Michigan Law Review

Volume 52 | Issue 5

1954

CONSTITUTIONAL LAW - JUDICIAL POWERS - LEGALITY OF THE GRAND JURY REPORT

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COMMENTS

CONSTITUTIONAL LAW — JUDICIAL POWERS — LEGALITY OF THE GRAND JURY REPORT—On December 2, 1952, a federal grand jury for the United States District Court for the Southern District of New York, in a "presentment" made to that court, took the State Department severely to task for what it considered to be a conspicuous failure in handling the problem of subversive employees, United States citizens,

at the United Nations. It further charged the State Department with impeding the grand jury's progress in attempting to fix responsibility for the failure upon certain State Department officials.[1] On October 11, 1951, the Camden County grand jury presented to the Superior Court of New Jersey for Camden County a report in which various irregularities in connection with the management of the county jail were charged. The sheriff of the county moved to expunge from the record portions of this report alleged to be defamatory as to him. An order denying this motion was subsequently upheld by the Supreme Court of New Jersey in *In re Presentment by Camden County Grand Jury*.[2] The October grand jury of Westchester County, New York, in its report on the so-called "Peekskill Riots" of 1949, roundly criticized the American Civil Liberties Union for publishing a report entitled "Violence in Peekskill." The grand jury described the Union's report as "based on a biased assumption as to the underlying cause of the disorder" and found that "much of its text and some of its conclusions are so far from the truth as to be scandalous."[3] In Tennessee, a grand jury which two years ago investigated charges of "immoral practices" in a Memphis high school reported to the court that the charges were wholly unfounded. Incorporated in the report was a statement that Mrs. Maurine D. Hayslip, a teacher at the high school who had first publicized the charges, had "viciously maligned" the school and that her continued employment in city schools would be "unadvisable and a disservice to the community." A motion by Mrs. Hayslip to expunge this portion of the report was denied by the Supreme Court of Tennessee in *Hayslip v. State*.[4] The October grand jury for the United States District Court for the Southern District of New York, in a "presentment" issued November 25, 1952, said that certain non-Communist affidavits filed by union officials under section 9(h) of the Taft-Hartley Act were not "worth the paper they are written on" and that the filing of such affidavits was a "subterfuge." The union officials, who were not named, had invoked the privilege against self-incrimina-

[1] N.Y. TIMES, Dec. 3, 1952, p. 1:8. The text of the "presentment" is set out at page 19:1. Illustrative of the general tenor and effect of the presentment is the *Times'* headline on the front page: "Clearing of Spies for UN Laid to State Department by Defiant US Jury Here."

[2] 10 N.J. 23, 89 A. (2d) 416 (1952). The able and detailed opinion is by Chief Justice Vanderbilt.

[3] N.Y. TIMES, June 17, 1950, p. 1:6. Excerpts from the grand jury report, from which these quotations are taken, are printed on page 2:3. A statement by the American Civil Liberties Union in reply was issued on August 20, and appeared in N.Y. TIMES, Aug. 21, 1950, p. 7:5.

[4] 193 Tenn. 643, 249 S.W. (2d) 882 (1952). The portions of the report to which objection was made are set forth in the opinion of the court at 645-646.

tion when subpoenaed in connection with an investigation of possible violations of conspiracy and perjury laws arising out of the non-Communist affidavit provision of the Taft-Hartley Act. The grand jury recommended that the National Labor Relations Board revoke the certification of the unions involved.[5] Two unions and four union officials individually moved to expunge this "presentment" from the records of the court. The district court granted the motion in *Application of United Electrical Workers.*[6]

Despite an obvious diversity in the circumstances giving rise to these grand jury reports, they possess a common, significant characteristic which it is the purpose of this comment to explore. The characteristic is this: in none of these instances was a group or an individual charged with an offense against the criminal law of state or nation, nor was the report intended to serve as the basis for such a charge. While it is indisputably the function of the grand jury to present and to indict for violations of the law of its jurisdiction, serious question may be raised about grand jury reports which go beyond this in censuring individuals and groups for conduct which, however blameworthy, cannot for one reason or another be made the basis of criminal sanction. The legality of reports of this nature has been commonly tested in two ways: (1) by a motion to expunge from the records of the court such portions of the report as are alleged to be both defamatory and outside the province of the grand jury, and (2) by an action for libel against one or more of the grand jurors themselves.[7] The theory behind a libel

[5] The NLRB did in fact issue an order directing the petitioners in this action to affirm the truth of the non-Communist affidavits which they had filed previously. Failure to file affirmations was to result in a declaration by the Board that the union was not in compliance with §9(h) of the Taft-Hartley Act. Counsel for the Board admitted that the sole basis for this order was the grand jury "presentment." On January 27, 1953, the Board was permanently enjoined from ordering this reaffirmation. United Electrical, Radio & Machine Workers v. Herzog, (D.C. D.C. 1953) 110 F. Supp. 220. This grand jury was not the same body which a week later filed a report dealing with subversion in the United Nations (see note 1 supra), although both were attached to the same court.

[6] Application of United Electrical, Radio & Machine Workers of America, (D.C. N.Y. 1953) 111 F. Supp. 858. The case presents an example of the severity of the consequences which a grand jury recommendation may have.

[7] A third procedural form in which the issue has been presented, far less frequently, is the contempt proceeding by the court against one or more of the grand jurors. See, e.g., Coons v. State, 191 Ind. 580, 134 N.E. 194 (1922); State ex rel. de Armas v. Platt, 193 La. 928, 192 S. 659 (1939). As with the libel cases, the result turns on the question whether the statements to which exception is taken are privileged or not. Finally, there are a few cases in which the action has been one for a writ of mandamus to compel the elimination from the records of objectionable portions of grand jury reports. This remedy has been unsuccessful in the states of Missouri [State ex rel. Lashly v. Wurdeman, (Mo. 1916) 187 S.W. 257] and Nevada [State ex rel. Weber v. McFadden, 46 Nev. 1, 205 P. 594 (1922)] for the reason that the decision whether or not to expunge is considered to involve discretion. In Michigan, however, the distinction between ministerial and dis-

action is that a report which is extra-judicial is not privileged, as a proper indictment and presentment concededly are. An examination of the authorities reveals an irreconcilable conflict of opinion, although a fair majority of the cases appear to support the view that the grand jury should be limited to presentments and indictments which charge a crime. More useful than mere citation of authority is an analysis of the major arguments employed by courts and writers in attempting to delimit the proper sphere of grand jury report and recommendation. A commonplace in the reported cases is a vast display of inconsistency in the use of the terms "indictment," "presentment," and "report." From a brief explanation of these terms this discussion will proceed to an examination of the major premises and the holdings of cases in which the issue of the proper scope of the grand jury's function has been raised.

I

It may be well at the outset to note the distinction between an indictment and a presentment, although the distinction is of relatively minor significance today. Technically, an indictment is a formal and written accusation made by the public prosecutor which is submitted to the grand jury in order that it may determine from the evidence whether the accusation, if proven, would be sufficient to secure the conviction of the accused. If this is found by the grand jury to be the case, the words "A True Bill" are generally endorsed on the document, attested by the foreman; if the accusation and the evidence are found to be insufficient to sustain a conviction, the grand jury "ignores" the bill. A presentment, on the other hand, is traditionally an accusation of crime made by the grand jury from its own knowledge or from evidence supplied by witnesses or one or more of its own members. This presentment furnishes the basis upon which the prosecuting attorney frames an indictment, which is then endorsed by the grand jury in the usual fashion. Far more important is the distinction between a presentment or indictment on the one hand, and a report on the other. Judicial usage in the matter is well summarized by the court in *In re Report of Grand Jury:*

> "In some of the reported cases the matter asked to be expunged was spoken of as contained in a 'presentment,' and in others as

cretionary acts has not served as a bar to the writ, and the remedy has been employed with success. See Bennett v. Kalamazoo Circuit Judge, 183 Mich. 200, 150 N.W. 141 (1914), followed in Oakman v. Recorder of the City of Detroit, 207 Mich. 15, 173 N.W. 346 (1919).

> being contained in the 'report' of the grand jury. These terms are used synonymously, not in a technical sense, but as indicating a written communication made by a grand jury and filed with the court, wherein there is no crime charged and no facts upon which an indictment could be framed. . . ."[8]

In order to foster precise analysis, an attempt will be made in this discussion to reserve the use of the terms "indictment" and "presentment" to instances in which the commission of a crime is charged, and to use the term "report" to signify commentary on all other matters. The immediate concern here is with such "reports," whether called "reports" or "presentments." The focal point of inquiry, moreover, is the report of the type in which individuals are specifically singled out by name, office, or clear implication.[9] It is the legality of this type of report which is the subject of strenuous contention.[10]

II

Inspection of a substantial number of cases in which the legality of grand jury reports has been tested reveals attitudes both of wide judicial tolerance and approval,[11] and of a strict approach limiting the grand jury to the endorsement of criminal charges. Each position is supported by stout advocates, and the arguments on either side are

[8] 152 Md. 616 at 630, 137 A. 370 (1927).

[9] The statutes of many states authorize or require the grand jury to make general investigations into the conditions of public institutions such as jails, hospitals, and the like. There is relatively little dispute as to the propriety of investigations and reports of this type, which are generally conceded to be within the grand jury's common law prerogative as well. A typical statute is N.Y. Crim. Proc. (McKinney, 1945) §260: *"Grand jury must inquire as to persons imprisoned on criminal charges and not indicted, and the misconduct of public officers.* The grand jury must inquire, 1. Into the case of every person imprisoned in the jail of the county, on a criminal charge, and not indicted; and 2. Into the willful and corrupt misconduct in office, of public officers of every description, in the county. 3. The grand jury may inquire into the condition and management of the public prisons in the county." The argument that the power to investigate into the conditions of public office necessarily implies the power to report upon the conduct of individual officials is considered in Part III of this comment. It should be noted, however, that it is perfectly possible to empower a grand jury to make the broadest sort of investigations while at the same time insisting that it refrain from comment upon individuals unless the commission of an unlawful act is involved. The scope of the power to investigate doubtless determines the scope of the power to indict; it does not have to determine the scope of the power to report.

[10] The distinction between the two types of report is emphasized in Dession and Cohen, "The Inquisitorial Functions of Grand Juries," 41 YALE L.J. 687 at 706 (1932): "The varying receptions accorded reports suggest their separate consideration in two groups: *first,* those addressing themselves to a general condition; and *second,* those censuring particular persons."

[11] An attitude well exemplified by In re Presentment by Camden County Grand Jury, 10 N.J. 23, 89 A. (2d) 416 (1952).

worth scrutinizing in some detail. Those who doubt the legality of grand jury reports usually make one or more of the following points:

(1) Although at its inception and for many generations thereafter the chief office of the grand jury was to serve as a shield for the English citizen against oppression by the crown, the grand jury in this country came naturally to have an additional purpose. While continuing as the major vehicle for bringing law-breakers to trial, it was soon found to be a "means of protection to the citizen against the dangers of a false accusation, or the still greater peril of a sacrifice to public clamor."[12] Accepting the premise that this is an important part of the grand jury's role, one can still say that a grand jury must necessarily act only upon violations of the criminal law. This ensures that the citizen will not be publicly pilloried for conduct which, though not illegal, may be highly offensive to accepted mores in a particular locality. In this view, to permit a grand jury to censure an individual according to its own canons of law and morality is to permit the grand jury to subvert the very principle it was developed to protect.

(2) The major argument against the grand jury report, however, proceeds less from any theoretical view as to the purposes of the grand jury and more from a sense of what is fundamentally fair. The gist of the argument is simply that whereas an indictment or a presentment is but a prelude to a trial in which the accused is furnished with a forum wherein to answer his accusers, the grand jury reports stamp the individual with a stigma which it is well nigh impossible to erase. A forceful statement of the argument appears in *People v. McCabe:*

> "A presentment [report] is a foul blow. It wins the importance of a judicial document, yet it lacks its principal attributes—the right to answer and to appeal. It accuses but furnishes no forum for a denial. No one knows upon what evidence the findings are based. . . . The presentment [report] is immune. It is like the 'hit

[12] REPORT OF SELECT COMMITTEE ON CODE OF CRIMINAL PROCEDURE 125 (1855), quoted in the opinion in In re Wilcox, 153 Misc. 761 at 765, 276 N.Y.S. 117 (1934). The point is stressed repeatedly by judges and writers. See, e.g., the description of the dual function of the grand jury in Application of United Electrical, Radio & Machine Workers of America, (D.C. N.Y. 1953) 111 F. Supp. 858 at 863: "One [function] was to accuse those believed to have violated the laws and to bring them to trial. The other, equally important and sometimes overlooked in this modern day, was to protect the citizen against unfounded accusation of crime, whether by public officials or by private citizens." In 2 KENT, COMMENTARIES 9 (1827), the grand jury is classified under the rights of personal security, and in 3 STORY, COMMENTARIES ON THE CONSTITUTION 658 (1833), the author states that the grand jury is of great importance in securing citizens against ill-founded and vindictive prosecutions. See also Hale v. Henkel, 201 U.S. 43 at 59, 26 S.Ct. 370 (1906).

> and run' motorist. Before application can be made to suppress it, it is the subject of public gossip. The damage is done. The injury it may unjustly inflict may never be healed."[13]

Lending particular weight to this argument are a number of reasons why the report of a grand jury, whether the charges it makes are in fact true or false, is especially pernicious. These may be viewed as arguments subordinate to but supporting the principal contention just stated.

(a) *Importance the grand jury report assumes in the public mind.* Since it is generally understood that a grand jury is a body which carefully weighs the evidence in order to determine whether criminal charges may be brought, and since it is properly considered to be an arm of the court, its pronouncements are inevitably clothed with a certain judicial sanctity.[14] There is frequently and understandably little popular disposition to question the absolute reliability of its findings. The result is that the individual who is censured by a grand jury labors under a very grave handicap in seeking exoneration and the reestablishment of his reputation. Even the successful litigant who has sought to expunge the offensive passages has won a shallow victory; the grand jury has already spoken.

(b) *Secrecy of the proceedings.* A principal characteristic of the grand jury proceeding is its secrecy. The oath which enjoins secrecy upon the grand juror is of very ancient origin, and in many jurisdictions survives much as it was administered in 1681.[15] While the pledge to keep inviolate the grand jury deliberations does not appear in the oaths of all states, it has been held to be a binding obligation on the basis

[13] 148 Misc. 330 at 333, 226 N.Y.S. 363 (1933).

[14] Many decisions emphasize the point. Representative is the following quotation, from Application of United Electrical, Radio & Machine Workers of America, (D.C. N.Y. 1953) 111 F. Supp. 858 at 861: "And the accusation, coming as it does, from a quasi-judicial body which occupies a position of respect and dignity in the community, carries greater weight than a similar charge from a private person. The widespread publication of the charges and the identification of petitioners as the offenders subjected them to public censure to the same degree as if they had been formally accused of perjury or conspiracy."

[15] The oath, as it was administered in that year in the proceedings against the Earl of Shaftesbury, is worth quoting in full: "You shall diligently inquire and true presentments make of all such matters, articles and things, as shall come to your own knowledge, touching this present service; *the king's counsel, your fellows' and your own, you shall keep secret;* you shall present no person for hatred or malice; neither shall you leave any one unpresented, for fear, favor or affection, for lucre or for gain, or any hopes thereof; but in all things you shall present the truth, the whole truth, and nothing but the truth, to the best of your knowledge. So help you God." Italics added. This form of the oath is set out in THOMPSON AND MERRIAM, JURIES 649-650 (1882). See also 1 HOLDSWORTH, HISTORY OF ENGLISH LAW, 3d ed., 322 (1922).

solely of public policy considerations.[16] Whatever the source, a requirement of secrecy seems likely to continue as an integral part of the grand jury system.[17] The implications of the requirement for an individual who has been criticized in a grand jury report are at once apparent. The manner in which the grand jury arrived at its conclusions, the nature of the evidence on which the report was based (its legal sufficiency a matter of pure conjecture), the witnesses who may or may not have been examined—all of this is known only to the jurors themselves. An accusation made without the slightest opportunity on the part of the accused to know the basis of the charges is offensive to the best traditions of Anglo-Saxon justice. That it is not, strictly speaking, an accusation of crime for which the individual will be obliged to stand trial does not in many instances render it any the less offensive.

(c) *Irresponsibility of the grand jury.* By the most deliberate intent on the part of those who channelled its development, the grand jury emerged as an essentially irresponsible body, in the sense that it is legally accountable to no one. At first the notion was to create a bulwark against oppression by the crown, in the person of citizens free to exercise an independent judgment in the endorsement of criminal prosecutions. In this country independence of the electorate rather than independence of the Crown was the significant feature.[18] Selected rather than elected, the grand jury was well designed to shield the individual from the possible consequences of popular passion. It enjoyed, and enjoys today, a very considerable degree of independence

[16] THOMPSON AND MERRIAM, JURIES 738-739 (1882), record that the injunction of secrecy is preserved in the oath in all but nine states. It has been held that the obligation is binding, moreover, even though not formally a part of the oath. Little v. Commonwealth, 66 Va. 921 at 930 (1874).

[17] A succinct modern statement of the reasons underlying the secrecy requirement appears in United States v. Amazon Industrial Chemical Corp., (D.C. Md. 1931) 55 F. (2d) 254 at 261: "The reasons which lie behind the requirements of secrecy may be summarized as follows: (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 subornation 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 untrammeled 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." The court notes that of all of these only the last is intended for the protection of the individual whose case is being considered by the grand jury. On the secrecy requirement see also THOMPSON AND MERRIAM, JURIES 739 (1882); United States v. Smyth, (D.C. Cal. 1952) 104 F. Supp. 283. Rule 6(e) of the Federal Rules of Criminal Procedure, 18 U.S.C. (1946), prohibits the disclosure of matters occurring before federal grand juries.

[18] Among the many cases in which this point has been made is Application of Texas Co., (D.C. Ill. 1939) 27 F. Supp. 847.

from the public prosecutor himself, if it wishes to assert that independence. Political non-accountability, highly desirable from the standpoint of securing unbiased presentments and indictments, is a factor heightening the possibility of oppressive grand jury action in the matter of reports. Legislative investigations conducted in a patently unfair manner are subject to correction through public dissatisfaction which can be expressed at the polls. Political chastisement of a grand jury which has acted unjustly is impossible.

(d) *Lack of objective standards.* It is not intended to suggest that in finding true bills a grand jury acts always in a restrained and objective fashion. In determining whether grounds exist for prosecution of alleged offenders, however, a grand jury has a relatively fixed set of standards upon which to act. The crime charged is one defined, perhaps over a period of centuries, in the statutes or at common law. The grand jury can be carefully instructed as to the necessary elements in the state's case and as to what is legally sufficient evidence. In sharp contrast is the mixture of law, ethics and individual notions of morality which guide the grand jury in censuring persons for non-criminal conduct. Here prejudices and predilections may result in the severest sort of condemnation for acts which might pass unnoticed in another community.[19]

(3) A rather different line of argument against the grand jury report is constructed upon the doctrine of separation of powers. Frequently a grand jury report concludes with various recommendations addressed to the executive or legislative branches of government. These may range from the suggested dismissal of a high school teacher to a recommendation that the National Labor Relations Board revoke the certification of a labor union.[20] The objection in either case is that the grand jury, concededly an arm of the judicial branch of government, is put in the position of rendering an advisory opinion, something which the judiciary in this country has long been reluctant to do.

[19] See the notable dissent by Woodward, J., in Matter of Jones, 101 App. Div. 55 at 60, 92 N.Y.S. 275 (1905): "It cannot be said that it was ever contemplated that this body, created for the protection of the citizen, was to have the power *to set up its own standards of public or private morals,* and to arraign citizens at the bar of public opinion, without responsibility for the abuse of that power, and without giving to the citizen the right to a trial upon the accusations." Italics added.

[20] These examples are taken from the factual situations in Hayslip v. State, 193 Tenn. 643, 249 S.W. (2d) 882 (1952), and Application of United Electrical, Radio & Machine Workers of America, (D.C. N.Y. 1953) 111 F. Supp. 858, to give some idea of the varied nature of grand jury recommendations. Recommendations are often detailed in the extreme, occupying a major portion of the report.

Reports of this nature involve the courts in the working out of solutions to delicate political problems and mark a wide departure from the accepted rule of deciding issues only as they arise in actual litigation. The argument is most convincing in its application to the federal courts, which are expressly limited by the Constitution to the determination of concrete "cases or controversies."[21] Intrusion by federal courts into the area of the so-called "political question" has been repeatedly condemned by the Supreme Court.[22] To support a federal grand jury's ability to give advice on policy matters it is necessary to argue that its powers exceed those of the court in some fashion, despite holdings that the jurisdictional limits of the grand jury are defined by those of the court to which it is an appendage.[23]

(4) It is said that at least in the case of investigations which represent broad-gauge, intensive inquiries into corruption in public office, the grand jury is not properly equipped to do an effective job of investigating and of publicizing the results of its investigations. The concern, it must be repeated, is with investigation into official conduct which is reprehensible rather than illegal. Grand jury budgets are usually limited to the payment of fees of jurors and witnesses; rarely may grand juries retain their own counsel, accountants or detectives.[24] The jurors themselves are seldom skilled in the techniques of investigation and have only very limited amounts of time to devote to their duties as jurors.[25] Finally, the secrecy requirement rules out public hearings or

[21] U.S. CONST., art. III, §2.

[22] United States v. Evans, 213 U.S. 297, 29 S.Ct. 507 (1909); Muskrat v. United States, 219 U.S. 346, 31 S.Ct. 250 (1911); Coleman v. Miller, 307 U.S. 433, 59 S.Ct. 972 (1939). Strict regard for separation of powers was at the basis of the decision in Application of Texas Co., (D.C. Ill. 1939) 27 F. Supp. 847. The argument receives powerful emphasis in Application of United Electrical, Radio & Machine Workers of America, (D.C. N.Y. 1953) 111 F. Supp. 858 at 865, with the statement by the court that: "One may well ponder the result if each of the Grand Juries in the eighty-six Federal districts returned recommendations to the legislature and executive as to the conduct of their affairs. The circumstances of this case are particularly instructive, for the Grand Jury undertook to advise the other branches of government in a controversial and 'delicate field' [citing testimony on February 24, 1953, before the Committee on Education and Labor], the subject of continuing Congressional inquiry. Its advice to the NLRB impelled action which was subsequently stayed by the courts as beyond the NLRB's power. Thus, the Grand Jury succeeded in involving that agency in unauthorized action." See note 5 supra. A state decision stressing the point is In re Grand Jury Investigation, 173 Pa. Super. 197, 96 A. (2d) 189 (1953).

[23] United States v. Hill, (C.C. Va. 1809) 26 Fed. Cas. 315, No. 15,364; United States v. Smyth, (D.C. Cal. 1952) 104 F. Supp. 283; Application of United Electrical, Radio & Machine Workers of America, (D.C. N.Y. 1953) 111 F. Supp. 858.

[24] See annotation, 26 A.L.R. 605 (1923).

[25] Dession and Cohen, "The Inquisitorial Functions of Grand Juries," 41 YALE L.J. 687 at 698 (1932), state that a regular grand jury in New York City devotes to its work five mornings a week, of two hours each, for one month. Special grand juries may be

the disclosure of testimony taken and makes it impossible to secure the sort of publicity obtainable by a legislative committee.

III

Supporting the filing of reports by grand juries are arguments which seek to establish both the legality and desirability of such reports. Much of the argument proceeds on the basis of historical precedent and tends to become a matter of terminology, turning on the manner in which the word "presentment" is defined.[26] As a matter of substance, however, there seems to be a considerable body of evidence indicating that for centuries English common law grand juries made reports in which no crime was charged, and that the practice continued in this country.[27]

A number of policy arguments in favor of the grand jury report are also advanced. Very frequently grand juries may uncover wrongdoing of the most flagrant sort which, perhaps through some quirk in the law, is not indictable.[28] Should the grand jury in such a case remain silent and allow its investigation to go for naught? Should it not exert its very considerable influence on behalf of better government and

impaneled for longer periods to do more intensive work in a particular area. Similar observations are made by Medalie, "Grand Jury Investigations," 7 THE PANEL No. 1, p. 5 at 7 (1929).

[26] E.g., Chief Justice Vanderbilt in In re Presentment by Camden County Grand Jury, 10 N.J. 23, 89 A. (2d) 416 (1952), defines "presentment" as referring to the findings of a grand jury with respect to derelictions in matters of public concern, and contends that "presentments" of this nature have been filed for centuries. It is certainly true that in the grand juror's oath as it was phrased in the seventeenth century and before, "presentment" is used in the broadest sense; there is no mention of the word "indictment." Professor A. M. Kidd, in "Why Grand Jury's Power is a Menace to Organized Crime," 12 THE PANEL No. 3, p. 32 at 33 (1934), strongly supports the propriety of grand jury reports and asserts that the accusation of suspected persons was only one of the functions of the English common law grand jury and that in fact at the time of Henry III the grand jury can be said to have exercised a "general superintendence over all the local details of the executive government" [citing 1 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND (1883)].

[27] The use of reports was certainly widespread in New Jersey, as indicated by the extensive citation to reports contained in In re Presentment by Camden County Grand Jury, 10 N.J. 23, 89 A. (2d) 416 (1952).

[28] There is much conduct on the part of officials which, while it would be condemned by every thinking citizen and taxpayer, cannot be made the basis for criminal prosecution. One situation is thus envisaged by Kidd, "Why Grand Jury's Power is a Menace to Organized Crime," 12 THE PANEL No. 3, p. 32 at 34 (1934): "It is by no means uncommon for an investigation to disclose a general laxness and inefficiency and an administrative setup in which responsibility is divided and may be shifted. The conditions imperatively demand a clean-up, but it is perfectly clear that no trial jury will find that the guilty responsibility of any individual is proved to a moral certainty and beyond a reasonable doubt. Therefore it is useless to return indictments." It would appear, however, that the case where it is "perfectly clear" that no trial jury would ever convict is the very case in which a grand jury should be extremely reluctant to publish any accusations whatsoever.

better moral standards in the community? The permissible scope of grand jury investigation varies from state to state, but in the many jurisdictions in which it is given wide powers, to permit it to investigate and then to forbid it to report may seem to defy common sense. The court stated in *Irwin v. Murphy*: "Law and common sense combine to compel the conclusion that, if a grand jury is authorized and bounden to inquire of public offense, a necessary element of this power must be the power and duty to disclose the result of the inquiry."[29]

To the argument that a grand jury report may be eminently unfair in its application to a particular individual several answers are given. The first is that the same is often true of indictments in instances in which persons not actually indicted are named in the indictment, or in which an indictment is never pursued to trial. The possibilities of injustice and oppression, moreover, are said to be less in the case of the grand jury investigation than in other types of public investigation, by reason of the care with which grand juries are selected, the secrecy attending their deliberations, and judicial control of reports filed with the court. The availability of a remedy against an ill-founded report in the form of a motion to expunge does not require that all such reports be held extra-judicial and hence illegal. Finally, as will be universally conceded, the most frequent object of grand jury attack is the local public official, and the argument is that he must be prepared to accept investigation and, if necessary, exposure of the way in which he performs his duties.

The fitness of the grand jury for the preparation and submission of reports detailing public and private misconduct is firmly defended. If the grand jury is typically without sufficient funds and adequate investigative aids, the short answer is that these must be provided. The importance of direct participation by citizens in the administration of justice provides an argument that grand juries should not be confined within narrow limits. Chief Justice Vanderbilt of the Supreme Court of New Jersey said: "What cannot be investigated in a republic is likely to be feared. The maintenance of popular confidence in government requires that there be some body of laymen which may investigate any instances of public wrongdoing."[30] Aside from the element of direct popular participation, the grand jury may carry on its investigations within broader jurisdictional limits than those commonly imposed upon legislative investigatory bodies. While the grand jury is charged

[29] 129 Cal. App. 713 at 717, 19 P. (2d) 292 (1933).

[30] In re Presentment by Camden County Grand Jury, 10 N.J. 23 at 65, 89 A. (2d) 416 (1952).

with inquiry into all crimes committed within its territorial jurisdiction, other types of public investigating agencies face constant objections raising questions of constitutional scope or statutory construction.[31] The opportunities for obstructive tactics on the part of witnesses are very great. There is surely nothing inherent in the legal construction of the grand jury system, it is concluded, which prevents it from being a most effective organ in focusing public attention on conditions which demand amelioration.

IV

Judicial opinion on the legitimacy of the grand jury report divides sharply but a very considerable weight of authority in the state decisions supports the view that such reports exceed the powers of the grand jury and may upon proper motion be expunged from the court records.[32] Where relief is sought in the form of a libel action, the courts have likewise tended to the position that reports of this nature are extra-judicial and hence not privileged.[33] An examination of the New York decisions is particularly instructive, because of the comparatively large number of cases on the question and because both points of view are represented. The New York Code of Criminal Procedure authorizes grand juries to investigate public officials for willful misconduct in office,[34] and it was principally on this basis that the appellate division in *Matter of Jones*[35] upheld a report in which Jones, a member of the county board of supervisors, was severely criticized. The majority of the court conceded: ". . . if under the guise of a presentment the

[31] Dession and Cohen, "The Inquisitorial Functions of Grand Juries," 41 YALE L.J. 687 at 699 (1932), illustrate the point with citations to a number of New York and New Jersey cases, and point to one particular instance in which new legislation had to be passed before an investigation could continue.

[32] Supporting this view are In re Report of Grand Jury, 152 Md. 616, 137 A. 370 (1927); Ex parte Robinson, 231 Ala. 503, 165 S. 582 (1936); Bennett v. Kalamazoo Circuit Judge, 183 Mich. 200, 150 N.W. 141 (1914); State ex rel. Strong v. District Court of Ramsey County, 216 Minn. 345, 12 N.W. (2d) 766 (1944); Report of Grand Jury, 204 Wis. 409, 235 N.W. 789 (1931); In re Presentment of Superior Court, 14 N.J. Super. 542, 82 A. (2d) 496 (1951), upon which considerable doubt is cast by the opinion of the New Jersey Supreme Court in the subsequent case of In re Presentment by Camden County Grand Jury, 10 N.J. 23, 89 A. (2d) 416 (1952); State v. Bramlett, 166 S.C. 323, 164 S.E. 873 (1932). To the contrary see In re Report of Grand Jury, 152 Fla. 154, 11 S. (2d) 316 (1943); Owens v. State, (Fla. 1952) 59 S. (2d) 254, noted, 6 UNIV. FLA. L. REV. 140 (1953).

[33] Rector v. Smith, 11 Iowa 302 (1860); Poston v. Washington, A., & Mt. V. R. Co., 36 App. D.C. 359 (1911); Bennett v. Stockwell, 197 Mich. 50, 163 N.W. 482 (1917). *Contra:* O'Regan v. Schermerhorn, 25 N.J. Misc. 1, 50 A. (2d) 10 (1946); Irwin v. Murphy, 129 Cal. App. 713, 19 P. (2d) 292 (1933).

[34] See note 9 supra.

[35] 101 App. Div. 55, 92 N.Y.S. 275 (1905).

grand jury simply accuse, thereby compelling the accused to stand mute, where the presentment would warrant an indictment so that the accused might answer, the presentment may be expunged. . . ."[36] The typical situation, however, is one in which the presentment (report) will not support an indictment. Later decisions in New York have not followed the *Jones* case,[37] with frequent reference being made rather to a dissent from that opinion. While there is some suggestion that a distinction may be made between the report concerning an official and a report criticizing a private citizen, it may be said that today neither type of report is likely to be received favorably in New York state courts.

While the bulk of the cases appear to form a fairly consistent pattern of majority and minority view, two additional and somewhat different approaches have found support in the decisions. The first of these is that whether or not a grand jury report should be expunged is a matter within the discretion of the lower court, generally the one initially receiving the report.[38] It is probable that in this view the discretion of the lower court is extremely broad.[39] The other position is that where the report was itself instigated at the behest of the individual who later seeks to have it expunged, relief will be denied.[40] This was the reasoning in *Hayslip v. State*,[41] where the court held that since the charges publicized by the petitioner had been the cause of the investigation, she could not complain when the resulting report recommended her dismissal from her teaching position. While the opinion professes to be following the majority view limiting the power of the grand jury, it may be argued that it marks a very wide departure from that view. The unsoundness of the result is ably exposed in a dissenting opinion, which points out that to deny relief just because a person is the one who initially supplied information to the grand jury would discourage the free flow of information from citizens to grand juries.

The question of the grand jury report has not often been litigated

[36] Id. at 58.

[37] The New York authorities are extensive, and the overwhelming majority of the cases support the majority view denying the grand jury broad powers to issue reports. Among these are Matter of Wilcox, 153 Misc. 761, 276 N.Y.S. 117 (1934); Matter of Funston, 133 Misc. 620, 233 N.Y.S. 81 (1929); In re Woodbury, 155 N.Y.S. 851 (1915); Matter of Osborne, 68 Misc. 597, 125 N.Y.S. 313 (1910); In re Heffernan, 125 N.Y.S. 737 (1909); People v. McCabe, 148 Misc. 330, 226 N.Y.S. 363 (1933); Matter of Gardiner, 31 Misc. 364, 64 N.Y.S. 760 (1900); Application of Bar Assn. of Erie County, 182 Misc. 529, 47 N.Y.S. (2d) 213 (1944).

[38] State ex rel. Lashly v. Wurdeman, (Mo. 1916) 187 S.W. 257; Ex parte Cook, 199 Ark. 1187, 137 S.W. (2d) 248 (1940).

[39] See Ex parte Cook, 199 Ark 1187, 137 S.W. (2d) 248 (1940).

[40] Matter of Knight, 176 Misc. 635, 28 N.Y.S. (2d) 353 (1941).

[41] 193 Tenn. 643, 249 S.W. (2d) 882 (1952).

in federal courts.[42] Such authority as exists accords with the majority position taken in the state courts, which restricts the scope of the grand jury's report. The commentaries on the propriety of the grand jury report reflect a division of opinion roughly similar to that of the courts, though if anything somewhat more heavily weighted in opposition to the issuance of the reports.[43]

V

It is concluded that a sound approach to the question of the grand jury report lies in preserving and strengthening the distinction between two types of report: the report in which individuals are named, and the report relating to general conditions in public institutions. It is apparent that this distinction is far from clear-cut. There may be the sharpest censure of an individual implicit in a report on general conditions which names no names. The one type of report shades imperceptibly into the other. But the law abounds in distinctions of this sort. Insistence that the grand jury report should be used under no circumstances does not seem to be good sense in view of the very great public interest and benefit to be derived from many reports. On the other hand, respect for individual rights and reputations demands that a grand jury which is not in a position to provide a trial of the personal accusations it makes should keep silent.

Judged by this standard, it would appear that the position taken by the court in *Application of United Electrical Workers* represents a better view than is evidenced by the result in *Hayslip v. State* and *In re Presentment by Camden County Grand Jury*.[44] In both of the latter

[42] In the Matter of the Report of the Grand Jury, 4 U.S.D.C. Hawaii 780 (1911), appears to be the only other federal case directly on the question in addition to Application of United Electrical, Radio & Machine Workers of America, (D.C. N.Y. 1953) 111 F. Supp. 858.

[43] 24 AM. JUR., Grand Jury §36, p. 859 (1939). Useful annotations showing the weight and distribution of authority are in 22 A.L.R. 1367 (1923), supplemented by 106 A.L.R. 1388 (1937). Writers expressing a preference for the majority view include: Dession and Cohen, "The Inquisitorial Functions of Grand Juries," 41 YALE L.J. 687 (1932); Lawyer, "Should the Grand Jury System be Abolished?" 15 YALE L.J. 178 (1906); Medalie, "Grand Jury Investigations," 7 THE PANEL No. 1, p. 5 (1929); ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 146 (1947); Konowitz, "The Grand Jury as an Investigating Body of Public Officials," 10 ST. JOHN'S L. REV. 219 (1936); Bowman, "Grand Jury Report Censuring an Individual but Not Indicting Him," 22 OKLA. B.A.J. 635 (1951). In opposition see Kidd, "Why Grand Jury's Power is a Menace to Organized Crime," 12 THE PANEL No. 3, p. 32 (1934). Indicating disapproval of the decision in Hayslip v. State: notes, 38 VA. L. REV. 950 (1952); 28 N.Y. UNIV. L. REV. 442 (1953).

[44] The facts of these cases are set forth in the text at notes 2, 4, 5, and 6 supra. It may be argued that the severe and detailed criticism of the management of the county jail made by the grand jury in the Camden case would inevitably have reflected upon the

cases, individuals were allowed to be singled out and severely criticized by the grand jury. Moral justification for the criticism is not the issue. The important point is that had the references to individuals been omitted, the usefulness to the public of the reports in each instance would not have been materially impaired, and a sounder precedent for the guidance of grand juries in the future would have been established.

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appellant, Sheriff Martino. However, the circumstances in Hayslip v. State would not support this argument, and it is difficult to see why the grand jury in that case felt it necessary to censure the petitioner, once it had found no basis in fact for the charges she had made.