UIC Law Review

Volume 2 | Issue 2 Article 7

Spring 1969

# Should the Grand Jury Indictment Procedure Be Abolished in Illinois, 2 J. Marshall J. of Prac. & Proc. 348 (1969)

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# SHOULD THE GRAND JURY INDICTMENT PROCEDURE BE ABOLISHED IN ILLINOIS?

## INTRODUCTION

As a procedure for initiating felony prosecutions, the grand jury system has been a fruitful topic of comment by legal writers, who have reached opposing conclusions with regard to the utility of this institution with characterizations of rubberstamp[1] to protector of the innocent accused.[2] Advocates for the maintenance of the grand jury as the sole means of initiating felony prosecutions base their argument upon the premise that the grand jury is necessary to stand between the prosecutor and the accused to protect the individual from unfounded accusation of crime. The reasons in support of this proposition center upon the purported independent check on the prosecutor by the grand jury and the secret procedures that protect the innocent accused from the public embarrassment of criminal accusation. An examination of the accusatory role of the grand jury, both traditionally and in actual practice, raises some doubt as to the accuracy of that premise.

## HISTORICAL BACKGROUND

The grand jury originated 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.[3] Although it has been stated that "[t]he grand jury served in England as a barrier between the King and the rights of the subject, and also assured the subject security against oppression or unfounded prosecution,"[4] nothing in the history of the Assize of Clarendon supports the proposition that the grand jury developed for the protection of individual rights.[5] Indeed, the Assize of Clarendon contributed

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[1] Calkins, *Abolition of the Grand Jury Indictment in Illinois*, 1966 U. ILL. L. F. 423, 429, 431 [hereinafter cited as Calkins].

[2] 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).

[3] 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 321-23 (3rd ed. 1922) [hereinafter cited as 1 W. HOLDSWORTH].

The first clause of the assize of Clarendon provided that:

> [F]or the preservation of the peace and the maintenance of justice enquiries be made throughout each county and hundred by twelve legal men of the hundred and four legal men from each township, under oath to tell the truth; if in their hundred or their township there be any man who is accused or generally suspected of being a robber or murderer or thief, or any man who is a receiver of robbers, murderers or thieves since our lord the king was king.

*Id.* at 77.

[4] Maley v. District Court, 221 Iowa 732, 733-34, 266 N.W. 815, 816 (1936).

[5] Protection of the individual from unfounded accusations came about in 1215 with the issuance of Magna Carta. However, it was not the accusations of the King from which the Barons primarily sought protection but

to the increase of royal power, rather than to the accused's protection, as demonstrated by the fact that it was the duty of the community to take the initiative in informing the sheriff or king's judges of events which *might* have lead to accusation or suspicion of crime.[6] Thus, it has been pointed out that "[t]he original function of the grand jury . . . was to give a strongly centralized government the advantage that would be derived from communal accusation of crime."[7] The government's power was enhanced to the detriment of an individual's rights because an accusation by the *Grand Assize,* as the grand jury was originally called, raised a presumption of guilt which for certain offenses stigmatized the accused despite subsequent acquittal by the primitive trial methods of compurgation or ordeal.[8]

By the 13th century, trial by battle, compurgation and ordeal became nonexistent, so that in addition to the accusatorial function, the *Grand Assize* assumed the fact finding role of the petit jury.[9] This procedure of placing both the accusatorial and fact finding functions in the hands of a single jury prima facie established a system for determining an accused's guilt or innocence

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rather from other royal officials such as sheriffs, constables, and coroners "who had earned reputations as local tyrants to try lawsuits that ought to be heard in the royal courts." A. E. DICK HOWARD, MAGNA CARTA TEXT AND COMMENTARY 15-16 (1964). This abusive practice was eliminated by Chapter 24 of Magna Carta which provides that "[n]o sheriff, constable, coroners, or other of Our Baliffs shall hold pleas of Our Crown." *Id.* at 40. Further it was provided in Chapter 38 of Magna Carta that "[i]n the future no baliff shall upon his own unsupported accusation put any man to trial without producing credible witnesses to the truth of the accusation." *Id.* at 43.

[6] 1 W. HOLDSWORTH 77. The assizes of Clarendon and Northampton required jurors to answer questions regarding, among other things, persons suspected of crimes, escheats, outlaws and the misconduct of officials. *Id.* at 313.

[7] Comment, *The Grand Jury,* 30 U. KAN. CITY L. REV. 149, 151 (1962).

[8] Calkins 429. *The Grand Jury, supra* note 7, at 151. *See* M. BIGELOW, HISTORY OF PROCEDURE IN ENGLAND 324 (1880). *See* 1 W. HOLDSWORTH 323. Commenting upon the early grand jury procedure, the Supreme Court has said that:

> [A]s to the grand jury itself, we learn of its constitution and functions from the Assize of Clarendon . . . and that of Northampton. . . . By the latter of these . . . it was provided, that 'if any one is accused before the justices of our Lord the King of murder, or theft, or robbery, or of harbouring persons committing those crimes, or of forgery or arson, by the oath of twelve knights of the hundred, or, if there are no knights, by the oath of twelve free and lawful men, and by the oath of four men from each township of the hundred, let him go to the ordeal of water, and, if he fails, let him lose one foot. And at Northampton it was added, for greater strictness of justice . . . that he shall lose his right hand at the same time with his foot, and abjure the realm and exile himself from the realm within forty days. And if he is acquitted by the ordeal, let him find pledges and remain in the kingdom, unless he is accused of murder or other base felony by the body of the country and the lawful knights of the country; but if he is so accused as aforesaid, although he is acquitted by the ordeal of water, nevertheless he must leave the kingdom in forty days and take his chattels with him, subject to the rights of his lords, and he must abjure the kingdom at the mercy of our Lord the King.'

Hurtado v. California, 110 U.S. 516, 529 (1884).

[9] *See* authority cited at note 4 *supra.*

based on the facts of the case. Because of this dual function of the same jury, the rights of the accused were still subject to the coercive domination of the Crown in that trial jurors could be punished for acquitting where they had been members of the grand jury which had accused the individual.[10]

Though the accused could object to having the trial jury composed of some or all of the persons who had presented him for trial,[11] it has been pointed out that:

> The crown, being interested in securring convictions, was opposed to the total elimination from the petty or trial jury of all the members of the presenting jury. As Parning, J., said in 1340 'if indictors be not there it is not well for the king.' We can well understand this . . . if we remember that the indictors who acquitted could be and sometimes were punished for their action by the court.[12]

In order to eliminate the inherent abuse in a proceeding where the trial jury was composed of some members of the grand jury who were subject to possible punishment if they acquitted the accused, the function of the trial jury was separated from that of the grand jury in 1351.[13] Thereafter, the grand jury proceeding was restricted to finding whether there was probable cause that the accused had committed the alleged crime. However, such probable cause was to be determined solely upon evidence presented by the prosecution.

The proposition that the grand jury protected the individual from governmental oppression appears to date from the *Earl of Shaftesbury Trial* in 1681.[14] There, the accused was suspected of treason and the prosecution insisted that the grand jury receive the evidence in open court. However, the grand jury successfully asserted for the first time that its procedures, including reception of evidence as well as its final deliberations, be conducted in secrecy. Subsequently, the grand jury refused to return an indictment. The actions of the grand jury in the *Earl of Shaftesbury* case, and in the companion case of *Stephen*

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[10] "[T]he judges sometimes considered that when the members of the petty jury who had presented a person as suspected, acquited [*sic*] him, they contradicted themselves and could be punished." 1 W. HOLDSWORTH 322.

[11] *Id.* at 322-24.

[12] *Id.* at 325. The Crown's interest in securing convictions went beyond the limited purpose of punishing convicted felons. To some degree at least the Crown's interest in convictions was interwoven with the feudal system of land holding. When a tenant was convicted his land was forfeited. However, the forfeiture was not made to the tenant's grantor but directly to the Crown. As a result the Crown received all of the profits from the land and both the tenant and the *mense lords* were permanently deprived of any benefit from the land.

This abuse by the Crown was recognized in and for the most part eliminated by Chapter 32 of Magna Carta which states that "[w]e [the crown] will retain the lands of persons convicted of felony for only a year and a day, after which they shall be restored to the lords of the fees." A. E. DICK HOWARD, *supra* note 5, at 42.

[13] 1 W. HOLDSWORTH 325.

[14] 8 How. St. Tr. 759 (1681).

*Colledge*,[15] have been represented as support for the conclusion that the grand jury acted to protect innocents unjustly accused by the Crown. The correctness of the proposition has been questioned:

> Modern references to these momentous events tend to obscure somewhat the fact that these celebrated defendants were probably guilty of the crimes with which they were charged under the laws of the time. And if their grand juries had been true to their oaths, indictments should have been handed up. That the law did not follow its designated course in those few instances is certainly not attributable to any solicitude for private rights, but only to the antipathy of the grand jurors to the existing political order. Although their fine courage must be admired, the aims of these so-called landmark grand juries were essentially insurrectionary. The analogy may offend some, but their conduct is comparable to that of a present day grand jury which refuses to indict because of racial sympathies; or to that of a grand jury which refused to indict because the victim of the crime was unpopular.[16]

*Origin of the Grand Jury in the United States and Illinois*

The Federal Constitution expressly provides for indictment by a grand jury in cases of capital and other infamous crimes

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[15] 8 How. St. Tr. 549 (1681). The trial of Stephen Colledge represents a second case where the grand jury refused to indict notwithstanding the strongest possible pressure from the Crown.

[16] Antell, *The Modern Grand Jury: Benighted Supergovernment*, 51 A.B.A.J. 153, 156 (1965). It has also been noted that the action of the grand jury in the *Earl of Shaftesbury* case was not only unique, but quite probably improper in light of the evidence and the procedure used to select the jury.

> It is frequently said that, in the struggles which at times arose in England between the powers of the king and the rights of the subject, the grand jury often stood as a barrier against persecution in the king's name, until, at length, it came to be regarded as an institution by which the subject was rendered secure against oppression from unfounded prosecutions of the crown.
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> But it is believed that the importance of this institution, as a bulwark for the protection of the rights of the people and the nobility against regal oppression, has been greatly overestimated. It is true, indeed, that in the iniquitous proceedings against the Earl of Shaftesbury the grand jury merited all the eulogy which it has received for its firmness upon that occassion. But there are two potent reasons which go to show that such exibitions of opposition to the will of the crown must have been rare; 1. Because the selection of every panel of jurors lay wholly within the discretion of the sheriff, himself in a measure a creature of loyal authority. 2. Because the crown was apt to deal severely with jurors who opposed its will.
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> Each of the foregoing reasons appears in the case of the Earl of Shaftesbury, and perhaps it is not too much to say that the books do not furnish another case like it; so that the praise which was deserved by this particular grand jury has in latter times been quite undeservedly accorded to the institution itself.

S. THOMPSON & E. MERRIAM, A TREATISE ON THE ORGANIZATION CUSTODY AND CONDUCT OF JURIES, INCLUDING GRAND JURIES §§475-76 at 568-69 (1882).

> Upon a reading of the whole case of the Earl of Shaftesbury, there can be little doubt that the sheriff was a zealous adherent of that nobleman. The grand jury was probably packed by this officer in behalf of the accused instead of the crown, as the case must ordinarily have been.

*Id.* at 569 n. 3.

under the laws of the United States,[17] while 28 states require indictment either by constitution or statute. Apparently, the underlying reason for the requirement of grand jury indictment, under both federal and state law, was the belief that the grand jury provided an effective method for protecting the individual from unfounded accusation:

> In this country, from the popular character of our institutions, there has seldom been any contest between the government and the citizen, which required the existence of the grand jury as a protection against oppressive action of the government. Yet the institution was adopted in this country, and is continued from considerations similar to those which give to it its chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it come from government or be prompted by partisan passion or private enmity.[18]

The Illinois grand jury procedure is the product of English history and the common law.[19] Thus, the Illinois Supreme Court has recognized that "the common law grand jury became a part of the fundamental law of the State for the prosecution of crime, and no authority has ever existed in this State for the prosecution of felonies except upon the indictment of a grand jury."[20]

The Illinois Constitution provides in article II, section 8 that:

> 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 a penitentiary, in cases of impeachment, and in cases arising in the army and 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.[21]

While many of the Bill of Rights' safeguards have been judicially interpreted as applicable to the states through the due process clause of the fourteenth amendment,[22] this incorporation

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[17] The fifth amendment of the United States Constitution provides:
> No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger. . . .

U.S. CONST. amend. V.

[18] *In re* Charge to Grand Jury, 30 F. Cas. 992, 993 (No. 18, 255) (C.C.N.D. Cal. 1872).

[19] People *ex rel.* Ferrill v. Graydon, 333 Ill. 429, 432-33, 164 N.E. 832, 834 (1929).

[20] *Id.* at 433, 164 N.E. at 834. This statement is qualified to the extent that the accused may now waive indictment. ILL. REV. STAT. ch. 38, §111-2 (1967).

[21] For the history of the efforts of the Constitutional Convention of 1870 to abolish the Illinois grand jury see Calkins 425-27.

[22] Right to counsel, Gideon v. Wainwright, 372 U.S. 335 (1963); right to suppression of involuntary confessions, Brown v. Mississippi, 297 U.S. 278 (1936); right to privilege against self-incrimination, Malloy v. Hogan,

has not occurred with respect to the fifth amendment guarantee of indictment by a grand jury for felony prosecutions. In *Hurtado* v. *California*,[23] the Supreme Court held that a state's abolition of the grand jury was not violative of due process. California's elimination of the grand jury in *Hurtado* has been followed by 21 additional states which now provide for the initiation of felony prosecutions by information in place of or in addition to the grand jury indictment,[24] and in England the grand jury system, with minor exceptions, was abolished in 1935[25] for reasons of economy and efficiency.[26]

The validity of the argument that the grand jury protects the innocent accused by virtue of its independence from the prosecutor[27] and its secretive procedures[28] will be analyzed with

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378 U.S. 1 (1964); right to exclusion of evidence obtained by illegal searches and seizures, Mapp v. Ohio, 367 U.S. 643 (1961); right to protection from cruel and unusual punishment, Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947); right to trial by jury, Duncan v. Louisiana, 391 U.S. 145 (1968); right to a public trial, *In re* Oliver, 333 U.S. 257 (1948); right to a speedy trial, Klopper v. North Carolina, 386 U.S. 213 (1967); right to confrontation of witnesses, Pointer v. Texas, 380 U.S. 400 (1965); right to compulsory process for obtaining witnesses, Washington v. Texas, 388 U.S. 14 (1967).

[23] 110 U.S. 516 (1884).

[24] Calkins 423-24. Illinois maintains the grand jury indictment as the sole means of initiating felony prosecutions unless waived by the accused pursuant to ILL. REV. STAT. ch. 38, §111-2 (1967).

[25] The Administration of Justice (Miscellaneous Provisions) Act of 1933, 23 & 24 Geo. 5, c. 36, §1.

[26] For a discussion of the administrative considerations such as delay, expense, efficiency, and procedural hazards involved in the indictment system as compared to the information system in this country see Dession, *From Indictment To Information — Implications Of The Shift*, 42 YALE L. J. 163, 180-89 (1932).

[27] The proposition has been asserted by those favoring retention of the grand jury that though the jurors in the *Shaftesbury* and *Colledge* cases did not act from the purest of motives, it is significant that they did act independently of the prosecutor and that this is the only point of real importance. Such a defense of the independence of the grand jury, based on these two cases, would be more convincing if it were not for the fact that in both of these cases there was sufficient evidence to warrant the return of true bills. *See* text at notes 14-16 *supra.*

The proposition is likewise subject to attack from two other directions: 1.) In actual practice it is not true that the grand jury acts independently of the prosecutor. 2.) Even if it were true that the grand jury acts independently, this carries with it its own danger, because if it be assumed that in some cases the grand jury can and does act independently of the prosecutor, the question which must be answered is of what significance is such an independent body when it is remembered that while the grand jury has the power to refuse to indict when the evidence establishes probable cause, it also has the power to indict when the evidence is insufficient. And the latter is the more likely when it is realized that the grand jury hears only the prosecutor's evidence and that the prosecutor is not bound by the rules of evidence. *See* text at note 36 *infra.*

The effect of returning an indictment has judicially been stated to be that:

> [I]t is settled law that (1) (an) indictment returned by a legally constituted nonbiased grand jury * * is enough to call for a trial of the charge on the merits and satisfies the requirements of the Fifth Amendment, Lawn v. United States, 355 U.S. 339 . . . (1958); (2) an indictment cannot be challenged 'on the ground that there were inadequate or incompetent evidence before the grand jury', Costello v. United States, 350 U.S. 359 . . . (1956); and (3) a prosecution is not abated,

regard to the practical considerations extant within the grand jury system.

### GRAND JURY — BARRIER BETWEEN THE STATE AND THE INDIVIDUAL — DEPENDENCY FOR INFORMATION

One of the primary contentions for maintaining the procedure of grand jury indictment is that "[t]he [alternative] system of giving [the] district attorneys the authority to bring the [accused] persons to trial upon an information places too much power in the hands of the prosecution."[29] Nevertheless, if the grand jury is to exercise any significant control over the prosecutor's power, the grand jury must act independently of the prosecutor. However, it is clear that the grand jury is incapable of acting autonomously since the grand jury typically lacks legal expertise, primarily relies upon information elicited by the prosecutor and, consequently, is dominated by the prosecutor by virtue of its complete dependence upon him.

In Illinois, the grand jury is composed of twenty-three citizens selected according to the same qualifications required of petit jurors.[30] This selection process has been criticized for the

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nor barred, even where 'tainted evidence' has been submitted to a grand jury, United States v. Blue, 384 U.S. 251 . . . (1956).

We gave effect to the foregoing cases in United States v. Grosso, 358 F.2d 154 (3d Cir., 1966). There, the trial court had denied the defendant's motion for the dismissal of his indictment which was premised on the ground that the indictment was predicated at least in part on illegally seized evidence. In rejecting the defendant's contention that the denial of his motion to dismiss the indictment was ground for reversal, we said (p. 163): 'It is well established that an indictment is not open to challenge on the ground that the evidence presented to the grand jury was either inadequate or incompetent.'

United States v. American Radiator & Standard San. Corp., 278 F. Supp. 241, 249 (1967). *See also* West v. United States, 359 F.2d 50 (8th Cir.), *cert. denied*, 385 U.S. 867 (1966); United States v. Labate, 270 F.2d 122 (3rd Cir.), *cert. denied*, 361 U.S. 900 (1959).

[28] Calkins, *The Fading Myth of Grand Jury Secrecy*, 1 JOHN MAR. J. PRAC. & PROC. 18 (1967).

[29] Younger, *The Grand Jury Under Attack*, 46 J. CRIM. L. C. & P. S. 214, 223 (1955).

[30] ILL. REV. STAT. ch. 78, §9 (1967) which provides:

If a grand jury is required by law or by the order of the judge for any court, the county board in each of the counties in this State wherein such court is directed to be held, at least 20 days before the time of appearance specified in the summons hereinafter mentioned shall select 23 persons, regardless of sex, possessing the qualifications provided in Section 2, of this Act, and as near as may be a proportionate number from each town or precinct in their respective counties, to serve as grand jurors; the panel of the 23 persons so selected to be known as the regular panel; and shall at the same time, in like manner, select 20 additional persons possessing such qualifications, the panel of the 20 additional persons so selected to be known as the supplemental panel. . . .

Sixteen of the twenty-three jurors constitute a quorum. ILL. REV. STAT. ch. 78, §16 (1967). At least twelve affirmative votes are required to return an indictment. ILL. REV. STAT. ch. 38, §112-4 (c) (1967).

The qualifications for selection are set forth in ILL. REV. STAT. ch. 78, §2 (1967):

Jurors in all counties in Illinois must have the legal qualifications herein

reason that it results in the selection of jurors who are not equipped to exercise independent initiative or judgment and this assures their domination by the prosecution.

> Prominent in its folklore we find frequent reference to the fact that grand juries are populated by people of high and low estate, *from all vocational backgrounds except law and law enforcement.* It is somehow suggested that there is some special merit in confiding these important responsibilities to a group of citizens who are completely untrained in the work they have to do and whose only legal qualification for service is that they can see and hear and have resided for a prescribed time in the jurisdiction where they have been called for service.
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> . . . It is absurd to place these . . . well-intentioned people on a grand jury, charge them with the duty of enforcing hundreds of laws, almost none of which they have even heard of, protecting individual liberties, and keeping a watch on the general level of morality and efficiency of government. Yet, our present systems require precisely this.[31]

Advocates of the indictment procedure attempt to avoid the argument that the public lacks the necessary legal skills and training to return indictments and dismissals by asking their adversaries whether they also believe that "citizens [are] too ignorant to handle convictions or acquittals on the petit jury?"[32] However, that argument disregards the distinction between the *ex parte* nature of a grand jury hearing, unfettered by evidentiary standards of admissibility or judicial supervision and the

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prescribed, and shall be chosen a proportionate number from the residents of each town or precinct, and such persons only as are:

First — Inhabitants of the town or precinct, not exempt from serving on juries.

Second — Of the age of 21 years or upwards.

Third — In the possession of their natural faculties and not infirm or decrepit.

Fourth — Free from all legal exceptions, of fair character, of approved integrity, of sound judgment, well informed, and who understand the English language.

Provision is made for exemption from grand jury membership in ILL. REV. STAT. ch. 78, §4 (1967):

> The following persons shall be exempt from serving as jurors, to-wit: The Governor, Lieutenant Governor, Secretary of State, Auditor of Public Accounts, Treasurer, Superintendent of Public Instruction, Attorney General, members of the General Assembly during their term of office, all judges of courts, all clerks of courts, sheriffs, coroners, practicing physicians, Christian Science practitioners, Christian Science readers, postmasters, practicing attorneys, all officers of the United States, officiating ministers of the gospel, members of religious communities, mayors of cities, policemen, active members of the Fire Department and all persons actively employed upon the editorial or mechanical staffs and departments of any newspaper of general circulation printed and published in this state.

[31] Antell, *supra* note 16, at 154 (emphasis added). Eugene Stevenson, a New Jersey public prosecutor, has said that "[i]t is difficult to see why a town committee of laymen, utterly ignorant both of law and the rules of evidence should be the appropriate tribunal. The summoning of a new body of jurors each term insures an unfailing supply of ignorance." Younger, *The Grand Jury Under Attack*, 46 J. CRIM. L.C.&P.S. 26, 42 (1955).

[32] Brown, *supra* note 2, at 472.

adversarial nature of a trial, conducted according to rules of evidence enforced by a judge as well as by the presence of adverse parties.[33]

Even if expertise were not an essential requisite to the exercise of independent judgment, control over the sources of evidence would be.[34] In Illinois, as in most grand jury jurisdictions, the situation is one of "complete dependency on the State's Attorney"[35] because:

> The grand jury normally considers only those cases presented to it by the State and then only the prosecution's side of the case is heard. The public prosecutor calls those witnesses he desires the grand jury to hear and then he interprets the evidence given, applies the law, and advises as to whether or not the evidence shows that a crime has been committed. An indictment is further assured because the state's attorney, if he desires, can offer hearsay and other inadmissible evidence inasmuch as the grand jury is not bound by the rules of evidence.[36]

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[33] *See* text at notes 35-37 *infra.*

[34] The Illinois grand jury has the statutory duty to return indictments when there is probable cause and to protect citizens from unfounded accusations. ILL. REV. STAT. ch. 78, §18 (1967) provides:

> [Y]ou shall present no person through malice, hatred or ill-will; nor shall you leave any unpresented through fear, favor or affection, or for any fee or reward, or for any hope or promise thereof; but in all your presentments, you shall present the truth, the whole truth, and nothing but the truth. . . .

However, if the only evidence considered is that of the prosecution, then the grand jury's duty to protect the innocent accused appears anomalous because in order for the grand jury to protect the accused it is essential that it have information which encourages autonomy from the prosecutor.

[35] Russell, *The Cook County Grand Jury: Some Problems and Proposals,* 43 CHI. B. REC. 9, 14 (1961).

[36] Calkins 431. As a practical matter, the mere volume of cases presented to the grand jury requires that it be dependent upon the prosecutor. It has been pointed out that:

> In 1966, Cook County grand juries returned 4,226 indictments as compared with 3,756 in 1965, or an increase of about 12.5 per cent. The 4,226 indictments returned in 1966 involved 5,623 defendants as compared with 5,025 named in the 3,756 indictments returned in 1965. There were 4,560 indictments disposed of in 1966 as compared with 4,079 in 1965, or an increase of almost 11.8 per cent. In 1966 there were 3,779 defendants disposed of as compared with 3,410 the preceding year or an increase of 10.8 per cent. There were 290 jury trials requiring 721 jury days in 1966 as compared with 358 jury trials and 829 jury days in 1965. At the close of 1966 there were 1,692 indictments pending in the Criminal Division of the Circuit Court of Cook County as compared with 1,434 in 1965 which represents an increase of almost 18 per cent.
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> The following chart is a compilation of information based on an analysis of the daily minutes of the Criminal Division of the Circuit Court of Cook County together with data provided in the annual reports of the Clerk of the Criminal Division:

| | 1960 | 1961 | 1962 | 1963 | 1964 | 1965 | 1966 |
|---|---|---|---|---|---|---|---|
| Indictments returned by Grand Jury | 4,050 | 3,259 | 3,028 | 3,697 | 3,846 | 3,756 | 4,226 |
| Defendants indicted by Grand Jury | 6,059 | 4,831 | 4,250 | 5,127 | 5,034 | 5,025 | 5,623 |
| Indictments disposed | 4,702 | 3,740 | 2,850 | 3,844 | 4,225 | 4,079 | 4,560 |
| Actual defendants disposed | 4,431 | 3,441 | 2,522 | 3,478 | 3,591 | 3,410 | 3,779 |
| Jury trials | 339 | 263 | 248 | 321 | 366 | 358 | 290 |
| Jury days | 910 | 742 | 706 | 790 | 827 | 829 | 721 |
| Indictments pending at end of year | 978 | 779 | 1,200 | 1,344 | 1,350 | 1,434 | 1,692 |

Of the indictments returned by Cook County grand juries in 1966,

the following chart sets forth data regarding the charges as well as the number of defendants involved and makes a comparison with the preceding year:

INDICTMENTS RETURNED 1965-1966

| Offense Charged | Number of Indictments | | Per Cent of Total | | Number of Defendants | | Per Cent of Total | |
|---|---|---|---|---|---|---|---|---|
| | 1965 | 1966 | 1965 | 1966 | 1965 | 1966 | 1965 | 1966 |
| Robbery | 899 | 888 | 23.9 | 21.0 | 1,399 | 1,353 | 27.8 | 24.0 |
| Violation Narcotic Laws | 666 | 743 | 17.7 | 17.6 | 722 | 814 | 14.4 | 14.5 |
| Burglary | 562 | 549 | 15.0 | 13.0 | 814 | 860 | 16.2 | 15.3 |
| Theft | 444 | 346 | 11.8 | 8.2 | 600 | 474 | 11.9 | 8.4 |
| Murder | 230 | 302 | 6.1 | 7.1 | 280 | 356 | 5.6 | 6.3 |
| Violation Gambling Laws | 112 | 346 | 3.0 | 8.2 | 197 | 524 | 3.9 | 9.3 |
| Aggravated Assault | 164 | 259 | 4.4 | 6.1 | 202 | 320 | 4.0 | 5.7 |
| Rape | 142 | 190 | 3.8 | 4.5 | 169 | 234 | 3.4 | 4.2 |
| Jumping Bail | 123 | 211 | 3,3 | 5.0 | 125 | 211 | 2.5 | 3.8 |
| All Other Offenses | 414 | 392 | 11.0 | 9.3 | 517 | 477 | 10.3 | 8.5 |
| Total | 3,756 | 4,226 | 100.0 | 100.0 | 5,025 | 5,623 | 100.0 | 100.0 |

Peterson, *A Report On Chicago Crime For 1966*, CHICAGO CRIME COMMISSION 13-14 (1967).

Certain restrictions on the grand jury's ability to collect information make it further dependent on the state's attorney for its information. ILL. REV. STAT. ch. 38, §112-6(b) (1967) provides:

> Any grand juror or officer of the court who discloses, other than to his attorney, matters occurring before the Grand Jury other than in accordance with the provisions of this sub-section is in contempt of court, subject to proceedings in accordance to law.

The case law in Illinois has also added to the prosecutor's domineering role in the grand jury proceedings. People v. Parker, 397 Ill. 305, 74 N.E.2d 523 (1947), *aff'd* 334 U.S. 816 (1948). This case modified the common law rule that a private person had the right to communicate knowledge of criminal activity to the grand jury. The court held that any private communication with the grand jury outside of recognized channels would be considered an attempt to incite it to action and would constitute a contempt of court.

> In a prior case against the same defendant, the defendant had addressed two letters to the Cook County grand jury charging the publisher of the *Chicago Tribune* and various public officials with a conspiracy to steal large sums of money which were allegedly due in unpaid taxes and penalties. The Illinois Supreme Court labeled the language used 'vicious and inflamatory.'

People v. Parker, 374 Ill. 524, 525, 30 N.E.2d 11 (1940), *cert. denied*, 313 U.S. 560 (1941).

> In the second Parker case the defendant made the accusations against the same individuals by letter to the grand jury, but he phrased it more moderately, and he purported to sign it as an officer of the Puritan church carrying forth church duties. Such communication was still held a contempt of court.

Calkins, 437, n. 57.

Further, judges and state's attorneys have not encouraged independent investigation by grand juries and in some instances have actively discouraged them.

> Judge Dougherty told a grand jury in 1954 that it had no right to present a report and that its sole function was to render indictments on matters presented to them by the State's Attorney. The September, 1952, Grand Jury complained that Judge Graber would not allow it to launch an investigation of gambling and had threatened the members of the jury with contempt of court if they attempted to defy him. State's Attorney Boyle supported the Judge's position and told the jury that such investigations were not a part of its duties.

Russell, *supra* note 35, at 18, n. 19.

While the restrictions and attitudes of judges and state's attorneys limit the independent investigatory function of the grand jury, such limitations are not unfounded.

> It is really unthinkable that there could be a productive grand jury investigation that has not been preceded by a prolonged period of study and preparation by a prosecutor's office. Who can believe that

Thus, rather than creating an atmosphere which is conducive to independent decision making on the part of the grand jurors, the circumstances may be such that the prosecutor becomes the dominant force behind each decision.[37] Nevertheless, proponents of the grand jury contend that the system provides a theoretical safeguard between the prosecutor and the accused in extreme situations where the prosecutor labors merely to harass and embarrass an accused by subjecting him to trial wholly without cause.[38] However, a proposition which asserts as its conclusion the necessity of retaining the grand jury to protect the innocent from unfounded accusations must be based on a premise which assumes the existence of an over-zealous or corrupt prosecutor, while the practicalities of the situation dictate otherwise.

> But recognizing that a self-seeking prosecutor may, on occasion, wish to indulge himself, it must be noted that this will happen only where there are unique motivations. In the ordinary case he simply has no incentive to burden himself with pointless work, especially where this involves cases which are doomed from the outset. This is practicality at work. And this same practicality, where the prosecutor's responsibility is undiluted by the grand

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even a moderately complex inquiry can be managed by twenty-three untrained people who must work within the framework of the law? The work of examining and collating documents, interviewing witnesses, analyzing discordant evidence, all these require the application of skills and techniques which are totally outside the knowledge of the average grand juror.

Antell, *supra* note 16, at 155.

While it is highly desirable for responsible groups and individuals to be able to furnish the grand jury with important information, it must be kept in mind that it is perhaps equally undesirable to have citizens constantly pestering the grand jury with their own personal crusades.

Russell, *supra* note 35, at 14.

[37] In a survey conducted by Dean Morse he found that in 6,453 cases where the prosecutor expressed his opinion to the grand jury as to what disposition should be made of the case, the grand jury disagreed with the prosecutor in only 5.39% of the cases, and in the cases of disagreement the grand jury tended not to indict. Dession, *supra* note 26, at 178.

In the 95% of the cases where there was complete agreement between the prosecutor and the grand jury it is difficult to understand how the accused benefitted from the presence of the grand jury when the result would have been the same in the absence of the grand jury. In the minority of cases where there was disagreement between the prosecutor and the grand jury, no reason is apparent why justice would not have been better served by an information system including a preliminary hearing conducted by a judge trained in the rules of law and evidence who has an opportunity to hear both sides of the case.

> Cook County [Illinois] have returned no bills in approximately 15% of all the cases presented to them, which is consistent with the state-wide average. It is impossible to estimate what portion of that 15% should be attributed to the grand jury's function as protector and what portion can be explained by the many other possible causes for a grand jury no-billing a case.

Russell, *supra* note 36, at 10.

[38] However, it has been said that:

> '[T]heory' which will not work in practice is not sound theory. 'It is theoretically correct but will not work in practice' is a common but erroneous statement. If a theory is 'theoretically correct' it will work; if it will not work, it is 'theoretically incorrect'.

Cook, *Hohfeld's Contributions To The Science Of Law*, 28 YALE L. J. 721, 738 (1919).

> jury system, would militate for dismissals of unworthy cases even more effectively than now.
>
> The return of an indictment no longer is merely prologue to a conviction. The burdens of law enforcement are now well known, and the logic of self-interest suggests that few prosecutors will happily involve themselves in so formidable an undertaking except where the evidence is at least sufficient to augur a respectable showing. He does not relish the kind of disrepute which comes with the vexatious use of public resources, and this is a safeguard against arbitrary action.
>
> There are exceptions of course.
>
> [But] [i]n practice, our system of law contemplates only one bulwark for the protection of individual rights, and that lies in the courts themselves by the work of lawyers and the application of law.[39]

In addition, when the exceptional case of bad faith arises there is no reason to think that the grand jury will be better equipped to escape domination than there would be under normal circumstances, since there is no check on abuse in the introduction of evidence.

Where, on the contrary, the prosecution acts in good faith the grand jury system is merely an unnecessary and expensive procedure which does not encroach on the accused's rights moreso than would an information system. But, where the prosecution acts in bad faith, the grand jury can become a shield to protect the prosecution from the impact of adverse public opinion which would otherwise result if the prosecution sought to subject an accused to trial by information where there was not even a semblance of probable cause.

> [T]he grand jury may well be, in given circumstances, the skirt behind which an over-zealous or malicious or even corrupt prosecutor may hide to destroy the accused in the white-hot light of public accusation, without merit, and without fear of retribution in the form of a suit for malicious prosecution.[40]

The theory that "the most valuable function of the grand jury was . . . to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will"[41] completely disregards the possibility that the indictment may be the sole product of the prosecutor rather than the decision of the

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[39] Antell, *supra* note 16, at 156. The Supreme Court has also commented upon this problem: "It may be questioned whether the proceeding by indictment secures to the accused any superior rights and privileges; but certainly a prosecution by information takes from him no immunity or protection to which he is entitled under the law." Hurtado v. California, 110 U.S. 516, 520 (1884).

[40] Kranitz, *The Grand Jury, Past — Present — No Future*, 24 Mo. L. REV. 318, 328 (1959). A grand jury indictment is prima facie evidence of probable cause for prosecution of a claimant suing state for malicious prosecution. Danchak v. State, 29 App. Div. 2d 609, 285 N.Y.S. 2d 976 (1967).

[41] Hale v. Henkel, 201 U.S. 43, 59 (1906).

group.[42] This possibility was examined by the National Commission on Law Observance and Enforcement, after conducting a nationwide survey in 1931, which concluded:

> Every prosecutor knows, and every intelligent person who ever served on a grand jury knows, the prosecuting officer almost invariably completely dominates the grand jury. * * * The grand jury usually degenerates into a rubber stamp wielded by the prosecuting officer according to the dictates of his own sense of propriety and justice.
>
> . . . .
>
> [T]he prosecution in Illinois is unduly handicapped by the constitutional requirement of an indictment by the grand jury. The innocent citizen need not fear unfounded prosecution by information. If the State's Attorney wished to prosecute him, he could easily obtain an indictment from a grand jury which he dominates.[43]

Thus, the grand jury system, aside from being largely ineffective as a safeguard of the innocents' rights and thus an unnecessary drain on the taxpayer, can be used as a means by which the state can summarily subject an innocent accused to trial without having to account to the public for its abuse of power.

Notwithstanding these failures of the grand jury system, advocates of the indictment procedure contend that the system must be sustained on the grounds that its secretive proceedings protect the innocent accused from public accusation of crime in that in the event that a "no bill" is returned the public need never know that an indictment was ever sought. An examination of this contention in light of the actual workings of the system is necessary in order to determine whether the secretive proceedings provide the protection attributed to them.

## GRAND JURY SECRECY: A SWORD OR SHIELD?

The argument that the innocent accused receives protection from the secrecy of grand jury proceedings is more theoretical than real. The risk that an innocent person may be compelled to answer charges at a public preliminary hearing is outweighed by the even greater risk that an equally innocent person may be compelled to the trouble and the expense of proving his innocence after indictment by a secretive *ex parte* proceeding. The

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[42] It has been stated that:

> [A]lthough the grand jury is exalted as a curb upon the arbitrary use of power, ironically it encourages abuses by allowing the prosecuting authority to carry on its work with complete anonymity and with effects greatly magnified by the accompanying judicial rites.
>
> . . . .
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> . . . [A] predatory district attorney cannot be held in check by twenty-three confused laymen, and without the happy refuge from responsibility afforded by a grand jury such men will be far less likely to have their way with the judicial system.

Antell, *supra* note 16, at 156.

[43] 1 NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, [No. 4], REPORT ON PROSECUTION 125 (1931).

proposed protection of the innocent accused by the secrecy of grand jury deliberations overlooks the fact that

> [N]early all grand jury proceedings in Illinois are held after a preliminary hearing, at which the magistrate has bound the accused over to the grand jury. Because the preliminary hearing is held in public, there can be no question that the accusations made against the accused are known to all.[44]

Thus, the grand jury's secretive proceeding merely duplicates the preliminary hearing that has already publicly considered the same questions of whether a crime was committed and whether there is probable cause to believe that the accused committed it.[45] This duplication would appear to be unnecessary, due to the nature of the cases presented to the grand jury, where "the vast majority . . . are of a routine, mechanical nature in which there not only is no doubt as to the accused's guilt, but the accused himself is willing to admit it and intends in fact to plead guilty."[46]

Furthermore, the grand jury proceeding may cause an inference of the accused's guilt by public exposure prior to the return of an indictment. For example, the accused may invoke his right against self-incrimination when called as a witness before the grand jury. If the witness objects to incriminating questions by asserting the fifth amendment, he subjects himself to a public hearing in court on the question of incrimination.[47] In such a situation the grand jury becomes an instrumentality for fostering publicity rather than protecting the innocent accused by secretive procedures.[48]

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[44] Calkins 432. The provisions for preliminary hearing are expressed at ILL. REV. STAT. ch. 38, §109-3 (1967). *See* Whyte, *Is The Grand Jury Necessary?*, 45 VA. L. REV. 461, 488-89 (1959).

[45] Magistrate Glen W. McGee of the Circuit Court of Cook County stated: "It has been my 10 years' experience that in every instance in which I have found probable cause at the preliminary hearing and bound the accused over, the grand jury has subsequently returned an indictment against the accused." Calkins 440.

[46] Russell, *supra* note 35, at 15.

[47] Rogers v. United States, 340 U.S. 367 (1951); Blau v. United States, 340 U.S. 159 (1950); *In re* Willie, 25 F. Cas. 38 (No. 14692e) (C.C. D. Va. 1807).

[48] The following situation serves to illustrate:

> The grand jury was investigating the robbery of a tavern owner. Witness No. 1 was subpoenaed to appear and was duly sworn. Thereafter, he was asked the following questions by an assistant prosecutor which he refused to answer on the ground of privilege against self-incrimination.
>
> 'Q. Isn't it a fact that you were one of three men who held up _____?'
>
> 'Q. Isn't it a fact you discussed (it) with _____ before you pulled the holdup?'
>
> 'Q. Isn't it a fact that you have had to clear other stickups with _____ before they were pulled?'
>
> 'Q. Isn't it a fact that _____ have to give clearance for all holdups and burglaries pulled in Kansas City?'
>
> 'Q. Isn't it a fact that you tried to threaten _____ if he identified

Moreover, to the extent that the internal proceedings of the grand jury are secretive, it facilitates domination by an over-zealous prosecutor.[49] The secretive nature of the procedure provides the prosecutor with a forum which systematically excludes the accused and his counsel and prevents them from objecting to the tactics of the prosecutor. Such a situation was recognized in *United States* v. *Wells*,[50] where the court considered the potential danger of a grand jury investigation that is conducted "from the standpoint of hostility rather than friendly inquiry."[51] Without a request for advice by the grand jury, the prosecutor expressed, at length, his opinion that the defendants were guilty and should be indicted. This procedure was criticized by the court which stated:

> Upon the whole record it appears that a commendable zeal, which gathered force as it progressed, finally expanded into an exaggerated partisanship wholly inconsistent with the semijudicial duties of a public prosecutor. . . .
>
> . . . .
>
> . . . [T]he fact that the jurors testified that they were not influenced by what occurred . . . is hardly possible. We have seen that they were by some method induced to do that which the evidence, or rather want of evidence, before them could not justify. . . . There is no surer road to anarchy than . . . to extend procedure to such an extent as to invade constitutional rights.[52]

Thus, we find that the secretive procedures of the grand jury afford only theoretical protection, similar to the illusory safeguard of the "independent" nature of the indictment system. In practical application there is no essential secrecy due to prior public preliminary hearings.[53]

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you, that some bodily harm would come to him after the holdup was pulled?'

In the news article that appeared in The Kansas City Times on the 26th day of June, 1961, the blank spaces contained named individuals.

It would be impossible, by any accepted usage of the English language, to frame questions that would have a greater tendency to incriminate a witness then those set out above. Why were these questions certified? The hearing in court on the question of incrimination is open to the public with members of different news media in attendance. An almost overwhelming case of bad faith can be made against the grand jury and/or prosecutor for aiding and abetting the publication of these questions to which the witness claimed privilege and thereby inviting the general public to draw an inference of guilt. Four days after the witness was questioned, he was indicted for the mentioned robbery.

Comment, *The Grand Jury*, 30 U. KAN. CITY L. REV. 149, 176 (1962).

[49] *See* text at notes 35-43 *supra*.

[50] 163 F. 313 (D.C. Idaho 1908).

[51] *Id.* at 322.

[52] *Id.* at 329.

[53] The concept of secrecy becomes meaningless in those cases where the accused intends to plead guilty at trial. In such cases the grand jury indictment becomes duplicative, purporting to protect a right to secrecy which no longer exists and which the accused intends to waive by pleading guilty.

## CONCLUSION

### THE EFFECTIVENESS OF THE GRAND JURY AS AN INDICTING BODY

In summary, the reasons in support of retaining the grand jury as the sole means of initiating felony prosecutions fail to support the proposition that the grand jury stands as a safeguard between the prosecution and the accused. Therefore, it is recommended that the indictment function of the grand jury be replaced by an information system, while the grand jury be retained in its investigatory capacity.

As a reasonable alternative, the information system recognizes the marginal utility of the citizen's role in the initial stages of criminal prosecutions and eliminates direct citizen participation at this stage of the proceedings. The information system does not, however, entirely eliminate the intervention of the intelligence of the ordinary citizen from the criminal proceeding. Rather the interjection of ordinary intelligence into the proceeding is postponed until such time that a citizen's intelligence can best be exercised as a member of a petit jury, after hearing all of the competent evidence in a case in order to render a verdict. Similarly, the citizen's fact finding qualifications could be utilized by the grand jury acting exclusively as an investigatory body under the guidance of the prosecutor.[54] Such a procedure would allow the grand jury to effectively help combat such problems as organized crime and malfeasance in public office.

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[54] One authority has stated:

> The grand jury, as investigator, is thought by many to be the only real means by which the citizenry itself can take direct action against criminal forces in society. Without the grand jury, the public must rely solely upon elected and appointed officials for enforcement of its laws. The grand jury has unique power to investigate and then take action on its findings. Because it operates beyond the realm of politics, it is free from the influence of pressure groups. Legislative committees can only recommend changes in the law, States' Attorneys do not have the power to call in and question witnesses under oath, crime commissions can only publish the results of their investigations; no other instrument of law enforcement has powers equal to the powers of the grand jury to call in witnesses, investigate a criminal activity fully and then take direct action to bring those accused to trial.

Russell, *supra* note 35, at 9.