UIC Law Review

Volume 12 | Issue 2 Article 4

Winter 1979

The Illinois Grand Jury Indictment: A Denial of Due Process, 12 J. Marshall J. Prac. & Proc. 319 (1979)

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COMMENTS

THE ILLINOIS GRAND JURY INDICTMENT: A DENIAL OF DUE PROCESS?

The grand jury is a relic of another condition of society and of a method of administering justice now entirely reformed.

London Times, July 11, 1849

INTRODUCTION

In the entire field of criminal law, no single institution or practice has been so severely criticized as the grand jury. As a procedure for initiating felony prosecutions, opponents of the grand jury system have characterized it as a "puppet"[1] or "rubber stamp"[2] of the prosecutor's office. They point to abuses of the system as calling for its abolition.[3] Advocates for maintenance of the grand jury, as one manner of initiating felony prosecutions, base their argument upon the premise that the grand jury is necessary to protect individuals from unfounded accusations of criminal conduct.[4]

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1. W. Coates, *Grand Jury, The Prosecutor's Puppet. Wasteful Nonsense of Criminal Jurisprudence*, 33 PENN. BA Q 311 (1962).

2. Calkins, *Abolition of the Grand Jury Indictment in Illinois*, 1966 U. ILL. L.F. 423, 429-31. [hereinafter cited as Calkins].

3. M.P. Antell, *Modern Grand Jury: Benighted Super-Government*, 51 A.B.A. J 153 F (1965); Calkins, *supra* note 2; T.M. Kranitz, *Grand Jury; Past-Present-No Future*, 24 MO. L. REV. 318 (1959); J.P. Vukasin Jr., *Grand Jury: Useful or Useless?*, 34 CALIF. SBJ 436 (1959); L.P. Watts Jr., *Grand Jury: Sleeping Watchdog or Expensive Antique*? 37 NCL REV. 290 (1959).

4. Brown, *Ten Reasons Why the Grand Jury in New York Should be Retained and Strengthened*, 22 RECORD OF N.Y.C.B.A. 471, 473 (1967). But a reading of history indicates that protection of individual rights was not a contemporaneous motivation for creating the grand jury. The grand jury was born in England with the issuance of the Assize of Clarendon by Henry II in 1166 which was reissued in 1176 in the Assize of Northampton. W. Holdsworth, A HISTORY OF ENGLISH LAW 321-23 (3rd ed. 1922). Nothing in the history of the Assize of Clarendon supports the proposition that the grand jury developed for the protection of an innocent accused. Barons seeking relief from royal officials such as sheriffs, constables, and coroners found it in chapter 24 of Magna Carta which provided that "[n]o sheriff, constable, coroners or other of Our Baliffs shall hold pleas of Our Crown." A.E. DICK HOWARD, MAGNA CARTA TEXT AND COMENTARY 43 (1964).

Somewhere between its inception and subsequent incorporation into the fifth amendment to our Federal Constitution, philosophical justification for the grand jury shifted. The United States has historically regarded the grand jury as a watchdog for individual rights. In Illinois as early as 1870, this common misconception had become the foundation for proponents of retaining a state grand jury system. One delegate to the constitutional convention of that year remarked:

The heated debate over whether or not to retain the grand jury appears to have been rendered academic in Illinois. Despite persuasive commentary and express constitutional authority to abolish the grand jury,[5] both existing for well over one hundred years,[6] the indictment process remains substantially

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[T]hrough long centuries this very grand jury system standing between the people and the crown, between the freemen and the star chamber, by its continuous influence, contributed as much to settle the foundation of human freedom in the minds and sentiments and opinions of the English people as any other institution known to that island.

2 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF ILLINOIS 1869-1870, at 1437 (1870). For a history of the grand jury in Illinois, see Calkins, *supra* note 2.

5. The 1970 Illinois Constitution provides in relevant part:

No person shall be held to answer for a criminal offense unless on indictment of a grand jury, except in cases in which the punishment is by fine or by imprisonment other than in the penitentiary, in cases of impeachment, and in cases arising in the militia when in actual service in time of war or public danger. *The General Assembly by law may abolish the grand jury or further limit its use.* (emphasis added).

ILL. CONST. art. I. § 7, cl. 1.

6. The 1970 Constitution is certainly not innovative. Consider the corresponding provision in the 1870 document:

No person shall be held to answer for a criminal offense, unless on indictment of a grand jury, except in cases in which the punishment is by fine, or imprisonment otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army or navy, or in the militia, when in actual service in time of war or public danger; *Provided that the grand jury may be abolished by law in all cases.* (emphasis added).

ILL. CONST. art. II § 8, cl. 1. (1870). The minor change in language is said to have been aimed at clarifying the legislature's authority with respect to the grand jury. Under the 1870 provision, it was unclear as to whether use of the grand jury could be limited, without a total abolition "in all cases."

Even at the 1870 convention there was strong opposition to the grand jury. A proposed amendment seeking to abolish the indictment process sparked a vitriolic debate. The delegate offering the amendment stated by way of introduction:

I am satisfied that this grand jury system has ceased to be any protection to the interests or the rights of the people in any of the forms, involving life, liberty, or property or character. It is an abuse in its operation on almost every one of these rights and privileges.

2 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF ILLINOIS at 1434 (1870). In support of the amendment another delegate said:

I regard this grand jury system as the one dark spot upon our glorious judicial system; as a relic of the star chamber; as a well-defined adjunct of the old inquisitional order that prevailed for so great a length of time in the old world. In my opinion no public good is subserved by retaining it. The object of criminal law is to punish the guilty, to give all persons charged a fair opportunity of appearing, confronting their witnesses, of having their charges investigated, and passed upon by a jury of their country.

The grand jury system pre-judges the indicted party's case. It is regarded by many persons, and always so insisted upon by State's Attorneys as prima facie evidence of guilt, that a grand jury have returned an indictment against an individual.

Id. at 1436.

unmolested by statute[7] or judicial review.[8] It has become part of the genetic fiber in Illinois' judicial system. Thus, to render any further commentary useful, the existence of a grand jury must be taken as a given. From that base, by purposefully probing the gamut of pretrial activity in Illinois, the grand jury indictment may be viewed in a more meaningful perspective.

Whenever a topic of discussion commands great debate, arguments tend to proceed from foregone conclusions. In this case, logical inquiry is necessary to evaluate the aphorism that the grand jury is an evil, a reprobate body whose very existence is counter-productive. Therefore, this comment is neither a demand for abolition nor an idealistic plea for reform. Rather, the attempt here is to analyze the grand jury indictment in terms of its relationship with the preliminary hearing,[9] then compare the results of that analysis to an actual case,[10] while at all times

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7. Notwithstanding its authority, the legislature has done very little to control the grand jury outside of enacting innocuous rules proscribing the method of selecting members and assembling the body. ILL. REV. STAT. ch. 38, § 112-1 thru § 112-6 (1977). Only one provision of the Illinois statutes affects the jury's operation. Section 114-1 of the Code of Criminal Procedure lists 10 specific grounds upon which a defendant may base a motion to dismiss a criminal charge. As far as they relate to grand jury indictments, the grounds are procedurally oriented and do not speak to protection of any inherent rights of an accused. ILL. REV. STAT. ch. 38, § 114-1 (1977). *See also* text accompanying note 80 *infra*.

8. The activities of the grand jury have never been flatly at issue, but Illinois courts have had opportunities to initiate reform. However, when the initiative was taken by trial judges, reviewing courts were unreceptive and reversed in no uncertain terms:

> We agree with the State's contention that the trial court did not have authority to enter the order of dismissal for want of prosecution. The court on its own motion, or on the motion of defendant has no power before trial, in the absence of statute, to dismiss criminal charges or enter a nolle prosequi in a criminal case, since this power rests intially and primarily with the prosecution officer . . . The court may dismiss an indictment, information or complaint only upon the grounds set forth in section 114-1 of the Code of Criminal Procedure.

People v. Guido, 11 Ill. App. 3d 1067, 1069, 297 N.E.2d 18, 19 (1973). For a good discussion of the grand jury's history in Illinois see *People v. Graydon*, 333 Ill. 429, 164 N.E. 832 (1928).

9. A preliminary hearing is simply a hearing, conducted by a magistrate or judge, which is given to a person accused of a crime to ascertain whether there is evidence to warrant or require the commitment and holding to bail of the person accused. BLACK'S LAW DICTIONARY 852 (4th ed. 1968). State v. Clark, 546 S.W.2d 455, 462 (Mo. 1977) (a preliminary hearing is simply a means to prevent abuse of power by the prosecution and to permit detention by means of a limited inquiry into whether there is probable cause that the accused committed an offense); Lambus v. Kaiser, 352 Mo. Rep. 122, 125, 176 S.W.2d 494, 497 (1943) (a preliminary hearing is in no sense a trial, but is simply a course of procedure to prevent prosecutorial abuse of power); State v. Langford, 293 Mo. Rep. 436, 443, 240 S.W. 167, 168 (1922) (a preliminary hearing is a course of procedure designed to prevent an abuse of power). *See also* ILL. REV. STAT. ch. 38, § 102-17 (1977).

10. People v. Creque 72 Ill. 2d 515, 382 N.E.2d 793 (1978).

keeping a watchful eye on that transcendental notion known as due process.[11]

DETERMINING PROBABLE CAUSE

Grand Jury Indictment

It is something of an anomaly when legal commentators describe an accused felon as possessing the "right" to go before a grand jury, since most agree that the "right" is really an onus on the defendant.[12] Yet the idea sought to be conveyed is essentially correct: one accused of a crime has an absolute right to a determination that probable cause exists to hold him for trial.[13] This idea permeates all facets of criminal law. For instance, police officers are well aware that they must have "probable cause" to stop a pedestrian and search his person,[14] to go beyond the

11. Due process of law in each particular case means such an exercise of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs. BLACK'S LAW DICTIONARY 590 (4th ed. 1968).

12. Though appearance before a grand jury is often sub-titled a "right," the common conclusion of legal writers is that the grand jury should be abandoned or modified. These conclusions, drawn from critical treatment of the indictment process, are at least tacit admissions that the "right" is burdensome if not manifestly onerous. Robinson, *The Determination of Probable Cause in Illinois - Grand Jury or Preliminary Hearing*, 7 LOY. L.J. 931 (1967) [hereinafter cited as Robinson]; Canfield, *Have We Outgrown The Grand Jury?*, ILL. B.J. 206 (Jan. 1952); Calkins, *supra* note 2; Comment, *Should The Grand Jury Indictment Procedure Be Abolished In Illinois?*, 2 J. MAR. J. 348 (1969). In addition, when the accused is allowed to testify as a witness before the grand jury, his failure to answer incriminating questions exposes him to a public hearing in court. Rogers v. United States, 340 U.S. 367 (1951); Blau v. United States, 340 U.S. 159 (1950); United States v. Levine, 267 F.2d 335 (2nd Cir. 1959); *In re* Wille, 25 F. Cas. 38 (No. 14692e) (C.C.D. Va. 1807).

13. The notion that probable cause must exist before an accused can be held to answer for an offense stems from the idea that an individual has a right to be secure in his person. U.S. CONST. amends. V & XIV. It follows that a person has a right to be free from prosecution absent a showing sufficient to warrant suspension of that right. Roads v. Superior Court, in and for County of Siskiyou, 275 Cal. App. 2d 593, 80 Cal. Rptr. 169 (1969); People v. Garcia, 265 Cal. App. 2d 94, 71 Cal. Rptr. 102 (1968); Jensen v. Superior Court, in and for Los Angeles County, 96 Cal. App. 2d 112, 214 P.2d 828 (1950). Further, unless there is a good faith belief on the part of the person bringing the charge that the defendant has committed a crime, an action for malicious prosecution will lie in favor of the innocent accused. Redding v. Medica, 411 F. Supp. 272 (W.D. Pa. 1976); Stamatiou v. United States Gypsum Co., 400 F. Supp. 431 (N.D. Ill. 1975), *aff'd* 534 F.2d 330 (7th Cir. 1975).

14. When a search is involved, the issue of probable cause becomes a fourth amendment problem. U.S. CONST. amend. IV. The search or seizure is unreasonable and therefore unconstitutional if conducted without "sufficient probability" of obtaining incriminating evidence. Hill v. California, 401 U.S. 797 (1971); Terry v. Ohio, 392 U.S. 1 (1968). A "seizure" occurs whenever a police officer accosts an individual and restrains his freedom to walk

scope of a limited investigation,[15] or to make an arrest without a warrant.[16]

A grand jury indictment is essentially a statement by the jury that they believe there is reason, sufficient at law, to compel the accused to stand trial for the offense charged.[17] They form their belief after hearing evidence proffered by the prosecutor. However, in Illinois and in most jurisdictions, the "evidence" which a jury may consider to return an indictment is often less than that required to obtain a conviction at trial and frequently violates traditional rules of evidence.[18] For example, an out of court statement offered to prove the truth of the matter asserted therein will be excluded as hearsay in every American court.[19]

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away. Yam Sang Kwai v. Immagration & Naturalization Service 411 F.2d 683 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 877 (1969). In addition, the obtaining of physical evidence from a person involves potential fourth amendment violations at two levels: the seizure of the person necessary to bring him in contact with government agents and the subsequent search for evidence. United States v. Lincoln, 494 F.2d 833 (9th Cir. 1974).

15. Cause to search one place is not necessarily cause to search another. McCann v. State, 504 P.2d 432 (Okl. 1972). General exploratory searches are not tolerated and the searcher must have in mind some reasonably specific thing he is looking for and reasonable grounds to believe it is in the place being searched. State v. Call, 8 Ohio App. 2d 277, 220 N.E. 2d 130 (1965). Even when a search warrant is issued, the fourth amendment requires that objects to be seized be specifically described. United States v. Clark, 531 F.2d 928 (8th Cir. 1976).

16. Though sometimes labeled a "reasonableness" standard, some finding of cause sufficient to justify detention amounting to arrest is always required. United States v. Bates 533 F.2d 466 (9th Cir. 1976); United States v. Martin, 509 F.2d 1211 (9th Cir. 1975), *cert. denied*, 421 U.S. 967 (1975); United States v. Rias, 524 F.2d 118 (5th Cir. 1975); United States v. Salvo, 447 F.2d 474 (5th Cir. 1971), *cert. denied*, 404 U.S. 883 (1971); Kirkland v. Preston, 385 F.2d 670 (D.C. Cir. 1967).

17. When the grand jury considers returning an indictment, their duty is twofold. They must first determine whether there is probable cause to believe a crime has been committed, and second that a particular suspect has committed that crime. Only when both of these requirements have been met may they return an indictment or "true bill." Bacon v. United States, 449 F.2d 933 (9th Cir. 1971); Silverthorne v. United States, 400 F.2d 627 (9th Cir. 1972); Arrington v. United States, 350 F. Supp. 710, *aff'd* 475 F.2d 1394 (3rd Cir. 1973); United States v. Atlantic Commission Co., 45 F. Supp. 187 (E.D.N.C. 1942); State v. Atkins, 26 Conn. Supp. 209, 216 A.2d 840 (1966); United States v. Atlantic Commission Co., 45 F. Supp. 187 (E.D.N.C. 1942).

18. As a general proposition, a grand jury is to conduct its investigation in accord with standard rules of evidence. Gelbard v. United States, 408 U.S. 41 (1972); Gordon v. Tracy, 238 S.W. 395 (Ky. 1922). But the rule is not at all enforced. The grand jury may compel production of evidence and is not bound by evidentiary rules governing the conduct of criminal trials. United States v. Calandra, 414 U.S. 338 (1974); Maddox v. State, 213 Ind. 537, 12 N.E. 2d 947 (1938). The grand jury is also free to consider evidence illegally seized. United States v. Pike, 523 F.2d 734, *rehearing denied* 525 F.2d 1407 (D.C. Cir. 1975). *See also, Criminal procedure - grand juries - exclusionary rule in search and seizure cases does not apply to grand jury proceedings*, 27 VAND. L. REV. 560-72 (1974).

19. At common law the notion evolved that statements made out of

Nonetheless, indictments based solely on hearsay testimony are sufficient to bring the accused to trial, and convictions based on them will not be overturned.[20]

In addition, grand jury proceedings have been classified as non-adversary, non-judicial affairs[21] at which a defendant has no meaningful right to counsel,[22] no right to cross examine witnesses,[23] and no opportunity to present evidence of his own.[24] The justification offered for the denial of these procedural safeguards is that the accused has not been harmed because he will have all these rights at trial. The argument is that, if the defendant can then prove his innocence, no lasting detriment has befallen him.[25] This approach overlooks the fact that going to trial

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court, not subject to the truth seeking devices of oath and cross-examination, were not admissible as evidence. The motivation was to bring witnesses before the court so that under oath, subject to all the truth seeking devices, the truth could be more readily determined. WIGMORE ON EVIDENCE § 1364 (1974). Although the hearsay rule remains an operative concept in our system of jurisprudence, common law and statutory exceptions seem to have undermined its basic philosophy. WIGMORE ON EVIDENCE § 1420-26 (1974); F.R. EVID. § 803-04.

20. It is black letter law in most jurisdictions that hearsay evidence is admissible before a grand jury. United States v. Costello, 221 F.2d 668 (2nd Cir. 1955); State v. Parks, 437 P.2d 642 (Alaska, 1968); State v. Chandler, 98 N.J. Super 241, 236 A.2d 632 (1967). *Criminal procedure - grand jury - validity of indictment based solely on hearsay questioned when direct testimony is readily available*, 43 NYU L. REV. 578 (May 1968); *Criminal law - sufficiency of indictment based solely on hearsay*, 24 FORDHAM L. REV. 453 (Autumn 1955). Further, that indictments based on hearsay are not subject to attack as grounds for reversing a conviction is a general averment subsumed by the reluctance to dismiss indictments for all but the most grievous of errors. In Illinois, an indictment is not subject to attack unless all the witnesses and testimony were "incompetent." People v. Duncan, 261 Ill. 339, 103 N.E. 1043 (1914); People v. Moore, 28 Ill. App. 3d 1085, 329 N.E.2d 873 (1975).

21. When brought into issue, courts have labeled the grand jury an inquisitional and accusing body whose function is to determine probable cause. *In re* Weir, 377 F. Supp. 919, *aff'd* 495 F.2d 879, *cert. denied*, Weir v. United States, 419 U.S. 1038 (1974); State v. Williams, 310 So. 2d 528 (La. 1975); Watson v. Warden, Md. Penitentiary, 2 Md. App. 134, 233 A.2d 321 (1967); Mathews v. Pound, 403 S.W.2d 7 (Ky. 1966).

22. The accused has no right to be heard either personally or through counsel when his "case" is before the grand jury. United States v. Central Supply Ass'n, 34 F. Supp. 241 (N.D. Ohio 1940); State v. Meek, 450 P.2d 115, *cert. denied*, 396 U.S. 847 (1969); People v. Dupree, 186 C.A.2d 12, 319 P.2d 39 (1957); People v. Vlcek, 68 Ill. App. 2d 178, 215 N.E.2d 673 (1966).

23. *Id. See also* note 24 *infra*.

24. Even when the accused is brought before the grand jury, he is not allowed to actively participate by presenting his own evidence. United States v. Tallant, 407 F. Supp. 878 (N.D. Ga. 1975); United States v. Bolles, 209 F. 682 (W.D. Mo. 1913); People v. Fernandez, 172 C.A.2d 747, 342 P.2d 309 (1959); State v. Cox, 218 La. 277, 49 So. 2d 12 (1950).

25. The standard reply to assertions that an indictment is in some way deficient is that so long as it is fair on its face, a defendant is required to stand trial for the offense. The logic is that by strict observance of the rules at a fair trial, any improprieties in the indictment will be cured. United

is expensive, time consuming, and not particularly prestigious. Further, the grand jury indictment itself casts a shadow upon an individual which looms over him in proportion to the infamous nature of the offense charged.[26] An individual implicated by indictment has, if nothing else, a substantial pragmatic interest in curtailing the criminal process at the earliest opportunity.

These practices have been promulgated and ratified by the courts in case after case.[27] The judiciary has been indoctrinated with them, and defense counsel must accept the grand jury's methods as operative facts. However, over 400 years ago another vehicle for determining probable cause developed into a viable alternative.

History of the Preliminary Hearing

Originally inquisitional in nature, the preliminary hearing eventually evolved into a judicial proceeding.[28] Although technically having no roots in the common law, two statutes in England provided for preliminary hearings as early as the sixteenth century.[29] These statutes empowered justices of the peace to examine accused felons and hear testimony from witnesses to determine whether there was reason to believe the accused had committed a crime.[30] Upon affirmative resolution, the suspect would be confined in jail or released on bond pending trial. If

States v. Calandra, 414 U.S. 338 (1974); United States v. Dionisio, 410 U.S. 1 (1973); Costello v. United States, 350 U.S. 359 (1956); People v. Jones, 19 Ill. 2d 37, 166 N.E.2d 1 (1960).

26. The Illinois Supreme Court was at least receptive to the idea that the indictment itself has adverse implications. A suspect, by being indicted, carries a cloak of guilt that is not completely removed, even by acquittal. People v. Sears, 49 Ill. 2d 14, 273 N.E.2d 380 (1971). *See also*, *In re* Fried, 161 F.2d 453 (2d Cir. 1947).

27. See notes 20-25 *supra*.

28. *See* Woods v. United States, 128 F.2d 265, 271 (D.C. Cir. 1942); L. Orfield, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 53-61 (1947). It is generally accepted that the preliminary hearing is a judicial proceeding. People v. Johnson, 8 Mich. App. 462, 154 N.W.2d 671 (1967); Durmer v. Huegin, 110 Wis. 109, 85 N.W. 1046 (1901); 21 AM. JUR. 2d *Criminal Law* § 443 (1965). One court has gone so far as to call a preliminary hearing a trial. Jefferson v. Sweat, 76 So. 2d 494, 500 (Fla. 1954).

29. As an inquisitional device, the early form of preliminary hearing was born of two statutes. 1 & 2 Phil. & M.C. 13 (1554-1555); 2 & 3 Phil. & M.C. 10 (1555). For an analysis of these two statutes see J. Langbein, PROSECUTING CRIME IN THE RENAISSANCE, ENGLAND, GERMANY, FRANCE, p. 5-125 (1974).

30. The function of the preliminary hearing remains virtually unchanged. While procedures differ from one jurisdiction to another, the primary function of the preliminary hearing remains to determine probable cause. Gerstein v. Pugh, 420 U.S. 103, 115 (1975); United States v. Allen, 409 F.2d 611 (10th Cir. 1969); People v. Ferro, 353 N.Y.S.2d 854 (1974); People v. Maire, 42 Mich. App. 32, 201 N.W.2d 318 (1972); State v. Ussery, 452 S.W.2d 146 (Mo. 1970); State v. Reggio, 176 N.W.2d 62 (S.D. 1970).

the evidence did not sustain the accusation, the defendant would be released from custody.[31]

The framers of the United States Constitution, in selecting what of the English common law to adopt, did not provide for a preliminary hearing to determine probable cause.[32] Moreover, the Supreme Court has adhered to the proposition that in federal court, a judicial determination of probable cause is not a prerequisite to prosecution.[33] Similarly, in *Lem Woon v. Oregon*,[34] the Court held the due process clause of the fourteenth amendment does not require the states to provide for a preliminary hearing prior to initiating a prosecution by information.[35] Though used extensively to resolve collateral issues before, during, and after trial in civil cases, the preliminary hearing has not attained notoriety as an arbiter of probable cause in criminal prosecutions.[36]

Prior to July 1, 1971, preliminary hearings in Illinois were a

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31. It follows that if an accusation is groundless, the suspect cannot be held in custody. This proposition remained constant throughout the history of the preliminary hearing. *See* Krutz v. Moffit, 115 U.S. 487 (1885); 2 M. Hale, PLEAS OF THE CROWN, 77, 81, 95, 121, (1736); I. J. Stephen, HISTORY OF THE COMMON LAW OF ENGLAND, 233 (1883). Under the English law examination of the prisoner was inquisitional and the witnesses were questioned outside the prisoner's presence. It became well established that the prisoner was entitled to an absolute discharge if the investigation turned up insufficient evidence of his guilt. *Id.*, at 233.

32. The first ten amendments to the United States Constitution, passed by the First Continental Congress in 1791, secure to citizens of the United States certain "fundamental" rights. Among them is the right to be free from prosecution for an infamous crime unless on indictment by a grand jury. U.S. CONST. amend. V. This is however, the only provision in the entire document or its amendments that specifies the prerequisites for a felony prosecution.

33. Federal courts have been unwilling to read into the fifth amendment any requirement of a preliminary hearing. Gerstein v. Pugh, 420 U.S. 103 (1975).

34. 229 U.S. 586 (1913).

35. Lem Woon v. Oregon, 229 U.S. 586, 590 (1913). For an updated version see *Carter v. Kilbane*, 519 F.2d 1370 (6th Cir. 1975). *See generally* Robinson, *The determination of Probable Cause in Illinois - Grand Jury or Preliminary Hearing*, 7 LOY. L.J. 931. [hereinafter cited as Robinson].

36. In civil litigation, judicial hearings play an important role in managing the lawsuit and guiding its course. They are particularly useful at the close of discovery in Federal Court to elicit evidence and limit issues for trial. F.R. CIV. P. Rule 16.

However, as a device for establishing probable cause in criminal cases, the preliminary hearing often takes a back seat to the grand jury indictment. United States v. Daras, 462 F.2d 1361 (9th Cir. 1972), *cert. denied*, 409 U.S. 1046 (1972); United States v. Harris, 458 F.2d 670 (5th Cir. 1972), *cert. denied*, 409 U.S. 888 (1972); United States v. Le Pera, 443 F.2d 810 (9th Cir. 1971), *cert. denied*, 409 U.S. 1046 (1972); United States v. Foster, 440 F.2d 390 (7th Cir. 1971); Bonner v. Pate, 430 F.2d 639 (7th Cir. 1970), *cert. denied*, 401 U.S. 915 (1970).

matter of legislative grace.[37] There was no recognized right to a judicial determination of probable cause.[38] However, at the 1970 Illinois Constitutional Convention, the seeds were sown which eventually raised the preliminary hearing to constitutional status.[39] The minutes of the convention reveal that the preliminary hearing section of the constitution was a direct result of the Bill of Rights Committee's cognizance of the grand jury's shortcomings.[40]

Although acutely aware of its criticisms, the Bill of Rights Committee again voted to retain the grand jury indictment as one method of initiating felony prosecutions. The committee felt that the investigatory powers of the grand jury contributed a meaningful service to the community, but noted its indictment process to be of marginal utility.[41] Consequently, in an effort to placate and compromise the issue, a preliminary hearing section was proposed. Designed to cure the vices while retaining the virtues of the grand jury,[42] this section provides, as of right, for an alternative method of initiating criminal prosecutions. However, it may be more accurate to characterize one's right to a judicial determination of probable cause in Illinois as illusory.

WORKING RELATIONSHIPS—STATE OF THE ART

Art. I, sec. 7, cl. 2 of the Illinois Constitution provides: "No person shall be held to answer for a crime punishable by death or by imprisonment in the penitentiary unless *either* the initial charge has been brought by indictment of a grand jury *or* the

37. The 1965 edition of the Illinois revised statutes provided for a limited use of the preliminary hearing. A person arrested, with or without a warrant, was to be brought before a judge and given a preliminary hearing to establish probable cause only if the judge was without jurisdiction to hear the case. ILL. REV. STAT. ch. 38, § 109-1, 3 (1965).

38. The limited statutory provisions for a preliminary hearing did not spark adoption of the procedure as a matter of "right." Robinson, *supra* note 35, at 937. *See also* People v. Bonner, 37 Ill. 2d 553, 229 N.E.2d 527 (1967); People v. Petruso, 35 Ill. 2d 578, 221 N.E.2d 276 (1966).

39. When the 1970 Illinois Constitution was ratified, the preliminary hearing was elevated to a constitutionally guaranteed right, presumably on a par with the grand jury indictment. ILL. CONST. art. I, § 7.

40. 3 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF ILLINOIS 1970, at 1454 (1970). [hereinafter cited as PROCEEDINGS]. Committee members considering abolishing the grand jury indictment were influenced by the fact that an indictment often represents no more than the whim of the prosecutor. Since the grand jury hears one side of the evidence, an indictment is automatic. *See generally* Stern, *Seeking a Rational Determination of Probable Cause*, 24 DE PAUL L. REV. 559 (1975). [hereinafter cited as Stern].

41. 6 PROCEEDINGS *supra* note 40, at 1439.

42. The biggest objection to the grand jury procedure was the returning of an indictment solely on State's evidence. Stern, *supra* note 40, at 560-62.

person has been given a prompt preliminary hearing to establish probable cause."[43] A fair reading of this provision indicates that there are two ways in which one could be held to answer for a felony in Illinois. First, if the grand jury, by utilizing its investigatory powers, initiates the prosecution by indictment. Or, in the alternative, if after arrest the accused is given a prompt preliminary hearing to determine probable cause. The disjunctive wording of the section lends itself to one and only one reasonable interpretation, that the two procedures were intended to be mutually exclusive. Indeed, such an interpretation has been ascribed to this section by many commentators.[44]

The pivotal language in the section is the reference to the "initial charge." The framers intended that where the initial charge results from an arrest, the accused has a right to be formally charged by a judge sitting at a prompt preliminary hearing.[45] On the other hand, where the charge results from a grand

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43. ILL. CONST. art. I §7 cl. 2 (emphasis added).

44. Herman and Whalen, *Constitutional Commentary, S.H.A. Const. of 1970.* In reference to art. I § 7 the work states:

> [I]n cases where the prosecutor obtains a grand jury indictment prior to the defendant being taken into custody, there is no Constitutional requirement for a preliminary hearing because the issue of probable cause will have been determined by the grand jury in deciding to indict. These cases are probably the exception. Usually the "initial charge" is made by an arresting officer rather than a grand jury. In such cases the person would be entitled to a prompt preliminary hearing unless it was understandingly waived.

Id. at 372. *See also* Stern, *supra* note 40, at 574-75.

45. The argument against holding an accused without a formal charge following a determination of probable cause is that such detention may violate his fourth and fourteenth amendment right to be free from unreasonable search and seizure. This logically flows from the well established principle that an "arrest" with or without a warrant is legal only if probable cause to make the arrest exists. United States v. Radford, 452 F.2d 332 (7th Cir. 1971); D'Agostino v. State, 310 So. 2d 12 (Fla. 1975); Kansas City v. Fulton, 533 S.W.2d 677 (Mo. 1976); Lurie v. Kings County, 288 N.Y.S.2d 256, 56 Misc. 2d 68 (1968). Courts are careful to distinguish between an arrest and a temporary detention which may be made without a showing of probable cause. Terry v. Ohio, 392 U.S. 1 (1968). In California, to justify a temporary detention, the officer involved must be able to point to specific facts which, along with rational inferences, reasonably warrant the action. Anderson v. Superior Court for County of Los Angeles, 88 Cal. Rptr. 617 9 Cal. App. 3d 851 (1970). But despite this careful articulation, once an arrest is made, wholly on the presumption that it was made with probable cause, Illinois courts have tolerated long delays between arrest and indictment. People v. Hansaker, 23 Ill. App. 3d 55, 318 N.E.2d 737 (1974) (delay of 48 days); People v. Williams, 19 Ill. App. 3d 136, 310 N.E.2d 666 (1974) (delay of 17 days); People v. Savage, 12 Ill. App. 3d 734, 298 N.E.2d 758 (1973) (delay of 22 days). The fact that an indictment is ultimately returned has a settling effect, but what would happen if after 48 days of confinement the grand jury found no probable cause to indict? Illinois courts have never faced this problem because the indictment is inevitable. Stern, *supra* note 40; W. Coates, *Grand Jury the Prosecutor's Puppet. Wasteful nonsense of criminal jurisprudence*, 33 PENN. BAQ 311 (1962); Calkins, *supra* note 2. In 1973 Cook County grand

jury investigation, the determination of probable cause must antedate any arrest by first securing an indictment.[46] Here, the initial charge of arrest reflects the formal charge of the indictment. In this way the delegates sought to protect accused felons from a denial of due process through confinement without a formal charge. Since there is no right to trial until a formal charge has been filed,[47] without a preliminary hearing, an innocent bystander mistakenly arrested could spend considerable time in jail if there were no grand jury sitting to indict him.[48]

At the convention, Delegate William Jaskula proposed a change in the wording of section 7 that would have substituted "unless a true bill has been voted by the grand jury" for "unless

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juries returned a verdict of no indictment in less than four percent of their cases. Chicago Tribune, July 23, 1974, at 7, col. 3. Even more startling is the fact that the Fifth Appellate District in Illinois has recognized a violation of at least the state constitution: "There is no question that a delay of four months from the defendant's arrest to his trial without a preliminary hearing, even though there was a grand jury indictment in the interim violated a constitutionally given right." People v. Sanders, 36 Ill. App. 3d 518, 344 N.E.2d 479 (1976). However, the court felt that the Illinois Supreme Court decisions foreclosed reversal as a remedy. *Id.* at 520-21, 344 N.E.2d at 481. *See also* People v. Todd, 34 Ill. App. 3d 844, 340 N.E.2d 669 (1976). *But see* People v. Kirkley, 60 Ill. App. 3d 746, 377 N.E.2d 540 (1978) (delay of 176 days between arrest and subsequent indictment violated defendants' constitutional rights *and* required reversal of their convictions).

46. The two systems were designed to complement each other. If the indictment preceded arrest, the determination of probable cause was subject to review at a preliminary hearing. If arrest preceded indictment, the preliminary hearing was available to determine probable cause. 6 PROCEEDINGS *supra* note 40, at 76. But a finding of no probable cause did not prevent the prosecutor from seeking an indictment if new or additional evidence was produced. *See* 3 PROCEEDINGS *supra* note 40, at 1455. When a judge, following arrest, enters a finding of probable cause thereby establishing the "lawfulness" of the detention, it would seem the grand jury is bound to return an indictment. An Illinois statute required all felony prosecutions to be by indictment of a grand jury. ILL. REV. STAT. ch. 38, § 111-2 (1971). Therefore, unless the jury was bound to indict, the accused would be legally held in custody with no access to a trial. Presumably his confinement would be indefinite. People v. Hendrix, 54 Ill. 2d 165, 169, 295 N.E.2d 724, 726 (1973). Note, however, that Illinois law also provides a right for every person in "custody" to have a speedy trial. ILL. REV. STAT. ch. 38, § 103-5 (1977).

47. According to Illinois statute, all felony prosecutions must be initiated by indictment or information. ILL. REV. STAT. ch. 38, § 111-2 (1977). Courts have held this means there is no right to a trial in Illinois unless the statutory requirement is met. People v. Hendrix, 54 Ill. 2d 165, 295 N.E.2d 724 (1973); People v. Moore, 28 Ill. App. 3d 1085, 329 N.E.2d 893 (1975). Other jurisdictions are in accord. State v. Granberry, 530 S.W.2d 714 (Mo. 1975); Box v. State, 241 So. 2d 158 (Miss. 1970); Commonwealth v. Diaz, 235 Pa. 352, 340 A.2d 559 (1975); Simpson v. Cahn, 307 N.Y.S.2d 581, 33 A.D. 790 (1969).

48. The problem of an accused sitting in jail without a formal charge and no right to trial becomes acute in rural areas where grand juries sit at sporadic intervals. ILL. REV. STAT. ch. 38, § 112-3 (1977). Under Illinois law, it is conceivable that in a county whose population is less than one million, a grand jury may *never* be called since the power to convene the body lies only with the judge or state's attorney. *Id.*

either the initial charge has been brought by . . . a grand jury."[49] Opposing this proposed change, Delegate Bernard Weisberg observed: "That would mean that a preliminary hearing right could be easily defeated whenever a prosecutor chose to do so by simply postponing a preliminary hearing until he obtains a grand jury indictment."[50] Delegate Weisberg was concerned that deleting reference to the "initial charge" would frustrate the attempt to provide for a preliminary hearing as a matter of right. The other delegates agreed, and Delegate Jaskula's proposed change was defeated.

These records vividly display the delegates' concern for insuring the integrity of the preliminary hearing. However, Illinois courts have chosen to ignore the commentators and the convention debates. In *People v. Hendrix*,[51] the original charge was brought by complaint,[52] and notwithstanding his arrest, the defendant was subsequently indicted without being afforded a preliminary hearing. The Illinois Supreme Court, relying on a statutory provision requiring felony prosecutions to be by indictment,[53] found defendant's assertion of a constitutional right to a preliminary hearing "preposterous." Justice Goldenhersh stated in his concurring opinion that the purpose of Art. I, sec. 7, is fulfilled so long as probable cause is determined promptly *either* by grand jury indictment *or* appearance before a judge sitting at a preliminary hearing.[54]

Before paragraph two of Art. I, sec. 7, became part of the constitution, Illinois law was well settled on the proposition that a finding of no probable cause at a preliminary hearing was not binding on the grand jury.[55] Since the preliminary hearing was a matter of legislative grace, its determination of probable cause was not considered conclusive. Thus, although a judicial officer at an adversary proceeding[56] had found that there was no reason

49. 3 PROCEEDINGS *supra* note 40, at 1469.

50. *Id.*

51. 54 Ill. 2d 165, 295 N.E.2d 724 (1973).

52. A complaint is a charge, made under oath, of the commission of a crime or offense. 21 AM. JUR. 2d *Criminal Law* § 441; ILL. REV. STAT. ch. 38, § 102-9 (1977). In Illinois, only those crimes which are not deemed to be felonies may be prosecuted by a complaint. ILL. REV. STAT. ch. 38, § 111-2 (1977).

53. People v. Hendrix, 54 Ill. 2d 165, 168, 295 N.E.2d 724, 726 (1973).

54. *Id.* at 170, 295 N.E.2d at 727.

55. The fact that a judge sitting at a preliminary hearing did not find probable cause did not prevent the prosecutor from securing an indictment. Bonner v. Pate, 430 F.2d 639 7th Cir. 1970 *cert. denied*, 401 U.S. 915 (1970); People v. Bonner, 37 Ill. 2d 553, 229 N.E.2d 527 (1967); People v. Morris, 30 Ill. 2d 406, 197 N.E.2d 433 (1964); People v. Jones, 9 Ill. 2d 481, 138 N.E.2d 522 (1957); People v. Rinks, 80 Ill. App. 2d 152, 224 N.E.2d 29 (1967); People v. Campbell, 49 Ill. App. 2d 269, 200 N.E.2d 72 (1964).

56. This result is disturbing since a preliminary hearing more closely

sufficient at law to believe the accused had committed a crime, the prosecutor was free to take his carefully selected evidence to the grand jury and procure an indictment.[57] However, by raising the preliminary hearing to constitutional status, the convention delegates seriously questioned a sizeable body of law.

As a result, the issue of "conclusiveness" was meaningfully presented in *People v. Kent*.[58] In *Kent* a grand jury returned an indictment against the defendant, predicated upon the same evidence with which a judge had previously entered a finding of no probable cause. At trial, defendant's motion to dismiss the indictment was granted on the premise that a judicial determination of no probable cause was constitutionally binding on the grand jury. In reversing the trial court's dismissal, the Illinois Supreme Court held that Art. I, sec. 7, cl. 2, of the constitution was "not intended to attach finality" to a judicial determination of probable cause.[59] This decision, a logically predictable companion to *Hendrix*, certified the awesome autonomy of the grand jury. Consequently, a prosecutor is still free to appear before a judge at a preliminary hearing, and suffering an adverse result, usher the accused over to the grand jury for indictment.

The People of the State of Illinois v. Franklin Creque

The defendant, Franklin Creque, was arrested and charged with the offenses of attempted murder and aggravated battery against Martha Creque, his estranged wife. A preliminary hearing was held at which direct evidence, including live testimony from defense witnesses, was presented to the court. At the conclusion of the hearing, Judge Maurice Pompey entered a finding of no probable cause as to the charge of attempted murder and probable cause as to the offense of aggravated battery.

Within two weeks thereafter, the Assistant State's Attorney who represented the People at the preliminary hearing appeared before the grand jury and secured an indictment alleging that Franklin Creque committed *both* the offense of attempted murder and of aggravated battery. There is no question but that the evidence submitted to the grand jury was hearsay. Moreover, the Assistant State's Attorney did not advise the grand jury that the testimony they heard was hearsay and therefore inadmissable at trial, nor did he advise them of the existence of direct evidence, or articulate their ability to secure such evi-

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resembles a trial than does the ex parte grand jury indictment. 6 PROCEEDINGS *supra* note 40, at 76.

57. See note 55 *supra*.

58. 54 Ill. 2d 161, 295 N.E.2d 710 (1972).

59. *Id.* at 164, N.E.2d at 712.

dence by subpoena. Furthermore, no explanation was offered by the Assistant State's Attorney to apprise the grand jury of the need for presentation of hearsay rather than direct evidence. Finally, he did not inform the grand jury of the fact, and consequently deprived them of an opportunity to consider, that a judge had entered a finding of no probable cause as to the charge of attempted murder.

Although state circuit court judges rarely deliver written opinions, Judge Strayhorn felt compelled to do so in *Creque*. Granting defendant's motion to dismiss the indictment, Judge Strayhorn narrowly stated the issue before the court as encompassing all the factual elements set out above. So construed, the court found the cumulative effect of those facts to warrant the following order: "[T]o protect the integrity of the judicial process and upon the basis of fundamental fairness and due process the motion of the defendant to dismiss the indictment should be and is hereby sustained and the indictment is hereby dismissed."[60] A case of first impression owing to Judge Strayhorn's wording of the order, the State's appeal was taken directly to the Illinois Supreme Court.[61]

By specifically basing his decision on principles of fundamental fairness and due process, Judge Strayhorn squarely presented only three issues for the supreme court to resolve:

(1) do Illinois courts command the inherent power to supervise grand juries and dismiss their indictments when they fail to conduct themselves within due process requirements of the federal and state constitutions;

(2) to what standard of procedural and substantive due process will the grand jury be held. Or conversely stated, to what extent will an accused be afforded due process safeguards before a grand jury, and;

(3) do the facts of this case violate that standard?

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60. People v. Creque, No. 77-1973, slip op. at 6 (Cir. Ct. Ill. Sept. 29, 1977). There could be no doubt that the trial court's opinion in *Creque* was going to address a due process issue:

> The issue presented is: Does this court have the authority to dismiss an indictment based solely on hearsay testimony wherein the prosecution does not offer any reasons for not presenting direct testimony nor the necessity for it to present only hearsay evidence and where the grand jury is not advised of the existence of direct evidence nor its power to secure the presence of eye-witnesses before it, thru the use of the grand jury subpoena, nor is the grand jury advised that a judge, after a preliminary hearing in which direct evidence was presented found no probable cause?

Id. at 2.

61. Direct appeal to the Illinois Supreme Court was made possible by a rule providing for such appeal when the public interest requires an expeditious determination of the case. ILL. SUP. CT. RULE 302 (b).

POWER TO REVIEW GRAND JURY PROCEEDINGS

On the federal level, whether grand jury proceedings are subject to judicial review would appear to be a fundamental question answered in the affirmative by *Marbury v. Madison*[62] and its progeny.[63] The Supreme Court has consistently held that it possesses inherent power to review actions taken by both the executive and legislative branches.[64] That this power exists has become so widely accepted it ceases to be an issue in most cases brought before the court.[65] Thus, it necessarily follows

62. 5 U.S. (1 Cranch) 137 (1803). This citation, committed to memory by countless students of Constitutional law, is relied on for its dicta, not its holding. The great Chief Justice Marshall's opinion held quite simply that the Court was without jurisdiction to hear a petition for mandamus since Congress had repealed the statute which had previously allowed the Court to hear such cases. However, Marshall went on to express his belief that the Court could act as the final arbiter with respect to the other branches when their acts interfere with individual rights in violation of the Constitution.

63. The idea of the Supreme Court holding the reins of the Constitution did not meet with the Jeffersonians' approval. Judicial review by the Court has therefore been the topic of endless debate. Classic statements viewing judicial review as undemocratic are found in: Commanger, MAJORITY RULE AND MINORITY RIGHTS (1943); Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). Important defenses of judicial intervention are: C.L. Black Jr., THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY (1960); Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952).

In point of fact, the Court decisions have staked out a wide range of reviewable cases once thought to be purely political, and when the Court has refused to act, its refusal is grounded more in its own policy than any supposed lack of authority. For an example of the Court prying into the once thought sacred chambers of Congress, see *Powell v. McCormack*, 395 U.S. 486 (1969).

64. It would be impossible to list every case in which the Supreme Court has either expressly or impliedly asserted its authority to review the coordinate branches of federal government. However, a particularly prolific source of decisions dealing with the subject has been commerce legislation during the New Deal era. *See e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936); Shechter Poultry Corp. v. United States, 295 U.S. 495 (1935). The history surrounding these cases not only illustrates the point but provides enjoyable reading as well.

The executive branch has enjoyed comparative freedom and the President's desk has been a veritable sanctuary. But when public pressure drives the Court into action, not much escapes its purview. In *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), the Court found that the Presidential Recordings and Materials Preservation Act of 1974 was constitutional and that President Nixon could not act contrary to that law. The effect of this decision was to place much of the President's private materials into the public domain. By sanctioning an invasion of the Oval Office, the Court displayed the extent of its power.

65. Today, judicial review surfaces as a real issue primarily in those cases where the Court is asked to pass upon enactments of state legislatures. The issue becomes critical when the state has acted in reliance on its strongest power, the police power. *E.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (ban on contraceptives). But even here, the power to review is assumed by the fact that the Court renders an opinion on the merits. If it

with syllogistic precision, that if courts can review acts taken by bodies whose independence is secured by constitutional mandate,[66] they have the power to review acts done by agents or appendages of those bodies. The power to review cannot be destroyed by delegating the authority to act.

However, federal courts cannot agree on the scope of their power to review grand jury proceedings.[67] This result may be due to an inexplicable propensity to explore the nature and origin of the grand jury at almost every opportunity. Beyond general agreement that it is not a "tool of the prosecutor,"[68] courts have thought the grand jury to be either an agent of the court,[69] executive,[70] legislative branch,[71] or an independent body responsible to *all* branches of government.[72] But although inces-

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upholds the state law, the issue is given at least a cursory treatment. *See also* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (exercise of discretion in a zoning ordinance is a legislative not a judicial function). However, the Court's power borders on being "oppressive" when state legislation concerning desegregation is under attack. *See* Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) (the Court dictated to the state legislatures the ground rules for legislation required to effectuate desegregation of public schools).

66. The structure of our Constitution clearly indicates that the framers intended each of the three branches to enjoy autonomy with respect to their delegated powers. However, even the separation of those powers has been at issue before the Court. Cases arise when one branch of government attempts to delegate some of its power to another. Usually successful, an attempt at such delegation will nonetheless command great attention from the Court when called on to review it. *See* United States v. Curtiss-Wright, 299 U.S. 304 (1936). The issue becomes intriguing when an act by one branch attempts to delegate authority outside the coordinate branches to a territory controlled by the United States. *See* Cincinnati Soap Co. v. United States, 301 U.S. 315, 321 (1937).

67. Viewing the federal grand jury as an agency of the court, the Fifth Circuit Court of Appeals held that the grand jury exercises its powers under the authority and the supervision of the court. United States v. Stevens, 510 F.2d 1101, *rehearing denied*, 512 F.2d 1406 (5th Cir. 1975). But a district court held a grand jury's decision not to bring criminal charges "unreviewable." *In re* Report and Recommendations of June 5, 1972, Grand Jury Concerning Transmission of Evidence to House of Representatives, 370 F. Supp. 1219 (D.D.C. 1974).

68. United States v. Fisher, 445 F.2d 1101 (2d Cir. 1972) (the grand jury is not meant to be the private tool of a prosecutor).

69. The federal grand jury is an arm of the district court through which it derives its power. *In re* Long Visitor, 523 F.2d 443 (8th Cir. 1975); United States v. Campanale, 518 F.2d 352 (9th Cir. 1975) (grand jury is an appendage of the court); Bursey v. United States, 446 F.2d 1059 (9th Cir. 1972) (grand jury is an arm of the judiciary).

70. *In re* Grand Jury Proceedings, 486 F.2d 85 (3rd Cir. 1973) (grand jury is basically a law enforcement agency and is for all practical purposes an investigative and prosecutorial arm of the executive branch of government).

71. United States v. Macklin, 523 F.2d 193 (2d Cir. 1975) (grand jury is a creature of statute).

72. *In re* Dymo Industries, 300 F. Supp. 532 (N.D. Cal. 1969) *aff'd*, United States v. Dymo Industries, 418 F.2d 500 (9th Cir. 1969) *cert. denied*, 397 U.S.

sant, these metaphysical inquiries bear no relation to the issue sought to be resolved. Regardless of its nature, and notwithstanding its origin, the grand jury as an institution is a parasite, not a host, and as such cannot be less prone to review than the source from which its existence is derived, whatever that source may be.[73] A federal grand jury indictment is therefore subject to being held up to the court's constitutional light in the same manner as an act of Congress. But while lip service may be paid to this power, examples of its exercise are rare.[74]

Illinois: The Timid Approach

Prior to 1964, Illinois case law was all but devoid of decisions even remotely resembling *Creque*. In *People v. Blumenfeld*,[75] a 1928 case, the Illinois Supreme Court recognized that the lower courts have, independent of statute, an inherent right to summon or reconvene a grand jury "whenever the ends of justice require it to do so."

Blumenfeld was convicted of robbery in the Circuit Court of McLean County. Upon writ of error, he sought review of the entire record, of which the allegedly defective indictment was only a small part. The court was not asked to review the substance of the proceedings before an admittedly qualified jury, but the propriety of a particular group sitting in that capacity.[76]

Similarly, remarks contained in the often cited case *People*

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932 (1969) (grand jury is not wholly identifiable with any one of the three traditional branches of government).

73. Some courts treat the grand jury as a separate entity unto itself, deriving its power directly from the Constitution. Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973). They postulate the grand jury as interposed by the fifth amendment to afford safeguards against oppressive actions by prosecutors or the court. Gaither v. United States 413 F.2d 1061 (D.C. Cir. 1969).

74. A glaring abuse of the grand jury which resulted in dismissal of an indictment can be found in *Gaither v. United States*, 413 F.2d 1061 (D.C. Cir. 1969). There, a United States Attorney prepared an indictment that was signed by the jury foreman but was never submitted to the entire body. Most cases which address themselves to grand jury conduct do so collaterally, as where a witness before the jury is subsequently tried for perjury. The issue which typically arises in that case is the propriety of the grand jury's questions submitted to the witness during his testimony. United States v. Mancusco, 485 F.2d 175 (2d Cir. 1973); Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972). *See also* United States v. Braniff Airways, Inc., 428 F. Supp. 579 (W.D. Tex. 1977) (the very presence of an unauthorized person before the grand jury is *per se* ground for abating an indictment, without proof of actual prejudice).

75. 330 Ill. 474, 161 N.E. 857 (1928).

76. The defendant's complaint in *Blumenfield* was that a special grand jury, called into session earlier, was reconvened without being resworn by order of court. Defendant contended that this procedure did not comply with the statute so that the jury which indicted him was "illegal." *Id.*

v. Graydon[77] go only to defining the duties and functions of a grand jury. *Graydon*, like *Blumenfeld*, questioned not the procedure but the validity of the grand jury that indicted him. *Graydon*, coming up on a petition for writ of habeas corpus, was actually decided on statutory grounds,[78] rendering references to the power of the grand jury nothing more than dicta.

These two cases fairly represent the extent of litigation in the state until 1964, when section 114-1 of the Code of Criminal Procedure took effect. Its statutory form, set out below,[79] enumerates ten instances when the court may dismiss a criminal charge on defendant's motion. Unfortunately, this legislative laundry list is limited to procedural grounds for dismissal, and does not include any of the catch-all phrases such as "or in any other case that justice requires."[80] Consequently, courts have

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77. 333 Ill. 429, 164 N.E. 832 (1929).

78. In *Graydon*, the court relied on a statute that permitted a special grand jury to be summoned by the court. People v. Graydon, 333 Ill. 429, 435, 164 N.E. 832, 835 (1929). *Graydon* and *Blumenfield* are not cited as exhaustive of judicial commentary on the grand jury, but representative of remarks frequently made as dicta or in casual reference to history. *See also* Boone v. People, 148 Ill. 440, 36 N.E. 99 (1924).

79. The Code of Criminal Procedure provides the following grounds for granting a defendant's motion to dismiss:

(1) The defendant has not been placed on trial in compliance with Section 103-5 of this Code (speedy trial provision, also known as the four term act);

(2) The prosecution of the offense is barred by Sections 3-3 through 3-8 of the "Criminal Code of 1961," approved July 28, 1961, as heretofore and hereafter amended (double jeopardy and statute of limitations bar);

(3) The defendant has received immunity from prosecution for the offense charged;

(4) The indictment was returned by a Grand Jury which was improperly selected and which results in substantial injustice to the defendant;

(5) The indictment was returned by a Grand Jury which acted contrary to Article 112 of this Code and which results in substantial injustice to the defendant (rules governing the calling and impaneling of a grand jury);

(6) The court in which the charge has been filed does not have jurisdiction;

(7) The county is an improper place of trial;

(8) The charge does not state an offense;

(9) The indictment is based solely upon the testimony of an incompetent witness;

(10) The defendant is misnamed in the charge and the misnomer results in substantial injustice to the defendant.

ILL. REV. STAT. ch. 38, § 114-1 (1977) (explanatory parentheticals added).

80. Legislative boiler plate affording a trial court wide latitude in administering the specific provisions of a given rule appear regularly throughout the Code of Criminal Procedure. For example, a court may grant a motion for continuance on grounds not stated in the statute where "the interests of justice so require." ILL. REV. STAT. ch. 38, § 114-4 (d) (1977). The

been hard pressed to justify anything but the mechanical approach of comparing a motion to the "list" and checking off similarities until they are satisfied it qualifies as one, several, or "none of the above" reasons to dismiss the charge.

The first real test of an Illinois court's authority to dismiss an indictment came in *People v. Barksdale*.[81] On December 6, 1963, defendant was indicted for the offense of arson. Ten days later appointed counsel requested that defendant be examined by the court behavior clinic. After several continuances on motion by the defendant, in January of 1964, a jury found the accused incompetent to stand trial. He was committed to a state mental institution, and the pending criminal charge was stricken with leave to reinstate. In December of 1966, three years after his arrest, the arson charge was reinstated and on March 16, 1967 defendant was found competent to stand trial. After various delays, several by defendant's motion, one by the State, and three by agreement, the cause was finally disposed of on June 14, 1968. On that date, no less than five and one-half years after defendant's arrest, the state requested a continuance in order to file an amended list of witnesses. Over State's objection, the trial court granted defendant's motion to dismiss for want of prosecution.[82]

On appeal by the State, section 114-1 of the Code of Criminal Procedure came up for judicial review. After deciding that the facts of this case did not fit any of the pigeon holes provided in the statute, the appellate court summarily rejected defendant's position saying, "[t]he trial court has power to dismiss an indictment prior to trial only for the grounds set forth in section 114-1

court may extend the statutory period in which a defendant must be brought to trial if it finds the state has exercised "due diligence" to obtain evidence material to the case but has been unsuccessful. ILL. REV. STAT. ch. 38, § 103-5 (c) (1977). These phrases which seek to fill in the gaps must be implicit in *all* the sections if the code's stated purpose—insuring fair administration of justice—is to be effectuated. ILL. REV. STAT. ch. 38, § 101-1 (1977).

81. 110 Ill. App. 2d 163, 249 N.E.2d 165 (1969).

82. Dismissal for want of prosecution, and its formal counterpart *nolle prosequi*, are terms of art denoting that for one reason or another the action against the defendant will not proceed. The former is technically applicable only in civil cases where the plaintiff has failed to prosecute his action with due diligence. 27 C.J.S. *Dismissal & Nonsuit* § 65 (1) (1955). The latter is a formal entry upon the record at a criminal trial that the state is not willing to proceed against the defendant. 22A C.J.S. *Criminal Law* § 456 (1955). However, courts ignore the technical distinction and dismiss criminal charges for failure of the state to prosecute with due diligence. People v. Nelson, 18 Ill. App. 3d 628, 310 N.E.2d 174 (1974) (failure of state's witness to appear was grounds for dismissal even though prosecution sought a continuance and wished to proceed); People v. Rinks 80 Ill. App. 2d 152, 224 N.E.2d 29 (1967) (magistrate dismissed criminal charges "for want of prosecution").

of the Code of Criminal Procedure."[83]

Four years later the issue in *Barksdale* was presented again in *People v. Guido*[84] and *People v. Hoover*.[85] In each case, defendant's motion to dismiss for want of prosecution was granted at the trial level. Reversing the decisions below, the appellate court in each instance recited almost verbatim the rhetoric set out in *Barksdale*. After *Hoover*, speculation in the market rose sharply amid rumors that appellate court clerks in Illinois would soon be clamoring for rubber stamps bearing the language of *Barksdale*. Clearly, the trial court's authority with respect to indictments was strictly limited to the four corners of the statute.

But the limitation was eased slightly by the Illinois Supreme Court. In *People v. Lawson*,[86] the court recognized an inherent power to dismiss indictments, informations, or complaints, notwithstanding section 114-1 of the Code of Criminal Procedure, where "due process has clearly been denied." After proclaiming an awareness of the appellate cases holding that the trial court may not dismiss an indictment for any reason other than those given in section 114-1 of the Code, Mr. Justice Clark said:

> [W]e believe that on the basis of the reasoning of our past decisions and that of the appellate courts and on the basis of the reasoning of the United States Supreme Court, we must conclude that a trial court *does* have an inherent authority to dismiss an indictment in a criminal case where there has been a clear denial of due process even though that is not a ground stated in section 114-1.[87]

Lawson seems to have put the trial courts back on the track toward securing due process safeguards for an accused. Its holding is plain, unambiguous, and sufficiently broad to cover many situations which may result in a clear denial of due process. The decision does not purport to be limited to procedural or technical denials of due process, and appears equally applicable where a defendant has simply been deprived of fundamental fairness at any stage in the pretrial process, including indictment by a grand jury.

But remember, *Graydon* and *Blumenfeld* addressed themselves only to whether a trial court could convene a grand jury relying solely on its inherent authority. Further, *Lawson* may be read as speaking only to the power to dismiss a charge for procedural delays assuming it had first emanated from a cogent body. These cases are easily distinguishable from *Creque*,

83. 110 Ill. App. 2d 163, 165, 249 N.E.2d 165, 167 (1969).
84. 11 Ill. App. 3d 1067, 297 N.E.2d 18 (1973).
85. 12 Ill. App. 3d 25, 297 N.E.2d 400 (1973).
86. 67 Ill. 2d 449, 367 N.E.2d 1244 (1977).
87. *Id.* at 455, 367 N.E.2d 1246 (emphasis added).

where the issues of pretrial due process and judicial review are focused in the void between *Blumenfeld* and *Graydon*, squarely on the shoulders of the grand jury. *Creque* lies beyond *Blumenfeld* in that it admits the jury's legitimacy, but stops short of *Lawson* in that it questions not the subsequent use of an indictment, but the propriety of the means employed to secure it. *Creque*, therefore, tests the range of the power recognized in *Lawson* to determine if that power extends into the grand jury room itself.

PRETRIAL DUE PROCESS—FORMULATING A STANDARD

The United States Constitution,[88] along with a monumental body of case law highlighted in more recent years by *Miranda v. Arizona*[89] and *Mapp v. Ohio*,[90] espouse the principles of procedural due process.[91] Though this concept fluctuates in scope, its underlying premise remains firmly intact. From the moment the criminal process begins the prosecution must proceed in a manner which reflects the accepted maxims applicable to each phase of that process.[92] This reasoning is admittedly circular and provides little in the way of definition. It does, however, elucidate the fact that due process is relative, not only to changing values in substantive law, but to the particular situations being evaluated as well.[93]

88. Two of the most fruitful sources of Constitutional litigation are the fifth and fourteenth amendments.

89. 384 U.S. 436 (1966). *Miranda*, one of the most significant decisions toward protecting procedural due process for accused persons, dictated that prior to any questioning, certain rights must be made known to the accused. The sanction imposed for failure to comply was that any evidence or confession obtained through questioning could not be used against the individual at trial.

90. 367 U.S. 643 (1961). Though the incorporation controversy—whether the fourteenth amendment binds the states to follow the first ten Amendments—has never been fully resolved, *Mapp* took a step toward an affirmative answer. The Court held that fourth amendment protection against unreasonable searches and seizures applies to the states through the fourteenth, and any evidence illegally seized will be excluded from trial in state court.

91. A list of definitions encompassing all those things which are or could be considered within the notion of due process would approach infinite length. The concept's essential elements include notice and an opportunity to be heard. Pennoyer v. Neff, 95 U.S. 714 (1877); Dimke v. Finke, 209 Minn. 29, 295 N.W. 75 (1940); Di Maio v. Reid, 132 N.J.L. 17, 37 A.2d 829 (1944). But in its broadest sense, the term means simply that law shall not be unreasonable, arbitrary, or capricious, and that some real and substantial relationship exist between the end sought and the means employed to achieve that end. Nebbia v. People of the State of New York, 291 U.S. 502 (1934); North American Co. v. Securities and Exchange Commission, 133 F.2d 148 (2nd Cir. 1943).

92. See note 11 *supra*.

93. *Id.* All of the cases dealing with the fifth and fourteenth amend-

Historically, pretrial activity was not regarded as a critical stage of a criminal prosecution since jeopardy did not attach until trial.[94] The purpose of pretrial proceedings was thought to be primarily ministerial. In fact, the atmosphere surrounding these affairs more closely resembles the trading floor of the New York Stock Exchange than a hall of justice. This is not to suggest that a conscious effort exists to subvert our judicial system, but merely points out that the type of activity outlined in *Creque* has become a widely accepted reality. Therefore, denying an accused otherwise fundamental rights during grand jury proceedings has become part of the substantive law. No one can seriously challenge the grand jury indictment on due process grounds so long as its classification as a "noncritical" stage in the criminal process remains viable.[95] By necessary implication, and to preserve the logic of the model, courts have likewise classified the preliminary hearing a "noncritical" component in felony prosecutions.[96]

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ments seem to agree that due process of law can only be determined on a case-by-case basis. Conduct in one situation which violates fundamental principles of justice may be excused by the facts of another. Mathews v. Eldridge, 424 U.S. 319 (1976); Morrissey v. Brewer, 408 U.S. 471 (1972); Boykins v. Fairfield, 492 F.2d 697 (5th Cir. 1974), *cert. denied*, 420 U.S. 962 (1974); Scarpa v. United States Bd. of Parole, 477 F.2d 278 (5th Cir. 1973), *vacated*, 414 U.S. 809 (1973); Daby v. American Col. of Surgeons, 468 F.2d 364 (7th Cir. 1972); Howard v. United States, 372 F.2d 294 (9th Cir. 1967), *cert. denied*, 288 U.S. 815 (1967).

94. No jeopardy attaches at a preliminary hearing. United States v. Battisti, 486 F.2d 961 (6th Cir. 1973); United States v. Dickerson, 271 F.2d 487 (D.C. Cir. 1959); Johnson v. United States, 169 F.2d 769 (D.C. Cir. 1959); *In re* Russell, 115 Cal. Rptr. 511, 524 P.2d 1295 (1974). Jeopardy attaches at trial when the taking of testimony begins. State v. Blackwell, 198 P.2d 280 (Nev. 1948), *rehearing denied*, 200 P.2d 698, *cert. denied*, 336 U.S. 939 (1949); State v. Doyle, 11 Ohio App. 2d 97, 228 N.E.2d 863 (1967). However the exact time when jeopardy attaches is in dispute. State v. Cunningham, 535 P.2d 186 (Mont. 1975) (jeopardy attaches when first witness is sworn); Ochoa v. State, 492 S.W.2d 576 (Tex. 1973) (jeopardy attaches on entering of a plea).

95. State v. Stalling, 25 Conn. Sup. 386, 224 A.2d 718 (1966). *See also* Comm. v. Gibson, 368 Mass. 518, 333 N.E.2d 400 (1975). The grand jury's classification as a noncritical stage in prosecutions, is an inference more than a statement, drawn from the fact that an accused has never possessed the right to counsel during grand jury proceedings. *In re* Lung, 1 Conn. 428 (1815). See note 22 *supra*.

96. Since a preliminary hearing is not a trial, all the procedures for trial need not be employed, but the hearing must nonetheless comport with fundamental notions of fairness. Berger v. Jennings, 110 Ariz. 441, 520 P.2d 313 (1974); People v. Gaines, 53 Mich. App. 443, 220 N.W.2d 76 (1974); State v. Lenahan, 12 Ariz. App. 446, 471 P.2d 748 (1970); State v. Linn, 93 Idaho 430, 462 P.2d 729 (1969). Other courts state the proposition that a preliminary hearing is noncritical. Gerstein v. Pugh, 420 U.S. 103 (1975). Johns v. Pinto, 449 F.2d 613 (3rd Cir. 1971); Walker v. Maroney, 313 F. Supp. 237, *aff'd* 444 F.2d 47 (3rd Cir. 1971); Donlavey v. Smith, 426 F.2d 800 (5th Cir. 1970); Walker v. Wainright, 409 F.2d 1311, *cert. denied*, 396 U.S. 894 (1969); Budd v. Rundle, 267 F. Supp. 49, *aff'd*, 398 F.2d 806 (3rd Cir. 1968).

However, it is quite frankly inconceivable that a defendant accused of a felony would be in accord with the assertion that the pretrial stage of *his* prosecution was "noncritical"—particularly when the initial charge is by arrest and the individual is unable to post bond. In that case, a determination of probable cause will result in his immediate incarceration. In *Coleman v. Alabama*,[97] the United States Supreme Court took cognizance of these facts when it vacated the convictions of Alabama indigent defendants who had been shuffled through that state's pretrial process. The Court, in holding that an accused is entitled to the aid of counsel at a preliminary hearing, concluded that this proceeding was a critical stage of the Alabama criminal justice system.[98]

Within three months the Illinois Supreme Court reversed its earlier position by adopting the holding of *Coleman*. The court, in *People v. Adams*,[99] recognizing identity of purpose between Illinois' preliminary hearing and the process at work in Alabama, felt compelled to follow the teaching of *Coleman*. But while this decision kept Illinois in step with the United States Supreme Court, it unwittingly struck a local note of discord. After *Adams*, Illinois found itself in the curious position of operating two pretrial charades, each with its own set of rules. The grand jury retained its autonomy while the preliminary hearing became bound to a higher standard of procedural due process. Assuming that the primary function of both the grand jury indictment and the preliminary hearing is to determine probable cause, what rule of substantive law justifies the distinction? Is there not a denial of due process being built into the grand jury indictment by definition, not to mention a flagrant violation of the fourteenth amendment's equal protection clause?[100]

The distinction has been dealt with by several states that have abandoned reliance on the grand jury indictment as the sole means of initiating a felony prosecution.[101] Others have

97. 399 U.S. 1 (1970).

98. *Id.* at 9-10.

99. 46 Ill. 2d 198, 263 N.E.2d 488 (1970).

100. The fourteenth amendment to the United States Constitution provides in relevant part: "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. This section has been taken to mean that any variation in the application of a law must bear a rational relationship to the achievement of a legitimate goal. Police Dept. of the City of Chicago v. Mosley, 408 U.S. 92 (1972); Perry v. Grenada Municipal Separate School Dist., 300 F. Supp. 748 (N.D. Miss. 1969). *See also* Johnson v. Superior Court, 15 Cal. 3d 248, 539 P.2d 792, 124 Cal. Rptr. 32 (1975) (Wright, C.J., concurring).

101. In the following states felony prosecutions can be initiated either by indictment or the less formal information; Ala., Ariz., Ark., Cal., Colo., Conn., Fla., Idaho, Iowa, Kan., La., Md., Mich., Mo., Mont., Neb., N.M., N.Y.,

"evened the score" by extending certain rights to an accused when appearing before a grand jury.[102] But Illinois continues to rationalize rather than reason. One commentator offered as justification that the grand jury indictment is accusatory while the preliminary hearing is merely custodial. Therefore, since the two bodies perform different functions, any procedural inconsistencies are irrelevant to the rights of an accused.[103] Though this rationale may serve as a haven for courts determined to preserve the autonomy of the grand jury, upon closer examination the chasmic distinction suggested quickly evaporates.

In order for a judge, sitting at a preliminary hearing, to enter an order binding the accused over to the grand jury he must find probable cause to hold the defendant. Similarly, before the grand jury can indict an individual bound over to them, they must also find probable cause, this time to formally charge the accused. But since the power to act in each case is derived from a similar finding, all things being otherwise equal, inconsistent results are possible only when different standards of probable cause are applied. It necessarily follows that two standards aimed at gauging the same thing must be related as a matter of degree. However, to sanction two standards for determining probable cause runs the risk of placing wholesale police powers in the hands of the prosecutor. If the lower standard becomes synonymous with capricious hit-or-miss accusations, we have taken a substantial step backward to the tactics of the star chamber.[104]

N.D., Okla., S.D., Utah, Vt., Wash., Wis., and Wyoming. Even Illinois has provided for prosecution by information, but this has had no real impact on the operation of the criminal justice system. The Illinois statute requires that when the prosecution is by information, a preliminary hearing be held to determine probable cause. Sounds good so far, but remember that a judge's finding of no probable cause is not binding on the grand jury. Even if a defendant is released on the information, the prosecutor can still seek an indictment for the same offense . . . Catch-22? ILL. REV. STAT. ch. 38, § 111-2 (1977). This feature seems to distinguish Illinois from other jurisdictions where a not so cavalier attitude is exhibited toward proceedings following dismissal by a judge sitting at a preliminary hearing. Skinner v. Superior Court in and for the County of Prima, 106 Ariz. 287, 475 P.2d 271 (1970) (subsequent indictment allowed after offering additional evidence); Wilson v. Garrett, 104 Ariz. 57, 448 P.2d 857 (1969) (prosecution cannot "shuttle" a defendant from one magistrate to another simply because he is unhappy with the result); Stockwell v. State, 98 Idaho 797, 573 P.2d 116 (1977) (procedures are not so formal at a preliminary hearing to prohibit reopening them to admit additional evidence); Stone v. Hope, 488 P.2d 616 (Okl. Cir. 1971) (state *must* have additional evidence before proceeding against the accused on the same charge).

102. See note 114 *infra*.

103. Robinson, *supra* note 12, at 945.

104. During the reign of Henry VIII, the star chamber became infamous for severely punishing violators of the king's arbitrary proclamations. It de-

Probable cause must remain a constant in the equation. It would be a sad commentary on the state of our judicial system if the substance in a concept could be shaped to fit the form of its administration. Further, any distinction between a judicial determination of probable cause and indictment by the grand jury must be clerical only. A functional difference would interfere with an accused's right to a speedy trial[105] and relegate the preliminary hearing to a secondary role in derogation of the Illinois Constitution.[106]

Finally, maintaining these two pretrial devices on discoordinate procedural planes defies all but the most narrow logic. It is reasonable to conclude that a judge, bound by the rules of evidence and able to hear cross examination, will be less likely to find probable cause from a given set of evidence than an unrestricted grand jury, even if the same standard of probable cause is applied. But which procedure more closely resembles the inevitable atmosphere of trial? There seems to be no legitimate reason for allowing a prosecutor, absent a showing of additional evidence,[107] to secure an indictment after suffering an adverse result at a preliminary hearing. A new breed of justice is being served by forcing an accused to prepare for a trial when it has been made obvious that the state cannot make out a prima facie case against him.[108] To the extent that this activity results in confinement, an accused is most certainly deprived of his liberty without due process of law.[109]

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generated, grew odious to the nation, and was finally abolished. 4 Steph. Comm. 310; BLACKS LAW DICTIONARY 1577 (4th ed. 1968).

105. It is generally recognized that a defendant has a right to a speedy trial. Klopfer v. State, 386 U.S. 213 (1967). Prince v. State, 507 F.2d 693 (5th Cir. 1976); McIntyre v. Pearson, 435 F.2d 333 (8th Cir. 1970), *cert. denied*, 402 U.S. 947 (1970). In Illinois, statute provides that a defendant must be brought to trial within 120 days of his being taken into custody. ILL. REV. STAT. ch. 38, § 103-5 (1977).

106. The preliminary hearing is presumably on a par with the grand jury indictment. ILL. CONST. art. I § 7 cl. 2.

107. Even the delegates to the 1970 convention agreed that when the prosecutor failed to establish probable cause at a preliminary hearing, he was free to seek an indictment based on new or additional evidence. *See* 3 PROCEEDINGS *supra* note 40, at 1455.

108. The burden of proof in a criminal case is "beyond a reasonable doubt." 22A C.J.S. *Criminal Law* § 566 (1955). If the state cannot establish probable cause, or a reasonable belief in defendant's guilt at the pretrial stage, it appears incandescent that they will not be able to meet their burden at trial. *Id.*

109. Once a judicial determination of no probable cause is entered upon the record, it would appear that any pretrial confinement resulting from a subsequent indictment has no foundation in law notwithstanding the indictment. That this assertion has not been accepted by Illinois courts does not render its logic any less accurate. To the extent it is still recognized, Quo Warranto should lie against the grand jury who returns an indictment in such a case. BLACK'S LAW DICTIONARY 1417 (4th ed. 1968).

It would be meaningless to propose specific guidelines of conduct for a procedural due process standard applicable to pretrial proceedings. Yet two simple suggestions seem to resolve the confusion and limit debate. First, the proceedings of both the grand jury and the preliminary hearing must be made complete. They must each be capable of initiating prosecutions upon a finding of probable cause, and absent a change in circumstance sufficient to warrant reconsideration, a finding by one must be binding on the other. Second, whatever constitutional safeguards are to be afforded an accused, they must be the same or substantially similar in each forum. Only by observing these two criteria can any semblance of fairness be attributed to the pretrial process.

CREQUE IN THE ILLINOIS SUPREME COURT

The circuit court judge in *Creque* was of the opinion that the cumulative effect of the proceedings before the grand jury had deprived the defendant of due process, and thus dismissed the indictment.[110] However, the Illinois Supreme Court took an approach to the case which effectively dissipated the strength of defendant's argument.[111] By breaking down the overriding issue of due process into four component parts, the court handily disposed of the case and averted a major policy decision. In its fastidious disposal of each fabricated straw issue, the court was able to point to an ample supply of statutory and case law to support its decision. However, in doing so, the Illinois Supreme Court completely ignored a trend developing in this country to protect the integrity of the judicial process by more closely supervising the performance of the grand jury.

The first issue raised by the Illinois Supreme Court was the propriety of using hearsay evidence to procure an indictment.[112] Unquestionably, an unbroken line of authority in Illinois sanctions this practice.[113] However, instead of dutifully adhering to the principles of *stare decisis*, the court should have seized the opportunity to bring Illinois in line with the ever-increasing

110. People v. Creque, No. 77-1973, slip op. at 6 (Cir. Ct. Ill. Sep. 19, 1977).

111. People v. Creque, 72 Ill. 2d 515, 382 N.E.2d 793 (1978). In the majority opinion, Justice Underwood saw the case as presenting four separate issues, none of which included the issue of due process as presented by Judge Strayhorn in his memorandum opinion.

112. 72 Ill. 2d at 521, 382 N.E.2d at 795 (1978).

113. People v. Hopkins, 53 Ill. 2d 452, 292 N.E.2d 418 (1973); People v. Jones, 19 Ill. 2d 37, 166 N.E.2d 1 (1960); People v. Bissonnette, 20 Ill. App. 3d 970 313 N.E.2d 646 (1974). Moreover, it has also been held that it is proper for the state to present evidence to the grand jury that has been suppressed at the preliminary hearing. People v. Taylor, 124 Ill. App. 2d 168, 260 N.E.2d 347 (1970). *But see* People v. Marotta, 3 Ill. App. 3d 280, 278 N.E.2d 256 (1972).

number of jurisdictions which have sharply limited this procedure.[114]

A fair representative of these jurisdictions is Alaska. Seven years ago in *State v. Burkholder*,[115] the Alaska Supreme Court recognized that the hearsay evidence presented to the grand jury totally lacked probative value. Consequently, they dismissed an indictment predicated solely on hearsay testimony.[116] Shortly thereafter the Alaska Supreme Court adopted Rule 6(r) of the Alaska Rules of Criminal Procedure.[117] In essence this rule provides that hearsay evidence shall not be presented to a grand jury absent compelling justification for its introduction.[118] Thus, if direct witnesses are available, they are required to testify before the grand jury. Certainly this cannot be viewed as unreasonable, and is no more burdensome on the criminal process than calling the investigating officer before the grand jury to summarize the evidence.

In order to lend credence to the continuation of this practice, the Illinois Supreme Court cited *Costello v. United States*.[119] Indeed, in *Costello*, the United States Supreme Court held that an indictment may be based solely on hearsay evidence.[120] Moreover, this principle has been affirmed on subsequent occasions.[121] However, at least one circuit court has eroded this principle somewhat by subjecting it to qualifica-

114. For a complete list of the jurisdictions which do not permit an indictment to be predicated solely on hearsay evidence see Annot., 37 ALR 3d 612 (1971).

115. 491 P.2d 754 (Alaska 1971).

116. *Id.* at 758.

117. Alaska R. Crim. P. 6 (r) provides:

> Evidence which would be legally admissible at trial shall be admissible before the grand jury. In appropriate cases, however, witnesses may be presented to summarize admissible evidence if the admissible evidence will be available at trial. Hearsay evidence shall not be presented to the grand jury absent compelling justification for its introduction. If hearsay evidence is presented to the grand jury, the reasons for its use shall be stated on the record.

For applications of this rule see *State v. Gieffels*, 554 P.2d 460 (Alaska 1976); *Webb v. State*, 527 P.2d 35 (Alaska 1974); *State v. George*, 511 P.2d 1293 (Alaska 1973); *Taggard v. State*, 500 P.2d 238 (Alaska 1972).

118. In *State v. Gieffels*, 554 P.2d 460, 465 (Alaska 1976), the Alaska Supreme Court held that mere expense of transportation for eight witnesses who were out of state when the grand jury met did not make it necessary for a police officer to testify before the grand jury on their behalf. The court went on to say that a reliable determination of probable cause can best be guaranteed when witnesses against an accused appear in person.

119. 350 U.S. 359 (1956).

120. *Id.* at 363.

121. *E.g.*, United States v. Calandra, 414 U.S. 338, 344-45 (1974); United States v. Dionisio, 410 U.S. 1, 15 (1973); Branzburg v. Hayes, 408 U.S. 665, 701 (1972).

tions. In *United States v. Leibowitz*,[122] the Second Circuit stated that indictments based on hearsay evidence will not be dismissed "unless it appears that dismissal is required to protect the integrity of the judicial process."[123] The court went on to say that dismissal should be considered if there is a high probability that with eyewitnesses rather than hearsay testimony the grand jury would not have indicted.[124] Thus, it appears that, hypothetically speaking, if the Second Circuit standard had been applied in *Creque* the indictment would have been dismissed.[125]

The second issue considered by the Illinois Supreme Court was whether the prosecutor's failure to disclose to the grand jury the hearsay nature of the evidence rendered the indictment invalid.[126] The court cited federal cases which acknowledged the prosecutor's failure as a ground for dismissal but quickly distinguished them as standing for the proposition that an indictment may be dismissed only when a grand jury has been misled into thinking that it is hearing direct evidence when it is not.[127] Here again the Illinois Supreme Court demonstrated its propensity to rationalize rather than reason. The majority opinion curiously avoided discussion of federal cases wherein a misleading of the grand jury was not required in order to dismiss an indictment. In *United States v. Gallo*,[128] it was held that the prosecutor is under an affirmative duty to enlighten the grand jury as to the nature of the evidence they are receiving.[129] Prior to *Gallo*, criticism had been leveled at prosecutors who presented hearsay evidence without making it clear to the jurors

122. 420 F.2d 39 (2d Cir. 1969).

123. *Id.* at 42. *See also* United States v. Fernandez, 456 F.2d 638 (2d Cir. 1972); United States v. Gallo, 394 F. Supp. 310 (D. Conn. 1975).

124. 420 F.2d at 42.

125. Furthermore other federal decisions espouse principles which, if applied, would warrant dismissal of the indictment in *Creque*. *See* United States v. Esteppa, 471 F.2d 1132 (2d Cir. 1972); United States v. Andrews, 381 F.2d 377 (2d Cir. 1967), *cert. denied*, 390 U.S. 960 (1968); United States v. Umans, 368 F.2d 725 (2d Cir. 1966); United States v. Gramolini, 301 F. Supp. 39 (D.R.I. 1969).

126. 72 Ill. 2d at 523, 382 N.E.2d at 796 (1978).

127. *Id.* The court cites *United States v. Basturo*, 497 F.2d 781 (9th Cir. 1974) and *United States v. Estepa*, 471 F.2d 1132 (2d Cir. 1972), and contends that the validity of these two cases has been "questioned" by *United States v. Marchand*, 564 F.2d 983, 1001, n. 29 (2d Cir. 1977). However, Justice Underwood fails to point out that in *Marchand* no deception of the grand jury was involved. Furthermore, the court in *Marchland* also concluded that the grand jury would have indicted even if the direct witness would have been called. *Id.*

128. 394 F. Supp. 310 (D. Conn. 1975).

129. *Id.* at 315. *See also* United States v. Leibowitz, 420 F.2d 39 (2d Cir. 1969); United States v. Catino, 403 F.2d 491 (2d Cir. 1968).

that they are receiving "shoddy merchandise."[130] The common theme which runs throughout these decisions is, if direct evidence is readily available, the prosecutor should produce it for the grand jury to evaluate. Indeed, if the historic function of the grand jury is to be preserved—that of a buffer between the overzealous prosecutor and the accused—such a requirement is indispensable.

The third issue raised by the Court in *Creque*—a corollary to the above—was whether a prosecutor must advise the grand jury of its power to secure the presence of direct witnesses by subpoena.[131] So obvious was the resolution of this issue to the Illinois Supreme Court that they disposed of it in one paragraph. The Court simply stated that no statutory duty is imposed on an Illinois prosecutor to do so.[132] Moreover, a prosecutor's task is complete when, pursuant to ch. 38, par. 112-4(b),[133] he advises the grand jurors of their power to subpoena anyone *against whom* the state might seek an indictment. The key words of this statute are "against whom the state might seek an indictment." This statute merely apprises the grand jury of their power to subpoena a potential defendant. It defies reason to believe that it also sufficiently apprises the grand jury of their power to subpoena witnesses to the event. Grand juries in Illinois do in fact possess this power,[134] but from where they learn of it is anyone's guess. Thus it seems that when a prosecutor fulfills his statutory duty in Illinois, he, in effect, misleads the grand jury.[135]

The final issue dealt with by the Court in *Creque* was defendant's contention that a prosecutor must advise a grand jury

130. United States v. Payton, 363 F.2d 996, 1000 (2d Cir. 1966) (Friendly, J., dissenting), *cert. denied*, 385 U.S. 993 (1966).

131. 72 Ill. 2d at 525, 382 N.E.2d at 797 (1978).

132. *Id.*

133. The first paragraph of ILL. REV. STAT. ch. 38, § 112-4 (b) (1977) provides:

> The Grand Jury has the right to subpoena and question any person against whom the State's Attorney is seeking a Bill of Indictment. Prior to the commencement of its duties and, again, before the consideration of each matter or charge before the Grand Jury, the State's Attorney shall inform the Grand Jury of this right.

134. In *People v. Bissonnette*, 20 Ill. App. 3d 970, 313 N.E.2d 646 (1974), the Second District held that a grand jury has the power to require the presence of witnesses if it feels it needs additional or more complete information. However, it is preposterous to believe that the mere existence of case law sufficiently apprises the grand jury of this power.

135. One can only speculate as to why all the powers of the grand jury are not codified, but it would not be unreasonable to suspect that the Illinois legislature is desirous of leaving prosecutorial powers undiluted. Fair play and common sense call for the Illinois Supreme Court to rectify this unhealthy situation.

when a judge at a preliminary hearing finds no probable cause.[136] Disposal of this issue was again accomplished by a cursory reference to prior Illinois authority to the effect that no such duty exists.[137] Thus, the justices clearly conveyed the message that they had no desire to delve into the correctness of their prior decisions. The California Supreme Court offers an interesting study in contrast.

In 1975, the California Supreme Court was confronted with a case remarkably similar to *Creque*. In *Johnson v. Superior Court*,[138] a magistrate entered a finding of no probable cause after a preliminary hearing in which direct evidence had been adduced. Undaunted, the district attorney proceeded to present hearsay evidence to the grand jury which obediently returned an indictment. The defendant challenged the indictment on the ground that the district attorney had failed to apprise the grand jurors of the magistrate's finding of no probable cause. The California Supreme Court sustained the defendant's position basing its decision on a state statute.[139] They concluded that the district attorney must advise the grand jury as to the nature and existence of any exculpatory evidence known to him.[140] A close examination of the statute relied upon by the California court reveals, however, that its only clear mandate requires the production of state's evidence. Analogously, ch. 38, sec. 112-4(a)[141] of the Illinois revised statutes, also mandates the grand jury to hear "all evidence presented by the State's Attorney." Consequently, in *Johnson* a strained interpretation of the California statute was necessary in order to reach the desired result. Furthermore, two justices who concurred in the result were also

136. 72 Ill. 2d at 525, 382 N.E.2d at 797 (1978).

137. A close reading of the Supreme Court opinion in *Creque* indicates that the majority never dealt with this issue. Justice Underwood framed it but then proceeded to discuss whether a finding of no probable cause at a preliminary hearing is binding on the grand jury. Id. at 525, 382 N.E.2d at 797.

138. 15 Cal. 3d 248, 539 P.2d 792, 124 Cal. Rptr. 32 (1975). For a thorough analysis of this case *see generally* Haigh, *The Future of the Grand Jury Indictment in California*, 3 PEPPERDINE L. REV. 365 (1976).

139. Cal. Penal Code § 939.7 (West 1970) provides:

> The grand jury is not required to hear evidence for the defendant, but it shall weigh all the evidence submitted to it, and when it has reason to believe that other evidence within its reach will explain away the charge, it shall order the evidence to be produced, and for that purpose may require the district attorney to issue process for the witnesses.

Clearly, this statute does not expressly obligate the district attorney to advise the grand jury of any exculpatory evidence known to him. Yet the California Court, reluctant to reach the constitutional issues raised by the case, was moved by a sense of fairness to read such an obligation into the statute.

140. 15 Cal. 3d at 250, 539 P.2d at 794, 124 Cal. Rptr. at 33.

141. ILL. REV. STAT. ch. 38, § 112-4 (a) provides: "The Grand Jury shall hear all evidence presented by the State's Attorney."

quite willing to reach the constitutional issues raised by the case.[142] These justices were prepared to hold that the indicting function of the grand jury, as exercised in California, violates both equal protection and due process standards.

As the above discussion demonstrates, standing alone, any one of the actions taken by the prosecutor in *Creque* may have resulted in dismissal of the indictment in a number of United States jurisdictions. Yet even the cumulative effect of the prosecutor's actions was insufficient to persuade the Illinois Supreme Court that the defendant's due process rights had been violated. The reluctance of the supreme court to analyze grand jury proceedings in light of modern due process requirements reflects an unwillingness to withdraw constitutional support for a venerable institution. However, *Creque* may even represent a retreat from a prior position put forth by the Illinois Supreme Court.

Conspicuous by its absence in the *Creque* opinion was any reference to *People v. Sears*.[143] In *Sears*, the Illinois Supreme Court stated that Illinois courts have a supervisory duty to see that the grand jury and its processes are not abused.[144] The court went on to say that supervision must be exercised when a failure to do so would effect a deprivation of due process or result in a miscarriage of justice.[145] It is difficult to believe that the processes of the grand jury were not abused in *Creque*. Moreover, the court came prayerfully close to admitting as much. In

142. Justice Torbiner recognized that the *Johnson* case raised serious constitutional questions, but chose to reserve their determination for a case wherein the issues were well-delineated. 15 Cal. 3d at 270, 539 P.2d at 807, 124 Cal. Rptr. at 47. However, Chief Justice Wright and Justice Mosk contrasted the different procedures involved when a prosecution is initiated by information and preliminary hearing as opposed to grand jury indictment. They felt that in light of the lower level of procedural safeguards granted an accused in grand jury proceedings, a prosecution by indictment fails to meet due process standards. 15 Cal. 3d at 256-57, 539 P.2d at 797, 124 Cal. Rptr. at 37. If the majority had reached this conclusion, a number of prior California cases would have been implicitly overruled. *E.g.*, People v. Rojas, 2 Cal. App. 3d 767, 82 Cal. Rptr. 862 (1969); People v. Flores, 276 Cal. App. 2d 61, 81 Cal. Rptr. 197 (1969).

143. 49 Ill. 2d 14, 273 N.E.2d 380 (1971).

144. *Id.* at 28, 273 N.E.2d at 392. Indeed, there is Illinois authority which states that a trial judge is responsible for the justice of the judgment that he enters. Freeman v. Chicago Transit Authority, 33 Ill. 2d 103, 106, 210 N.E.2d 191, 194 (1965). If Illinois courts have no power or control over the grand jury, then this responsibility, at least in criminal trials, would be impossible to fulfill.

145. 49 Ill. 2d at 31, 273 N.E.2d at 394. The Court reached this conclusion even though they recognized the importance of preserving the historic independence of the grand jury. Moreover, this view has been expressed in other jurisdictions as well. *See* People v. Ianiello, 21 N.Y.2d 418, 235 N.E.2d 439 (1968) (particular responsibility imposed upon the judiciary to prevent unfairness in grand jury proceedings). *See also In re* National Window Glass Worker, 287 F. Supp. 219, 224 (N.D. Ohio 1922).

response to defendant's assertion of abuse, Justice Underwood restated the age-old adage that the most important protection for the accused in our system of law is a fair trial itself.[146] While this statement ignores reality and is understandably viewed with contempt by many courts and commentators,[147] it also casts serious doubt on the vitality of the court's holding in *Sears*. Consequently, the decision in *Creque* confuses rather that clarifies Illinois law.

CONCLUSION

In *Watts v. Indiana*,[148] Mr. Justice Frankfurter admonished the judiciary that: "there comes a point where a court should not be ignorant as judges of things they know as men." In regard to the determination of probable cause in Illinois, that point has long since been reached. *People v. Creque* presented the supreme court with the opportunity to remedy some of the flagrant abuses which infest grand jury proceedings in Illinois. However, Justice Clark, in his dissenting opinion, was the only member of the court willing to seize this opportunity.[149] Moreover, judicial action was made all the more urgent by the fact that the legislature has declined to exercise its constitutional authority for 108 years.[150] In opting to ignore a situation which cries out for reform, the court once again demonstrated its seemingly inexhaustible desire to preserve an awkward, illogical approach to determining probable cause that makes a mockery of modern concepts of due process. Allowing the indictment process to escape unscathed from the decision in *Creque*, certified the grand jury as an immortal, indestructable barrier to the evolution of the Illinois criminal justice system.

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146. 72 Ill. 2d at 527, 382 N.E.2d at 798.

147. A wrongful indictment is no laughing matter; it often works a grievous irreparable injury to the person indicted. *In re* Fried, 161 F.2d 453 (2d Cir. 1947). People v. Creque, 72 Ill. 2d 515, 382 N.E.2d 793 (1978) (Clark, J., dissenting). *See also* Frank, IF MEN WERE ANGELS (1942); Hall, *Objectives of Criminal Procedural Revision*, 51 YALE L. J. 723, 741 (1942); People v. Sears, 49 Ill. 2d 14, 273 N.E.2d 380 (1971). *See* text accompanying note 26 *supra*.

148. 338 U.S. 49 (1949).

149. 72 Ill. 2d at 528, 382 N.E.2d at 789. Justice Clark is of the opinion that Illinois courts *do* possess the power to dismiss an indictment when there is prosecutorial misconduct before a grand jury.

150. See text accompanying notes 5-6 *supra*.