, or typist who transcribes recorded testimony, may disclose matters occurring before the grand jury, other than the deliberations of a grand jury or the vote of the grand juror, but may disclose such matters only when so directed by the court preliminary to or in connection with a judicial proceeding, or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No grand juror, officer of the court, or other person shall disclose that an indictment has been found against a person before such indictment is filed and the case docketed. The court may direct that an indictment shall be kept secret until the defendant is in custody or has been released pursuant to Rule 46. In that event the clerk shall seal the indictment, the indictment shall not be docketed by name until after the apprehension of the accused, and no person shall disclose the findings of the indictment when necessary for the issuance of a warrant or summons. *No obligation of secrecy may be imposed upon any person except in accordance with this rule.* (Emphasis Added).

<sup>73</sup> One grand jury foreman commented in his report:

But it annoyed our Grand Jurors to see TV reporters with mikes in hand, and cameras set up inside and outside the Court House, trying to wheedle comment from witnesses who had been before the Special Grand Jury . . . . Extensive security was set up to protect the witnesses and Grand Jurors; nevertheless, the media workers tried daily to break it. . . . That the [newsmen] invariably got no news was obvious, but the fact that they tried and would have disseminated information if they could have got it, was unethical, unprofessional and outrageous. CUYAHOGA COUNTY GRAND JURY REPORT, September 1973 Term (P. Porter, Foreman) 8-9 (1974).



would constitute an imminent threat to a defendant's right to a fair trial.<sup>74</sup> During our term it was reported that some witnesses that appeared before the grand jury were ordered not to comment about their testimony before the grand jury. Absent an over-riding constitutional due process constraint, such orders, if imposed, clearly violated Ohio Rule of Criminal Procedure 6(E).<sup>75</sup>

The reach of the rule is not readily apparent from its face. As noted above, it was interpreted this term to permit parents of small children to be present while they testified.<sup>76</sup> It appeared that such an interpretation was consistent with the purpose of the rules and the specific purposes of Rule 6(E).<sup>77</sup> One purpose of the rule is to protect the grand jurors themselves.<sup>78</sup> Generally, the rule is said to serve the following ends:

- (1) To prevent the escape of those whose indictment may be contemplated;
- (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors;
- (3) to prevent subordination of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it;
- (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes;
- (5) to protect the 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 was no probability of guilt.<sup>79</sup>

The authorities uniformly agree that the purpose is *not* to protect defendants.<sup>80</sup> Thus, if grand jury minutes are kept the accused is not entitled to

<sup>74</sup> Any court order that imposes a significant restraint on free expression bears "a heavy presumption against its constitutional validity." *New York Times v. United States*, 403 U.S. 713, 714 (1971); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). *But see Gannett Co., Inc. v. DePasquale*, 99 S. Ct. 2898 (1979); *Williams v. Stafford*, 589 P.2d 332 (1979).

<sup>75</sup> OHIO R. CRIM. P. 6(E) does not, however, impose a penalty for its violation. *See State v. E.W. Scripps Co.*, 172 N.E. 2d 178, 181 (Cuyahoga Cty. 1960). It is doubtful that a judge who violates this rule could be held in contempt based on his oath of office in light of other due process considerations. *See Walker v. City of Birmingham*, 388 U.S. 307 (1967); *Baggett v. Bullitt*, 377 U.S. 360 (1964); *Speiser v. Randall*, 357 U.S. 513 (1958); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939).

<sup>76</sup> *See* discussion at *supra* note 48.

<sup>77</sup> OHIO R. CRIM. P. 1(B) (Page Supp. 1979) provides: "These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed and applied to secure the fair, impartial, speedy, and sure administration of justice, simplicity in procedure, and the elimination of unjustifiable expense and delay."

<sup>78</sup> *See Judging the Grand Jury*, TIME, Feb. 7, 1972, at 59.

<sup>79</sup> *United States v. Amazon Industrial Chemical Corp.*, 55 F.2d 254, 261 (D.Md. 1931). *See also Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 405 (1959) (Justice Brennan dissenting); 8 WIGMORE, EVIDENCE § 2360 (3d ed. 1940).

<sup>80</sup> *Kuh, supra* note 14, at 1115 n. 56.

inspect them prior to trial without some "particularized need . . . for the minutes which outweighs the policy of secrecy."<sup>81</sup> Such a particularized need is not required for the accused to obtain public records that are introduced before the grand jury such as arrest records, property books, etc.<sup>82</sup>

The grand jury<sup>83</sup> is free from most of the constitutional restraints imposed on other institutions involved in the criminal justice system.<sup>84</sup> The witness has no sixth amendment right to counsel,<sup>85</sup> although he may have counsel outside the jury room with whom he can consult.<sup>86</sup> Only one witness who appeared before our grand jury appeared with retained counsel who remained outside the jury room, and was not actually consulted by his client during the taking of testimony.

The grand jury is not bound by normal evidentiary rules and may hear evidence inadmissible at trial because obtained in violation of the fourth amendment.<sup>87</sup> It may return indictment based on hearsay.<sup>88</sup> Indeed, In *Costello v. United States*,<sup>89</sup> the only evidence presented the grand jury on which it returned an indictment was hearsay. Nonetheless, the Court upheld the validity of the indictment, observing that the grand jury could act on

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<sup>81</sup> *State v. Laskey*, 21 Ohio St. 2d 187, 191, 257 N.E.2d 65 (1970). See also M. FRANKEL & G. NATFALIS, *THE GRAND JURY: AN INSTITUTION ON TRIAL* 117-138 (1977).

<sup>82</sup> The distinction between persons and inanimate objects is well recognized in the law. See note 56, *supra*. Naturally the testimony concerning the public record would be covered by the rule. See *In re Klausmeyer*, 24 Ohio St. 2d 143, 146, 265 N.E.2d 275 (1970). An interesting parallel exists with the Court's interpretation of the fifth amendment's privilege against self-incrimination as not covering real evidence, but only testimonial or communicative utterances. Under this rationale the fifth amendment does not protect an individual from compulsory blood tests, *Schmerber v. California*, 384 U.S. 757 (1966); use of the clothing of the defendant, *Warden v. Hayden* 387 U.S. 294 (1967); or compulsory appearance in a lineup. *United States v. Wade*, 388 U.S. 218 (1967).

<sup>83</sup> Grand jury proceedings constitute the one stage of the criminal justice process that has escaped the due process scrutiny to which other aspects of the system have been subjected during the past two decades. 64 A.B.A.J. 337. The American Bar Association has recommended sweeping changes in grand jury procedures. Among changes advocated are:

- (1) the allowance of counsel inside the grand jury room;
- (2) the recording of all grand jury proceedings, except the jurors' deliberations; and
- (3) the granting of transactional rather than "use" immunity.

*Id.* at 338.

<sup>84</sup> State grand juries are not even bound by federal court interpretation of the grand jury institution since the grand jury guarantee of the fifth amendment of the United States Constitution is not applicable to the states. *Beck v. Washington*, 369 U.S. 541 (1962); *Hurtado v. California*, 110 U.S. 516, 538 (1884); *Rowan v. State*, 30 Wis. 129 (1872).

<sup>85</sup> See *In re Groban*, 352 U.S. 330 (1957). Compare *Jenkins v. McKeithen*, 395 U.S. 411 (1969) with *Hannah v. Larche*, 363 U.S. 420 (1960).

<sup>86</sup> See *People v. Ianniello*, 21 N.Y.2d 418, 288 N.Y.S. 2d 462, 235 N.E.2d 439 (1968).

<sup>87</sup> *United States v. Calandra*, 414 U.S. 338 (1974). See *United States v. Dionisio*, 410 U.S. 1 (1972). Federal grand juries cannot hear evidence obtained by illegal electronic surveillance, but the basis for the exclusion is *statutory, not constitutional*. *Gelbard v. United States*, 408 U.S. 41 (1972). See also *Thompson, The Fourth Amendment Function of the Grand Jury*, 37 OHIO ST. L.J. 727 (1976).

<sup>88</sup> *Elder, supra* note 39, at 286-87.

whatever evidence it deemed "satisfactory."<sup>90</sup> The Court has approved the grand jury acting on the basis of "tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors."<sup>91</sup> The Court justifies the lack of evidentiary limitations as necessary to effectuate the grand jury's role.<sup>92</sup>

During our term no person was indicted on the basis of inadmissible hearsay. We required each element of the crime to be substantiated by competent credible evidence. That is not to say that we did not have witnesses every day who gratuitously offered blatant hearsay evidence. Frequently, in a substantial number of cases the prosecutor subpoenaed detectives who appeared with no personal knowledge of the case. These detectives would read from the reports until asked if they had any personal knowledge of the case. If they did not, and there was no other basis for their testimony, they were excused. This is apparently not an uncommon procedure:

In response to a question by Judge Friedman as to whether there was any evidence the grand juries in Cuyahoga County indicted based on hearsay evidence, Mr. Knowling responded that Mr. Douglas, a past grand jury foreman, earlier told the committee of the practice of police departments utilizing "readers" to read the reports of other police officers not present. . . . Mr. Rowell added that this is a common practice in the Cleveland Police Department.<sup>93</sup>

Often police officers would look at the prosecutor and ask if he wanted the accused's criminal record, which was in the officer's hand. Of course, such comments were prejudicial and immaterial, except in cases where a prior conviction was an aggravating element elevating a lesser to a greater offense (such as petty to grand theft). Again, this appears to be a common practice with Cuyahoga County grand juries.<sup>94</sup>

The grand jury's ultimate power is that of returning a presentment or, with the prosecutor's concurrence, an indictment. Surprisingly, there is no definitive statement of the standard for determining if the evidence is

<sup>90</sup> 350 U.S. at 362. The rule is the same in Ohio. "We must not forget that grand juries may return indictments based wholly upon facts within their own knowledge and to support which not a single witness has been called or sworn." *State v. Woolard*, 12 Nisi Prius & Gen. T. Rep. 395, 398 (Licking Cty. 1910).

<sup>91</sup> *Branzburg v. Hayes*, 408 U.S. 665, 701 (1972), quoted in *United States v. Calandra*, 414 U.S. 338, 344 (1974). The Court earlier had indicated that a grand jury can return indictments "based solely on their own knowledge of the particular offenses." *McCrain v. Daugherty*, 273 U.S. 135, 157 (1927).

<sup>92</sup> "Any holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." 410 U.S. at 17.

<sup>93</sup> See *supra* note 73, at 42.

<sup>94</sup> *Id.* at 31. When questions about the effect of the prior record on his voting an indictment one former foreman stated that it "gives you a picture of whether or not this fellow, having committed and been sentenced before, might have returned on the same thing." *Id.* at 15.

sufficient to justify an indictment—the matter is just left to the grand jury's discretion.<sup>95</sup> The tests proposed range from

the function of the grand jury is merely to say whether from the evidence for the prosecution (at which alone they look) there is probable cause of suspicion<sup>96</sup>

to

[i]n passing upon the question of whether or not a bill of indictment shall be returned, it is the duty of the grand jury to so return if the guilt of the defendant is established beyond a reasonable doubt.<sup>97</sup>

Given the enormous and amorphous power of the grand jury, it is not surprising to learn that witnesses often feel helpless when appearing to testify.

The witness must submit to virtually unlimited grand jury questioning with respect to criminal matters, his constitutional rights endangered, without the benefit of counsel. Our society has no comparable institution which sanctions such interrogations of a person "legally" denied counsel.<sup>98</sup>

Nor is it surprising to hear frequent criticisms of the abuse of grand jury power, like that in 1974 of Los Angeles Police Chief Edward Davis:

Indictments are being generated, and (sic) in my opinion, under an unconstitutional law that is in effect a 20th-century legal rack and screw. Grand juries can and do listen to illegal evidence, and when my men were put through the federal grand juries in this city, it was the worst star chamber session you ever saw. Multiple prosecutors scattering themselves through the jury, throwing questions from left field and right field, where if it wasn't like the Spanish Inquisition, at least it was like the day when police with rubber hoses and spotlights in the faces of suspects got the truth out of them in that fashion.<sup>99</sup>

#### IV. WEAKNESSES AND DISABILITIES

It is clear that some of the above-noted powers are *de facto* non-existent. For example, the power to issue subpoenas to compel witnesses to appear,<sup>100</sup> is of little use. First, without an investigative staff,<sup>101</sup> there

<sup>95</sup> See *State v. Price*, 101 Ohio St. 50, 55 (1920). See also Alexander & Portment, *Grand Jury Indictment versus Prosecution by Information—An Equal Protection—Due Process Issue*, 25 HASTINGS L.J. 997 (1974).

<sup>96</sup> See HOLDSWORTH, *supra* note 12, at 321.

<sup>97</sup> 12 Nisi Prius & Gen. T. Rep. at 398.

<sup>98</sup> Boudin, *The Federal Grand Jury*, 61 GEORGET. L.J. 1,3 (1972).

<sup>99</sup> See Solowey, *supra* note 28, at 34.

<sup>100</sup> OHIO REV. CODE ANN. § 2939.12 (Page 1975).

<sup>101</sup> "In our vast urban society, jurors have no intimate knowledge of the goings-on within the community. They must depend, therefore, upon the facts and knowledge brought before them from extrinsic sources. They have no investigative skills or resources of their own and thus the task of gathering facts must be performed for them by the professional investigative agencies at their disposal—law enforcement agencies." Campbell, *Eliminate the Grand Jury*, 66 J. CRIM. & CRIMINOLOGY 174, 178 (1973). See also Y. KAMISAR, 19

is no way to exercise this power with any degree of authority or rationality. Second, the theory is not consonant with fact. Thus, when the Clerk's Office was asked to issue a subpoena, the response was to suggest that the grand jury see the prosecutor. Throughout our term, the grand jury relied on the Prosecutor's Office to issue subpoenas. The grand jury did not issue a single subpoena.

Ohio Rules of Criminal Procedure 6(D)(E) appear to authorize recording of the proceedings before the grand jury. However, without the agreement of the prosecutor it appears almost impossible to obtain a court reporter to transcribe the testimony.<sup>102</sup> And even if a court reporter transcribes the testimony, it is not available for the use of the grand jury, only the prosecutor.<sup>103</sup>

The most glaring defect is the lack of any training program for the jurors. The grand jurors as laymen cannot comprehend the nuances of evidence, criminal, and constitutional law. How is a layman to understand that a statement of a co-conspirator, although hearsay, is admissible only if there is evidence *aliunde* establishing the conspiracy, and the hearsay is not devastating or critical to the defense?<sup>104</sup> This is not merely hypothetical, since that very issue arose during our term.

Further, without an understanding of its power, how can the grand jury really assert itself?<sup>105</sup> The training generally offered—

Once assembled the jurors are usually treated to a rather lofty explanation of the enormity and significance of their task by the presiding judge of the particular jurisdiction. The formality of apprising them

W. LAFAYE & J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 879 n.g (4th ed. 1974). "The grand jury should be provided with special independent counsel for advice on the myriad of legal matters that confront it." Note, *The Grand Jury*, 27 CASE W.R.L. REV. 580, 600 (1977).

<sup>102</sup> One witness' testimony was transcribed because the prosecutor had not obtained a prior statement from the witness. The grand jury did itself electronically record the testimony of several witnesses, but the practice was discontinued when it became apparent that the prosecutor planned to rely on statements taken from the witnesses in his office rather than testimony before the grand jury.

<sup>103</sup> OHIO REV. CODE ANN. § 2939.11 (Page 1975). This provision seems a rather clear manifestation of legislative intent to make the grand jury subordinate to the prosecutor.

<sup>104</sup> See *Dutton v. Evans*, 400 U.S. 74 (1970). Jurors' ignorance of the law has often been cited as one basis for abolition of the institution. See R. YOUNGER, *supra* note 10, at 66. Indeed, the grand jurors have been characterized as providing an "unfailing supply of ignorance." *Id.* at 141.

<sup>105</sup> The improper exercise of power is also a product or lack of adequate training. "The continued appearance of [invalid jury] reports might be attributable to the common belief among lay jurors, uninstructed in law, that they are a power unto themselves and can peer into any matter that their civic consciences indicate needs investigation." Kuh, *supra* note 14, at 1105. See also *Simington v. Shimp*, 60 Ohio App. 2d 410 (1979); McGaughey,

concerning their powers and obligations having been disposed of, the jurors are then dispatched to commence their duties.<sup>106</sup>

The lack of training is reported in the literature concerning grand juries generally,<sup>107</sup> in Ohio,<sup>108</sup> and in Cuyahoga County,<sup>109</sup> In some areas of the country, grand juries are given briefings, booklets, and orientation sessions.<sup>110</sup> But, anyone who has studied law knows how difficult it is to "think like a lawyer," which is the stance required to interpret the material with which the grand jury must work. For a layman, attempting to maintain that posture is like bending over backward—a very difficult position to hold for very long. Many grand jurors expect the foreman to provide the requisite insight. But where he too is a layman, he probably ends up feeling like one former foreman who admitted:

I didn't know any more about what we were supposed to be doing than anybody else, but everyone kept asking me, "Can we do this? Are we supposed to do that?" I finally got so I really studied our [grand jury] handbook every night, and I used to stop by the D.A.'s office [actually the office of Assistant District Attorney in charge of the Grand Jury Division] every now and then and asked them for advice. In time I was able to keep one step ahead of the other grand jurors, and I guess that way I earned some of their respect as a leader. But most of the time I didn't know about what was coming

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<sup>106</sup> Campbell, *supra* note 101, at 177. Similar commentaries appear throughout the literature. Once selected, grand juries are given little preparation, training or briefing for their task. Beyond the prepared speech that the impaneling judge delivers to newly impanelled jurors, there are no further informational sessions to explain the exact nature of jurors' functions; the nature, scope and limitations of their powers; their relationship with the other entities in the criminal justice system, such as the district attorney, the attorney general, the superior court, and the other law enforcement agencies; their relationship with county governmental agencies, or, most importantly, the law's intent that the grand jury be an autonomous body, free of any outside influences.

Bickner, *supra* note 43, at 734-35.

<sup>107</sup> See R. YOUNGER, *supra* note 10, at 244; Bickner, *supra* note 43, at 734-35; Calkins, *Grand Jury Secrecy*, 63 MICH. L. REV. 455 (1965); Campbell, *supra* note 101, at 177; Carp, *The Harris County Grand Jury—A Case Study*, 12 HOUSTON L. REV. 90, 118 (1974); Fine, *FEDERAL GRAND JURY INVESTIGATION OF POLITICAL DISSIDENTS*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 432, 442 (1972).

<sup>108</sup> See especially Lee, *supra* note 5.

<sup>109</sup> See *supra* note 73, at 12, 31, 63. "Mr. Allerton (former foreman, Cuyahoga County Grand Jury) noted that none of the grand jurors, including himself, received any meaningful amount of education or orientation at the outset of their terms in regard to the prospective performance of their duties." *Id.* at 31. See also Braun, *The Grand Jury—Spirit of the Community?* 15 ARIZ. L. REV. 893 (1973).

<sup>110</sup> In San Diego the jurors are given a booklet entitled, "The San Diego County Grand Jury Guide." Unfortunately even after reading the booklet most jurors are "confused and admit they don't understand the role of the grand jury and the standards to use for indictments." *Report of the Grand Jury Committee, San Diego County Bar Association*, 9 SAN DIEGO L. REV. 145, 155 (1972). In Harris County, which has Houston as its major city, grand jurors, prior to hearing cases, attend a seminar offered by police and sheriff's department officials, receive two instructional booklets (one written by the district attorney, the other by the Harris County Grand Jury Association), and an intensive "give and take" discussion session with a member of the district attorney's staff. Carp, *supra* note 107, at 97. 21

off any more than they did, and I doubt whether I fooled them very much.<sup>111</sup>

When the lack of training is combined with a workload of almost one thousand cases a term,<sup>112</sup> with five to six minutes allotted per witness,<sup>113</sup> the prosecutor pressing the grand jury to move it along,<sup>114</sup> and the increasing complexity of the law,<sup>115</sup> it is surprising grand juries do as well as they do—which, unfortunately is not very good at all.

## V. EVALUATION

Recalling that the primary function of the grand jury is to filter out of the system those individuals who ought not be prosecuted, the statistics provide the most telling indictment of all—of those indicted who go to trial less than 40% are convicted.<sup>116</sup>

It is really indisputable that the grand jury is not an effective filtering or screening device. Students of the grand jury uniformly recognize that

<sup>111</sup> Carp, *supra* note 107, at 108.

<sup>112</sup> Our grand jury heard 841 cases, involving 1005 defendants. The cases, by indictment, are as follows:

Abduction	2	Attempted Kidnapping	2
Attempted Abduction	1	Larceny by Trick	5
Aggravated Assault	1	Aggravated Menacing	4
Arson	2	Misuse of Credit Card	3
Aggravated Arson	5	Murder	2
Breaking and Entering	104	Aggravated Murder with Specification	1
Attempt Breaking and Entering	3	Attempt Murder	1
Bribery	1	Neglect	1
Burglary	2	Non-Support of Dependents	3
Aggravated Burglary	66	Obstructing Justice	2
Attempted Burglary	3	Obtain Money with forged Title	1
Carrying Concealed Weapons	60	Operating Motor Vehicle without the Owner's Consent	1
Child Stealing	3	Passing Bad Check	10
Corruption of a Minor	2	Poor Relief Fraud	23
Defrauding Innkeeper	1	Possession Criminal Tools	9
Drug Law	39	Promoting Prostitution	3
Escape	6	Rape	31
Failure to Appear	47	Attempt Rape	2
Felonious Assault	57	Receiving Stolen Property	66
Forgery	40	Receiving Stolen Property (MV)	6
Grand Theft	111	Robbery	25
Grand Theft Motor Vehicle	20	Aggravated Robbery	82
Grand Theft Poor Relief Fraud	47	Sexual Battery	1
Gross Sexual Imposition	4	Theft	1
Having Weapon While under Disability	6	Theft in Office	3
Intimidation	1	Unlawful Use of Vehicle	1
Intimidating Witness	1	Vandalism	5
Kidnapping	12		

<sup>113</sup> See *supra* note 73, at 14. This is consistent with other reports. See also Carp, *supra* note 107, at 101.

<sup>114</sup> Witnesses, of course, sometimes get cranky, and detectives on occasion complained that we were too slow.

<sup>115</sup> See Note, *Evaluating the Grand Jury's Role in a Dual System of Prosecution: An Iowa Case Study*, 57 IOWA L. REV. 1354-55 (1972).

<sup>116</sup> *Supra* note 73, at 14, 37.

this is so.<sup>117</sup> Further, it is apparent that there is no way for the grand jury as currently conceived to ever screen cases fairly and justly. Our system of justice is based on the effective operation of the adversary process. The adversary system serves multiple ends, but perhaps most significant is that when operating properly it assures the public and litigants that the legal process is just and fair and thus maintains the confidence of the public in legal institutions. For many students of the law, challenge to government action is basic to the system, especially where criminal justice is involved.

The essence of the adversary system is *challenge*. The survival of our system of criminal justice and the value it advances depends upon the constant, searching, and creative questioning of official decisions and assertions of authority at all stages of the process.<sup>118</sup>

But proceedings before the grand jury are, as we have seen, not adversarial in nature.<sup>119</sup> There is no lawyer to challenge the state's case or to point up inconsistencies in the witnesses' testimony.<sup>120</sup> What the United States Supreme Court said about the defendant's need for counsel is equally applicable, *mutatis mutandis*, to the layman grand juror's need for counsel:

Even the intelligent and educated layman has small and sometimes no skill in the science of the law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step of the

<sup>117</sup> See Morse, *supra* note 12, at 313; Carp, *supra* note 107, at 118; *supra* note 73 at 27-28, 37, 61. See also Cleveland Plain Dealer, Dec. 25, 1978, § B, at 2. "Court clerk's figures show that, in recent years, grand jurors [in Cuyahoga County] indicted between ninety-one and ninety-seven percent of the suspects whose cases they heard . . . Only one in five persons processed through the court was convicted of the charges leveled against him."

<sup>118</sup> Allen, REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 11 (1963).

<sup>119</sup> See Note, *The Grand Jury*, *supra* note 101, at 580:

The grand jury in practice, hears only cases the prosecutor decides to present to it; it often hears only the prosecutor's version of the case; the prosecutor generally selects and examines the grand jury's witnesses; the accused is not allowed to be present or heard unless called as a witness; the accused is not represented by counsel; and the grand jury is composed of laymen who are likely to show considerable deference to the prosecutor's expertise.

<sup>120</sup> "The prosecutor should disclose to the grand jury any evidence which he knows will tend to negate guilt." A.B.A. STANDARDS, THE PROSECUTION FUNCTION § 316(b) (1971). Similarly, the A.B.A. CODE OF PROFESSIONAL RESPONSIBILITY E.C. 7-13 (1975) states:

"The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict." The California Supreme Court held in *Johnson v. Superior Court*, 15 Cal. 3d 248, 124 Cal. Rpt. 32, 539 P.2d 792 (1975) that the prosecutor has a clear duty to apprise the grand jury of evidence tending to negate the guilt of the suspect. See also Note, *The Prosecutor's Duty to Present Exculpatory Evidence to an Indicting Grand Jury*, 75 MICH. L. REV. 1514 (1977).



proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.<sup>121</sup>

Trying to plug the non-adversarial indictment of a grand jury into the adversarial system is akin to the square peg in a round hole trick. Of course, some will try the impossible.

Without counsel and training, the grand jury naturally relies on the prosecutor—who constitutes one-half of the adversarial equation. This reliance is well established, and accounts for the low percentage of no-bills.<sup>122</sup> The National Advisory Commission on Criminal Justice concludes:

The Grand Jury, which indicts almost all cases presented to it, has a negligible effect—other than delay—on the criminal process. It seems most reasonable to avoid using the Grand Jury except in cases where a community voice is needed in a troublesome or notorious case.

In most cities where the grand jury is used it eliminates fewer than twenty percent of the cases it receives. In Cleveland, Ohio, the figure is seven percent; in the District of Columbia, twenty percent; and in Philadelphia, Pa., two to three percent.<sup>123</sup>

The extent to which the proceedings are skewed in favor of the state with only the prosecutor presenting the case is manifest when one considers merely the effect on the witnesses' testimony of the way in which the questions are framed. In one study it was demonstrated that when witnesses were asked to estimate the speed of a car involved in an accident they had witnessed, *ceteris paribus*, the verb used in asking the question significantly changed the response. Indeed, twice as many witnesses recalled seeing broken glass at the scene of the accident when asked in terms of "smashed" as opposed to "hit."<sup>124</sup> Many commentators have recognized the tendency of the grand jury to merely "rubber stamp" the findings of the prosecutor.<sup>125</sup>

<sup>121</sup> Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

<sup>122</sup> Our grand jury heard 841 cases and returned 53 no-bills (6.3%).

<sup>123</sup> Allen, *supra* note 118, at 75.

<sup>124</sup> See E. Loftus, *Reconstructing Memory: The Incredible Eyewitness*, 8 PSYCHOLOGY TODAY 116 (Dec. 1974).

<sup>125</sup> Antell, *The Modern Grand Jury: Benighted Supergovernment*, 51 A.B.A.J. 153 (1965). [W]hen a case is brought into the grand jury room the prevailing feeling is that the prosecutor wouldn't bring it there if he didn't think he could get a conviction. Accordingly, it follows in nearly all cases that unless the prosecutor does something forceful about it indictments are normally returned by the grand jury.

*Id.*

Protection of the citizen against hasty and unfounded prosecutions, the advantage claimed for the requirement of an indictment in case of all infamous crimes, is more theoretical than real in the urban community of today. With the enormous lists of arrests in our large cities there is no guaranty against hasty or oppressive prosecutions in a body which can give but little time to the general run of cases and must depend on the prosecuting attorney for its information as to facts. Under such circumstances it must be a very weak case which can not be presented so as to procure an indictment. Where the number of prosecutions is large, it is hard for the grand jury in any ordi-

Ironically, the grand jury thus no longer serves the role constitutional drafters envisioned when the guarantee was placed in the Bill of Rights, but instead has reverted to its original role as an arm of the executive. As Justice Douglas has observed: "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."<sup>126</sup>

The bottom line is then that although the prosecutor makes the decision to go forward in a case, he is able to shift the apparent responsibility to the grand jury, hiding behind its secrecy—inimicable to the interests of that institution—often making the grand jury the scapegoat for an unpopular decision either to indict or not to indict.<sup>127</sup> Prosecutors are generally willing to admit the crucial import of the decision to charge,<sup>128</sup> but are unwilling to admit that they, in fact, *do* make that determination. As one county prosecutor puts it: "[C]harging, in great measure, is playing god . . . and I do not particularly want to play god."<sup>129</sup> Interestingly, he adds that if there is a problem of overcharging then "the grand jury is responsible, not this office,"<sup>130</sup> and "when it [overcharging?] does occur 'it is a charge leveled to suit a purpose.'"<sup>131</sup>

The grand jury is, therefore, naturally the prosecutor's darling. Not

nary case to get at other facts than those presented to them, or even to know that it is authorized to get at them. It is unusual for grand juries to go into a thorough, independent investigation of any ordinary case unless the prosecutor is willing. If the work of sifting were done as it should be by proper criminal investigation at the outset and by the prosecuting attorney, the grand jury could be given a basis for doing its work thoroughly and well. But the loose methods of investigation and sifting, which prevail generally in large cities, cause that work to be mechanical and perfunctory, except in a small number of sensational or unusual cases.

NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT REPORT ON PROSECUTION 36 (1931). (Hereinafter referred to as WICKERSHAM REPORT). See also Note, *Removing Politics from the Justice Department: Constitutional Problems with Institutional Reform*, N.Y.U.L. REV. (1975); Tuerkheimer, *The Executive Investigates Itself*, 65 CALIF. L. REV. (1977).

<sup>126</sup> *United States v. Mara*, 410 U.S. 19,23 (1973) (Justice Douglas dissenting.) The Supreme Court has admitted that the "grand jury may not always serve its historic role as a protecting bulwark standing solidly between the ordinary citizen and an overzealous prosecutor." Dionisio, 410 U.S. at 17. See also Boudin, *supra* note 98, at 35.

<sup>127</sup> See Tigar & Levy, *Grand Jury as the New Inquisition*, 50 MICH. STATE B.J. 693 (1971); R. YOUNGER, *supra* note 10, at 146.

<sup>128</sup> M. FREEDMAN, *supra* note 36, at 85. See also Lee, *supra* note 5, at 338-344 (1979).

<sup>129</sup> See *supra* note 73, at 17. The petit jury has long served a similar role in insulating the judge from responsibility. However, there is an enormous difference in that the petit jury does not rubber stamp the decision of the judge or prosecutor. Further, the jury, except in Maryland, only determines questions of fact, not law, with extensive instruction from the judge concerning the law relevant to the case.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* See also Cleveland Plain Dealer, *supra* note 117, at § 8 at 2.

[The] County Prosecutor . . . said charges of over indictment amount to a "smoke screen" to demean the system for the benefit of defense lawyers . . . . Defense lawyers argue that plea bargaining would be unnecessary if the grand jury did not over indict.

only can the prosecutor avoid responsibility for his determination of whether to go forward with a case, but the grand jury provides him with unilateral pretrial discovery,<sup>132</sup> a chance to test his evidence,<sup>133</sup> and where public officials are prosecuted, by "shifting to the grand jury the responsibility for the decision whether to allow such a prosecution to go to trial, the county attorney may be able to protect his working relationship with other public officials and, if the prosecution is ultimately unsuccessful, may be able to avoid the potentially adverse political consequences of the decision to prosecute."<sup>134</sup> And where there are two or more grand juries impanelled contemporaneously, the prosecutor is in an even better position since he can opt for the more acquiescent panel.<sup>135</sup>

There is a phenomenol cost attached to maintaining the grand jury system. First and foremost is the charging of more innocent persons under the indictment as opposed to information system.<sup>136</sup> Professor Morse, after extensive research, concluded that "a greater number of innocent men

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<sup>132</sup> See Fine, *supra* note 107, at 455. See also Newman, *The Suspect and the Grand Jury: A Need for Constitutional Protection*, 11 U. RICH. L. REV. 119 (1978). A prosecutor cannot however, use the grand jury as a form of pre-trial discovery once a defendant has been secretly indicted. The Sixth Circuit held in *United States v. Doss*, 563 F.2d 265 (1977):

Where a substantial purpose of calling an indicted defendant before a grand jury is to question him secretly and without his being informed of the nature and cause of the accusation about a crime for which he stands already indicted, the proceeding is an abuse of process which violates both the Right To Counsel provision of the sixth amendment and Due Process Clause of the fifth amendment. Indictments for perjurious answers given in such a proceeding must be quashed because the proceeding itself is void.

<sup>133</sup> See Note, *Evaluating the Grand Jury's Role in a Dual System of Prosecution: An Iowa Case Study*, *supra* note 115, at 1372; Lee, *supra* note 5, at 349 n. 56.

Prosecutor: I use them as a sounding board. I present my evidence in the same manner as it were a trial. I know their reactions will be similar to a petit jury. They often ask questions I never think of.

*Id.*

<sup>134</sup> See Note, *Evaluating the Grand Jury's Role in a Dual System of Prosecution: An Iowa Case Study*, *supra* note 115, at 1373. "If the county attorney alone makes the decision to prosecute a fellow public official by information and the prosecution is unsuccessful, it may appear to the public that he was engaging in a 'witch hunt.'" *Id.* Other prosecutorial advantages also are apparent. "The institution enables the prosecutor to conduct an investigation with the power to subpoena witnesses, examine them under oath, preserve their testimony on record, and question a potential defendant without his attorney being present. Moreover, the grand jury enables the prosecutor to engage in wide ranging investigations seeking a wrong, rather than beginning with the commission of a crime and investigating from that point." L. KATZ, L. LITWIN & R. BAMBERGER, *JUSTICE IS THE CRIME: PRETRIAL DELAY IN FELONY CASES* 122 (1972).

<sup>135</sup> See *supra* note 73, at 32-33. At one of our sessions one prosecutor was so upset at our demand for better evidence that he actually jumped up and down in anger. "[A] phenomenon that may well occur in Harris County is for the district attorney to 'size up' the grand juries during their first several working sessions and then to present cases to the grand jury that is most likely to act in accordance with the district attorney's wishes. To what extent this occurs is unknown, but that it does occur to some degree is beyond doubt." Carp, *supra* note 107, at 118.

<sup>136</sup> Where the information approach is used there are proportionately more guilty pleas and a higher rate of conviction of defendants who go to trial. See Morse, *supra* note 12, at 313-14.

are indicted under the grand jury system than are prosecuted under the information system, and further, . . . defendants more often insist on trial under the indictment method than under the information method."<sup>137</sup> The concomitant cost to the defendant of delay necessarily accompanying the inefficiency of the indictment system means he must remain under the cloud of criminal charges (often in a miserable jail) for a longer period of time. From the state's viewpoint the delay and inefficiency means greater cost, both in dollars and energy.<sup>138</sup> Some of the best, or worst (depending on who you ask), assistant prosecutors must be assigned to the role of grand jury ventriloquist and are, therefore, unavailable to try cases. Dean Miller sums up the matter of costs:

When a guilty man pleads guilty, following an arraignment upon an information, the cost is a minimum one. When the same man lives at the expense of the county for a month or two, receives the attention of a grand jury and a prosecuting attorney for a day or two, stands trial in the district court for a day or two or three more and finally arrives at the same point at which he would willingly have gone free of charge two or three months before, the expense to the county is a maximum one; and in addition twenty-three citizens have donated their valuable services in grand jury service, more than a dozen more for trial service, and many others have waited their turns as witnesses. In addition to the *per diem* and expenses of the jurors, consideration should be given to the salaries and expenses of additional judges, assistant prosecuting attorneys, jailers, and court attaches who must be provided to care for the increased work which the grand jury entails. If the result of the delay is an acquittal or a disagreement, then we have a miscarriage of justice to figure in the total cost also.<sup>139</sup>

<sup>137</sup> *Id.* at 139.

<sup>138</sup> See Campbell, *supra* note 101, at 180; Molely, *The Initiation of Criminal Prosecutions by Indictment or Information*, 29 MICH. L. REV. 403 (1931); Note, *Evaluating the Grand Jury's Role in a Dual System of Prosecution: An Iowa Case Study*, *supra* note 115, at 1359. The Wickersham Committee's recommendation of abolition of the grand jury was primarily based on the inefficiency of the indictment approach. See WICKERSHAM REPORT, *supra* note 125, at 34-37.

<sup>139</sup> Miller, *Informations or Indictments in Felony Cases*, 8 MINN. L. REV. 379, 387-388 (1924). There is also the deleterious effect of delay on witnesses' recollections. See Morse, *supra* note 12, at 256. And for society, delay and inefficiency in the criminal justice system reduces the effectiveness of its "war on crime." Senator Edward Kennedy made the point quite eloquently in an appearance before the Chicago Crime Commission:

Today, courts and prosecutors in every major city in the nation are beset with expanding dockets and shrinking budgets. They cannot possibly cope with crime and the mushrooming caseload waiting to be tried.

The result in all to many cases is that "crime does pay." Even if the policeman on the beat catches up with you, the courts will let you go. Of the 730,000 adult felony arrests in New York in the past decade, only thirty-one percent were indicted; of those indicted, only thirty-three percent were convicted; and of those convicted, only thirty-eight percent were sentenced to jail. You do the arithmetic. The extraordinary result is that ninety-seven percent of all adults actually arrested for a felony in New York were filtered through the law enforcement system and escaped a prison term.

Or take Los Angeles. During 1972, only six percent of those charged with burglary;

And there is the further cost of abuse when the darling becomes the "twin sister of the inquisition"<sup>140</sup> and is used to harass unpopular individuals and groups.<sup>141</sup> Of course, all this is not new or obscure. One feels in recounting the state of the grand jury a bit like the child exclaiming, "but the King doesn't have on any clothes." Or, in citing studies to support the obvious like using a sledgehammer to open peanuts. But the incredible fact is that the grand jury persists in Ohio with no benefits to the accused and at great cost to him and society.<sup>142</sup> Students of the criminal justice system agree that the accused and society are better served by an information approach coupled with the requirement of a prior preliminary hearing.<sup>143</sup> Numerous critics have recommended the abolition of the grand jury indictment requirement in Ohio, including Roscoe Pound and Felix Frankfurter,<sup>144</sup> the Ohio Bar Association,<sup>145</sup> and the Greater Cleveland Bar Association.<sup>146</sup>

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who had a serious prior record, were actually sent to prison.

The reason for these astounding figures has almost nothing to do with noble principles like the presumption of innocence or noble goals like the rehabilitation of offenders. The reason is court congestion. In virtually every state and local jurisdiction, the ideal of judicial wisdom and deliberation is a romantic relic of the past. Courts today are dispensing hectic stopwatch justice on overloaded assembly lines. The proceedings involve little nobility or solemnity. Defendants are processed at breakneck speed through a system where bargains must be offered at every turn if the system is to stay afloat—what bail can be agreed to, what hearing can be postponed, what charge can be dismissed, what plea bargain can be made, what sentence can be suspended? The most frequent remedy used by reluctant judges and prosecutors to ease the pressure of their caseload is to make the problem go away by allowing the offender to "cop a plea" and return to circulation.

This is law without order, crime without punishment. It demonstrates why crime too often pays today. "Revolving door" justice—the need to reduce crowded dockets—persuades the criminal that his chances of actually being caught, tried, convicted and jailed are so slim as to be nonexistent. Effective crime control requires much more than that. The vast majority of criminals are rational. They play the odds. Effective deterrence requires that the odds must be reduced. A prospective criminal must believe that if he is caught, the chances are high that he will be swiftly and surely punished.

*Reprinted in 121 CONG. REC. No. 159, 94th Cong., 1st Sess., October 30, 1975.*

<sup>140</sup> R. YOUNGER, *supra* note 10, at 144.

<sup>141</sup> For examples see L. CLARK, *supra* note 65, at 11, 19, 22, 38-44, 45-62; Goodell, *Where Did the Grand Jury Go?* 246 HARPER'S No. 1476, May 1973, at 14. See also note 99 and accompanying text, *supra*.

<sup>142</sup> See KATZ, LITWIN & BAMBERGER, *supra* note 134, at 17. *Contra*. Lee, *supra* note 5, at 352.

<sup>143</sup> Blackstone long ago noted that the accused has no cause to complain when an information rather than indictment is used where the "same notice was given, the same process was issued, the same pleas were allowed, the same trial by jury was had, the same judgment was given by the same judges, as if the prosecution had originally been by indictment." 4 W. BLACKSTONE, COMMENTARIES 310. True then and true now. On the federal preliminary hearing see 18 U.S.C. § 3060.

<sup>144</sup> After completing a survey of the criminal justice system in Cleveland, Pound and Frankfurter concluded that the grand jury was "inefficient" and "unnecessary." See R. POUND & F. FRANKFURTER, CRIMINAL JUSTICE IN CLEVELAND 176, 211-12, 248 (1922).

<sup>145</sup> It was in 1892 that the Ohio Bar Association moved to abolish the grand jury to simplify criminal procedure. See R. YOUNGER, *supra* note 10, at 141.

<sup>146</sup> Bernard Stuplinski chaired the committee that conducted the study that produced the recommendation for abolition of the grand jury and substitution of information and a mandatory preliminary hearing. See *supra* note 73, at 13-14. If abolition was not forthcoming, the committee recommended the following: "First, all grand jury proceedings, with

The requirement of a grand jury indictment was actually eliminated in the Ohio Constitution of 1872,<sup>147</sup> but unfortunately, the people rejected the new constitution.<sup>148</sup> As is commonly known, England, the birthplace of the grand jury, virtually abolished the institution in 1933,<sup>149</sup> and most states have also eliminated it.<sup>150</sup> Alfred S. Julien, Chairman of American Trial Lawyers Board of Editors, thoughtfully comments:

THE GRAND JURY SYSTEM IS AN ABOMINATION. IT HAS OUTLIVED ITS USEFULNESS. IT SERVES NO PURPOSE. IT SHOULD BE ABOLISHED.

When we consider how many futile *reform* proposals assail the administration of justice, sponsored by so many disappointed lawyers, now professors, or would-be lawyers, now journalists, we wonder why this anachronism escapes real reform.<sup>151</sup>

One suspects that it persists in large measure by virtue of inertia, the normalization of the actual, and the popular myth of the institution as a bulwark of protection for individual rights. The arguments usually advanced in support of retention are not very persuasive. These include the fear that elimination would enhance the bureaucratic power of prosecutors and judges with exacerbation of establishment "hardening of the categories."<sup>152</sup> The ready answer is that the power already exists, but is merely camouflaged. To make visible the decision process and who bears the responsibility would actually serve as a check on arbitrary exercise of discretion. "We have long learned in our profession: Responsibility begets care!"<sup>153</sup>

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the exception of the actual voting, should be recorded. Second, the accused, at his request, should be afforded an opportunity to appear before the grand jury. Finally, the preliminary hearing should be mandatory unless waived by the accused." *Id.* at 14.

<sup>147</sup> See R. YOUNGER, *supra* note 10, at 151.

<sup>148</sup> *Id.* See also PROCEEDINGS AND DEBATES OF THE THIRD CONSTITUTIONAL CONVENTION OF OHIO 1872, 113, 191 (Cleveland 1873-74).

<sup>149</sup> See Administration of Justice (Misc. Provisions) Act, 1933, 23 & 24 Geo. 5, c. 36, § 13 The Criminal Justice Act, 1948, 11 & 12 Geo. 6, c.58, § 83, sched. 10, pt. I.

<sup>150</sup> See *supra* note 73, at 81. The Twenty-Seven states provide for prosecution of felonies by information or by indictment at the option of the prosecutor. See also Steele, *Right to Counsel at the Grand Jury Stage of Criminal Proceedings*, 36 Mo. L. REV. 193 (1971); *Federal Grand Jury; Hearings before the Subcomm. on Immigration, Citizenship, and International Law of the Comm. on the Judiciary on H.J. Res. 46 H.R. 1277 and Related Bills*, 94th Cong. 2d Sess. 716-17 (1976).

<sup>151</sup> Julien, *The Grand Jury: Necessary or Decadent?* 8 TRIAL 15 (Jan.-Feb. 1972). Of course, prosecutors are often "adamant in their desire to preserve the grand jury." KATZ, LITWIN & BAMBERGER, *supra* note 134, at 122. See also Lee, *supra* note 5, at 346-49.

<sup>152</sup> See Kuh, *supra* note 14, at 3; Morse, *supra* note 12, at 353-54; R. YOUNGER, *supra* note 10, at 188.

<sup>153</sup> Julien, *supra* note 151, at 15. The ABA Standards set forth some sensible guidelines for exercise of prosecutorial discretion:

3.9 Discretion in the charging decision.

(a) It is unprofessional conduct for a prosecutor to institute or cause to be instituted criminal charges when he knows that the charges are not supported by probable cause.

(b) The prosecutor is not obliged to present all charges which the evidence might

A second argument adduced in support of grand jury retention suggests that regardless of its faults in carrying out the indicting function, it excels in investigating official misconduct. Past examples of grand jury successes are cited, such as the "racket busting" grand juries working with Special Prosecutor, Thomas E. Dewey, or more recently, the Watergate grand jury investigations. However, closer examination reveals that in almost every instance the investigations were not initiated by the grand jury, rather by a crusading newspaper in conjunction with a prosecutor.<sup>154</sup> Sadly, the truth is that as an investigatory body, just as in the indicting function, the grand jury is without the resources and training necessary for effective independent action and thus serves solely the prosecutor's ends. "The only difference is that in the [investigative situation] . . . the prosecutor does not know the answers ahead of time."<sup>155</sup>

The investigation of the Cuyahoga County Sheriff's Department during our term was possible only because of the extensive investigation conducted and published by *The Plain Dealer*. Indeed, the resources for investigation available to the media astronomically exceed those of the grand jury. Without the enthusiastic aid of the County Prosecutor's Office there is no way that the Cuyahoga County Grand Jury can effectuate a comprehensive in-depth investigation of official corruption. And when the prosecutor is enthusiastic, he doesn't need the grand jury, except as a tool to be used in exactly the same way as in the indicting phase. There are other institutional arrangements, not bound by the traditional arbitrary and op-

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support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his discretion are:

- (i) the prosecutor's reasonable doubt that the accused is in fact guilty;
- (ii) the extent of the harm caused by the offense;
- (iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;
- (iv) possible improper motives of a complainant;
- (v) reluctance of the victim to testify;
- (vi) cooperation of the accused in the apprehension or conviction of others;
- (c) In making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved or to a desire to enhance his record of convictions.
- (d) In cases which involve a serious threat to the community, the prosecutor should not be deterred from prosecution by the fact that in his jurisdiction juries have tended to acquit persons accused of the particular kind of criminal act in question.
- (e) The prosecutor should not bring or seek charges greater in number or degree than he can reasonably support with evidence at trial.

AMERICAN BAR ASSOCIATION STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE: THE PROSECUTION FUNCTION, § 3.9 (1974).

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<sup>154</sup> Professor Morse' study indicated that fewer than five percent of grand jury investigations were initiated by the grand jury itself. See Morse, *supra* note 12, at 134-135, 362. The Tweed Ring investigation in New York in 1872 was investigated by the New York Times. See R. YOUNGER, *supra* note 10, at 182-84; and Campbell, *supra* note 106, at 179.

pressive features of the grand jury, that would better serve the investigatory role.<sup>156</sup>

The Panglossian absurdity of assuming the grand jury can effectively conduct its own independent investigation of a police enforcement agency becomes apparent by merely setting forth the parameters of the problem. Fourteen laymen, with no training in investigatory techniques, with no investigative staff, no clerical help, and no independent counsel, attempt to investigate charges of corruption, frequently brought forward by courageous law-enforcement officers at great personal risk. The grand jury faces overwhelming difficulties where police agencies are involved since there is sure to exist the special problems generated by group loyalty.<sup>157</sup>

There is also most certainly going to be political reverberations, with all manner of pressure exerted on the grand jury and the witnesses.<sup>158</sup> There is obviously no way to keep secret the identity of Deputy Sheriffs testifying before a grand jury sitting in a building that is manned by Sheriff's Department Personnel.<sup>159</sup> Statement of the problem obviates the need for further elaboration. The grand jury, as presently constituted, is simply not able to carry out an in-depth *independent* investigation of government corruption. If the prosecutor intends to carry out such an investigation, then again, assign to him the responsibility, making appearances consistent with reality.<sup>160</sup>

Other arguments for retention are put forward by grand jury proponents,<sup>161</sup> but none meet the intractable impossibility of the non-adversarial secret procedure of a grand jury acting as an effective screening device

<sup>156</sup> Commissions, such as the Knapp Commission set up to investigate police corruption in New York, appear far more effective. Legislative Committees; such as the Senate Committee on Presidential Campaign Activities, as well as Commissions and Citizen protest organizations such as Common Cause and "Nader's Raiders" can "conduct open hearings" and thereby "better publicize the problems and generate the public concern essential for reform." L. CLARK, *supra* note 65, at 28.

<sup>157</sup> See KNAPP COMMISSION, *supra* note 3, at 6-7.

<sup>158</sup> The foreman did receive some most unusual phone calls during the term. It is a terribly inhibiting thing to be told, as was the grand jury foreman, that he might be shot for proceeding with the investigation. One may consider this merely idle rumor, but when a witness appearing in an investigation is shot at, as was alleged in our investigation, the rumor becomes strikingly immobilizing.

<sup>159</sup> Witnesses reported being questioned about their testimony by their superiors shortly after appearing before the grand jury.

<sup>160</sup> See Julien, *supra* note 151.

<sup>161</sup> Two are worthy of mention: (1) There is a great value in citizen participation in the processes of government. Representative John Conyers takes this position.

There are only two institutions in our judicial system in which decision making authority is given to people independent of the Government. The trial jury is one; the grand jury is the other. I believe that it would be a mistake to eliminate the grand jury, or to minimize its role at a time when one widely recognized problem of American democracy is the increasing disaffection of American citizens with our political and legal institutions.

Quoted in Solowey, *supra* note 28, at 34. See also R. YOUNGER, *supra* note 10, at 148, 153; Shannon, *The Grand Jury: True Tribunal of the People or Administrative Agency of*



for defendants whose innocence or guilt will ultimately depend on an open and public hearing in an adversarial proceeding monitored by an impartial judge trained to exclude from the proceeding much of the type of evidence presented to the grand jury.

But there are many who object that abolition rather than reform is throwing out the baby with the bath water. However, when one considers the extent of the reforms required to give the grand jury a modest chance to attain its reputed function, even its own mother wouldn't recognize the baby. The array of necessary reforms to enhance independence would include, at the least,<sup>162</sup> (1) additional resources, such as independent legal counsel, investigators, and clerical staff,<sup>163</sup> (2) extensive training,<sup>164</sup> (3) elimination of any rigid rule of secrecy,<sup>165</sup> and (4) an institutionalized pro-

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*the Prosecutor?* 2 N. MEX. L. REV. 141 (1972); Morse, *supra* note 12, at 333, 364; Note, *Evaluating the Grand Jury's Role in a Dual System of Prosecution: An Iowa Case Study*, *supra* note 15, at 1359. One cannot fault the value of the citizen participation in a democracy, but from the above analysis it appears there is no meaningful effective participation by grand jurors. Thus both quantitatively and qualitatively grand jurors would be better off participating as petit jurors where they could have an actual impact. In response to a questionnaire distributed to our grand jury the response most frequently made indicated that the jurors had found the experience rewarding and informative. They also indicated some frustration with the limitations placed on the institution. Our grand jury may have been atypical in that the jurors read a hornbook on criminal law (Perkins) and each had photocopies of the Ohio Criminal Code.

(2) In a period of intense public concern about crime, it is necessary to zealously maintain the constitutional protections afforded the defendant. Abolition of the grand jury guarantee would facilitate abrogation of other valuable constitutional protections. See Soloway, *supra* note 28, at 34. Whatever merit this "edge of the wedge" or domino theory contentions might have concerning the federal Bill of Rights, it seems ephemeral as to state bills of rights, which have frequently been amended over the years. Again, it bears emphasizing that the United States Supreme Court has never considered the fifth amendment's indictment or presentment provision fundamental enough to make it applicable to the states by incorporation into the Due Process Clause of the fourteenth amendment. See note 84, *supra*. This means that the grand jury parameters of protection will be determined solely by state judges who, unlike federal judges, do not enjoy life tenure and are therefore more susceptible to political pressure. See Lewis, *The High Court: Final . . . But Fallible*, 19 CASE W. RES. L. REV. 528, 536, 545-546 (1968).

<sup>162</sup> See Morse, *supra* note 12, at 357.

<sup>163</sup> See R. YOUNGER, *supra* note 17, at 243; Bickner, *supra* note 106, at 466, 737, Note, *Evaluating the Grand Jury's Role in a Dual System of Prosecution: An Iowa Case Study*, *supra* note 115, at 1366-77.

<sup>164</sup> The training program should apprise the grand jurors fully concerning their power and obligations, including the functions of protecting the innocent. Given the undeveloped nature of Ohio law concerning grand jury powers this will be no easy task.

<sup>165</sup> It has often been pointed out that secret proceedings are breeding places for arbitrary and oppressive action. Justice Black tells us why this is so:

Secret inquisitions are dangerous things justly feared by free men everywhere. They are the breeding place for arbitrary misuse of official power. They are often the beginning of tyranny as well as indispensable instruments for its survival. Modern as well as ancient history bears witness that both innocent and guilty have been seized by officers of the state and whisked away for secret interrogation or worse until the groundwork has been securely laid for their inevitable conviction. While the labels applied to this practice have frequently changed, the central idea . . . remains unchanging—extraction of 'statements' by one means or another from an individual by officers of the state while he is held incommunicado.

In re Groban, 352 U.S. 330, 253 F.2d 53 (1957), (J. Black dissenting). None of the reasons

cedure whereby all citizens with complaints could have direct access to the grand jury.<sup>166</sup> And to protect the rights of witnesses and the accused, reform proposals generally include separating indicting from investigating grand juries,<sup>167</sup> permitting counsel to be present during interrogation of

adduced for grand jury secrecy appear valid. Professor Dash has characterized grand jury secrecy as "substantial as gossamer." Dash, *The Indicting Grand Jury: A Critical Stage?* 10 AM. CRIM. L. REV. 807, 819 (1972). Analysis of the reasons for secrecy leads him to that conclusion. (1) Since probable cause for arrest requires less proof than an indictment, any suspect who may flee can certainly be arrested prior to the indictment—which the rubber stamping grand jury is sure to return. And if there is to be harassment of witnesses, surely that is more likely at trial than at the grand jury level—and trials are open and public. Anyway, it is not difficult to find out who testified before a grand jury, as we and our witnesses quickly learned. (2) The notion derogatory information will be disclosed about the unindicted defendant fails again to take into account the fact that with rubber stamping the order of the day, the defendant could better prevent an indictment and its concomitant notoriety if the facts were public so he could counter them. Also, since no obligation of secrecy is imposed on witnesses they may reveal their testimony, totally undercutting this rationale for the rule. (3) the idea that the rule enhances witnesses' willingness to testify is subject to some of the same criticisms as above. Anyway, the rule is designed for the "protection of the grand jury itself as a direct, independent representative of the public as a whole, rather than those brought before the grand jury." 55 F.2d at 261. See also text accompanying note 80, *supra*. (4) The protection of the grand jury's deliberations and votes naturally only require strict secrecy as to that aspect of the proceedings. See Dash, at 819-23. The Supreme Court has acknowledged "the growing realization that disclosure, rather than suppression . . . ordinarily promotes the proper administration of justice." *Dennis v. United States*, 384 U.S. 855, 870 (1966). It is not at all startling to find Professor Boudin conclude: "The essential usefulness of secrecy is clear." Boudin, *supra* note 98, at 34.

The Sixth Circuit Court of Appeals has expressed concern for the dangers inherent in secret proceedings:

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 error at his trial, the torture of suspense and the pains of imprisonment, or the burden of bail. The secrecy of any judicial procedure 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 over-zealous men, either in or out of office, may with impunity persuade grand juries without any legal evidence, either by hearsay testimony, undue influence, or worse means, to indict whom they will, and there is no way in which the courts may annul such illegal accusations, 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.

*Schmit v. United States*, 115 F.2d 394, 397 (6th Cir. 1940) quoting from *McKinney v. United States*, 199 F.2d 31 (8th Cir. 1912) (Dissenting opinion).

<sup>166</sup> There is an historical basis for permitting direct access. See R. YOUNGER, *supra* note 10, at 52, 83. The Knapp Commission recommended institutionalizing direct access, especially where official misconduct is involved due to the reluctance of complainants to report to establishment type officials. See KNAPP COMMISSION, *supra* note 3, at 15, 255. At this time the individual grand jurors may hear citizen complaints and then bring those to the attention of the grand jury, but there is no institutionalized procedure to make access more than theoretical.

<sup>167</sup> As Richard Braun has noted, investigation is prosecutorial whereas examination of evidence to ascertain if an indictment is justified is more quasi-judicial. "These functions [investigating vs. indicting] are inconsistent in their very nature and should not be performed by the same persons, just as a judge should not also serve as a prosecutor." Braun, *supra* note 109, at 915. See also Bickner, *supra* note 43, at 736; and Peterson, *The California Grand Jury System: A Review and Suggestions for Reform*, 5, PACIFIC L.J. 1 (1974).

witnesses,<sup>168</sup> improving the quality of the evidence—coupled with a provision for quashing indictments based on incompetent or illegal evidence,<sup>169</sup> requiring a transcript of grand jury proceedings,<sup>170</sup> and greater judicial supervision.<sup>171</sup> It is recognized that some reforms could be accomplished immediately, whereas others would require legislative or constitutional revision.<sup>172</sup> Paradoxically the reforms suggested would appreciably complicate grand jury proceedings, transforming them into minitrials resulting in protracted proceedings whereby the defendants' interest would ultimately suffer and the grand jury would only continue as "a pawn in a technical game instead of . . . a great historic instrument of lay inquiry into criminal wrongdoing."<sup>173</sup>

### CONCLUSION

A survey of the literature and a term as grand jury foreman have convinced me that the powers that be do not want a truly independent grand jury which *on its own* would challenge the circumlocution office and the contemporary political equilibrium. Instead, adhering to Hoffenstein's, "come weal come woe, my status is quo," a docile and malleable institution is praised as the "people's panel" serving as a bulwark of protection for the individual against the state. Given this posture and the absence of any lobby for change, reform is most unlikely. Further, as indicated above, other constitutional arrangements would better serve the same ends as the proposed reformed grand jury. It is revolting to discover that there is no better reason for the continuation of a practice detrimental to the rights of the individual than that it existed in the time of Henry II. The Grand Jury no longer serves, nor given contemporary conditions, can it serve its constitutional function of protecting the citizen from arbitrary and oppressive prosecution by the state. Accordingly, the only rational course of action requires abolition of the institution.

<sup>168</sup> See Fine, *supra* note 107, at 494, 496; Julien, *supra* note 151, at 15. Arizona does permit counsel to be present. ARIZ. REV. STAT. § 21-412 (1973).

<sup>169</sup> See Boudin, *supra* note 98, at 35.

<sup>170</sup> See Fine, *supra* note 107, at 494, Boudin, *supra* note 98, at 35, Morse, *supra* note 12, at 330, 363.

<sup>171</sup> Judges generally seem to manifest little interest in the grand jury. See Bickner, *supra* note 99, at 663. This is perhaps due to their desire to permit the grand jury to maintain its autonomy. Greater communication and support would certainly be produced by providing an institutional arrangement for grand jury access to common pleas judges for consultation and advice. See *Id.* at 666.

<sup>172</sup> See *Reform of the Grand Jury System: Hearing before the Subcomm. on Constitutional Rights of the Comm. on the Judiciary on S.3274, H.R. 1277, H.R. 6006, H.R. 6207, H.R. 10947, H.R. 11660, H.R. 11870, H.R. 14146, and H.J. Res. 46, 94th Cong., 2d Sess. (1976); Grand Jury Reform, Hearings before the Subcomm. on Immigration, Citizenship, and International Law of the Comm. on the Judiciary on H.R. 94, 95th Cong., 1st Sess. (1977).*

<sup>173</sup> *United States v. Johnson*, 319 U.S. 503, 512 (1943).