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NEW YORK TROIKA: CONFLICTING ROLES OF THE GRAND JURY

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> You . . . shall diligently inquire and true presentment make, of all such matters and things as shall be given you in charge; the counsel of the people of this state, your fellows' and your own you shall keep secret; you shall present no person from envy, hatred or malice; nor shall you leave any one unpresented through fear, favor, affection or reward, or hope thereof; but you shall present all things truly as they come to your knowledge, according to the best of your understanding. So help you God![1]

Extravagantly praised[2] and bitterly condemned,[3] unique in its trebly diverse and conflicting roles of "Public Inquisitor, Protector, and Reporter," the grand jury has been depicted by its defenders as the one institution developed by the Anglo-American legal system which most dramatically characterizes the ideal of popular justice. Paradoxically it has been the object of regular and repeated attempts at modification or abrogation;[4] in New York the most recent and effective effort has been an assault on the grand jury's role of public reporter.

In *Wood v. Hughes*,[5] the Court of Appeals has ruled that a grand jury has no authority to file as a public record with the court a report concerning alleged misconduct in public office where the underlying investigation did not disclose evidence warranting an indictment. The practice of filing such reports (frequently but inaccurately referred to as presentments)[6] has long been a controversial matter.[7] Both the authority for and the propriety of the procedure have been questioned, but until this decision the issue had not been squarely faced by other than the lower courts.[8]

Wood was the foreman of the May, 1959, Term of the Grand Jury for the

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1. This is the grand juror's oath as embodied in the New York Code of Criminal Procedure § 245. It appears not to have been changed substantially from the "Oath of the Great Inquest" adopted during the time of Queen Elizabeth. 1 Hamlin & Baker, Supreme Court of Judicature of the Province of New York 1691-1704, at 154 (1959).

2. See Current Notes, Dewey Speaks on Grand Jury, 32 J. Crim. L., C. & P. S. 217 (1941); Younger, The Grand Jury Under Attack, 46 J. Crim. L., C. & P. S. 26, 214 (1955).

3. See Kranitz, The Grand Jury: Past—Present—No Future, 24 Mo. L. Rev. 318 (1959); Vukasin, Useful or Useless—The Grand Jury, 34 Cal. State Bar J. 436 (1959).

4. 1 National Commission on Law Observance and Enforcement, Report on Prosecution 33, 124-26 (1931); 9 New York State Constitutional Committee, Problems Relating to Judicial Administration and Organization 864 (1938); A. L. I. Code Crim. Proc. §§ 113, 114.

5. 9 N.Y.2d 144, 212 N.Y.S.2d 33 (1961).

6. A presentment is an accusation originating with the grand jury, rather than with the prosecutor, which must be drawn into a bill of indictment and resubmitted to the jury. Orfield, Criminal Procedure from Arrest to Appeal 157 (1947).

7. See Bennett v. Kalamazoo Circuit Judge, 183 Mich. 200, 150 N.W. 141 (1914); In re Report of Grand Jury, 204 Wis. 409, 235 N.W. 789 (1931); In re Report of Grand Jury, 152 Fla. 154, 11 So.2d 316 (1943).

8. The only appellate decision bearing on this issue upheld the filing of a critical report. Jones v. People, 101 App. Div. 55, 92 N.Y.Supp. 275 (2d Dep't 1905), appeal dismissed, 181 N.Y. 389, 74 N.E. 226 (1905).

County of Schenectady; as foreman he sought to have filed and made public a nineteen page report criticizing the practices of the Schenectady County Highway Department, although the grand jury's investigation had yielded no basis for an indictment. The report did not name the individuals involved in the alleged derelictions but there was "little doubt as to identity." The Supreme Court Justice who had presided over the May Term, Charles M. Hughes, received the report but ordered it sealed; whereupon, Wood initiated a proceeding[9] to compel Hughes to file the report as a public record. In a 4-3 decision Fuld, J., affirmed the Appellate Division's dismissal of the petition, holding that there is no authorization, constitutional or statutory, for the filing of a grand jury report. The majority decision states that a grand jury inquiry must result in either an indictment or a dismissal of charges; otherwise it must remain silent. Desmond, C. J., and Froessel, J., dissented in separate opinions concurred in by Burke, J.

Conceding that, in the absence of conflicting sections, the New York Constitution continues the common law as the law of the State subject to legislative alteration,[10] Judge Fuld interprets the failure to authorize grand jury reports by specific provision in the Code of Criminal Procedure as a manifestation of legislative intent to eliminate their use. Consequently, the majority opinion rejects any examination of the historical development of the grand jury and its powers as pointless and moot. Conversely, the dissenters view the omission as a refusal to abolish the traditional grand jury practices and suggest that since the grand jury is required to inquire into misconduct of public officers,[11] the power to report is necessarily implied in order to implement this function.

Here the issue is one of statutory interpretation, or rather, an interpretation of statutory omission. Justice Frankfurter has observed that in this area the scope of free judicial movement is considerable, and that

> A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policymaking might wisely suggest, construction must eschew interpolation and evisceration. He must not read in by way of creation. He must not read out except to avoid patent nonsense or internal contradiction.[12]

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9. N.Y. Civ. Prac. Act, art. 78.

10. Such parts of the common law, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony, on the nineteenth day of April, one thousand seven hundred seventy-five, and the resolutions of the congress of the said colony, and of the convention of the State of New York, in force on the twentieth day of April, one thousand seven hundred seventy-seven, which have not since expired, or been repealed or altered; and such acts of the legislature of this state as are now in force, shall be and continue the law of this state, subject to such alteration as the legislature shall make concerning the same. But all such parts of the common law, and such of the said acts, or parts thereof, as are repugnant to this constitution, are hereby abrogated.
N.Y. Const. art. I, § 14.

11. The grand jury must inquire, . . .
2. Into the wilful and corrupt misconduct in office of public officers of every description, in the county. N.Y. Code Crim. Proc. § 253.

12. Frankfurter, The Supreme Court: Views from Inside 81 (Westin ed. 1961).

Even though in disagreement as to the merits of probing into history, tradition, and practice,[13] the majority and minority opinions alike give recognition to the social and political effects implicit in the reportorial role of the grand jury. It would seem that resolution of the question would compel at least a brief examination of grand jury function in all of its aspects, from common law evolvement to current use and effectiveness.

The origin of the jury system is somewhat uncertain. Maitland defined the jury as "a body of neighbours summoned by a public officer to answer questions upon oath."[14] Using Maitland's definition one writer suggests that Moses' selection of the twelve tribal leaders to investigate and report on conditions in the land of Canaan may be the earliest recorded use of the jury.[15] Dean Wigmore concluded that the earliest description of democratic justice in the form of jury trial is to be found in *The Iliad*, Book XVIII.[16] There are indications that the Athenians had developed a complicated jury system, at least by the time of the celebrated trial of Socrates, and that the jury's power extended into areas other than the trial of cases.[17]

It is not unusual for different nations to independently develop similar principles or institutions; no one contends that the English grand jury was derived from its Athenian counterpart. Yet, there is considerable disagreement as to whether the modern jury system was a Norman institution adopted after the conquest[18] or a product of the English system of frank-pledge[19] or a blending of both.

The laws of Ethelred II provided that twelve senior thanes of each hundred should go out with the reeve and accuse those who had committed any offense.[20] This may have been new law when promulgated about 997 A.D., but it is just as likely that it merely clarified a matter of custom. The accused

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13. Desmond, C.J., states:
> The question here is one of positive law, of Constitution and statute as explained by history and tradition.

Supra note 5 at 160, 212 N.Y.S.2d at 45.

14. 1 Pollock and Maitland, The History of English Law 117 (1903).

15. Pope, The Jury, 39 Texas L. Rev. 426 (1961). The Biblical account may be found in the Old Testament, Numbers 13.

16. 1 Wigmore, A Panorama of the World's Legal Systems 287 (1928).

17. Wigmore relied on the Kenyon translation of Aristotle's monograph on the "Government of Athens" in reaching the following conclusion:
> Jury-trial, as thus organized, was much more than our modern expedient for determining private claims and ordinary criminal charges. It was also, in effect, a chief engine for controlling the government.

Id. at 301.

18. Orfield, Criminal Procedure from Arrest to Appeal 141 (1947) [hereinafter cited as Orfield].

19. Edwards, The Grand Jury 4 (1906) [hereinafter cited as Edwards].

20. This passage appeared in Ethelred's law promulgated at Wantage in the year 997:
> And that a gemot be held in every wapontake; and the xii senior thegns go out, and the reeve with them, and swear on the relic that is given them in hand, that they will accuse no innocent man, nor conceal any guilty one. . . .

Plucknett, A Concise History of the Common Law 108 (1956) [hereinafter cited as Plucknett].

could avoid trial by paying weregild; otherwise he was tried by compurgation or ordeal.[21]

At about the same time the Normans were using a trial jury called the Nämnd or Nambda. It was not, however, an accusing jury;[22] the Norman method of accusation was by appeal. A private person made the criminal charge against another and the issue was resolved by physical battle. The concept of jury trial was brought into England with the other customs of the invaders, including the trial by battle. There is an informational gap of about one hundred years between the law of Ethelred and the conquest, and another one hundred year gap between the conquest and the next published law dealing with the accusing jury, the Assize of Clarendon. Plucknett states that until continuity can be established between Ethelred's law and the Assize of Clarendon, it is unsafe to credit the Anglo-Danes with the origin of the grand jury.[23]

William the Conqueror made extensive use of the inquest, a Norman administrative device (probably of Frankish origin),[24] to obtain useful information for governmental purposes, the answer being recorded in the Domesday Book.[25] Since William's successors used inquisitions for the determination of private rights as an occasional favor to a church or individual upon request,[26] the principle of jury determination of civil issues was soon established. But criminal matters were still disposed of by the ancient methods supplemented by the Norman appeal and battle.[27] If we may assume that accusations were brought by the twelve thanes in the hundred at the sheriff's tourns, then it is reasonable to believe that the Saxon form of accusation would be preferred by those complainants unwilling to assume the risks of combat. Whether public preference was a factor or not, the need for royal revenue was sufficient basis for the establishment of the inquisition as part of the criminal process in 1166. The Assize of Clarendon provided

> 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,

21. Compurgation was a sort of character test based on the accused producing a specified number of witnesses who would swear to believe his oath. The usual ordeals were fire and water. The defendant was required to hold a hot iron, or to place his hand in boiling water. If the hand healed in three days the accused was discharged. The ordeal of water involved lowering the bound defendant into a pool; if he sank a certain specified distance he was guilty; otherwise he was innocent. In later times the practice was sometimes known as swimming a witch.

Such ordeals were obviously direct appeals to the supernatural and were conducted with solemnity under the aegis of the Church.

Radcliffe & Cross, The English Legal System 10 (1937) [hereinafter referred to as Radcliffe & Cross].

22. Edwards 4.

23. Plucknett 109.

24. 1 Pollock & Maitland, supra note 14 at 141.

25. Plucknett 111.

26. Id. at 110.

27. The appeal and trial by battle was in common use for at least two hundred years after the Conquest. The right to appeal existed in theory until 1819. Radcliffe & Cross 37.

> 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.[28]

It will be seen that the Crown now had a part in criminal proceedings involving the enumerated offenses through the use of the King's justices, a feature lacking in Ethelred's law. Once the defendant was accused he still had to be tried by ordeal or compurgation, although the latter method might not entirely clear a defendant if of bad character.[29] It is believed that compurgation was largely abandoned as a result of the provisions of the Assize of Clarendon.[30] To complicate methods still further, the Fourth Lateran Council in 1215 forbade the clergy to participate in the ordeals. Subsequently, Henry III in recognition of clerical disapproval authorized his justices to use their discretion as to proof of guilt.[31] Gradually, and not without difficulty, the justices adopted the device of jury trial in criminal matters, first with the same jury that had presented the accused, later with a separate trial jury.

For a time the justices were reluctant to compel an accused to accept this substitute for the ordeal, but eventually the law required submission to jury trial or imprisonment and torture until such jurisdiction was admitted.[32] There were defendants who died in prison without accepting jury trial, possibly because the property of one who died without being convicted of a felony did not become forfeit to the crown. Probably many defendants who did submit would have preferred the ordeal to a trial by the same jurors who had constituted the presenting jury, since the accusing jurors often made their accusations on a basis of personal knowledge. However, by 1352 a trial juror could be challenged if he had served on the presenting jury,[33] and by 1368 the old procedure of drawing a jury from the hundred was replaced by a sheriff's return of a county wide panel of twenty-four knights known as "*le graunde*

28. Plucknett 113.

29. The Assize of Clarendon also had provided:

> The lord King also wishes that those who make their law and clear themselves shall, nevertheless, forswear the King's land if they are of bad renown and publicly and evilly reputed by the testimony of many lawful men, and cross the sea within eight days unless detained by the weather, and with the first favourable wind they shall cross the sea and never come back to England save by the King's permission, and shall be outlawed, and if they come back shall be captured as outlaws.

Plucknett 113.

30. Thayer, The Older Modes of Trial, 5 Harv. L. Rev. 59 (1891).

31. Plucknett 119.

It should be noted that at this time indictment and the appeal were not the only methods of initiating criminal proceedings. During the reign of Edward I, Longshanks (1272-1307) the king could bring a man to trial for treason or felony by information, that is, by complaint filed by a royal official without grand jury indictment. This right was gradually restricted to misdemeanors. Orfield 95.

32. But mostly the trial judges resorted to piene forte et dure. The accused was cast into prison, ironed, and laid on the ground; a little water was given him one day and a little bread the next: weights were piled on him and added to day by day; and there he was kept unless or until he put himself upon the country. . . .

Snyder, Criminal Justice 69 (1953).

33. 25 Edward III, stat. 5, c. 3; Plucknett 127, note 5.

inquest."[34] At this point the development of the jury system had reached the point where the grand and petit jury were approximately the same as the modern institutions.

From the beginning (whether Anglo-Saxon or Norman) the grand jury had an inquisitorial function; it had to present those accused of crime. In the absence of an organized constabulary force its duties were probably more extensive than investigation and accusation, and probably included apprehension and detention.

And from the time of the Norman Conquest the grand jury had a reportorial function, first as the information gathering agency for the early Angevins, and later as the proclaimer of facts useful to local administrative problems. In the Middle Ages the grand jury was the unit of local government most concerned with calling to the attention of the court and the public any matters affecting the good order of the community. It was a function of the grand jury to report on these conditions and to name individuals who had neglected public obligations.[35] With the development of more complicated and efficient systems of local representative government, the reportorial role became less significant, but it continued to be exercised down through the colonial period and later.[36]

The grand jury's symbolic role of Public Protector, based on popular acclaim, evolved more slowly, as the institution demonstrated its independence of political control and royal tyranny. In two celebrated cases, that of *Stephen College*[37] and that of the *Earl of Shaftesbury*,[38] both occurring in 1681, the grand jury under governmental pressure refused to relinquish the right to hear witnesses and to deliberate in secret; in both cases the grand jury refused to indict the defendants for treason. At this point the institution had approached the zenith of reputation as the bulwark of English individual freedoms; furthermore, all three roles, inquisitor, reporter, and protector, had sufficiently developed in time to permit a healthy transplant to colonial America.

Common law criminal procedures were generally followed in colonial New York until the adoption of the Constitution of 1777.[39] At the first session of the General Court of Assizes in October 1665, the minutes record a grand jury

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34. Edwards 26.
35. Radcliffe & Cross 198.
36. If anyone takes the trouble to read the old sessions papers published by various counties from time to time, he will find that they are full of cases down to the reign of Queen Victoria of the grand jury presenting all manner of things to the court which in those days was really the origin of local government for the county in such matters as roads, which they knew to be out of repair, bridges which were in a dangerous condition, public nuisances, disorderly houses, gaming houses and the like, either of their own knowledge or from information given to them.
Regina v. Chairman, County of London Quarter Sessions, 1 Q.B. 5 (1954).
37. 8 How. St. Tr. 550 (1681).
38. 8 How. St. Tr. 774 (1681).
39. 9 New York State Constitutional Convention Committee, Problems Relating to Judicial Administration and Organization 850 (1938) [hereinafter referred to as Constitutional Convention].

as having served.[40] Prosecutions were not limited to those initiated by grand jury, however, and persons were accused by information and complaints as well.[41] In 1691 an act was passed by the colonial assembly providing that "In all Cases Capitall or Criminall there shall be a grand Inquest who shall first present the offense and then twelve men of the neighbourhood to try the Offender who after his plea to the Indictment shall be allowed his reasonable Challenges."[42]

The right to indictment became a tradition, although it was still a matter of right only in capital cases. In many instances, the government was fearful of the reaction of colonial grand juries and preferred to initiate prosecutions with informations filed by the attorney general or some other royal official. Needless to say, this was and continued to be a source of irritation and grievance to the colonists.[43]

Almost inevitably, as had happened in England some fifty years earlier, a celebrated trial helped to establish in the popular mind a concept of the grand jury as protector of the liberties of the people. This was the case of John Peter Zenger,[44] accused in 1735 of libelling the royal governor in the *New York Weekly Journal.* A grand jury refused to indict him, despite the urgings of the Chief Justice. The trial jury acquitted Zenger after he had been brought to trial by information.[45] In an impassioned and eloquent plea, Andrew Hamilton, a Philadelphia lawyer, argued:

> . . . yet Old and Weak as I am, I should think it my duty, if required, to go to the utmost Part of the Land, where my Service could be of any Use in assisting to quench the Flame of Prosecutions upon Informations set on Foot by the Government, to deprive a People of the Right of Remonstrating, and complaining too, of the arbitrary attempts of men in Power . . . .[46]

This popular verdict, confirming as it did the independence of the jury, grand and petit, and the freedom of the press, was a topic of conversation in all of the colonies and in England as well.[47]

It is not surprising that the reportorial function of the grand jury continued in the Colony of New York as it had in the mother country. In fact

40. 1 Hamlin & Baker, Supreme Court of Judicature of the Province of New York 1691-1704, 142 (1959) [hereinafter referred to as Hamlin & Baker].
41. Id. at 144.
42. Id. at 147.
43. As late as 1727 we find the Grievance Committee of the Assembly reporting that:
> . . . many of his Majesty's leige Subjects have of late been prosecuted in their respective Counties, upon Informations filed against them by the Attorney General, or his Deputies, and other compelled to defend the same, in the [Supream] Court at the City of New-York, tho' the matters charged upon them, have often been trivial.

Id. at 149 & n. 16.
44. 17 How. St. Tr. 675 (1735).
45. Edwards 32.
46. 17 How. St. Tr. 721 (1735).
47. Marke, Peter Zenger's Trial and Freedom of the Press, N. Y. U. L. Cent. Bull., Sum. 1961, p 8.

the first colonial legislative assembly was created after a grand jury had petitioned the Duke of York for a body "Duly elected by the Freeholders of this Collony by whom . . . we may Enjoy the benefitt of the Good and wholsome Laws of the Realme of England . . . ."[48] The grand juries continued to assist the courts by reporting and "presenting" matters relating to the public welfare, such as negligence of public officers, uncleaned docks, and persons "playing publickly on the streets on Sundays."[49]

With the adoption of the Constitution of 1777, the grand jury, which was not mentioned, continued as at common law, since that Constitution provided that the common law of England and the laws of the colonial legislature that were in force in the colony on April 19, 1775, should continue to be the laws of the state, until and unless altered.[50] That provision continued in subsequent adoptions and is found in the present Constitution as amended.[51] In later adopted Constitutions specific provision was made that no person should be held to answer for crime unless first indicted by a grand jury. The present Constitution continues the requirement of grand jury indictment,[52] but makes no reference to the grand jury power to report; neither does the Code of Criminal Procedure.[53] In the absence of clear provision to abrogate the common law it would seem that the powers and practices of the common law grand jury had been continued. Certainly grand juries continued to investigate, to indict, and to file censorious reports; but the reporting practice began to be the subject of criticism. Occasionally, the courts would order reports or portions of them expunged, but the lower court decisions "left a trail of confusion" on the issue of legality of reports.[54]

By the time of the Constitutional Convention of 1938 a number of changes had occurred in the functioning of grand juries in other jurisdictions which suggested possible solutions for New York. One of the principal developments in the United States had been a trend toward the use of informations filed by a prosecuting official as an alternative to grand jury indictment. Only twenty states,[55] including New York, prohibited felony prosecutions except on indictment. (A New York statute authorizing a waiver of indictment was held un-

48. 1 Hamlin & Baker 146.
49. Id. at 154.
50. Wood v. Hughes, supra note 5 at 158, 212 N.Y.S.2d at 43.
51. N.Y. Const. art. I, § 14.
52. No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land, air and naval forces in time of war, or which this state may keep with the consent of congress in time of peace, and in cases of petit larceny, under the regulation of the legislature), unless on indictment of a grand jury. . . .
N.Y. Const. art. I, § 6.
53. See N.Y. Code Crim. Proc. §§ 223-260.
54. 9 Constitutional Convention 863.
55. Alabama, Arkansas, Delaware, Illinois, Kentucky, Maine, Maryland, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Texas, Tennessee, West Virginia, and Virginia. Id. at 849.

constitutional in 1928.)[56] Nineteen states[57] authorized felony prosecutions to be initiated on either indictment or information, a so-called "dual-system." Seven states permitted the use of a dual-system only as to certain crimes, and required grand jury indictment for others.[58] Two states permitted waiver of indictment as the only exception to a general requirement. No state had gone as far as elimination of the grand jury altogether, something the English had substantially accomplished by legislation in 1933.[59]

In addition, the forces of reform had provoked numerous local, state, and national crime surveys in an effort to re-evaluate the American systems of criminal law enforcement.[60] In general, these surveys found the grand jury system defective and inefficient, but still capable of rendering useful service in limited circumstances or in functions adaptable to the grand jury only.[61] Essentially the reformers had suggested the advantages of an information system as opposed to the indictment system, but had endorsed the reportorial function of the grand jury.

Although aware of the highly publicized criticisms made in other jurisdictions to the extent that proposed alternative accusatory systems were considered,[62] the Constitutional Convention of 1938 made no revision of the grand jury's functions. On the contrary, an amendment designed to protect the indictment process from judicial or legislative alteration was introduced, and subsequently adopted.[63] And this was done despite the recommendation of the 1935 Governor's Conference on Crime, the Criminal and Society that New York adopt an alternative or dual system of accusation by information or indictment,[64] a proposal substantially endorsed by Governor Herbert Lehman.[65]

56. People ex rel. Battista v. Christian, 249 N.Y. 314, 164 N.E. 111 (1928).

57. Arizona, California, Colorado, Idaho, Iowa, Kansas, Michigan, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, Washington, Wisconsin, and Wyoming. 9 Constitutional Convention 849.

58. Connecticut, Florida, Indiana, Louisiana, Massachusetts, Minnesota, and Vermont. Ibid.

59. Administration of Justice Act, 23 and 24 Geo. 5, c. 36 (1933).

60. E.g., National Commission on Law Observance and Enforcement (1931); Criminal Justice in Cleveland (1922); Illinois Crime Survey (1929); Missouri Crime Survey (1926); Report of the Minnesota Crime Commission (1934).

61. Today the grand jury is useful only as a general investigating body for inquiring into the conduct of public officers and in case of large conspiracies. It should be retained as an occasional instrument for such purposes, and the requirement of it as a necessary basis of all prosecutions for infamous crimes should be done away with.

National Commission on Law Observance and Enforcement, Report on Prosecution 37 (1931).

62. 9 Constitutional Convention 864.

63. The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law.

N.Y. Const. art. I, § 6.

64. It is proposed by the Commission that crimes may be prosecuted either by indictment or information, within the discretion of the district attorney, in cases where there has been a hearing before a committing magistrate, or such hearing has been waived.

State of New York, Proceedings of the Governor's Conference on Crime, the Criminal and Society 118 (1936?).

The last significant attempt to modify the functional scope of the grand jury occurred in 1946 when the legislature passed a bill forbidding the filing of censorious reports directed against alleged misconduct amounting to less than a crime. It was vetoed by Governor Thomas Dewey, who stated that any weakening of the grand jury's power "would be an irreparable loss to the citizens of a free community."[66]

Interestingly, the majority opinion and the minority opinions cite the 1938 amendment (Art. I, § 6) as supporting their respective and opposing interpretations of the reportorial prerogative.[67] Even less helpful is the dissenters' suggestion that the action of the 1946 legislature constitutes recognition of the power to report, when the position of the majority is based on their interpretation of the intent of the framers of the procedural code (1849) and the intent of the legislature which adopted the pertinent sections in 1881.

If the original Code of Criminal Procedure had been intended by the draftsmen, or by the legislature, to exclude and abolish any existent common law procedures not specifically mentioned, it would have been logical to clearly enunciate such a principle in the code itself. This was done in the Penal Law; Section 22 provides in substance that no act or omission shall be deemed criminal except as authorized by the Penal Law. Without this provision the common law of crimes would apply to areas of omission. Even with such a provision in the Code of Criminal Procedure there would be some difficulty in reconciling the reportorial function of the grand jury with criminal procedure at all.

A careful reading of the majority opinion leads one to the unassuaged conclusion that the *Wood* decision is based on policy, policy determined by a value judgment alone. There is much to be said against the too liberal use of the grand jury report, but historical fact cannot be denied by mere disapproval.

In any event, the *Wood* decision, good or bad, is now the law of the state, and we are left with the question of grand jury survival. Is the mutilated veteran to be revived with rehabilitative surgery, or assigned to limited duty only, or honorably discharged from further service? A judicious determination of that question requires an exhaustive examination into all of the aspects of the grand jury system, including its effectiveness as compared to possible alternatives, something beyond the scope of this discussion. However, even a preliminary consideration of the problem suggests that certain conflicts in grand jury roles may predetermine the outcome of such an inquiry.

Although historically, the grand jury did act as a protector of individual

65. In a special message to the legislature, dated January 7, 1936, Governor Lehman stated:

> I recommend a constitutional amendment providing that a district attorney may proceed by information instead of by indictment of a grand jury, on consent of the accused, in a manner to be provided by the legislature.

Id. at 1230.

66. Wood v. Hughes, supra note 5 at 158, 212 N.Y.S.2d at 43.

67. Id. at 150, 156, and 164, 173 N.E.2d at 24, 27, and 32.

right, and did effectively intervene between citizen and despot, does it so protect the citizen today, and from whom? With a long established system of representative government, and even elected prosecuting officials, the possibilities of arbitrary political persecution are greatly diminished, if not altogether eliminated. In actual fact it seems that the public prosecutor is the one who receives the protection.[68] The secrecy of the proceedings prevents the accused from knowing what evidence is to be used against him. Secret hearings help to conceal the identity of informers and witnesses, at least until the time of trial; and the secrecy of the grand jury hearing is supposed to protect the prosecutors's case from the possibility of perjured defenses, intimidated witnesses,[69] and absconding defendants.[70] And in New York the grand jury hearing can be used by the prosecutor to prevent a preliminary examination, so that the prosecutor's case will not be exposed to even this limited form of discovery.[71]

If it be conceded that the role of protector of liberties is not what it once was, and we eliminate the unique role of reporter, of what significance is the inquisitorial role? There appears to be conflict here, too. This is an era that has proudly produced scientific crime laboratories and professionalism in law enforcement, yet many would insist on maintaining a body of citizen investigators. Supporters of the system deny that grand juries rubber stamp the conclusions of the police and prosecutors,[72] but also deny that investigations by the amateur inquisitors duplicate the investigations already completed, and

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68. The prosecutor may use the grand jury as a screen to conceal decision actually made by him and rubber stamped by the jurors: these decisions can be either for or against indictment. Thus, he has a medium for the shifting of responsibility and any consequent public criticism. See Moreland, Modern Criminal Procedure 201 (1959).

69. Where the witness is a child, is the grand jury protecting the witness, the prosecutor, or the defendant, by refusing to allow the child's request for parental accompaniment during the grand jury interrogation? See People v. Minet, 296 N.Y. 315, 73 N.E.2d 529 (1947).

70. Commonwealth v. Mead, 12 Gray 167, 170, 71 Am. Dec. 741 (Mass. 1858).

71. The advice given to prosecutors in the P.L.I. short course for prosecuting attorneys is illuminative:

> However, a grand jury can, of course, act independently, without a preliminary hearing, where this is desired. Such cases may arise when you fear that witnesses may be tampered with, or where, for tactical reasons, you wish the defense to remain ignorant of your evidence, or where you wish to protect a witness from publicity, as in sex or extortion cases, or where undercover agents, such as narcotics squad men or co-defendants are used as witnesses. . . . There is no purpose in straining to get a doubtful indictment. Dismissals and acquittals will not enhance the record of a prosecutor's office. . . . Pragmatically you will not want to obtain indictments in cases you cannot win.

Practising Law Institute, Manual for Prosecuting Attorneys 368, 371 (Ploscowe ed. 1956). See People v. Edwards, 19 Misc. 2d 412, 189 N.Y.S.2d 39 (Ct. Gen. Sess. 1959).

72. In a comprehensive study by Wayne Morse, then Associate Professor of Law at the University of Oregon, out of 6453 cases from 21 states during the fall and winter terms of 1929-30 it was found that only 348 cases out of the total criminal cases considered by the grand jury involved differences of opinion between prosecutors and grand juries as to disposition of the cases or 5.39%. Morse, Survey of the Grand Jury System, 10 Ore. L. Rev. 154 (1931).

yet the best available statistics indicate that an incredibly small percentage of criminal cases originate with the grand jury.[73]

In summation, it is submitted that traditional grand jury roles have become debilitated in recent years as a result of irreconcilable intra-role conflict and in the face of inevitable social change. Each of the roles has had its effectiveness challenged—the role of inquisitor by modern professional police forces, the role of reporter by local representative government and the free press, and the role of protector by informations filed by an elected public prosecutor supplemented by the right to an open preliminary hearing.

The majority of the states have found it advantageous to combine the benefits of the old and new by using the information system while retaining the grand jury system for occasional and specialized use, seemingly a wise choice.[74] Although New York would have to resort to constitutional amendment to effectuate a similar reform,[75] this might be preferred to a continuation of internecine conflict caused by misdirected devotion to history and tradition. It will be interesting to observe whether New York will replace the reportorial horse in the troika so as to conform to the original design, or struggle along with the remaining two. Then again, might the ancient vehicle finally be replaced with modern machinery?

73. In a total of 7414 criminal cases considered by grand juries under the same conditions as noted in the previous footnote, grand juries initiated criminal prosecutions in only 353 or 4.76% of the total cases. The New York figures were even more significant, showing only two cases out of 842. Id. at 134.

74. It will have been observed that most of the comparative studies of the grand jury vs. the information system go back approximately thirty years. It is perhaps a comment by itself that the latest survey on the administration of criminal justice in the United States, that undertaken by the American Bar Foundation and conducted mostly in 1956-58, is of no assistance on this question since the three states selected for study, Wisconsin, Kansas, and Michigan, make predominate, if not exclusive, use of the information rather than the grand jury.

75. Neither the Fifth Amendment nor the Fourteenth Amendment to the United States Constitution require the states to initiate state felony prosecutions by grand jury indictment. Hurtado v. California, 110 U.S. 516 (1884).