

Washington Law Review

Volume 36
Number 2 *Washington Case Law—1960*

7-1-1961

Criminal Law

Lloyd W. Peterson

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>



Part of the [Criminal Procedure Commons](#)

Recommended Citation

Lloyd W. Peterson, *Washington Case Law, Criminal Law*, 36 Wash. L. Rev. & St. B.J. 134 (1961).
Available at: <https://digitalcommons.law.uw.edu/wlr/vol36/iss2/4>

This Washington Case Law is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.

CRIMINAL LAW

Some Observations on the Beck Case. *State v. Beck*¹ confronted the Washington Supreme Court with the joint problems of delineating the function of the grand jury and the protections required to be afforded those who appear in a grand jury proceeding.

The appellant was formerly president of the Western Conference of Teamsters and from 1952 to 1957 was president of the International Brotherhood of Teamsters. He was indicted after a grand jury hearing for grand larceny by embezzlement.² The indictment charged that a 1952 Cadillac automobile belonging to the Western Conference of Teamsters was sold under the appellant's authorization and that the proceeds of the sale were deposited in the appellant's personal account. The trial jury returned a verdict of guilty. On appeal it was alleged that various errors in the grand jury proceeding compelled reversal. Other grounds were also indicated.³

The appeal resulted in affirmance of the conviction by an evenly divided court, one judge abstaining.⁴ Four judges⁵ adopted the position that errors in the grand jury proceeding (if there were any), once

¹ 155 Wash. Dec. 565, 349 P.2d 387 (1960).

² The grand jury which returned the indictment was convened on May 20, 1957. In March of that year Mr. Beck appeared before the Senate Rackets Investigating Committee at which time charges of misconduct were leveled at him. Mr. Beck declined to answer questions of the committee and asserted his privilege under the fifth amendment. Presumably because Mr. Beck was the principal witness at the committee hearings during this time and was therefore interesting viewing for the homefolk, the hearings were televised live into the Seattle area. Other news media, ever alert to keep the citizenry informed, displayed prominent headlines describing the event. This publicity continued up until the time the grand jury was convened. National newspapers also devoted space to the activities. One significant title read "A City Ashamed—Dave Beck is on Seattle's Conscience." *Time*, May, 27, 1957. As a result of this attention, few people were unaware that Mr. Beck's affairs and those of the union were being investigated and that accusations were being aimed at both. From the outset there were factors operating in the *Beck* case which exerted uncommon pressure on our whole scheme of administering criminal justice.

³ Of the numerous assignments of error discussed in the opinion only those relating to the grand jury proceedings will be discussed in this Note.

⁴ The affirmance by an evenly divided court raises interesting questions. First, it is doubtful if the case should have validity as precedent. The United States Supreme Court has declared its position with respect to this situation in *United States v. Pink*, 315 U.S. 203 (1942). There the Court said that a case disposed of by an evenly divided court resulted in affirmance of the decision appealed from but that the case would not be considered authoritative. The Washington court is of course free to grant whatever credence it wishes to the *Beck* case, but the idea expressed in *Pink* provides an influential argument that succors stamina from its precedential value. Second, it is to be noted that doubt, sufficient to merit a re-hearing, existed as to whether a decision by an evenly divided court even operated as affirmance in Washington. *Rehearing granted* 156 Wash. Dec. 294 (1960). *Aff'd on rehearing* 156 Wash. Dec. 334, 353 P.2d 429 (1960) (without opinion).

⁵ The four judges voting for affirmance will subsequently be referred to herein as the majority although technically the term is inaccurate. The four judges voting for reversal will be referred to as the dissenters.

the grand jury had been properly selected, were immaterial since the appellant's rights were fully protected by the subsequent fair trial. The function of the grand jury was defined by them to be that of an inquisitorial body, used for investigative purposes to assist a prosecutor. Bias and prejudice were declared to be insufficient grounds for quashing a grand jury indictment or setting aside the verdict of the petit jury after trial. Misconduct by the prosecution, not amounting to interference with grand jury deliberations was said not to be violative of the appellant's rights. The reasoning of the majority is anchored to the idea that one accused of a crime in Washington has no right to a grand jury hearing because a constitutional provision⁶ authorizes the prosecution to proceed by information if it elects to do so.⁷ Accordingly, errors in a grand jury proceeding do not prejudice an accused because charges based on an information could have been brought without invoking a grand jury.

The four judges voting for reversal felt that once the election to proceed by grand jury indictment had been made, the accused had a right to a fair and impartial hearing. The charge of the court impaneling the grand jury and the conduct of the prosecution were thought to be prejudicial. They also felt that the statutes⁸ of this state necessarily compelled an impartial grand jury.⁹

The institution of the grand jury is of ancient origin. Its first developing stages have baffled even the most meticulous historians.¹⁰ The debate whether the idea developed from ancient Roman law,¹¹ whether it was a Norman institution introduced into England by William the Conqueror,¹² or whether it developed in England out of Anglo-Saxon institutions,¹³ has never been settled. There is general agreement, however, that the modern grand jury, that is, the practice of having

⁶ WASH. CONST. art. I § 25.

⁷ The dissenters thought this to be immaterial. 155 Wash. Dec. at 619, 349 P.2d at 418.

⁸ RCW 10.28.030; RCW 10.28.140. See notes 63 and 66 *infra*.

⁹ The two opinions are indicative of fundamentally different philosophies among members of the court. For example, the majority declared that the elements of procedural due process are not applicable to the procedures by which a grand jury reached an indictment. 155 Wash. Dec. at 574, 349 P.2d at 392. Throughout the opinion runs the idea that the accused had sufficient protection already, and that modernly the real problem is convicting the guilty, although innocent parties suffer harassment. The dissenters thought that these views represented erosion of the idea that men are presumed innocent until the prosecution proves them guilty beyond a reasonable doubt. 155 Wash. Dec. at 615, 349 P.2d at 416. Consequently we find the Washington court straddling a question dealing with one of the most basic aspects of our judicial system.

¹⁰ FORSYTH, TRIAL BY JURY 1-2 (1875).

¹¹ 1 POLLACK & MATTLAND, HISTORY OF ENGLISH LAW 141 (2d ed. 1899).

¹² EDWARDS, THE GRAND JURY 2 (1906).

¹³ *Ibid.*

a body, usually composed of seventeen to twenty-three members of the community, inquire of and present accusations, was first established in the reign of Edward III in the fourteenth century.¹⁴ Sometime thereafter the practice of using two juries crystallized.¹⁵ Thus we see that the institution later called the petit jury evolved from, and was preceded in historical development by the grand jury.¹⁶ The grand jury, serving as an instrument of the crown to ferret out crime came to be an independent body, standing between the crown and the people in defense of the liberty of the citizen.¹⁷ This result occurred because members of a community were reluctant to accuse others in their group without just cause.¹⁸ Eventually, the grand jury became virtually autonomous. The jurors voted in secret; they were not required to reveal the reasons for their decision; and their procedures were for the most part uncontrolled. Continued evolution of the petit jury facilitated this movement, since common law judges had no real reason to interrogate grand jurors with respect to how or why they reached a decision.¹⁹ The accusation presented by them neither determined the truth nor the falsity of the charge investigated; that decision was left to the petit jury. The judge's ire was reserved for petit jurors if a result was contrary to his idea of "justice."

With the settlement of America by Englishmen, the institution of the grand jury came with other concepts of the common law.²⁰ It has been said that the grand jury is made part of our judicial process by the federal constitution,²¹ but at least as far as the states are con-

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ Morse, *A Survey of the Grand Jury System*, 10 ORE. L. REV. 101, 114 (1931).

¹⁷ See *Hale v. Henkel*, 201 U.S. 43 (1906).

¹⁸ EDWARDS, *op. cit. supra* note 12, at 27.

¹⁹ *Id.* at 27-28. See generally, 1 HOLDSWORTH, A HISTORY OF ENGLISH LAW 312-27 (7th ed. 1957).

²⁰ *Id.* at 31. The Constitution of the United States contained no guarantee of indictment by grand jury, but the fifth amendment provides that: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger." This of course applies only to prosecutions of the federal government. The due process clause of the fourteenth amendment does not guarantee the right of indictment by grand jury to those prosecuted by state governments. *Hurtado v. California*, 110 U.S. 516 (1884); *State v. Nordstrom*, 7 Wash. 506, 35 Pac. 382 (1893), *aff'd* 164 U.S. 705 (1896). The majority cited these cases in recognition of this proposition.

The racial discrimination cases, *Smith v. Texas*, 311 U.S. 128 (1940); *Pierre v. Louisiana*, 306 U.S. 354 (1939), have in part undermined this rule. They declare that systematic exclusion of people from grand jury service on the basis of race or color is prejudicial to the accused, if the accused is also a member of the excluded class. Unless the grand jurors are representative of the community at large, the accused is denied due process.

²¹ *United States v. Cobbledick*, 309 U.S. 323, 342 (1940).

cerned, it is a creature of local law. Language appearing in *United States v. Central Supply Ass'n*²² reflects, for whatever it is worth, a generally accepted rule in this country. "Persons accused have a right to insist that the grand jury which indicted them should have been duly impaneled and conducted according to law. Beyond that they have no rights as far as the grand jury is concerned."²³ The justification for this idea is the same as that of the old common law judges, *i.e.*, all the grand jury can do is present an indictment after which the defendant will have ample opportunity to present his defense to the trial jury. Notice how this thinking has been carried through from the fourteenth century, kept alive by cases, now to become verbalized by the majority opinion in the *Beck* case as part of the law of Washington.

In 1933 Parliament abolished the grand jury in England.²⁴ Cries for similar action in this country have arisen from time to time. Words enunciated as far back as 1825 by Jeremy Bentham have been taken up and given new life.²⁵ For example, in *Blake v. State*²⁶ it is said that the grand jury is under modern conditions an "antiquated and well-nigh useless" part of judicial procedure.²⁷ Defenders of the institution have stated that the grand jury is the conservator of liberties, and "the noblest check upon malice and oppression of individuals . . ."²⁸ Those who advocate continued use of the grand jury rely on the protection it affords the accused to support their argument.²⁹

It would be impractical for the purposes of this Note to analyze all of the authorities cited in the *Beck* case, but the more important ones should be examined in order to trace and evaluate the reasoning of the two opinions. In short, a precedential analysis will be undertaken. The cases cited by the majority will be examined first.

*In re Grand Jury Proceedings*³⁰ is cited for the proposition that the

²² 34 F. Supp. 241 (N.D. Ohio 1940).

²³ *Id.* at 244.

²⁴ Administration of Justices Act, 1933, 23 & 24 Geo. V, c. 36 § 1.

²⁵ Bentham stated in 1825 that the grand jury had outlived its usefulness for over a century. 3 BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, ch. 15 § 11, cited in ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 140 (1947).

²⁶ 540 Okla. Crim. 62, 14 P.2d 240 (1932).

²⁷ *Id.* at 65, 14 P.2d at 242.

²⁸ EDWARDS, *op. cit. supra* note 12, at 1.

²⁹ For example this statement appears in McClintock, *Indictment by a Grand Jury*, 26 MINN. L. REV. 153 (1942) at 157: "[A]t this time, when rights of individuals have been completely subordinated to the will of the executive in many countries, and when fears are expressed in our own country that the expansion of the executive power is endangering the rights of the individual, it would be the height of folly to make an attempt to eliminate [the grand jury] . . . so long as any substantial part of the people continue to regard it as a bulwark against executive tyranny."

³⁰ 4 F. Supp. 283 (E.D. Pa. 1933). This case involved a petition to vacate an order

most valuable function a grand jury performs today is its inquisitorial function.³¹ The notion that the grand jury is a protection of the accused is resigned to antiquity by the majority in the *Beck* case; the use of the grand jury is viewed in its modern posture. The question in *In re Grand Jury Proceedings* involved the power of the grand jury to subpoena witnesses and garner testimony. The case is not authoritative with regard to a question pertaining to the relations between a grand jury and an accused. It is noteworthy that the fact pattern involved was reminiscent of *Hale v. Henkel*³² where the United States Supreme Court recognized that the grand jury stood between the prosecutor and the accused.

The majority stated that the functions of the grand jury are investigative and not judicial,³³ citing *State v. Lawler*.³⁴ There is language appearing in *United States v. Cobbledick*³⁵ which could hardly be more contrary to this view. It is there said that a "proceeding before a grand jury constitutes a judicial inquiry of the most ancient lineage."³⁶ In Washington, the constitution indicates that only a judge can order a grand jury.³⁷ They cannot convene themselves or be convened by the prosecutor. It would seem that a body directed, instructed, and to some degree controlled by the court calling it into existence has some relation to the judiciary. The problem is, in any event one of selecting a label and is not determinative of anything. Grand juries will do what grand juries have always done regardless of the label attached to their function.

A quotation was taken from *In re Kittle*³⁸ which was written by Judge Learned Hand. As cited, the quotation reads: "[The grand

granting government attorneys the use of certain testimony given in grand jury proceedings. It was claimed that the government's objective was to obtain the testimony for use in another action. The petition was denied because sufficient cause was shown to call the witness.

³¹ 155 Wash. Dec. at 567, 349 P.2d at 388.

³² 201 U.S. 43 (1906).

³³ 155 Wash. Dec. at 567, 349 P.2d at 388.

³⁴ 221 Wis. 423, 267 N.W. 65 (1936). This case is also cited in relation to the proposition that a court's charge to a grand jury is not subject to judicial review. 155 Wash. Dec. at 571, 349 P.2d at 390-91. The Wisconsin statutes provide that a grand jury is not bound by the court's instruction; therefore an indictment cannot be quashed if the instructions are incorrect. According to the Wisconsin court, if erroneous instructions were given it is presumed that the jurors separated the good law from the bad, since they are the judge of the law as well as the facts. It was recognized that there is a shady line between giving mere bad law and showing prejudice by relating an opinion. If the court gives an opinion, the remarks are beyond the pale of instructions and presumably the indictment can be quashed.

³⁵ 309 U.S. 323 (1940).

³⁶ *Id.* at 327.

³⁷ WASH. CONST. art. I § 26.

³⁸ 180 Fed. 946, 947 (S.D.N.Y. 1910).

jury] . . . is the voice of the community accusing its members . . .”³⁹ The last clause was omitted which read “and the only protection from such accusation is in the conscience of that tribunal.”⁴⁰ It is possible to interpret these words in this manner: Since the fate of the accused, that is, whether he will be faced with an indictment or reprieved by a “no bill,” rests in the conscience of the grand jurors, his only protection is that they will act freely, without bias or prejudice and according to their *good* conscience. Read in this fashion the quotation is favorable to the view of the dissenters. Notice that Judge Hand’s reference to the grand jury as a “tribunal” could be interpreted as indicating a view that the grand jury performs judicial acts. This would be contrary to the majority’s language previously indicated.

The *Kittle* case actually involved the question of secrecy of the grand jury proceeding and is inappropriate here. The case is cited in *Beck* for the proposition that the grand jury should not be handicapped or delayed because those appearing before it have been subjected to adverse publicity.⁴¹ The appellant argued that under such circumstances greater care must be taken to insure that grand jurors represent the community voice. To accomplish this, it was said, prospective grand jurors should be interrogated for bias and prejudice. The majority interpreted the argument as suggesting that the more notoriety an accused draws upon himself the more he becomes immune from grand jury investigation, and emphatically rejected it.⁴² The fact that the prosecutor could have proceeded on an information as an alternative was not considered relevant here.

*United States v. Knowles*⁴³ was cited as authority for the view that,

³⁹ 155 Wash. Dec. at 567-68, 349 P.2d at 393.

⁴⁰ The majority did include this clause at another place in the opinion. 155 Wash. Dec. at 574, 349 P.2d at 392.

⁴¹ 155 Wash. Dec. at 568, 349 P.2d at 388-89. *Kittle* is also cited for the proposition that little control can be exercised over grand jury proceedings. *Id.* at 574, 349 P.2d at 392. Another quotation is used which states: “We took the institution as we found it in our English inheritance, and he best serves the constitution who most faithfully follows its historical significance, not he who by a verbal pedantry tries a priori to formulate its limitations and its extent.” *Id.* at 575, 349 P.2d at 393. The use of this language is especially interesting since, as noted previously, the historical significance of the grand jury as a body standing between the accused and the prosecutor was disregarded. It appears that the majority is of the opinion that powers of the grand jury should not be tampered with, since in this respect, we must take the institution as we received it from our English ancestors. But modern considerations, not indicated in detail, force abandonment of protections historically afforded the accused.

⁴² 155 Wash. Dec. at 568, 349 P.2d at 388-89.

⁴³ 147 F. Supp. 19 (D.D.C. 1957). This case involved an indictment on a charge of contempt of congress. The defendant moved to dismiss the indictment on the ground that fourteen of the twenty-three members of the grand jury were employed either by the United States or the District of Columbia. It was alleged that independent judgment could not be rendered because of fear of investigation under an executive order relating to national security. The court denied the motion and affirmed the decision.

barring statutory provision to the contrary, bias or prejudice on the part of grand jurors is not a ground for quashing the indictment, since the grand jury only accuses.⁴⁴ In *Knowles* it was observed that the sixth amendment requires that (petit) jurors be impartial, but no such requirement is included in the fifth amendment relating to grand jurors. From this observation it was concluded that the framers of the federal constitution did not intend the requirement that grand jurors be impartial. This reasoning is, of course, applicable only to grand jury proceedings in relation to a prosecution by federal authorities.⁴⁵ With respect to grand jury proceedings conducted by state authorities, considerations of the fifth and sixth amendments of the federal constitution are irrelevant, and so is *Knowles*. The idea that statutory provisions are controlling is very important, however, and will be discussed later.

*Coblentz v. State*⁴⁶ is also cited for the proposition that absent a statute, jurors are not required to be without prejudice.⁴⁷ It was there recognized, however, that an extreme case could arise where prejudice was so great that indictment and conviction could not be upheld. The aid which can be drawn from *Coblentz* seems to be that there are degrees of prejudice, the extreme of which might be called incompetence; and that statutory provisions are in any event the controlling factor.

*United States v. Rintelen*⁴⁸ indicated that an indictment cannot be quashed merely because some of the grand jurors are prejudiced. The majority quoted from the case as follows: "an intelligent grand juror can hardly be found who has not decided opinions derived from his general knowledge as to any case of public notoriety. . . . The question is not what his feelings were, but whether he voted for an indictment

⁴⁴ 155 Wash. Dec. at 568, 349 P.2d at 389.

⁴⁵ Cf., *Adamson v. California*, 332 U.S. 46 (1947); *Twining v. New Jersey*, 211 U.S. 78 (1908); *Barron v. Baltimore*, 7 Pet. 243, 8 L. Ed. 672 (1833).

⁴⁶ 164 Md. 558, 166 Atl. 45 (1933). The defendant was convicted of having accepted a deposit of money as president of a banking institution with the knowledge that the bank was insolvent. Nine of the grand jurors were members of a trust company which had previously merged with the bank and all suffered financial losses as a result of the bank's insolvency. The foreman of the grand jury had publicly declared hostility to the defendant and had accused him of fraud. On appeal the court said that no statute required that grand jurors be impartial. It was said that possible cases could arise where the grand jurors would be incompetent to serve because of interest, but mere prejudice resulting from financial loss was insufficient. The case was reversed on other grounds.

⁴⁷ 155 Wash. Dec. at 569, 349 P.2d at 389.

⁴⁸ 235 Fed. 787 (D.C.N.Y. 1916). The indictment charged the defendants with conspiring to foment strikes in munitions factories for the purpose of restraining the export of munitions to foreign countries in time of war. One ground for plea in abatement was that the grand jurors were actuated by a strong temper and prejudice against the defendants as the result of false statements and vicious newspaper publications. There was no allegation that any grand juror would have voted differently had the publications not been made so the plea was overruled.

honestly and upon competent evidence."⁴⁹ The first sentence of this quotation is a good capsule summary of the argument of the dissenters. The second sentence reflects the question that the appellant argues should have been asked of the grand jurors. *Rintelen* dealt primarily with the question of misconduct of a prosecutor. A district attorney stated to the grand jury that he desired to have the defendants indicted. The court held that this did not amount to misconduct, although it recognized that a fine line exists between acceptable persuasive conduct and unacceptable prejudicial misconduct.

The cases cited by the dissenting opinion can be disposed of with less discussion. The language of *State ex rel. Murphy v. Superior Court*⁵⁰ is the chief authority relied upon for the proposition that an unbiased grand jury is required.⁵¹ The majority easily distinguished the case by saying that it relates only to the impanelment of a grand jury and not to the procedures used thereafter.⁵²

The remainder of the opinion deals with the questions of prejudice occasioned by the charge of the court and misconduct of the prosecutor during the proceedings. At this point we see that the court is at odds with itself as to just what the problems are, since the majority did not consider these points material. The dissenters on the other hand, devoted little argument to the proposition that the grand jury's function is to stand between the accused and the prosecutor.

*Fuller v. State*⁵³ is referred to by the dissenters in relation to the

⁴⁹ 155 Wash. Dec. at 569, 349 P.2d at 389.

⁵⁰ 82 Wash. 284, 144 Pac. 32 (1914). In *Murphy*, a superior court judge reduced the jury list from seventy-eight to forty names because of disqualifications for incompetence or other reasons. From the group of forty names the judge selected seventeen for the grand jury. There was no statute specifically regulating the selection of grand jurors; however, there was a provision relating to the selection of petit jurors, requiring essentially selection by chance. On appeal it was declared, in effect, that grand jurors must be selected in the same manner as petit jurors. The court indicated that the same reasons which compel selection of an unbiased petit jury exist with respect to selection of a grand jury. Even though no real injustice was shown, the court thought that the trial judge should not follow this practice and remanded the whole proceeding, directing selection of grand jurors from jury lists by chance.

State v. Guthrie, 185 Wash. 464, 56 P.2d 160 (1936), is cited by the dissenters as approving *Murphy*. 155 Wash. Dec. at 608, 349 P.2d at 412. It actually limited *Murphy*, but is of little value here in any event. *Guthrie* merely said that a judge can excuse grand jurors after selection as long as they are replaced by others from the jury list.

⁵¹ 155 Wash. Dec. at 608, 349 P.2d at 412.

⁵² *Id.* at 574, 349 P.2d at 392. If no importance is attached to the grand jury proceeding, and a subsequent fair trial wipes the slate clean, why should there be any concern about impaneling the jury? What purpose is served by having rigid rules pertaining to selection of jurors if any conduct is condoned during the proceedings?

⁵³ 85 Miss. 199, 37 So. 749 (1905). The defendant was convicted of unlawfully selling liquor. After the grand jury was impaneled the court said, "Have you never heard the name of Charlie Fuller?" The trial court's denial of a motion to quash the indictment was reversed. It was felt that directing attention to a particular individual in

point that a court's charge to the grand jury may be prejudicial and create bias in the minds of the jurors.⁵⁴ In *Beck* the charge did refer to the hearings previously held by the Senate Rackets Committee.⁵⁵ The dissenters felt that the judge's comments gave a veneer of authenticity to the unrelated charges and the accompanying publicity instead of directing attention to the specific evidence produced in the proceedings. Consequently bias was created in the minds of the grand jurors, and the accused was deprived of his presumption of innocence.⁵⁶ Although the position of the dissenters is a realistic one, it can be attacked on two grounds. First, the argument of the majority that the accused is protected by a subsequent fair trial encompasses the issue, and that argument is not met by the dissenters. Second, the *Fuller* case is not very persuasive support. It has lost its virility in its own jurisdiction. In *Wheeler v. State*⁵⁷ it was declared that bias created in the minds of grand jurors by the court's remarks was insufficient to merit quashing of the indictment. The court indicated that an indictment would be quashed only if the court's charge constituted dictation or coercion. A lone dissenter relied on *Fuller*. Since the conduct of the court in the *Beck* grand jury proceedings could hardly be characterized as coercive, the dissenters are left without doctrinal support for their position.

*United States v. Wells*⁵⁸ was cited for the proposition that the prosecutor must limit his conduct to advising jurors and examining witnesses and should not express opinions or make arguments.⁵⁹ It is noteworthy that the majority incorrectly distinguished this case on the ground that it involved a question of interference with the grand jury's deliberations.⁶⁰ A careful reading of the opinion in *Wells* will disclose that the prosecutor's misconduct was the basis for quashing the indictment. It was not essential that *Wells* be distinguished, since, even if misconduct on the part of the prosecution is assumed, it is subject to the same weakness indicated above in relation to the *Fuller* case, *i.e.*, the argument that the accused is protected by a subsequent fair trial.

such a manner attributed a notoriety to the accused which must have biased the minds of the grand jurors.

⁵⁴ 155 Wash. Dec. at 610-11, 349 P.2d at 413.

⁵⁵ *Id.* at 605-06, 349 P.2d at 410-11.

⁵⁶ *Id.* at 610-11, 349 P.2d at 413-14.

⁵⁷ 219 Miss. 129, 63 So. 2d 517 (1953).

⁵⁸ 163 Fed. 313 (D.C. Idaho 1908). In *Wells* the prosecutor presented his facts to the grand jury and then, without allowing deliberation, induced them to sign the indictment. The indictment was quashed on appeal since the court felt that the conduct of the prosecutor was prejudicial. However, the court did say that mere presence of the prosecutor during deliberations would not compel quashing the indictment.

⁵⁹ 155 Wash. Dec. at 613, 349 P.2d at 415.

⁶⁰ *Id.* at 573, 349 P.2d at 391.

*Commonwealth v. Bane*⁶¹ can be attacked in the same manner. It also appears to be a misconduct case where the indictment was quashed because of the actions of the prosecutor before the grand jury. It was thought to be almost directly in point by the dissenters but its persuasiveness is weakened by its obscurity.

Examination of the important cases cited by the two opinions suggests the conclusion that the ultimate legal problem is one of statutory interpretation. Most of the cases recognize the principle that the nature of grand jury proceedings and the protections afforded the accused depend upon the existence and substance of statutory provisions.

RCW 10.28.010⁶² and RCW 10.28.030⁶³ allow challenges to the panel of grand jurors and to individual grand jurors. RCW 10.28.010 provides that challenges to the panel of grand jurors shall be allowed "to any person in custody or held to answer for an offense." The majority declared that this requirement attached to RCW 10.28.030 also and that since the appellant was not so held, he did not come within either provision. Consequently, an impartial grand jury was not required.⁶⁴ The majority goes on to say that RCW 10.28.130⁶⁵ fortifies their conclusion since it is incumbent upon grand jurors to testify of their own knowledge.

The interpretation given these statutes raises some questions. The construction given RCW 10.28.030 results in the inescapable conclusion that those held in custody or held to answer for an offense have a protection not afforded those simply called before a grand jury and then accused by indictment. The former have the guarantee of an impartial grand jury; the latter do not. This classification may not be sufficiently reasonable to withstand charges of denial of equal protection of the laws, and it also raises the question of whether the court should so construe the statute.

⁶¹ Cited by the court as 39 Pa. Dist. & Co. R. 664.

⁶² "Challenge to panel. Challenges to the panel of grand jurors shall be allowed to any person in custody or held to answer for an offense, when the clerk has not drawn from the jury box the requisite number of ballots to constitute a grand jury or when the drawing was not done in the presence of the proper officers; and such challenges shall be in writing and verified by affidavit and proved to the satisfaction of the court."

⁶³ "Challenge to individual juror. Challenges to individual grand jurors may be made by such person for reason of want of qualification to sit as such juror; and when, in the opinion of the court, a state of mind exists in the juror, such as would render him unable to act impartially and without prejudice."

⁶⁴ 155 Wash. Dec. at 570, 349 P.2d at 390.

⁶⁵ "Jurors to communicate personal knowledge of offenses. If a member of a grand jury knows, or has reason to believe, that a public offense, triable within the county, has been committed, he must declare the same to his fellow jurors, who may thereupon investigate the same if a majority so order."

Another question is raised by the majority's reading of RCW 10-28.140.⁶⁶ This statute is cited in relation to the proposition that grand jurors are required to bring their knowledge and prejudices with them and reveal any information that they have.⁶⁷ But if they do testify, they are prevented from joining in the deliberation. This then, is really a protection against having a biased member on the grand jury. There is no reason why a grand juror could not testify and then rejoin the deliberation, unless the drafters of the statute intended to safeguard the grand jury from a biased member.

The dissenters would not restrict the application of RCW 10.28.030 to those already in custody or held to answer for an offense. They assume that an impartial grand jury has always been required in this state, citing *Watts v. Washington Territory*.⁶⁸ They declare that the statutes "clearly demonstrate the legislative intent to adopt the principle that the grand jury must be impartial and unprejudiced."⁶⁹ Their conclusions are not documented with authority.

There is one federal case which reflects an idea which could have germinated a compromising thought in the minds of the judges in the *Beck* case. The case is *Atwell v. United States*⁷⁰ and the idea is this: No indictment having been found by a properly impaneled grand jury should be disturbed for minor violations of procedure in the grand jury hearing. If the prosecution is slightly overzealous, if the court's charge is not quite correct, or if one or two of the jurors are shown to be slightly biased, as long as no great error is committed, the indictment should not be overturned. But, as the court stated, as the violations increase and become persistent and general, "the law and society are threatened with anarchy, and judges are not impotent to act,"⁷¹ and in a proper case, should overturn the indictment, in order to protect citizens from vindictive prosecutions by the government, or political partisans, or private enemies. Each of the cases cited in the two opinions can be reconciled if read with this idea in mind. The courts

⁶⁶ "Complainant not to take part. No complainant who may institute a prosecution shall be competent to be present at the deliberations of a grand jury, or vote, for the finding of an indictment."

⁶⁷ 155 Wash. Dec. at 570, 349 P.2d at 390.

⁶⁸ 1 Wash. Terr. 409 (1872). This case is mentioned by the dissenters as indicative of an early idea that bias or prejudice on the part of grand jurors, if shown, may be ground for reversal. 155 Wash. Dec. at 608, 349 P.2d at 412. The *Watts* opinion indicates that no allegation of bias was made. The court mentioned this only in passing: "What were these objections? . . . not that any of [the grand jurors] . . . had any prejudice or bias . . ." 1 Wash. Terr. 409, 413 (1872).

⁶⁹ 155 Wash. Dec. at 608, 349 P.2d at 412.

⁷⁰ 162 Fed. 97 (1908).

⁷¹ *Id.* at 99.

have considered the seriousness of the violation, the inflammatory nature of the case, the effect of allowing violations to go unchecked, and the effect of allowing one convicted by a petit jury to escape on a legal technicality. After balancing all factors they have reached varying results, but always with the recognition that a fine line exists when competing social interests are involved.

The majority in the *Beck* case did not seem to recognize that the seriousness of the violations alleged was an important consideration. The dissenters assumed that an impartial grand jury was required but failed to show clearly why a subsequent fair trial did not provide sufficient protection for the appellant.

The decision-making process does not take place in a vacuum, and it would be a mistake to assume that extra-legal considerations did not affect the result in the *Beck* case. The judges were aware of the publicity, the prominence of the appellant, the questionable utility of the grand jury hearing as a prosecutor's alternative in the future, and the possible public indignation should Mr. Beck go unpunished. Caught on the horns of a dilemma, the judges saw their challenge differently, and their individual consciences prompted them to select different social interests to protect. The result was two opinions with different abstractions of doctrine from the body of case law, and different interpretations of the applicable statutes. The role of precedent was actually of negligible effect as a determinative of the result in the *Beck* case. The judges did the best with what they had, but the simple fact of the matter is, none of the authorities was controlling. In terms of doctrine, both opinions are vulnerable to attack; but criticism of either side can only be made in terms of policy. The United States Supreme Court will have the final word.⁷²

LLOYD W. PETERSON

⁷² Certiorari was granted 81 Sup. Ct. 900 (1961). If the Supreme Court applies *Konigsberg v. State Bar of Calif.*, 353 U.S. 252 (1957) and *Schwartz v. Board of Bar Examiners of N.M.*, 353 U.S. 232 (1957) beyond the specific facts of those cases to the *Beck* case, it may reverse. Those cases indicated that state action which is arbitrary and thereby offends the dictates of reason, violates the due process clause of the fourteenth amendment. The Supreme Court served notice that it intends to guard against all arbitrary action by the states. This Supreme Court doctrine should be juxtaposed with the following quotations from the *Beck* case.

"The end result of a grand jury's deliberations is not a judgment and sentence, but merely a charge; consequently, the concepts of procedural due process do not apply to the grand jury, except as they may be necessary to prevent prejudice to an accused or a witness in subsequent proceedings..." 155 Wash. Dec. at 567, 349 P.2d at 388.

"Investigative agencies—city, county, state, or Federal—do not wait for the hue and cry to die down before they begin to investigate or to file a charge against an accused. Nor do we see why a grand jury investigation should be handicapped or delayed because of publicity of whatever kind or character." 155 Wash. Dec. at 568, 349 P.2d at 389.

"In [directing the grand jury] ... it was proper for the court to make notes of facts