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THE GRAND JURY "PRESENTMENT": FOUL BLOW OR FAIR PLAY?

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A widely misunderstood function of the grand jury—to render reports or presentments—has often functioned to ferret out and make known governmental inefficiency, neglect, and other misconduct short of crime. This aspect of grand jury activity exists, however, in the shadow of illegality.

The purpose of this paper is (i) to examine the history of grand jury reports or presentments, (ii) to consider the authorities delineating their use, (iii) to evaluate the service they can perform today, (iv) to determine their proper scope, and (v) to suggest procedures for suppressing improper reports and for protecting proper ones.

A grand jury report or presentment is a written statement made to a court by the grand jury that is incident to that court. These reports or presentments are frequently directed at unwholesome situations in the community, and occasionally are critical of named individuals. The characteristic that distinguishes them from other grand jury activity is that they do not formally charge named persons with the commission of specific criminal acts. Although these critical grand jury statements are often referred to as presentments, they are possibly better referred to as reports, which term will be used herein because of the distinct historical meaning of "presentment."[1]

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1. A presentment "is the notice taken by a grand jury of any offense from their own knowledge or observation, without any bill of indictment laid before them at the suit of the king." 4 BLACKSTONE, COMMENTARIES *301. See also GOEBEL & NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK 351-55 (1944); 4 STEPHEN, COMMENTARIES ON THE LAWS OF ENGLAND 243-44 (21st ed. 1950); 2 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 563 (5th ed. 1891). Originally, indictments were couched in formal terms written on parchment in Latin. Presentments, brought in by lay juries on their own initiative, were informal and in English. If they contained criminal charges, such charges were then formalized and followed by the translated formal indictments. The distinction between presentments and indictments is largely no longer sound. In most instances today the prosecutor draws the instrument, whether before or after the jury action, and no informal document is prepared by the grand jury. See In the Matter of Funston, 133 Misc. 620, 621-22, 233 N.Y. Supp. 81, 83-84 (Sup. Ct. 1929); Matter of Osborne, 68 Misc. 597, 600-01, 125 N.Y. Supp. 313, 315-16 (Sup. Ct. 1910); *In re* Report of Grand Jury, 260 P.2d 521, 521-22 (Utah 1953). The presentment, as the jurors' instruction

A persuasive example of the current criticism to which grand jury reports are subjected can be found in *Application of United Electrical Workers.*[2] In that case, a federal district judge ordered a report expunged from the records of the court. In support of his order, the judge stated that "the great weight of authority is that such reports exceed the power of the Grand Jury and may be expunged."[3] This conclusion has ample support. The weight of authority maintains that juries may not issue reports that criticize persons for inefficiency, neglect, or criminal or quasi-criminal conduct.[4] This authority purports to rely heavily upon the New York decisions. The frequency with which cases involving grand jury reports have arisen in New York may be due to the fact that reports commonly criticize inefficiencies of governmental employees; New York, a populous and highly commercial state, requires in its administration a large and complicated array of such public employees.

It might well appear anomalous that despite this clear authority grand jury reports continue unabated in New York and elsewhere. In one unusual nine-week period in 1954, four different grand juries, in four of the five counties constituting the City of New York, issued a total of seven reports.[5] Similar grand jury effusions have recently emanated from other jurisdictions.[6]

The continued appearance of these reports might be attributable to the

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to the prosecutor, still exists in several states. *North Carolina:* N.C. GEN. STAT. § 15-137 (1953); see State v. Thomas, 236 N.C. 454, 457-58, 73 S.E.2d 283, 285-86 (1952); *Pennsylvania: cf.* Commonwealth v. Soloff, 175 Pa. Super. 423, 107 A.2d 179 (1954). In Minnesota, by unique statute, presentments and indictments retain separate identities, although both are creatures of the grand jury. MINN. STAT. §§ 628.01-.04 (1949).

2. 111 F. Supp. 858 (S.D.N.Y. 1953).

3. *Id.* at 866.

4. See, *e.g.,* State *ex rel.* Strong v. District Court, 216 Minn. 345, 349-50, 12 N.W.2d 776, 778 (1944); *In re* Hudson County Grand Jury, 14 N.J. Super. 542, 546-47, 82 A.2d 496, 498 (L. 1951); Hayslip v. State, 193 Tenn. 643, 647-48, 249 S.W.2d 882, 884, *cert. denied,* 344 U.S. 879 (1952); *In re* Report of Grand Jury, 260 P.2d 521, 525 (Utah 1953); EDWARDS, THE GRAND JURY 157-60 (1906); Konowitz, *The Grand Jury as an Investigating Body of Public Officials,* 10 ST. JOHN'S L. REV. 219, 225-27 (1936); Comment, 52 MICH. L. REV. 711, 723-25 (1954); Note, 37 MINN. L. REV. 586, 603-04 (1953); 28 N.Y.U. L. REV. 442, 443 (1953).

5. *Kings County:* Reports of the Holdover December 1949 Grand Jury: an organized gambling and police corruption, April 23, 1954 (see account in N.Y. Times, April 24, 1954, p. 36, col. 1); on the proposal to legalize off-the-track betting, April 26, 1954 (see account in N.Y. Times, April 27, 1954, p. 33, col. 5); on crime and the waterfront, April 28, 1954 (see account in N.Y. Times, April 29, 1954, p. 1, col. 6); on overall cooperation jury received in over four years of existence, April 30, 1954 (see account in N.Y. Times, May 1, 1954, p. 36, col. 3). *N.Y. County:* Report of the Third April 1953 Grand Jury on police recruiting and the Municipal Civil Service Commission, April 29, 1954 (see account in N.Y. Times, April 30, 1954, p. 1, col. 6). *Queens County:* Report of the January 1954 Grand Jury on alleged irregularities in the office of the County Medical Examiner, March 18, 1954 (see account in N.Y. Times, March 19, 1954, p. 44, col. 3). *Richmond County:* Report of the Grand Jury drawn for the Extraordinary Special and Trial Term of the Supreme Court, 1951, on police corruption and gambling, May 21, 1954 (see account in N.Y. Times, May 22, 1954, p. 30, col. 5).

6. *E.g., New Jersey:* Report of the Mercer County Grand Jury on the influence of organized crime in government, April 28, 1954 (see account in N.Y. World Telegram & Sun, May 19, 1954, p. 19, col. 3). Report of the September 1954 Cape May County Grand Jury on election practices, Feb. 25, 1955 (see account in N.Y. Times, Feb. 26, 1955, p. 1,

common belief among lay grand jurors, uninstructed in the law, that they are a power unto themselves and can peer into any matter that their civic consciences indicate needs investigation. Possibly, reports continue because of a disregard of legal precedents by prosecutors who guide the grand juries and by judges who accept these reports and permit them to become matters of court record. Or conceivably, the knowledge of the rarity of motions to expunge may serve as an informal license to juries, prosecutors, and courts bursting with information that they believe will contribute to community enlightenment.[7] These may be the practical reasons why grand jury reports continue despite apparent contrary authority. But, it is submitted, the legal authority that appears to condemn all reports is founded on inadequate analysis.

I. History of Grand Juries and Grand Jury Reports

The opposition to grand jury reports contends that they pervert the historic purpose for the jury's existence. Allegedly, the jury's proper function is to serve as a buffer between the individual and the power of the state, to protect the citizenry from despotic prosecution.[8] A jury report does not protect a person from an improper charge; further, opponents of reports urge, it of itself constitutes an improper charge in that the persons criticized are deprived of a judicial forum in which the truth or falsity of the attack may be determined.[9]

The history of the grand jury, herein considered, reveals three fallacies in this argument. (1) The original purpose of the grand jury was not to serve as a buffer against despotic prosecution. Rather, the grand jury increased the power of the king in an age when there was little regard for personal rights. (2) When later in its history the jury became such a buffer, the need for pro-

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col. 7). *New Mexico:* Report of the United States Grand Jury for the District of New Mexico on alleged fraud in the 1952 general election, Sept. 24, 1954 (see account in N.Y. Times, Sept. 26, 1954, p. 1, col. 4). *New York, Westchester County:* Report of the May 1951 Grand Jury on gambling law enforcement, Feb. 16, 1955 (see account in N.Y. Times, Feb. 17, 1955, p. 29, col. 5).

7. Reports are frequently deemed "harmless and of no consequence." Konowitz, *supra* note 4, at 225. Even in instances where this may not be so, the publicity created by an attack on the report might serve only to increase the harm, and thus improper reports may often escape expunction.

8. See 4 Blackstone, Commentaries *349-50; 2 Story, *op. cit. supra* note 1, at 564; New York, Fourth Report of the Comm'rs on Practice and Pleadings, Code of Crim. P. xxxv (1849). See also Hoffman v. United States, 341 U.S. 479, 485 (1951); Hale v. Henkel, 201 U.S. 43, 59 (1906); Charge to Grand Jury, 30 Fed. Cas. No. 18,255, at 993 (C.C.D. Cal. 1872).

9. The most frequently cited opinion supporting this position is the dissent of Mr. Justice Woodward in Jones v. People, 101 App. Div. 55, 59, 92 N.Y. Supp. 275, 277 (2d Dep't), *appeal dismissed,* 181 N.Y. 389, 74 N.E. 226 (1905). For other New York authorities taking the same position, see, *e.g.,* Matter of Healy, 161 Misc. 582, 597-98, 293 N.Y. Supp. 584, 600-01 (County Ct. 1937); People v. McCabe, 148 Misc. 330, 333-34, 266 N.Y. Supp. 363, 366-67 (Sup. Ct. 1933); Matter of Gardiner, 31 Misc. 364, 374-75, 64 N.Y. Supp. 760, 767 (Gen. Sess. 1900). For similar reasoning in other states, see, *e.g., In re* Hudson County Grand Jury, 14 N.J. Super. 542, 545-46, 82 A.2d 496, 497 (L. 1951); State v. Bramlett, 166 S.C. 323, 326-30, 164 S.E. 873, 874-76 (1932); Hayslip v. State, 193 Tenn. 643, 647-49, 249 S.W. 2d 882, 884, *cert. denied,* 344 U.S. 879 (1952).

tection from *formal* criminal charges continued to be all important. The trial that followed the grand jury's accusation, although no longer based on superstition, included few of the protections now guaranteed. Criticism without indictment, however, did not then and does not now expose persons to a trial of this nature. (3) The grand jury has had a reporting function apart from, and in addition to, its indicting functions for the past several hundred years.

A. *Origins of the Grand Jury*

Historians find institutions analogous to the indicting jury in various cultures antedating the Norman conquest, although no actual link has been established between any of these pre-Norman bodies and the grand jury.[10] The Athenians utilized an accusatory body prior to the start of the Christian era. The Saxons, who settled in England in the fifth to seventh centuries, the Scandinavians, in the eighth century, and the Franks, in the ninth, may have had similar groups of accusing persons. But the ancestral body of the modern grand jury was created in the reign of Henry II.

This monarch's position in history rests on his centralization in feudal England of governmental power.[11] Of great importance in bestowing power on royal courts was the creation of the earliest form of the grand jury in 1166 by the Assize of Clarendon.[12] This assize established bodies of laymen charged with reporting, under oath, those persons accused or believed to be robbers, murderers, thieves, or harborers of such criminals. Reports were made to the royal sheriff and royal justices, before whom the prisoners could defend themselves by swearing to their denials and submitting to the ordeal by water.

Use of this progenitor of the grand jury was not the only mode of charging crime in twelfth century England. Private accusations could still be made. But although no private accuser might come forward, this Grand Assize had the responsibility of determining community repute, and making charges premised on it. This undertaking, *inter alia,* strengthened the royal power.[13] The assize

10. In preparation of this section on the early history of the grand jury, the following have been consulted: ADAMS, THE ORIGIN OF THE ENGLISH CONSTITUTION 106-35 (2d ed. 1920); EDWARDS, THE GRAND JURY 1-44 (1906); FORSYTH, HISTORY OF TRIAL BY JURY 1-196 (new ed. 1875); 1 HOLDSWORTH, A HISTORY OF ENGLISH LAW 312-27 (3d ed. 1922), 10 *id.* 146-51 (1938); PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 16-19, 86-88, 102-21 (3d rev. ed. 1940); 1 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW 136-53, 2 *id.* 598-662 (2d ed. 1903); STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 184-86, 250-58 (1883); THAYER, A PRELIMINARY TREATISE ON EVIDENCE 24-84 (1898); Green, *The Centralization of Norman Justice Under Henry II,* in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 111-38 (1907); Stephen, *Criminal Procedure From the Thirteenth to the Eighteenth Century,* in 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 443-89 (1908).

11. In centralizing power, control over the courts was of much importance. See ELIOT, MURDER IN THE CATHEDRAL 78-79 (pt. II, 2d scene) (2 ed. 1936).

12. Latin text in STUBBS, SELECT CHARTERS OF ENGLISH CONSTITUTIONAL HISTORY 170-73 (9th rev. ed. 1913), translation in ADAMS & STEPHENS, SELECT DOCUMENTS OF ENGLISH CONSTITUTIONAL HISTORY 14-18 (1901).

13. Henry II soon discovered that the creation of a centralized bureaucracy necessitated

was clearly not designed to guarantee any individual rights, nor were such rights in any way strengthened as its by-product. This new instrument for charging crime only increased the number of persons standing trial by the established methods, which made no provision for individual rights.[14]

For the first two hundred years of its existence, the Grand Assize had little to do with the safeguarding of individual rights. The logic of using persons drawn from the locale of the crime to determine the truth (or possibly the feelings of the community) was gradually recognized, and hence the petit jury slowly developed from the Grand Assize. Trial by ordeal and compurgation were finally abandoned, partially because of church dissatisfaction with methods that, having no logical relationship to guilt or innocence, too often resulted in the acquittal of persons deemed to be heretics.

B. *Development as a Protection Against Tyranny*

During the next three hundred years, it apparently became a grand jury function to lodge all charges of crime whether or not private accusers came forward. The grand jury also adopted the custom of hearing witnesses in private.

Two cases which arose in 1681, and in which departure from this custom of secrecy was forced, marked the start of the grand jury's role as an alleged protector against tyranny. The cases were heard at a time of political unrest.[15] Indeed, it is against this background of suspicion and of nearly equal struggle between the king and a delicately balanced Parliament that *Colledge's* case[16]

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the setting up of machinery to minimize corruption. Four years after the promulgation of the Assize of Clarendon, Henry ordered certain of his barons to conduct an inquest of his sheriffs, bailiffs, archbishops, bishops, earls, barons, stewards, foresters, and other officers to ascertain that the royal funds were being dealt with properly, and that royal property was being protected. Inquest of the Sheriffs. Latin text in STUBBS, *op. cit. supra* note 12, at 175-78, translation in ADAMS & STEPHENS, *op. cit. supra* note 12, at 18-20.

14. The assize expressly provided for trial by the ordeal by water, wherein the accused was slowly lowered by rope into a body of water. His innocence was vindicated by his sinking; if he floated, he was found guilty. For those who might survive this ordeal, the assize specifically provided the imposition of banishment and outlawry. These sanctions were invoked although the accusation and submission to the ordeal, not necessarily based on direct evidence of guilt, might have been solely premised on the local opinion that the prisoner was guilty. If convicted, punishment was the loss of a foot, supplemented in 1176 by a provision of the Assize of Northampton to include the loss of the right hand. See Latin text in STUBBS, *op. cit. supra* note 12, at 179-81, translation in ADAMS & STEPHENS, *op. cit. supra* note 12, at 20-23.

15. By 1681, the Puritan dictatorship of Cromwell had been replaced for some twenty-one years by the Restoration of the Stuart rulers. In 1679, the Exclusion Bill had been introduced; it was designed to bar succession to the throne of Charles II's younger brother, James, a Catholic. It barely missed becoming law in 1680 when, passed by the House of Commons, it was rejected by the Lords. At the same time rumors of a plot to assassinate the king and to establish his bastard son, the Protestant Duke of Monmouth in his stead, discredited his opponents and strengthened his pro-Catholic government. For this background, against which these two 1681 cases should be considered, see ADAMS, CONSTITUTIONAL HISTORY OF ENGLAND 334-61 (1920); 2 HALLAM, THE CONSTITUTIONAL HISTORY OF ENGLAND 303-468 (new ed. 1897); 2 OGG, ENGLAND IN THE REIGN OF CHARLES II 559-656 (1934).

16. The Trial of Stephen Colledge, at Oxford, for High Treason, [1681] 8 How. St. Tr. 550. In this case, an array of witnesses before a Middlesex grand jury stated that Col-

and the *Earl of Shaftesbury's* case[17] must be evaluated. In each case, the grand jury that first heard the evidence of treason, presented by the royal prosecutor, refused to indict, returning the bill of indictment endorsed "ignoramus" or "we know nothing of it." These cases are celebrated for establishing the grand jury as a bulwark against despotism.[18] In the light of the times, however, it is not unlikely that in fact each defendant was guilty of treason. The "ignoramus" endorsement by the grand jurors before whom each case was initially presented may, at least in part, be explained by the fact that their political beliefs were similar to those of the accused. Thus the action by these two juries may mirror practical politics rather than any lofty refusal to charge crime because of inadequate evidence.

Moreover, as the later history of *Colledge's* case proved, an indictment in 1681 was generally tantamount to a speedy conviction in a trial lacking all the safeguards now assured by "due process of law." Hence, protection from false indictment made the difference between life and death. Protection from a false jury report does not have this acute significance.

A half century after these two English cases, the early stirrings of American reaction to British colonial rule were mirrored by a New York colonial grand jury. Peter Zenger, publisher of the *Weekly Journal,* savagely attacked the colony's English governor, William Cosby. In 1734, Cosby sought to have Zenger indicted for criminal libel. The grand jury twice refused to indict. Thereafter, Zenger was charged with libel in an information. The prominent New York attorneys who represented him in habeas corpus efforts were disbarred by the Chief Justice of New York's Supreme Court. But Zenger—

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ledge spoke threateningly against Charles II and participated in a plot to kill him. After the jurors returned the already prepared bill of the royal prosecutor with the indorsement "ignoramus," they replied on questioning by the presiding justice as to their reasons that it was "according to their consciences and that they would stand by it." The jury foreman was subsequently sent to the tower and later forced to flee England. The case was then presented to an Oxford grand jury, which indicted; Colledge was forced to plead without seeing a copy of the indictment and without the assistance of counsel. Papers outlining his intended defense were taken from him and given to the prosecution, and the attorney who helped him prepare the papers was held under bail. At his trial Colledge contended that his Protestant faith was the reason for his prosecution. He was convicted and executed.

17. Proceedings at the Old-Bailey, upon a Bill of Indictment for High Treason, against Anthony Earl of Shaftesbury, [1681] 8 How. St. Tr. 759. This case for treason was presented to a London grand jury three months after Colledge's head had been set upon Temple Bar as a warning to others. The London jury returned the prosecutor's bill indorsed "ignoramus." Shaftesbury sought to prosecute his accusers for conspiracy, but was met by their motion that they not be tried in London, where the sheriff and others were Shaftesbury's friends. He fled to Holland, and soon died there. Shaftesbury's treason, and his role as Monmouth's champion, were satirized by Charles II's poet laureate. See DRYDEN, ABSALOM AND ACHITOPHEL. A POEM (1681).

18. See SOMERS, THE SECURITY OF ENGLISHMEN'S LIVES (1681). The author's partisanship, however, may be indicated by the fact that once James II had been forced to flee, Somers was knighted for his legal services in helping to establish the legality of the reign of William and Mary.

through the able services of his distinguised Philadelphia lawyer, Andrew Hamilton—was acquitted.[19]

Regardless of the political motivation, the action of the two 1681 grand juries and of the New York colonial grand jury has been celebrated as heroic conduct protecting the rights of the citizen from tyranny. This view of these events is not wholly unfortunate: an official body with power to protect against government excesses and to negate improper actions of tyrants is desirable. Grand juries, by refusing to indict, clearly have those powers. Nothing in these seventeenth and eighteenth century cases, however, affords any precedent barring a jury from taking the affirmative action of reporting on the derelictions of government officials.

C. *Early Use of the Grand Jury Report*

An objection voiced today to the grand jury report is that the secrecy obligation of the jury is violated when, without charging crime, it issues a report. This objection ignores the historic fact that grand jury reports were utilized during the years when the jury was developing as an instrument against despotism.

In 1683, an English grand jury in Chester without returning a formal indictment charged certain Whigs, including the Earl of Macclesfield, with disloyal and seditious conduct. The Earl sued the members of the grand jury for libel.[20] In defense, on oral argument, it was urged that "it is the constant universal practice" of grand juries to present to court any matters concerning the business of the county, and that this was commonly done in "every assizes and sessions."[21] In answer to this, plaintiff's contention was to the effect that "the law never did impower a jury or any other, to blast any man's reputation without possibility to clear it," and that grand juries may lodge only specific charges of crime. The defense also urged that if a grand jury learned of any national danger, the jurors' oaths bound them to make "prudent and discreet representations of their fears, and the grounds and reasons of them."[22] The court, without opinion, unanimously found for the defendants, apparently sustaining the propriety of grand jury reports.

Sidney and Beatrice Webb have set forth specific instances of early grand jury inquiries into misconduct of royal officers.[23] They mentioned grand jury

19. HEARTMAN, JOHN PETER ZENGER AND HIS FIGHT FOR THE FREEDOM OF THE AMERICAN PRESS (1934); MORRIS, FAIR TRIAL 69-95 (1952); THE TRIAL OF JOHN PETER ZENGER, OF NEW YORK, PRINTER (1765).

20. Proceedings between Charles Earl of Macclesfield and John Starkey, Esq., [1684-85] 10 How. St. Tr. 1330.

21. *Id.* at 1355.

22. *Id.* at 1371.

23. S. AND B. WEBB, ENGLISH LOCAL GOVERNMENT FROM THE REVOLUTION TO THE MUNICIPAL CORPORATIONS ACT: THE PARISH AND THE COUNTY 448-456 (1906). See also 10 HOLDSWORTH, A HISTORY OF ENGLISH LAW 146-51 (1938).

reports in the seventeenth and eighteenth centuries criticizing constables and justices for their abusive market practices. They also referred to reports on horseracing and cockfighting, on the supervision by the justices of houses of correction, on the use by innkeepers and vendors of false drink measures, on the improper care of bridges, gaols, highways, and other county property, and on justices of the peace who accepted excessive fees. A Gloucestershire grand jury in 1678 noted the increasing beggar nuisance and suggested that the constables, and others so charged, enforce the law. In 1697, a county coroner was criticized by an Essex County grand jury for "vexing" a coroner's jury that failed to follow his direction to find a verdict.

This grand jury practice of issuing reports on matters of public concern was followed in the American colonies. In New York in 1688, a grand jury urged that persons selling liquor should keep lodgings.[24] Subsequent New York colonial grand juries reported on highway repair and other matters of state proprietorship. Grand juries in New Jersey rendered reports on matters of public affairs as early as 1680.[25] In Virginia, it was common practice for grand juries to express their opinions on colonial administration.[26]

II. Analysis of the Legal Authorities

Despite the historic foundation for the reporting function, a practice apparently almost three centuries old, the weight of twentieth century authority—relying heavily upon the New York cases—appears to condemn the use of reports by grand juries. Analysis of this authority, however, suggests its limitations.

A. *New York Law*

Jones v. People,[27] a fifty-year-old decision by a divided intermediate appellate court, is the only appellate authority in New York bearing directly on the legality of grand jury reports. Although the majority of the court affirmed the denial of a motion to set aside and quash a report, the dissent has been heavily relied upon by subsequent decisions in New York[28] and elsewhere[29] quashing reports.

24. Goebel & Naughton, *op. cit. supra* note 1, at 361-63.
25. See *In re* Camden County Grand Jury, 10 N.J. 23, 41-44, 89 A.2d 416, 426-428 (1952).
26. Scott, Criminal Law in Colonial Virginia 70-71 (1930).
27. 101 App. Div. 55, 92 N.Y. Supp. 275 (2d Dep't), *appeal dismissed*, 181 N.Y. 389, 74 N.E. 226 (1905).
28. See review of authorities in In the Matter of Wilcox, 153 Misc. 761, 767-74, 276 N.Y. Supp. 117, 123-31 (Sup. Ct. 1934). See also People v. McCabe, 148 Misc. 330, 332, 266 N.Y. Supp. 363, 365-66 (Sup. Ct. 1933); In the Matter of Funston, 133 Misc. 620, 622-23, 233 N.Y. Supp. 81, 84-85 (Sup. Ct. 1929); Matter of Osborne, 68 Misc. 597, 605, 125 N.Y. Supp. 313, 319 (Sup. Ct. 1910); Dession & Cohen, *The Inquisitorial Functions of Grand Juries*, 41 Yale L.J. 687, 708-09 (1932); Medalie, *Grand Jury Investigations*, The Panel, Jan.-Feb. 1929, p. 5; Comment, 17 B.U.L. Rev. 438, 440 (1937); Note, 27 N.Y.U.L. Rev. 319, 327 (1952); 28 N.Y.U.L. Rev. 442, 444 (1953).
29. See Application of United Elec. Workers, 111 F. Supp. 858, 867 (S.D.N.Y. 1953);

The report involved in the *Jones* case was critical of a county board of supervisors and its clerks for alleged failures to perform their duties. The majority relied on section 260 of the New York Code of Criminal Procedure in sustaining the report. That section imposes on the grand jury the duty of inquiring into the cases of persons imprisoned and not yet indicted, into the condition and management of prisons, and "into the wilful and corrupt misconduct in office of public officers of every description in the county."[30] As similar statutes exist in a large number of other American jurisdictions,[31] the *Jones* court's reasoning is elsewhere applicable. Noting the power of inquiry conferred by the statute, the court stated that "official inquiry intends either official action or official report."[32] It ruled that as a grand jury lacks authority to take executive or administrative action, it must therefore have reportorial power.[33]

The court noted that an investigation might reveal "inefficiency, carelessness or neglect [that] may require correction and yet not justify indictment."[34] Therefore it held that a report was proper if it revealed public officials to be

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In the Matter of the Report of the Grand Jury for The April 1911 Term, 4 U.S. Dist. Ct. Hawaii 780, 786 (1911); *Ex parte* Robinson, 231 Ala. 503, 505, 165 So. 582, 583 (1936); *Ex parte* Faulkner, 221 Ark. 37, 41-42, 251 S.W.2d 822, 824 (1952); State *ex rel.* De Armas v. Platt, 193 La. 928, 976-80, 192 So. 659, 674-76 (1939); *In re* Report of Grand Jury, 152 Md. 616, 625-27, 137 Atl. 370, 373-74 (1927); *In re* Hudson County Grand Jury, 14 N.J. Super. 542, 547-48, 82 A.2d 496, 498 (L. 1951); *In re* Report of Grand Jury, 260 P.2d 521, 523-25 (Utah 1953).

30. 101 App. Div. at 57, 92 N.Y. Supp. at 276.

31. Statutes containing language substantially the same as N.Y. CODE CRIM. P. § 260 concerning misconduct of public officers are: ARIZ. CODE ANN. § 44-617 (1939); ARK. STAT. ANN. § 43-907 (1947); CAL. PEN. CODE § 923 (1949); IDAHO CODE ANN. § 19-1109 (1947); IND. ANN. STAT. § 9-824 (Burns 1933); IOWA CODE ANN. § 771.2 (1950); KY. CODES, CRIM. PRAC. § 102 (1948); MINN. STAT. ANN. § 628.61 (West 1947); MONT. REV. CODES ANN. § 94-6322 (1947); NEV. COMP. LAWS § 10826 (1929); N.M. STAT. ANN. § 41-5-15 (Supp. 1953); N.D. REV. CODE § 29-1019 (1943); OKLA. STAT. ANN. tit. 22, § 338 (1951); S.D. CODE § 34.1216 (1939); UTAH CODE ANN. § 77-19-7 (Supp. 1953); WASH. REV. CODE § 10.28.110 (1952). Differently worded statutes of apparently similar purpose are MO. REV. STAT. § 540.020 (1949); TENN. CODE ANN. § 11584 (Michie 1938). A statute creating a duty to inquire into very limited classes of public employees is ORE. REV. STAT. § 132.440 (1953). For statutes going further by creating a duty to report, see note 51 *infra*.

32. 101 App. Div. at 57, 92 N.Y. Supp. at 276.

33. See, to the same effect, In the Matter of Bar Ass'n, 182 Misc. 529, 532, 47 N.Y.S.2d 213, 215-16 (County Ct. 1944). See also *Ex parte* Faulkner, 221 Ark. 37, 40, 251 S.W.2d 822, 823 (1952); Irwin v. Murphy, 129 Cal. App. 713, 717, 19 P.2d 292, 293 (1933); *In re* Report of Grand Jury, 152 Fla. 154, 158, 11 So.2d 316, 318 (1943); Hayslip v. Wellford, 195 Tenn. 621, 626-27, 263 S.W.2d 136, 138 (1953).

This argument concerning § 260 of the N.Y. CODE OF CRIM. P. may logically be carried one step further. Article 170 of the N.Y. PENAL LAW, §§ 1820-77 makes wilful, wrongful misconduct in public office criminal. Therefore, were the grand jury to have exclusively its common law power of inquiring into crimes, expressly conferred in New York by § 223, N.Y. CODE CRIM. P., the provision of § 260 authorizing inquiry into the misconduct of "public officers of every description" would be redundant. As statutes are not to be construed in a manner rendering them meaningless, the section must be read to give the grand jury some power beyond the charging of a specific crime; hence the logic of including the reportorial function. See In the Matter of Wilcox, 153 Misc. 761, 766, 276 N.Y. Supp. 117, 122-23 (Sup. Ct. 1934); Matter of Healy, 161 Misc. 582, 593, 293 N.Y. Supp. 584, 596 (County Ct. 1937).

34. 101 App. Div. at 58, 92 N.Y. Supp. at 277.

"responsible for omissions or commissions, negligence or defects."[35] One limitation on reports criticizing public officials was expressed, however. The majority opinion conceded the hardship imposed by a charge of criminal conduct made in such manner as to deprive an accused of a judicial forum in which to answer. Reports, the majority therefore held, were to be stricken if they contained matter that afforded a basis for indictment.

Mr. Justice Woodward, dissenting in the *Jones* case, felicitously described judicial concern for the rights of the individual. This brilliance of expression must, in part, explain the dissent's wide approval. Woodward declared that the historic purpose of the grand jury was to protect individuals against unfounded accusations. He urged that grand jury criticism constituted the substitution by jurors of their own standards for those fixed by the law of the land, and that this was improper in a "government of laws, and not of men."[36] The dissent argued the unfairness of charging wrongful conduct in a manner that deprived offenders of a chance to defend themselves in a judicial forum. It referred to the report before the court as a "presentment," as such reports were commonly called. Then, noting a provision of the New York State Constitution guaranteeing persons the right to answer an indictment or a "presentment,"[37] the dissent contended that the type of "presentment" before the court, not being answerable in a judicial forum, was violative of the state constitution.[38] This point was urged, although the dissent noted that the term "presentment"—as used in the state constitution—accurately refers to a *criminal* charge based on the jurors' own knowledge.

Despite the encomia lauding the Woodward dissent in later New York lower court opinions, analysis of these cases shows that in each one quashing a report there were special factors noted and relied upon to distinguish it from the *Jones* decision. In one of the cases, the report was based on improper evidence, and persons other than the judge and district attorney were improperly permitted to guide the grand jury.[39] In others, the severely criticized public officials had not been given an opportunity to explain their conduct to the censuring grand jury, although adequate explanation might have been forthcoming.[40] In one, the report was apparently the product of the jury's irritation

35. *Ibid.*
36. 101 App. Div. at 63, 92 N.Y. Supp. at 280.
37. N.Y. CONST. art. I, § 6 (1894) (later amended by the constitutional convention of 1938 to eliminate all references to "presentment").
38. 101 App. Div. at 64, 92 N.Y. Supp. at 281. See, to the same effect, In the Matter of Funston, 133 Misc. 620, 621, 233 N.Y. Supp. 81, 83 (Sup. Ct. 1929).
39. Matter of Gardiner, 31 Misc. 364, 371-74, 64 N.Y. Supp. 760, 765-67 (Gen. Sess. 1900).
40. In the Matter of Healy, 161 Misc. 582, 596, 293 N.Y. Supp. 584, 599 (County Ct. 1937); *In re* Heffernan, 125 N.Y. Supp. 737, 739 (County Ct. 1909) (the court noted that the moving papers of the officials, who were not heard by the grand jury, exonerated them of blame).

with the prosecutor, not the result of a dispassionate investigation.[41] In another, the report approved by the jury was drawn by the complaining witness.[42] In several, the report did not purport to be that of the entire jury, but was the work of a subcommittee of jurors.[43] And in two, the misconduct charged appeared to be wilful and corrupt, but no indictment issued.[44]

The New York cases that refuse to permit reports, and purport to follow the *Jones* dissent, are thus distinguishable from the *Jones* case. Moreover, the New York courts have expressly permitted grand juries to report on their investigations into the conduct of public officials.[45] Further, a court has permitted reports critical of the instigator of the grand jury investigation. The only New York court to consider this problem stated that the grand jury has a duty, not merely a right, to communicate to the proper authority its findings concerning such an instigator.[46]

Besides the case law, other New York authority indicates the legality of some reports. In 1946, action by the state legislature and the governor demonstrated that both viewed some grand jury reports as legal. In that year, the legislature—apparently displeased with reports critical of public officials—sought to outlaw all reports.[47] In vetoing the bills passed by both legislative

41. Matter of Osborne, 68 Misc. 597, 125 N.Y. Supp. 313 (Sup. Ct. 1910).

42. *In re* Heffernan, 125 N.Y. Supp. 737, 739 (County Ct. 1909).

43. In the Matter of Wilcox, 153 Misc. 761, 762-64, 276 N.Y. Supp. 117, 118-20 (Sup. Ct. 1934); *In re* Woodbury, 155 N.Y. Supp. 851, 853 (Sup. Ct. 1915).

44. In the Matter of Wilcox, *supra* note 43, at 762, 276 N.Y. Supp. at 119; In the Matter of Funston, 133 Misc. 620, 233 N.Y. Supp. 81, 82 (Sup. Ct. 1929).

45. See In the Matter of Healy, 161 Misc. 582, 293 N.Y. Supp. 584 (County Ct. 1937), where the court upheld the right of grand juries to report, and noted that such reports might be of community benefit. Nevertheless, it ordered portions of the report before it stricken on the sole ground that the person criticized in it was not a public official. See also People v. Doe (Application of Halleran), 176 Misc. 943, 945-46, 29 N.Y.S.2d 648, 650-51 (County Ct. 1941).

An argument may be made that New York's highest appellate court has tacitly approved grand jury reports critical of public officials. In the Matter of Quinn, 293 N.Y. 787, 58 N.E.2d 730 (1944), was a case in which, after a report had been filed, the townspeople sought to secure the criticized official's grand jury testimony in connection with an action to remove him. Without opinion, the N.Y. Court of Appeals affirmed the intermediate appellate court's holding that the application to inspect minutes should have been granted. However, a retired Chief Judge of New York's highest appellate court, Frederick E. Crane, commented that a report is "a statement of the opinion of the grand jury regarding the acts of public officials after examination in which they, the grand jury, disagree with the officials and find them derelict in duty without giving them any chance whatever to answer or afford an opportunity for stating their side of the case. . . . In my humble opinion this power [to report] under our own statutes is very questionable and the matter should be settled by an authoritative determination of the courts." FEDERAL RULES OF CRIMINAL PROCEDURE WITH NOTES AND INSTITUTE PROCEEDINGS 246, 250-251 (1946).

46. Matter of Knight, 176 Misc. 635, 638, 28 N.Y.S.2d 353, 356 (Gen. Sess. 1941).

47. N.Y. Sen. Int. No. 509, Ass. Int. No. 623 (1946), provided that "The grand jury shall make no presentment or other public record censuring or reflecting upon the integrity of any person for alleged misconduct that does not constitute a crime." There may be a constitutional right in some states of grand juries to investigate, and possibly even to report, which cannot be infringed by statute. See Alexander, *Grand Jury Presentments*, THE PANEL, Jan.-Feb. 1935, p. 8; *cf.* Dauphin County Grand Jury Investigation Proceedings, 332 Pa. 342, 2 A.2d 804 (1938), 38 COLUM. L. REV. 1493 (1938); Note, 52 HARV. L. REV. 151 (1938).

houses, Governor Thomas E. Dewey praised the grand jury rights of inquiry and report as "one of the most valued and treasured restraints upon tyranny and corruption in public office."[48]

B. *The Law Elsewhere*

The *Jones* dissent has been widely followed in other jurisdictions.[49] These courts, in following this dissent and in averring that subsequent New York cases were in agreement with it, have frequently failed to note the distinguishing factors considered above. Thus other jurisdictions have stricken reports that were apparently not subject to the infirmities of the rejected New York reports, and which were apparently based on fair and complete jury investigations.[50]

There are several jurisdictions, however, in which some grand jury reports are expressly approved. In a few states, by statute the grand jury has a duty to report on misconduct or incompetence in government.[51] Judicial decisions in California, Florida, and New Jersey permit reports on public employees charged with neglect of their official duties.[52]

A well reasoned recent opinion in this area was that of *In re Camden County Grand Jury*,[53] in which New Jersey's Chief Justice Arthur T. Vanderbilt sustained a grand jury report critical of lax and indifferent public officials. Vanderbilt not only sustained the propriety of such grand jury action, but also urged that, since the administration of government in a democracy depends upon an

48. PUBLIC PAPERS OF GOVERNOR THOMAS E. DEWEY 140-41 (1946). The 1946 effort of the New York State Legislature to outlaw all grand jury reports, and the possible bearing on the legality of reports in New York since a 1938 revision of that state's constitution (referred to in note 37 *supra*) are fully considered in the most recent New York opinion on reports, In the Matter of the Application of Lundy, New York, County Court, Oct. 3, 1955 (pp. 8-10 of mimeographed opinion). (See account in N.Y. Times, Oct. 4, 1955, p. 23, col. 1.) This careful opinion, denying a motion to expunge, held the *Jones* decision to control. The court, however, ordered certain portions of the report stricken as being beyond the province of the jury.

49. See cases cited in note 29 *supra* for authorities expressly referring to the *Jones* dissent. For other decisions opposing reports, see Coons v. State, 191 Ind. 580, 134 N.E. 194 (1922); Rector v. Smith, 11 Iowa 302 (1860); Bennett v. Kalamazoo Circuit Judge, 183 Mich. 200, 150 N.W. 141 (1914); State *ex rel.* Strong v. District Court, 216 Minn. 345, 12 N.W.2d 776 (1944); State v. Bramlett, 166 S.C. 323, 164 S.E. 873 (1932); Report of Grand Jury, 204 Wis. 409, 235 N.W. 789 (1931).

50. See, *e.g.*, *In re* Hudson County Grand Jury, 14 N.J. Super. 542, 82 A.2d 496 (L. 1951); *In re* Report of Grand Jury, 260 P.2d 521 (Utah 1953); Report of Grand Jury, *supra* note 49.

51. ALA. CODE tit. 41, § 200 (1940); GA. CODE ANN. §§ 58-1043, 1044 (Supp. 1951) and § 59-309 (1935); MISS. CODE ANN. § 1788 (1942); *cf.* TEX. CODE CRIM. PROC. ANN. art. 27 (Supp. 1954). In Louisiana, a law enacted in 1928, the year Huey Long was elected governor, expressly bars any grand jury reports. LA. REV. STAT. § 15:210 (1950) (". . . the grand jury shall not . . . make any report on any matter . . . as the grand jury is an accusatory body and not a censor of public morals").

52. *California:* Irwin v. Murphy, 129 Cal. App. 713, 19 P.2d 292 (1933). *Florida:* Ryon v. Shaw, 77 So.2d 455 (Fla. 1955); Owens v. State, 59 So.2d 254 (Fla. 1952), 6 U. FLA. L. REV. 140 (1953); *In re* Report of Grand Jury, 152 Fla. 154, 11 So.2d 316 (1943). *New Jersey: In re* Camden County Grand Jury, 10 N.J. 23, 89 A.2d 416 (1952); *cf.* O'Regan v. Schermerhorn, 25 N.J. Misc. 1, 27-32, 50 A.2d 10, 25-27 (Sup. Ct. 1946); see also 1 NEW JERSEY CONST. CONVENTION OF 1947 617-22 (1947).

53. 10 N.J. 23, 89 A.2d 416 (1952).

enlightened public opinion, the grand jury has the duty to inform the public of official conduct that is deemed remiss.

Reports critical of persons whose false charges instigated grand jury action are permitted in Tennessee,[54] and apparently are permitted in Arkansas and New Jersey.[55] The logic of allowing these two types of reports and the limitations imposed on them are more fully considered in part IV of this paper, which deals with the proper scope of grand jury reports.

C. *The Opposition to Grand Jury Reports*

There are four objections that the adverse authorities assert when holding against grand jury reports. Three of these—that reports violate secrecy oaths, that they expose the jurors to libel actions, and that they violate the separation of powers principle—appear to be without merit.

1. *Secrecy.* If a grand jury indicts or dismisses after an arrest has been made, knowledge of the jury action, and hence of some of the facts adduced, ordinarily soon becomes public. But as indictment and dismissal are concededly proper functions of the grand jury, it is not contended that they violate the secrecy oath. Similarly, if reporting is a proper grand jury function, it cannot become improper because of necessity it departs from secrecy.

Indeed, one of the principal advantages of grand jury secrecy has greater strength in connection with grand jury reports than in connection with indictment.[56] Secrecy, in affording protection to grand jury informers, facilitates the collection of information. Trials following indictments are likely to reveal informers as witnesses—thus partially vitiating this benefit of secrecy—but reports need never reveal the informers. Another reason for grand jury secrecy —to prevent persons about to be indicted from fleeing—has no application to

54. Hayslip v. State, 193 Tenn. 643, 249 S.W.2d 882, *cert. denied,* 344 U.S. 879 (1952); see also Hayslip v. Wellford, 195 Tenn. 621, 263 S.W.2d 136 (1953).

55. *Arkansas: Ex parte* Cook, 137 S.W.2d 248 (Ark. 1940). But see *Ex parte* Faulkner, 221 Ark. 37, 251 S.W.2d 822 (1952), in which the court expunged a report which criticized the instigator of an investigation, specifically noting in so doing that the report was so strong as to constitute criminal libel. *New Jersey:* see *In re* Hudson County Grand Jury, 14 N.J. Super. 542, 548, 82 A.2d 496, 498 (L. 1951) in which the court notes that "obviously" the factual situation pertaining to a report criticizing the instigator of an inquiry was different from that in which non-instigators were criticized. Reports criticizing instigators of investigations are not permitted in Alabama. See *Ex parte* Burns, 261 Ala. 217, 221, 73 So.2d 912, 915 (1954).

56. The authorities are in agreement that the purpose of grand jury secrecy is *not* the protection of the accused. Secrecy serves (i) to encourage the free expression of witnesses by affording them maximum freedom of disclosure without fear of reprisals from outsiders, (ii) to prevent perjury by witnesses who come forward to controvert or reinforce other testimony of which they learn, (iii) to conceal the jury's interest in order to prevent prospective defendants from escaping, (iv) to prevent disclosure of investigations that result in no grand jury action, and (v) to assure the grand jury freedom from outside interference. See United States v. Amazon Industrial Chemical Corp., 55 F.2d 254, 261 (D. Md. 1931); United States v. Smyth, 104 F. Supp. 283, 303-04 (N.D. Cal. 1952); Howard v. State, 60 Ga. App. 229, 236, 4 S.E.2d 418, 423-24 (1939); Bennett v. Stockwell, 197 Mich. 50, 56-57, 163 N.W. 482, 484 (1917).

reports. The fear of flight cannot arise when a report is publicized since no criminal action is contemplated against those criticized in it.

The violation of grand jury secrecy in the public interest by ways other than formal indictment has ample precedent. Where the general welfare requires it, grand jury minutes will be made public.[57] Such a revelation may, of course, be far more harmful than a report, as it exposes testimony unsifted for the elimination of hearsay and ill-founded canards. How much more logical it is to permit the temperate and well based conclusions of a grand jury to be expressed in a report written for the benefit of the public. If jurors' oaths are not violated when a court makes public the minutes of testimony taken before them, they are not violated when with court sanction a careful report dedicated to the public interest becomes a matter of public record.

2. *Libel.* Another argument that raises itself by its own bootstraps is that jurors, by reporting, may expose themselves to libel actions.[58] If a report is a proper judicial utterance, it is privileged and cannot give rise to a libel recovery. Moreover, even in jurisdictions in which reports are considered improper, it has been held that grand jurors do not, by reporting, expose themselves to libel actions; their good faith belief that criticism was a proper jury function clothes their action with privilege, even though such action exceeds the jurors' proper authority.[59]

3. *Separation of powers.* Another argument urged against reports is that they contravene the constitutional separation of powers. It is contended that the grand jury, an arm of the court, should not charge executive or legislative officers with conduct other than criminal and that the efficiency of these branches

57. *In re* Grand Jury Proceedings, 4 F. Supp. 283 (E.D. Pa. 1933) (minutes of investigation which led to indictments for violation of the prohibition laws released on United States Attorney's application for use in proceedings re beer license revocation); In the Matter of Quinn, 293 N.Y. 787, 58 N.E.2d 730 (1944) (affirmance of order divulging minutes of investigation which led to report criticizing official for his negligence); In the Matter of Crain, 139 Misc. 799, 250 N.Y. Supp. 249 (Gen. Sess. 1931) (minutes of market investigation conducted by New York County District Attorney released to investigators into the conduct of that office); In the Matter of the Attorney General, 160 Misc. 533, 291 N.Y. Supp. 5 (County Ct. 1936) (minutes of state investigation which led to grand jury report concerning banking operations released, for use in connection with federal criminal trial, on application of United States Attorney General); *In re* People *ex rel.* Sawpit Gymnasium, 60 N.Y.S.2d 593 (Sup. Ct. 1946) (minutes of investigation which led to grand jury report concerning police collusion in gambling operation released on application by village seeking to stop conditions. See also Note, 27 N.Y.U.L. REV. 319 (1952).

58. In Posten v. Washington, A. & Mt. V.R.R., 36 App. D.C. 359 (1911), the appellate court held that the grand jury was without any authority to report, and hence its members were exposed to actions in libel. That decision relied on the often cited case of Rector v. Smith, 11 Iowa 302 (1860), in which, however, the court had stated that the lack of malice would be a good defense.

59. The conditional privilege of grand jurors to report on misconduct of public officers, honestly believing such reports proper and in the performance of their duty, was sustained in Rich v. Eason, 214 S.W. 581 (Tex. Civ. App. 1919). In Alabama where reports are improper, "fair" comment on the activities of public officials by grand juries was held to be privileged. Parsons v. Age-Herald Publishing Co., 181 Ala. 439, 61 So. 345 (1913). See also *Ex parte* Robinson, 231 Ala. 503, 504, 165 So. 582, 582-83 (1936), 17 B.U.L. REV. 438 (1937). See Dession & Cohen, *supra* note 28, at 709-10 (1932).

of government is not the concern of the jury. One historical flaw in this argument must be noted. Almost three hundred years ago, the grand jury developed into a check on the possible abuse of the executive power. Yet today, when it reports on other governmental abuses, it is criticized as violating the separation of powers principle. Historically, the grand jury has for centuries exercised both the reporting and indicting functions. As both roles have long been ascribed to the judicial branch of government, the exercise of the reporting function by this department is no more violative of the separation of powers principle than is the indictment of a governmental official for criminal conduct in the performance of duties.

It has never been contended that courts abuse their trust when, noting statutory defects, they suggest to the legislature that it consider amendment.[60] In criticizing public officers and calling for improvements, the grand jury performs an analogous function. It does not remove these persons from office, or assume their duties by its criticism, any more than a court legislates when it makes suggestions to the legislature. Success of the separation of powers principle depends to some extent on the interaction and cooperation of the arms of government, not on their total isolation from each other.[61] This mutual assistance is achieved when the grand jury exercises its historic public function of *suggesting* improvements.

The only serious argument against grand jury reports is that they charge wrongdoing while effectively denying the use of a judicial forum in which to reply. This argument requires full consideration and evaluation against the background of our contemporary society.

III. Current Use of Grand Jury Reports

The proper scope of the grand jury's reporting function is determined by a synthesis of three factors, the first two of which—the jury's history and the judicial reception of jury reports—have already been considered. The third factor is our contemporary society. Two facets of this society must be considered. One is the present day role of the grand jury as an investigator of official misconduct; the other is the injury inflicted on a person subjected to jury criticism that cannot be answered in a judicial forum.

A. *The Grand Jury as an Investigator of Official Misconduct*

As Chief Justice Vanderbilt of New Jersey has noted, government today "has taken on a complexity of organization and of operation that defies the

60. See, *e.g.*, Hoadley v. Hoadley, 244 N.Y. 424, 437, 155 N.E. 728, 733 (1927); First State Bank v. Hidalgo Land Co., 114 Tex. 339, 343, 268 S.W. 144, 146 (1925); 102 U. Pa. L. Rev. 254, 257-58 (1953).

61. See Vanderbilt, The Doctrine of the Separation of Powers and Its Present-Day Significance 43-45 (1953). See also Note, 37 Minn. L. Rev. 586, 588-89 (1953).

best intentions of the citizen to know and understand it."[62] Part of this new complexity is attributable to the greatly expanded hierarchy of public employees. As this hierarchy grows, its branches are ever further removed from those officials who are directly answerable to the electorate. At the same time, detailed familiarity of the public with the activities of even the elective officials steadily decreases. As this breach between the public and its servants widens, a need develops for new modes of policing the growing body of public employees to protect their ranks from the encroachment of the corrupt, the neglectful, and the incompetent. This need has in recent years been met by an outburst of probing bodies of questionable efficiency. Although these bodies have received the greatest notoriety in the federal field, their counterparts exist on state, city, and local levels. It is not a function of this paper to analyze in detail the weaknesses of such free-swinging investigatory groups; it will suffice for the instant purposes to contrast their fitness to conduct serious investigations of official misconduct with that of the grand jury, whether state or federal, which always acts subject to enforceable restraints.

Investigatory committees, whether of the legislative or of the executive arm of government, suffer common defects. Their members, being either elected or appointed by elected officials, ordinarily are not completely free of political motivation. Elected officials and professional investigators are apt to find their own personal interests best fostered by publicity. Consequently, investigations are most often either conducted in full public spotlight, or are punctuated by frequent reports to the public of interim results. The hearings conducted and the ensuing reports are often uninhibited by the limitations imposed by rules of evidence. As the outcome of all these investigations is probably influenced by political considerations, partiality and a deliberate lack of thoroughness are apt to be present.[63]

These defects are not necessarily found in all such investigations. However, there exists no immediate check, no supervision, no overseer to guarantee that legislative or executive committees act fairly while conducting their investigations and before making public the results of their activities.

Similar weaknesses exist as to inquiries privately fostered. Newspaper conducted investigations are ordinarily not impartial. Their reports are likely to be in line with the prevailing editorial policy and are, at least in part, designed to sell papers. Private organizations, whether lawyers' or veterans' associations, or other publicly spirited groups, often bestir themselves to in-

62. See *In re* Camden County Grand Jury, 10 N.J. 23, 65, 89 A.2d 416, 443 (1944).

63. For an excellent critical analysis of congressional investigations, see TAYLOR, GRAND INQUEST; THE STORY OF CONGRESSIONAL INVESTIGATIONS (1955). For the prosecutor's view of the contrasting roles of investigating commissions and committees, and of the public prosecutor, see REPORT OF THE DISTRICT ATTORNEY, COUNTY OF NEW YORK, 1949-54, 17-19 (1955).

vestigate only because of a preconception as to how their studies will turn out. A further severe limitation on private inquiries is that they depend wholly on the willing cooperation of the persons supplying the necessary information since subpoena power is lacking.

Grand juries appear better suited than either legislative or executive committees or private bodies to police the conduct of public officials. Because of the breadth of grand jury authority, contentious refusals to answer questions alleged to be beyond the scope of the investigation[64] will probably not hamstring investigations. The combination of subpoena power and secrecy permits testimony to be taken with minimum embarrassment and, indeed, with minimum risk of reprisals to the subpoenaed witnesses.[65] Although the rules of evidence need not be strictly enforced by investigating grand juries ferreting out leads, these rules are generally enforceable by court review as to the public emanations of the jury, whether indictments or reports.[66] The jurors, non-professionals, ordinarily are not dually engaged in both investigating the misconduct of public officials and in fostering their own public careers.[67] The effect of any unworthy ambitions of the state's attorney on an investigation may be minimized by the mature judgment and at least nominal control exercised by the non-political lay jurors. Most significantly, the grand jury is not an autonomous group, completely the master of its own investigation. Its action is subject to immediate control by the court of which the jury is but an arm.[68]

Grand juries may be misled into rendering reports outside of their competence by a judge and a prosecutor, one of whom ignores the proper limitations on jury action, while the other passively tolerates this abuse.[69] But since judges

64. See Dession & Cohen, *supra* note 28, at 700-02; Note, 39 CALIF. L. REV. 573, 574-75 (1951).

65. See note 56 *supra*. The advantage of hearing witnesses publicly, with the possibility that this may provoke strangers to come forward and give the lie to false statements, has been recognized. See People v. Jelke, 308 N.Y. 56, 62-63, 123 N.E.2d 769, 771-72 (1954). This possibility, however, is probably outweighed by the advantages afforded by secrecy.

66. See note 39 *supra*, and notes 95 and 96 *infra*.

67. There may be some danger that hand-picked grand jurors, not drawn from the same broad base as petit jurors, may be politically influenced. See Morse, *A Survey of the Grand Jury System*, 10 ORE. L. REV. 217, 236-39 (1931).

68. For discussion of the manner in which a grand jury's action can be controlled by the court, see part V, text at notes 117-41 *infra*.

69. One New York Grand Jury, impanelled in December, 1949 by a Kings County Judge, filed thirteen reports in almost four and a half years of existence. Successfully completed prosecutions for police corruption, bookmaking, and waterfront racketeering were initiated by this grand jury. The jury's story is told, complete with the full text of each of the reports, in the 154-page printed REPORT OF SPECIAL INVESTIGATION BY THE DISTRICT ATTORNEY OF KINGS COUNTY AND THE DECEMBER 1949 GRAND JURY (1954) (page references are to this report). The success of the investigation does not, however, render proper the interim filing of the periodic "progress reports." The intemperate language contained in several of the reports ascribed criminal conduct to some persons who were not formally charged with crime, was unfair to innocent persons who were tarred with broad brush strokes intended for their colleagues, and detracted from the dignity of both the grand jury and the court.

Two years after the jury's inception, and long after its normal term had expired, it launched into a new and major field of investigation, the waterfront, although no reason

are ordinarily appointed or are elected for longer terms than other public officials, they should tend to be less concerned with public relations. Furthermore, jury, prosecutor, and judge all exist as an immediate restraint on each other's conduct. Should such cross checks prove ineffective, the appellate courts may be available.

B. *Injury Inflicted by Reports*

That the grand jury can be an effective body for the investigation and report of public officials' inaction and wrongdoing has been widely noted.[70] It is then necessary to consider whether the weight given to a jury report so seriously harms persons criticized therein as to merit the appellation "foul blow" that it has been given.[71] It is submitted that although criticized individuals may be injured by reports which they cannot publicly answer in a judicial forum, the lack of such a forum is no longer as significant as it once was.

In the first place, urbanization has diminished the importance of the courthouse as a gathering place for community entertainment. Public interest in judicial spectacles is currently fed by radio, newspapers, magazines, television, and motion pictures, so that—indirectly—the courtroom now plays to its largest audiences.[72] But the courtroom has no unique advantage with these media. They are available for the lodging and refutation of charges of wrongdoing, whether or not such charges originate in a judicial forum. Notorious examples of their unprecedentedly broad use were the 1954 "Army-McCarthy" hearings which went on for many weeks with complete coverage by all communications media.[73]

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appears why a new and less professional corps of jurors could not have handled such an investigation. Apparently while this jury was still in existence a second jury, under the aegis of the same Kings County Judge, assumed an expert role concerning youthful delinquents and issued a series of reports in that field. One such report pitted the jurors' expertise against that of a state commission which had conducted an extensive study of youth in the state courts. This was the thirteen-page report of the holdover October 1952 Kings County Grand Jury entitled "A Critique of the Report of the Subcommittee on Youth and Family in the Courts," issued Jan. 19, 1955. See account in N.Y. Times, Jan. 20, 1955, p. 33, col. 8.

70. In the course of a dissenting opinion in Hurtado v. California, 110 U.S. 516, 538, 554-55 (1884), Mr. Justice Harlan noted that the grand jury, since free of control by the electorate and free from the public clamor, was ideally suited to the impartial and non-malicious consideration of charges. The grand jury report has been considered a healthy check on autonomous units of government, giving the inhabitants an opportunity to express themselves thereon. 10 Holdsworth, *op. cit. supra* note 23, at 149. See also ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 187 (1947); WILLOUGHBY, PRINCIPLES OF JUDICIAL ADMINISTRATION 193-94 (1929); NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PROSECUTION 37 (1931); Medalie, *supra* note 28, at 7; Miller, *Informations or Indictments in Felony Cases*, 8 MINN. L. REV. 379, 405 (1924); Morse, *supra* note 67, at 333-38; 4 STAN. L. REV. 68, 78 (1951).

71. See People v. McCabe, 148 Misc. 330, 333, 266 N.Y. Supp. 363, 367 (Sup. Ct. 1933); Comment, 52 MICH. L. REV. 711, 716-20 (1954).

72. In 1954, the murder trial of Dr. Samuel Shepard in a Cleveland Court of Common Pleas received tremendous coverage in all media of mass communication. Similarly, in 1955, the second trial of Minot F. Jelke III, on the felony charge of living on the earnings of prostitution, also received detailed coverage.

73. Throughout their duration, these hearings were directly televised on a nation-wide

Indeed, even when charges are pending in a judicial forum, their pre-trial or concurrent "litigation" out of the courtroom and in the public press—whereby the opinions of the great public "jury" are molded—is a common, if unfortunate, phenomenon.[74] It also bears witness to the litigants' recognition of the importance of the public, as well as the judicial, forum. This great public jury is, of course, available to hear the case of anyone criticized in the grand jury report whose denials are sufficiently newsworthy. Whether or not charges or answers originate in a judicial forum, their good or harm can be similarly amplified. Thus, in reality, the importance of the judicial forum for the determination of charges of ineptitude has yielded place to the broader forum created by our mass media of public information.

Secondly, persons criticized in grand jury reports have an advantageous position in the public forum absent in a judicial forum. The jury, its report issued, has spoken. It can speak again (if, indeed, with the rendering of its report it has not been dismissed) only through the cumbersome method of meeting, having its membership consider a further report, and having such a report accepted and filed by the court. In this additional utterance, the jury is still bound by rules of evidence and by the limitations on the scope of a report. Persons criticized are subject to none of these restrictions. Dynamic denials and countercharges can be issued, unlimited by rules of evidence or even basic requisites of truth. If sufficiently dramatic, they may outplay in their newsworthiness—and hence in their command of the public forum—the original grand jury charges. Thus, the alleged unfairness of depriving persons criticized of a judicial forum in which to raise their defenses may in some instances actually cloak them with their most effective means of defense: the freedom to deny and make countercharges without fear of eventual judicial discrediting of their position.[75]

Thirdly, the report is not the only type of grand jury action that injures persons without affording them the opportunity of vindication in a judicial

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television network; this coverage was supplemented by nightly summaries of the highlights, on both radio and television; newspaper coverage was similarly extensive. For an account of this spectacle, see STRAIGHT, TRIAL BY TELEVISION (1954).

74. See Brownell, *A Free Trial and a Free Press*, 132 N.Y.L.J. Nos. 66, 67, p. 4, col. 1 (Oct. 4-5, 1954); Ludwig, *Journalism and Justice in Criminal Law*, 28 ST. JOHN'S L. REV. 197 (1954). On May 11, 1954, by resolution, the Association of the Bar of the City of New York called on the ABA to amend § 20 of the Canons of Professional Ethics to make comment on pending cases by counsel improper. See account in N.Y. Times, May 12, 1954, p. 27, col. 5. Thereafter, on June 26, 1954, by resolution, the N.Y. State Bar Association similarly directed that action be taken to amend the canons. See account in N.Y. Times, June 27, 1954, p. 1, col. 1.

75. The New York grand jury report on police recruiting and the Municipal Civil Service Commission of April 29, 1954, *supra* note 5, criticized an expert on police matters for certain charges he had made that, in part, had given rise to the jury's investigation. After the report was issued, and the jury had passed out of existence, this expert issued press statements critical of the jury, its report, and the district attorney. See N.Y. Times, May 1, 1954, p. 36, col. 5.

forum. An indictment that is not prosecuted, or one that is quietly dismissed, has similar damning effect while not providing full opportunity for publicized vindication.[76] Nor does an indictment naming persons as co-conspirators, but not as defendants, offer an opportunity for vindication.

Finally, the good to the public resulting from justifiable charges of wrongdoing made against public officials may counterbalance whatever harm is done to the affected individuals. As Judge Learned Hand noted over thirty years ago:

> No doubt grand juries err and indictments are calamities to honest men, but we must work with human beings and we can correct such errors only at too large a price. Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.[77]

In today's climate, the presence or absence of a *judicial* forum does not determine the harm to the individual that may be done by charges of his incompetence and neglect. Recognition of this fact, coupled with the realization of the community benefit derived from appropriate grand jury reports, consequently prompts the formulation of rules as to their proper scope.

IV. The Proper Scope of the Grand Jury Report

An inquiry directed at the proper scope of a grand jury report must consider *who* may be criticized in grand jury reports, *when* an investigation and an ensuing report are proper, and *what* the report may contain.

A. *Who May Be Criticized*

Consideration of the history of grand jury reports, of the protection to the individual stressed by the case law, and of the community benefit derived from these reports indicates that grand juries can properly perform a reporting function as regards two groups of persons: those in government service and those whose activities have instigated investigations.

1. *Persons in government service.* It has been noted that "there is no greater deterrent to evil, incompetent and corrupt government than publicity."[78] Therefore, reports stimulating public employees to regard their office as a public trust appear to be in the general interest, which outweighs the personal hardship incident to criticism.

Public employees may suffer certain restrictions not imposed upon others.[79]

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76. See *In re* Camden County Grand Jury, 10 N.J. 23, 66-67, 89 A.2d 416, 444 (1952).
77. United States v. Garsson, 291 Fed. 646, 649 (S.D.N.Y. 1923).
78. Ryon v. Shaw, 77 So.2d 455, 457 (Fla. 1955).
79. See McAuliffe v. New Bedford, 155 Mass. 216, 220, 29 N.E. 517 (1892) (Holmes, J.) ("The petitioner may have a constitutional right to talk politics, but he has no constitu-

Their political activity may be curtailed,[80] as may their political unorthodoxy.[81] Their right to retain public employment while asserting the privilege against self-incrimination may be lost.[82] In the light of the long history of grand jury reports on official misconduct, persons accepting public employment might be held to have "assumed the risk" of report on any ineffectiveness revealed by proper inquiry.

In addition to governmental employees, certain other persons should be subject to critical grand jury reports if engaged in an activity affected with particular public concern.[83] Thus, as early as the seventeenth century, juries reported on the activities of private citizens whose conduct was regulated by special governmental supervision. Reports on innkeepers' overcharges and on market abuses have already been considered.[84]

Today, innkeepers' overcharges and market abuses may lack special governmental concern. But persons and business entities assuming public responsibilities—whether highway paving contracts, sewerage disposal arrangements, or other obligations—should be accountable to the community in the same fashion as individuals in actual government employement. Thus they should be subject to critical report if their public duties are misperformed.[85]

In the federal courts, the practice of reporting on persons in government service lacks one of its supporting arguments as there is no federal counterpart to the state statutes expressly conferring on grand juries the power to investigate governmental employees' corrupt misconduct.[86] The one federal

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tional right to be a policeman"); Note, *The "Right" to a Government Job,* 6 RUTGERS L. REV. 451 (1952).

80. The political activity of employees in the executive branch of the federal government is restricted by the Hatch Act, 53 STAT. 1147 (1939), as amended, 5 U.S.C. § 118i (1952), the constitutionality of which was sustained in United Public Workers v. Mitchell, 330 U.S. 75 (1947). See Mosher, *Government Employees Under the Hatch Act,* 22 N.Y.U.L.Q. REV. 233 (1947).

81. The constitutionality of a New York statute designed to bar subversives from employment in the public schools was sustained by the Supreme Court in Adler v. Board of Education, 342 U.S. 485 (1952), The Supreme Court, 1951 Term, 66 HARV. L. REV. 89, 111-12 (1952); 100 U. PA. L. REV. 1244 (1952). See also Garner v. Board of Public Works, 341 U.S. 716 (1951).

82. This may be provided by constitutional or statutory authority, or by judicial decisions. See note 102 *infra.*

83. The increasingly "public" nature of many activities has been noted, and the danger recognized that with the concomitant reduction of the safeguards afforded public employees, the overall protection created by those safeguards deteriorates. Note, 64 HARV. L. REV. 987, 995 (1951).

84. See text at notes 23-24 *supra.*

85. Only one case has approached this problem. Matter of Healy, 161 Misc. 582, 293 N.Y. Supp. 584 (County Ct. 1937), was a case in which the New York court ruled that only actual government employees were subject to censure in reports. While recognizing the propriety of reports on public employees, the court held that a political party official was not such an employee and was therefore immune to grand jury censure.

86. That the power of federal grand juries to inquire into public officials' conduct is not so broad as may be the power of state grand juries was noted by Justice Stephen Field in his classic Charge to Grand Jury, 30 Fed. Cas. No. 18,255, at 994 (C.C.D. Cal. 1872). See also FEDERAL RULES OF CRIMINAL PROCEDURE WITH NOTES AND INSTITUTE PROCEEDINGS 246, 251-52 (1946).

case that expressly considered whether there might be a difference between reports on persons in government employment and other individuals rejected any distinction.[87] But if federal grand jury reports emanate from investigations into official corruption, the arguments of history and logic—even lacking the added statutory support—are such that these reports should be considered proper.[88]

2. *Persons instigating investigations.* It is in keeping with the highest purposes of the grand jury to criticize individuals whose ill-founded and irresponsible charges have instigated investigations. Such widely publicized charges may strip their object of good name and livelihood. The grand jury can perform its historic function of protection against tyranny—in this case the tyranny of hostile public opinion—by reporting that a fair and impartial inquiry showed charges to be unfounded. Persons who levelled such charges in the self-assumed roles of public protectors should be exposed to the same inquiry and report as regularly appointed or elected public officials.

Some authorities oppose reports criticizing instigators of investigations on the ground that fear of grand jury censure will deter people from coming forward with merited charges against dishonest public officials.[89] Although some justified criticism may be discouraged, holding those persons responsible whose spurious charges initiate inquiries may have the salubrious effect of discouraging those who would otherwise seek publicly to bear false witness.

B. *When Reports Are Proper*

Reports critical of persons in government service and irresponsible instigators of fruitless investigations may not always be proper. Three further limitations appear appropriate: reports should emanate only from investigations originally premised on reasonable beliefs that crimes were committed, they should accurately state the results of investigations fairly conducted, and they should not issue while criminal charges are pending, the trials of which might be prejudiced by this publicity.

1. *When belief exists that crimes were committed.* As is so often true in the law, no readily apparent boundaries exist for determining when grand jury investigations and reports are proper. The problem is, of course, one of fixing limits that will include certain situations and exclude others. A balance must be struck. The benefits and injuries of grand jury investigations and reports, al-

87. Application of United Elec. Workers, 111 F. Supp. 858, 867 (S.D.N.Y. 1953).

88. The courts in Florida and New Jersey, in strong opinions, sustained the right of grand juries to comment in reports on improper official conduct, although neither of these states at the time of the decisions had statutes analogous to New York's CODE OF CRIM. P. § 260. See cases cited in note 52 *supra.*

89. Posten v. Washington, A. & Mt. V.R.R., 36 App. D.C. 359 (1911). See also Hayslip v. State, 193 Tenn. 643, 651, 249 S.W.2d 882, 885 (dissenting opinion), *cert. denied,* 344 U.S. 879 (1952), 28 N.Y.U.L. REV. 442, 445 (1953), 38 VA. L. REV. 950, 952 (1952).

ready considered, are weighed in striking this balance. But it is most essential to consider the grand jury's dominant purpose: the charging of crime.

When the ineffectiveness of public employees has become so marked as to suggest corruption, grand jury investigation becomes a duty. Once appropriate inquiry has been initiated, the belief that a grand jury should only charge crime or forever keep silent ought not to compel the loss of the inquiry's benefits.[90] If at no time has there been any reason to believe a crime was committed, it is, of course, improper to launch an investigation, with its concomitant expense to the state and harassment to those under inquiry, for the sole purpose of criticism.[91]

Grand jury reports have been attacked as the presumptious substitution by amateur public servants of their own judgments for those of professionals.[92] In view of this danger, grand jury machinery should not be set in motion when it is clear at the outset that its ultimate goal can *only* be the fostering of such amateur intervention.

The so-called "watch-dog" grand juries, which make inquiry without necessarily having cause for belief that crime exists, have been harshly censured.[93] These juries remain in continuous existence for long periods and frequently continue to keep under surveillance conditions that they have already determined are not criminal. In so doing, they lose some of the unique advantages of the grand jury as an inquiring body. As jurors gain experience in a prolonged inquiry, they lose their amateur standing and impartiality, and may soon constitute panels of prosecutors or of self-styled oracles on community welfare.[94] Similarly, impanelling judges and guiding state's attorneys are likely, with jury acquiescence, to conduct "watch-dog" inquiries along lines of personal political advantage.

90. Laymen find it "unthinkable" that the grand jury may not report despite the benefits derived from such reports. Rawson, *A Layman Looks at the Grand Jury,* 4 WESTERN RES. L. REV. 19, 29 (1952).

91. See Moore v. Delaney, 180 Misc. 844, 45 N.Y.S.2d 95 (Sup. Ct. 1943) (grand jury has no right to investigate the fiscal affairs of the legislature; it may only investigate crime; the legislature, as distinguished from its individual members, cannot commit a crime); Grand Jury Investigation of Western State Penitentiary, 173 Pa. Super. 197, 96 A.2d 189 (1953) (court orders grand jury investigation limited to criminal matters only, stating criminal acts are the foundation of grand jury deliberations). See also People v. Tatum, 60 Misc. 311, 315, 112 N.Y. Supp. 36, 39-40 (Sup. Ct. 1908); *In re* Petition for Grand Jury Investigation, 48 Lac. Jur. 209 (Q.S. Pa. 1947).

92. See In the Matter of Osborne, 68 Misc. 597, 606, 125 N.Y. Supp. 313, 319 (Sup. Ct. 1910), where the court noted that the grand jury had an "exaggerated idea of its own importance."

93. See United States v. Johnson, 123 F.2d 111 (7th Cir. 1941), *rev'd,* 319 U.S. 503 (1943). The circuit court noted that the "Grand Jury is not a conservator of the peace," anticipating and investigating future offenses, 123 F.2d at 119. *Contra,* Scott, *An Auditing Grand Jury Is Suggested,* THE PANEL, May-June 1931, p. 32.

94. See note 69 *supra.* There is a federal eighteen month limit on grand jury life. FED. R. CRIM. P. 6(g). Judge Learned Hand has noted that the "temporary constitution" of the grand jury is a guaranty against abuse of its powers. See *In re* Bornn Hat Co., 184 Fed. 506, 509 (S.D.N.Y. 1911), *aff'd sub nom.* Bornn Hat Co. v. United States, 223 U.S. 713 (1912).

A cognate of the rule authorizing investigations and reports only when crimes are believed to have been committed would bar interim reports. The dignity and impartial effectiveness of the jury are lost when interim reports, with resultant publicity for partial truths, are released. If an inquiry has not progressed far enough to determine whether crime will be revealed and charged by the jury, the interim report not only may express half-truths, but may also create a hostile atmosphere for the trial if crime is thereafter charged. If, when such an interim report is issued, it is clear that no crime can be proven, the jury's legitimate functions terminate on its issuance. Any further investigation and report will be made with the knowledge that crime is no longer being investigated.

2. *When investigation and report are fair.* Fair play is the keystone of the proper grand jury report. If a report is the product of an unfair investigation, or if a slanted report is issued after an otherwise complete and fair inquiry, the grand jury has lost its judicial character and its emanations are not entitled to status as a grand jury report. Fair play in this respect embraces: (i) reliance solely on legal evidence, (ii) the issuance of a report only after a complete investigation, and (iii) reflection in the report of the views of the jurors themselves, not simply those of the prosecutor.

a. *Legal evidence.* In the course of a grand jury investigation, probing for leads for further inquiry may properly entail recourse to incompetent, irrelevant, and immaterial items.[95] But the reporting jury must be instructed not to rely on such evidence in reaching its conclusions. A grand jury report, like the action of any jury, may be premised only on properly admissible evidence.[96] Speculation as to motives has no place in a report.[97] Nor is pique at the inability to indict for lack of necessary proof, despite strong suspicion, a proper basis for issuing reports.[98] Similarly, recognition of the difficulties of conviction, even though

95. See United States v. Smyth, 104 F. Supp. 283, 298-300 (N.D. Cal. 1952); State v. Kemp, 126 Conn. 60, 71, 9 A.2d 63, 69 (1939). See also Note, 37 MINN. L. REV. 586, 599 (1953).

96. See note 39 *supra.* Note, however, the recent opinion of Judge Learned Hand in United States v. Costello, 221 F.2d 668 (2d Cir. 1955) which held that a grand jury may premise an indictment wholly on hearsay testimony. Judge Hand contended that hearsay is normally inadmissible because it is not subject to cross-examination. Since in the grand jury the defendant cannot cross-examine any testimony, he reasoned that the lack of cross-examination of hearsay declarants should not prevent grand jury reliance on their statements.

Ultimately, in the case of indictments, defendants can on trial, by proper objection, prevent the use against them of improper hearsay. Hand's opinion fails to consider the obligation of the prosecutor in a grand jury proceeding to examine witnesses closely where doubt appears likely, in order to assure the truthfulness of their statements. The prosecutor cannot, of course, do this with hearsay declarants. Where the grand jury action ultimately leads to a report which cannot be tested by trial cross-examination, this duty is especially keen, and therefore reports, despite the *Costello* case, should not rest on hearsay.

97. See *In re* Report of Grand Jury, 152 Fla. 154, 158-59, 11 So.2d 316, 318-19 (1943).

98. See the grand jury's statement, indicating irritation with the lack of sufficient evidence to indict, in In the Matter of Wilcox, 153 Misc. 761, 762, 276 N.Y. Supp. 117, 119 (Sup. Ct. 1934). Pique may also have led to the report in the United Elec. Workers case:

technically a legal case can be made out and the accusatory body is convinced of guilt, should not induce accusation by report.[99] Every statement made in a jury report should be supported by a measure of proof analogous to that required to indict, *i.e.,* sufficient legally admissible proof to convince the grand jury beyond a reasonable doubt of the facts alleged in the report.[100]

b. *Complete investigations.* A grand jury investigation resulting in a report differs in an important respect from an inquiry leading to indictment. With the filing of an indictment, judicial action enters a new phase, one in which a defendant is permitted to contravert the charges against him in a judicial forum. With the filing of a proper report, judicial action terminates. Therefore fair treatment by a grand jury preparing to issue a report properly embraces a phase not necessary to an investigation leading to an indictment. Once it has become clear that the grand jury cannot indict, but the use of a condemnatory report is contemplated, the jury should call before it the persons to be criticized or their representatives and should seek from them some explanation of the points that dissatisfy it. In quashing reports, courts have relied at least in part upon the failure to do this as proof of the jury's unfairness.[101]

Bringing in the "defendants" in such cases will not in many cases endanger their rights against self-incrimination. Their testimony will not give rise to any immunity cloak in jurisdictions with constitutional or statutory provisions to the effect that public officials, in order to retain their jobs, must execute waivers of immunity.[102]

Once a jury has determined that it lacks sufficient evidence to charge a crime but has sufficient legal proof to merit a report, probably little is lost by call-

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the report there charged thirteen labor leaders with filing Taft-Hartley affidavits that were a "subterfuge" and "not worth the paper they were written on." Application of United Elec. Workers, 111 F. Supp. 858, 860 (S.D.N.Y. 1953). The federal district judge's action in expunging that report may thus be justified on several grounds: (i) it criticized private persons not public employees, (ii) the report in effect charged crime—perjury—without indicting for it, and (iii) the report was an expression of pique at the lack of sufficient evidence to support an indictment.

99. *But see In re* Report of Grand Jury, 152 Fla. 154, 11 So.2d 316 (1943) (report critical of county constable for countenancing gambling sustained, but that portion of it stricken which states constable not criminally prosecuted because conviction unlikely).

100. See Charge to Grand Jury, 30 N.J.L.J. 306, 307 (Ct. Oyer & Ter. 1907) (grand jury not to report "unless the proof is absolutely conclusive").

101. See cases cited note 40 *supra; cf.* Report of the Grand Jury for the April 1911 Term, 4 U.S. Dist. Ct. Hawaii 780 (1911) (in which withdrawal of the report was forced, although jury gave person criticized an opportunity to be heard). *But see In re* Report of Grand Jury, 152 Fla. 154, 159, 11 So.2d 316, 319 (1943) (report sustained although person criticized was not heard, the court noting that no right to be heard existed).

102. *E.g.,* N.Y. CONST. art. 1, § 6 (1938); LA. REV. STAT. § 33:2426 (1950). States may require waivers of immunity from certain public officials without statutory provision, and the officials may be removed for refusal to sign on the ground that such refusals do not become public officers. Drury v. Hurley, 339 Ill. App. 33, 88 N.E.2d 728 (1949), *cert. denied,* 339 U.S. 983 (1950). It has even been suggested that waiver of the privilege against self-incrimination might be imposed as a prerequisite to holding public office. See Note, 64 HARV. L. REV. 987 (1951). However, the United States Supreme Court has recently left in doubt the constitutionality of laws compelling public employees to waive their immunity in testifying. Regan v. People, 349 U.S. 58 (1955).

ing in and granting immunity to any persons who are about to be criticized, if statutory authority to confer such immunity exists. A possible alternative to an immunity grant would be to provide an opportunity to be heard under a voluntary waiver of immunity. This, however, might place persons in the unhappy dilemma of either giving testimony against themselves that might bolster a future criminal proceeding or passing up an opportunity to avert public criticism in the only judicial forum that will be available to them. In jurisdictions in which no authority to confer immunity exists, persons about to be criticized should at least be given the opportunity to appear voluntarily even though compelling them to testify is beyond the jury's power.

Fair play demands that explanations be heard with open minds. Once the grand jury has heard and fairly considered them in the preparation of a report, the subsequent non-existence of a trial forum in which to air "defenses" becomes less significant.

c. *Prosecutor's role.* Both prosecutors and grand jurors know that in the routine case presented for indictment the jury's function is almost mechanical. This result has prompted increasing use of informations, authorized by statute in a growing number of jurisdictions, in the place of grand jury action.[103] In the typical case, the jurors hear only the bare essentials necessary to make out the crime. Many such cases are likely to be heard during each session of the grand jury.[104] The jurors develop no real factual familiarity with each case and recognize that they have heard a mere skeleton of the evidence eventually to be presented on trial. They therefore follow any lead given to them by the prosecutor.

In the case of a sustained jury investigation that may lead to either indictment or report, as a result of their continued inquiry the jurors develop a familiarity with the subject matter rivaling that of the prosecutor. In the effort to determine whether or not crime existed, in all probability the jury has heard, rather than a bare minimum of evidence, all that is relevant and much that is irrelevant. If the problem concerns the corrupt misconduct of public officials, jurors—not professionally engaged in politics—may be in much better position to exercise objective judgment than the prosecutor who is leading an inquiry into the actions of his colleagues in government.

Because of these factors, the grand jury has a wide sphere in which to exercise independent judgment in an investigation culminating in a report. The jury should realize that its action in issuing a report is a reflection of com-

103. Miller, *Informations or Indictments in Felony Cases,* 8 MINN. L. REV. 379 (1924); Moley, *The Use of the Information in Criminal Cases,* 17 A.B.A.J. 292 (1931).

104. In New York County, for instance, in grand jury sessions lasting two hours, five days a week, two juries each hear somewhere between six and fifteen felony cases per session; other grand juries that are concurrently in session hear the longer cases and conduct investigations.

munity mores. Thus, in planning the inquiry and the report, it should assume initiative and responsibility not ordinarily incident to the performance of its routine indicting functions.

3. *When pending charges not prejudiced.* A grand jury report that charges activity of a criminal nature without indicting is improper.[105] This rule should not, however, prevent a grand jury from charging some persons with crime and, by means of a report, noting connected remiss but non-criminal conduct of others.[106] One caution must be urged. The release or filing of the report should not be so timed that it will in any way interfere with the indicted defendants' rights to a fair trial.[107] If necessary, public release of such a report should be delayed until all defendants charged with crime in associated matters have had their cases fully litigated.

C. *What Reports May Contain*

In addition to the suggested restrictions upon who may be criticized and when a report is proper, certain logical restrictions on the content of reports appear necessary.

1. *Action of the entire jury.* By definition, a grand jury report must be the action of the grand jury. Although the mechanics of preparing the report may be delegated, the entire jury, not its subcommittees, must have heard the evidence, and the report itself must be approved and issued by that body.[108]

2. *Criticism of named persons.* In some jurisdictions, the authorities indicate that general reports on undesirable situations are permitted. Reports thus apparently approved are those in which no individuals are singled out for criticism.[109] Such reports are permitted with faint damnation, with the courts noting that they may do some good, and certainly no harm, as long as no particular person is embarrassed by specific reference to him. But will this view bear analysis?

105. See *Ex parte* Burns, 261 Ala. 217, 221, 73 So.2d 912, 915 (1954); *Ex parte* Faulkner, 221 Ark. 37, 43, 251 S.W.2d 822, 823, 825 (1952); *In re* Report of Grand Jury, 152 Md. 616, 631, 137 Atl. 370, 375-76 (1927); Bennett v. Kalamazoo Circuit Judge, 183 Mich. 200, 211-12, 150 N.W. 141, 144 (1914); *In re* Messano, 16 N.J. 142, 147, 106 A.2d 537, 539 (1954); Jones v. People, 101 App. Div. 55, 58, 92 N.Y. Supp. 275, 277 (2d Dep't 1905).

106. See Howard v. State, 60 Ga. App. 229, 234-36, 4 S.E.2d 418, 422-23 (1939). See also note 117 *infra.*

107. See Application of United Elec. Workers, 111 F. Supp. 858, 869 (S.D.N.Y. 1953); *cf.* Delaney v. United States, 199 F.2d 107 (1st Cir. 1952), 53 COLUM. L. REV. 651 (1953), 66 HARV. L. REV. 532 (1953). See also Stroble v. California, 343 U.S. 181, 191-95 (1952).

108. See note 43 *supra; In re* Report of Grand Jury, 152 Md. 616, 137 Atl. 370 (1927); *cf.* State *ex rel.* De Armas v. Platt, 193 La. 928, 192 So. 659 (1939).

109. See Howard v. State, 60 Ga. App. 229, 235, 4 S.E.2d 418, 423 (1939); *In re* Report of Grand Jury, *supra* note 108, at 623, 631-32, 137 Atl. at 373, 376; In the Matter of Funston, 133 Misc. 620, 623, 233 N.Y. Supp. 81, 85 (Sup. Ct. 1929); Matter of Osborne, 68 Misc. 597, 603-04, 125 N.Y. Supp. 313, 318 (Sup. Ct. 1910); Matter of Gardiner, 31 Misc. 364, 367, 64 N.Y. Supp. 760, 761-62 (Gen. Sess. 1900); HOUSEL & WALSER, DEFENDING AND PROSECUTING FEDERAL CRIMINAL CASES 256-57 (2d ed. 1946); Comment, 52 MICH. L. REV. 711, 725-26 (1954).

Although specifying no names, a report critical of a general condition is likely to be inherently critical of the administrative officials whose duties embrace the policing of that condition.[110] For example, the report permitted as sufficiently "general" in *Howard v. State*[111] criticized alleged connections between law officers and those who had committed liquor violations and were engaged in other illegal businesses. No names were used, but the report at least tacitly criticized the heads of the law enforcement agencies for not performing their duties.

The persons with ultimate responsibility, however, may not be at fault. The fault may be that of subordinate civil service assistants inherited by a department head without power of veto. The trouble may lie within areas wholly in the command of such subordinates—areas with which the department head may be wholly unfamiliar.[112] The grand jury's service is far greater when it ascribes responsibility to those whom fair investigation indicates are blameworthy. This assessment of fault may relieve a departmental administrator, distracted by myriad departmental problems, of the burden of repeating the jury's investigation unaided by its subpoena power and its objective approach.

There is another advantage to the specific report. Being specific, it can be more dynamic, more newsworthy, and hence more effective publicly.[113] It is not open to attack—on either legal or emotional grounds—as a mere exercise in platitudes and generalities already well known in the community.[114] Therefore, the specific report will probably go further towards achieving the hoped-for improvements.

110. See Caruth v. Richeson, 96 Mo. 186, 9 S.W. 633 (1888) (verdict for libel defendants, grand jurors, affirmed, court noting that report on "corrupt" combination of notorious persons with some members of police board did not of necessity refer to libel plaintiff, one member of the board); *cf.* State v. Reichert, 226 Ind. 358, 80 N.E.2d 289 (1948) (an indictment of a mayor for participating in gambling protection was quashed, the court noting that the police chief, not the mayor, was the responsible party, and pointing out the error of ascribing omissions committed by inferiors to those persons in charge).

111. 60 Ga. App. 229, 4 S.E.2d 418 (1939).

112. The New York County grand jury report on police recruiting and the Municipal Civil Service Commission of April 29, 1954, *supra* note 5, criticized the police department's chief medical officer and chief personnel officer. The criticism was based on their neglect concerning items with which no commissioner of a 20,000-man department could possibly be personally familiar. Both the persons criticized had been in the department considerably longer than the incumbent commissioner.

113. See Jones v. People, 101 App. Div. 55, 57-58, 92 N.Y. Supp. 275, 276 (2d Dep't) *appeal dismissed,* 181 N.Y. 389, 74 N.E. 226 (1905) (in denying the motion to set aside the report, the court stated it "might be colorless or ineffective unless it specified individual delinquencies"). Reports, effective in achieving beneficial changes in the 17th and 18th centuries, dwindled into "sonorous generalities" by the end of the 18th century. S. AND B. WEBB, ENGLISH LOCAL GOVERNMENT FROM THE REVOLUTION TO THE MUNICIPAL CORPORATIONS ACT: THE PARISH AND THE COUNTY 456 (1906).

114. See People v. McCabe, 148 Misc. 330, 333, 266 N.Y. Supp. 363, 367 (Sup. Ct. 1933) (the court commented on a report criticizing city officials, noting that the evidence to support the jury's alleged findings was not stated); In the Matter of Crosby, 126 Misc. 250, 253, 213 N.Y. Supp. 86, 89 (Sup. Ct. 1925) (in expunging a report critical of city officials for permitting flagrant liquor, gambling, and sex violations, the court noted that the report did not but should have presented facts, and that being conclusory it was an "unwarranted imputation" on the honesty of those criticized).

3. *Recommendations.* The formulation of recommendations is not ordinarily within the fact-finding functions of juries, whether petit or grand, but expansion into this realm by grand jury reports has been permitted.[115] Proposing recommendations is one means of dramatizing and specifying defects found to exist. Making such proposals is also satisfying to jurors who have labored long and faithfully in their inquiry. It serves no purpose to force them to make only negative criticisms, to point out inefficiencies and neglect without also being able to suggest a remedy that readily occurs to them. In the course of their investigations, jurors may acquire some expertise, the benefits of which should not be sacrificed to the concept of the jury as an exclusively fact-finding body.

A report consisting wholly of recommendations and opinions is ordinarily improper as it represents a jury functioning solely as advisory experts, not as fact-finders giving expression to acquired special knowledge.[116] Such a report may not harm any members of the community, but it is an intrusion by jurors into an unauthorized area. Of course, if a jury has indicted it may supplement its formal charges of crime with a report limited to recommendations emanating from the factual investigations that led to the indictment.[117]

V. Procedural Problems

Even if the proper scope of grand jury reports is correctly outlined above, problems still exist as to the implementation of these limits. Enforcement is a procedural problem and will vary with the jurisdiction. Some of the problems that may be faced, however, are herein considered.

Suppose a grand jury submits to a court a report far exceeding proper

115. Extensive recommendations were permitted by Chief Justice Vanderbilt, in *In re* Camden County Grand Jury, 10 N.J. 23, 89 A.2d 416 (1952). See also Irwin v. Murphy, 129 Cal. App. 713, 715, 19 P.2d 292, 292-93 (1933); Hayslip v. State, 193 Tenn. 643, 645, 249 S.W.2d 882, 883, *cert. denied,* 344 U.S. 879 (1952).

116. An apparently absurd extreme in the realm of jury reports concerned with evaluating expert testimony, and making policy recommendations on the basis of such testimony, is the report of a July 1925 New York County Grand Jury. This jury, after hearing "expert" testimony and examining accident statistics, stated: "We recommend a stricter examination of applicants for licenses to operate automobiles in the city, particularly in the cases of women and young girls who, because of their impulsive natures and hasty conclusions, are more likely to miscalculate distances, to dislike the attitude or appearance of the traffic officer who halts them, and who, when in a 'jam,' lose their heads more quickly than male drivers." 5 THE PANEL, Sept. 1925, pp. 6, 7.

A more recent example of a grand jury report consisting wholly of recommendations based on the jury's evaluation of expert testimony is the New York Kings County grand jury report of April 26, 1954, on the proposal to legalize off-the-track betting, *supra* note 5.

117. The New York Richmond County report of May 21, 1954, of the Grand Jury drawn for the Extraordinary Special and Trial Term of the Supreme Court, 1951, on police corruption and gambling, *supra* note 5, is of this nature. In two and a half years of existence, the jury's investigations resulted in the filing of criminal charges that led to thirty-seven convictions. The experience of the grand jury in the course of its investigation led it to make eleven recommendations of a legislative, administrative, judicial, and "communal" nature in order to prevent a recurrence of the unwholesome situation with which the grand jury had dealt.

legal bounds. Or suppose a proper report is offered for filing, but the court to which it is submitted refuses to file it. Or finally, suppose a grand jury report is accepted and filed by the court. Thereafter, what may injured persons do who claim that the report was improper? These possibilities raise questions concerning the proper trial court action on reports both before and after filing, and the steps that appellate courts may take when problems reach them as to the propriety of reports.

A. *Action Prior to Filing*

A court may refuse to accept a grand jury report for filing if it deems the report improper.[118] The right of refusal may be necessary if the court is not to be used for launching improper attacks on members of the community and, possibly, if the court is to protect misguided jurors from exposure to libel actions. This right may also be important if the court is to protect its own dignity from improper attack[119] or its records from the inclusion of improper items.[120]

There are several variations on the outright refusal to file. A court can delay filing. This tactic may be desirable if the publicity attendant on filing will prejudice a pending criminal action possibly arising out of the same investigation. If filing is delayed, however, the court should be aware of the expiration date of the jury. For once a jury expires, it can take no further action if its life has not been extended.[121] This suggests still another course of action for a court adverse to a proposed report. It may discharge the grand jury prior to the date when its life would ordinarily terminate.[122] Courts have gone even beyond

118. See Bennett v. Kalamazoo Circuit Judge, 183 Mich. 200, 212, 150 N.W. 141, 144 (1914); State v. Bramlett, 166 S.C. 323, 332, 164 S.E. 873, 877 (1932); Report of Grand Jury, 204 Wis. 409, 413, 235 N.W. 789, 791 (1931). In Burke v. Oklahoma, 2 Okla. 499, 37 Pac. 829 (1894), not only did the court refuse to file a report, but it also held certain newspaper publishers in contempt for their efforts to force it to file.

119. In Coons v. State, 191 Ind. 580, 134 N.E. 194 (1922), a trial court's holding of grand jurors in contempt was affirmed, the jurors having submitted a report that the presiding judge filed without reading, which demanded that he submit his resignation and criticized his conduct as a judge.

120. See Application of United Elec. Workers, 109 F. Supp. 92, 93 (S.D.N.Y. 1952), and 111 F. Supp. 858, 862-63 (S.D.N.Y. 1953); In the Matter of Crosby, 126 Misc. 250, 253-54, 213 N.Y. Supp. 86, 89 (Sup. Ct. 1925). But New York's highest appellate court, in dismissing an appeal from an order sustaining a report while assuming that the lower court had inherent power over its own records, denied that appellate jurisdiction could exist in the absence of specific statutory authority. Jones v. People, 181 N.Y. 389, 74 N.E. 226 (1905).

121. In Louisiana by statute, an Orleans Parish grand jury, if discharged before the normal six month term has expired, may be brought back to life by the State Supreme Court. LA. REV. STAT. § 15:200 (1950).

122. See United States v. Smyth, 104 F. Supp. 283, 292 (N.D. Cal. 1952). See also Notes, 37 MINN. L. REV. 586, 594 (1953), 39 CALIF. L. REV. 573, 579 (1951). *But cf. In re* Laughlin, 265 S.W.2d 805 (Tex.), *appeal dismissed,* 348 U.S. 859 (1954), in which a judge's removal from office was ordered, the judge having discharged a grand jury to prevent his brother's indictment.

discharging reporting juries; they have removed jurors from the panel[123] and have held them in contempt[124] for taking action deemed illegal.

To determine what action is proper before filing or at any later stage, the court should read the proposed report, not to determine the truthfulness of the facts therein set forth,[125] but to decide whether it is within the proper area of reports. If some question arises as to the fairness of the inquiry leading to the report, or whether the report is supported by the testimony, the court should read the grand jury minutes.[126]

If, despite the application of the criteria earlier suggested, doubts remain as to whether a proposed report is proper, they should be resolved in its favor. Just as state criminal courts admit illegally obtained evidence because of the community benefit resulting from convictions of the guilty,[127] so the public benefit that will inure from the filing of a doubtful report may outweigh any possible "illegality." In addition, a highly practical reason exists for resolving doubts in favor of the proposed report. Since reports stricken before filing are not parts of any record, review of the court action may become impossible. Furthermore, our system of litigation is one in which the courts ordinarily look to the combat between adversaries as the most helpful way to test the strength of contentions. If a report is deemed objectionable, rights can be protected after filing in an adversary proceeding. Of course, once a report has done injury, subsequently striking it will not fully assuage the harm.[128] Such action will,

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123. See State *ex rel.* De Armas v. Platt, 193 La. 928, 192 So. 659 (1939), in which the appellate court denied the requested writ of prohibition to prevent the removal, as grand jurors, of persons who had issued a report and who had sought action which the court held was expressly barred by statute. Removal was apparently threatened in In the Matter of the Report of the Grand Jury for the April 1911 Term, 4 U.S. Dist. Ct. Hawaii 780, 790-91 (1911).

124. See note 119 *supra.*

125. See In the Matter of Funston, 133 Misc. 620, 620-21, 233 N.Y. Supp. 81, 83 (Sup. Ct. 1929); Matter of Osborne, 68 Misc. 597, 599, 125 N.Y. Supp. 313, 315 (Sup. Ct. 1910).

126. A recent New Jersey rule of court provides for court examination of grand jury minutes in connection with the filing and striking of reports. See N.J. REV. RULES, Rule 3:3-9(c) (1953).

The federal courts, in according grand juries a great measure of independence, refuse to grant motions to permit defendants to inspect minutes. United States v. Wolrich, 127 F. Supp. 215 (S.D.N.Y. 1955); United States v. Garsson, 291 Fed. 646 (S.D.N.Y. 1923). For a court itself to inspect minutes to determine the propriety of a report might, at first blush, seem inconsistent with this practice. If, however, the question is not one of the sufficiency of an indictment but rather one of accepting a report for filing, it is more in keeping with the grand jury's independence for the judge to review minutes to see that they support a report than peremptorily to refuse to file the report regardless of how well substantiated it may be.

If there is no transcript of testimony before the grand jury, inquiry into the basis of the jury's action becomes impossible. See Matter of Gardiner, 31 Misc. 364, 368-69, 64 N.Y. Supp. 760, 763 (Gen. Sess. 1900).

127. The opinion by Judge Cardozo in People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926), is the classic decision so to hold. The constitutionality of state court action admitting illegally obtained evidence has been sustained by the Supreme Court. Irvine v. California, 347 U.S. 128 (1954); Wolf v. Colorado, 338 U.S. 25 (1949).

128. See People v. McCabe, 148 Misc. 330, 333-34, 266 N.Y. Supp. 363, 367 (Sup. Ct. 1933).

however, remove any appearance of official sanction from the charges and render them as impotent or potent as any other non-official charges of wrongdoing.

B. *Action Subsequent to Filing*

Once a report has been accepted and filed by the court and has become part of the court records, its content ceases to be secret and it is open to formal attack.[129] Conflicting considerations bear on the question whether actions against such reports should be entertained only if made by persons with demonstrable direct interest. On the one hand, regardless of who makes these motions, they help the court in correcting improper conduct on the part of its arm, the grand jury, and in policing its records.[130] But on the other hand, the publicity attendant on these motions may occasion the very harm that persons criticized wish to avoid. If the affected individuals deem it in their own best interests to let the entire business "blow over," should outsiders be permitted to tamper with this decision?[131]

If the filed report is improper or contains improper matter and is attacked by an injured party, the most common action taken by courts has been to expunge, to quash, or to set aside. These motions, which should be made before the judge who accepted and filed the report,[132] are generally used interchangeably or in combination.[133] In the *Jones* case, it was suggested that if a filed report appeared improper, a court might resubmit the matter to a grand jury for further consideration.[134] In one case in which a report was attacked, this approach was used. After the court had instructed the jurors of the relevant law, they withdrew the offending document.[135]

C. *Appellate Court Action*

Appeals from court action concerning grand jury reports raise several problems. An important one, already considered, is that in the event of a refusal

129. Logically, for such attack to be successful, it should be made promptly in order that the injured reputations may be rehabilitated before they are permanently injured. However, the court did not so hold in Report of Grand Jury, 204 Wis. 409, 415, 235 N.W. 789, 791 (1931) in which a report was expunged on a motion made eight months after the report had been filed.

130. See Application of United Elec. Workers, 111 F. Supp. 858, 862-63 (S.D.N.Y. 1953). *Contra,* Matter of Bar Ass'n, 182 Misc. 529, 537, 47 N.Y.S.2d 213, 220 (County Ct. 1944).

131. *Cf.* United Press Ass'ns v. Valente, 308 N.Y. 71, 80-83, 123 N.E.2d 777, 780-82 (1954).

132. United States v. Connelly, 129 F. Supp. 786, 787-88 (D. Minn. 1955); Application of United Elec. Workers, 109 F. Supp. 92, 93 (S.D.N.Y. 1952).

133. One New York court suggested that an expunged report ceases to be part of the court records even for purposes of appeal. It therefore denied a motion to expunge, but ordered an improper report "set aside." See Matter of Gardiner, 31 Misc. 364, 368-70, 64 N.Y. Supp. 760, 762 (Gen. Sess. 1900).

134. 101 App. Div. 55, 58, 92 N.Y. Supp. 275, 277 (2d Dep't 1905).

135. In the Matter of the Report of the Grand Jury for the April 1911 Term, 4 U.S.

to file there may be no record on which to premise an appeal; in addition, there may be no proper appellant if the jury has passed out of existence.[136]

Ordinarily, appeal procedure is closely regulated by statute. If a grand jury report not charging crime is at issue and the order from which appeal is sought seems otherwise appealable,[137] is the appropriate procedure that prescribed for civil cases or that set forth for criminal cases? In the *Jones* decision, New York's highest appellate court refused to entertain the appeal since it could find no statutory authority under which it could do so. The intermediate appeal, already entertained, may have been proper because the intermediate appellate court was a part of the same tribunal that had filed and sustained the report; therefore, that appellate court may properly have exercised jurisdiction in connection with its "housekeeping" function over *its own* records.[138]

Motions to expunge, to quash, and to strike are not themselves the creatures of statute.[139] Therefore, consistency may require the courts to review orders granting these motions even absent express statutory authority for such review. Review could be justified by appellate recognition of a broad supervisory authority over the lower courts and the records and activities of their judicial arms. Review may also exist by liberally entertaining mandamus or similar applications.[140]

Where appeals have been entertained, appellate courts have noted that their function is solely to review the exercise of discretion by the lower courts in filing, refusing to file, or in striking a report.[141] If the limits within which this discretion might function were extremely broad, there would be little to review. If, however, the scope of reports is as suggested in this paper, the exercise of discretion by the trial court is narrowly confined.

Dist. Ct. Hawaii 780 (1911) (jury, apparently reluctant to withdraw, acted when their "dishonorable discharge" was being considered).

136. *Cf.* Grand Jurors for Worcester County for the Year 1951 v. Commissioner, 329 Mass. 89, 106 N.E.2d 539 (1952), in which the court held an appeal moot when the original action had been brought by a grand jury to get documents and the grand jury was defunct at the time of the appeal.

137. See State v. Bramlett, 166 S.C. 323, 326, 164 S.E. 873, 874 (1932) in which the court noted the possibility that a refusal to expunge might not be an appealable order, but nevertheless entertained the appeal and reversed.

138. See note 120 *supra.*

139. See *In re* Hudson County Grand Jury, 14 N.J. Super. 542, 546, 82 A.2d 496, 498 (L. 1951), in which the court held matter in a report should be deleted, although it noted the lack of authority, statutory or otherwise, to expunge.

140. Mandamus held to be the proper mode of review: *Ex parte* Burns, 261 Ala. 217, 73 So.2d 912 (1954); *Ex parte* Robinson, 231 Ala. 503, 165 So. 582 (1936); Bennett v. Kalamazoo Circuit Judge, 183 Mich. 200, 150 N.W. 141 (1914); *cf.* Oakman v. Recordor, 207 Mich. 15, 173 N.W. 346 (1919). *Contra,* State *ex rel.* Lashly v. Wurdeman, 187 S.W. 257 (Mo. 1916); State *ex rel.* Weber v. McFadden, 46 Nev. 1, 205 Pac. 594 (1922). In some states a writ of certiorari, to review the lower court's action, is used: *Ex parte* Faulkner, 221 Ark. 37, 251 S.W.2d 822 (1952); *Ex parte* Cook, 137 S.W.2d 248 (Ark. 1940); State *ex rel.* Strong v. District Court, 216 Minn. 345, 12 N.W.2d 776 (1944).

141. See *Ex parte* Cook, *supra* note 141, at 249; State *ex rel.* Lashly v. Wurdeman, *supra* note 140, at 259; *In re* Camden County Grand Jury, 10 N.J. 23, 67, 89 A.2d 416, 444 (1952). Hayslip v. State, 193 Tenn. 643, 650, 249 S.W.2d 882, 885, *cert. denied,* 344 U.S. 879 (1952). *Contra, Ex parte* Burns, *supra* note 140, at 222, 73 So.2d at 915.

To prevent the forfeiture of the advantages of proper reports at the caprice of trial judges, the appellate courts must have the power to review both the refusal to file and the expunging of reports. In order to guarantee this review, especially in jurisdictions where review in the nature of mandamus is not liberally allowed, legislative action may be advisable. Such legislation should specify the remedy, whether appeal or mandamus, according to the use of such modes of review in the particular jurisdiction. It should also treat the trial judge's power to discharge grand juries, possibly imposing restrictions on this power when exercised over the objection of jurors before whom an investigation was progressing. Moreover, legislation might provide that either the prosecutor or a quorum of the jury, whether or not that jury had in fact expired or been discharged, might constitute a proper party in any action to compel the filing of a proposed report or to appeal from the expunging of a report already filed.

VI. Conclusion

Despite the allegedly contrary weight of judicial authority, grand juries today have a reporting function. That function, however, is narrower than it is believed to be by many grand jurors who picture themselves as general boards of regents privileged to pass on any facet of life in the community. To protect the proper utilization of that function, appellate courts must liberally exercise their reviewing power.

Proper use of the grand jury's inquiring and reporting functions may mark the resurgence of that body as an important factor in effective government. At the same time, such use will protect the citizenry from the tyranny of improper accusation. These have been historic grand jury functions, somewhat neglected in the misinterpretation of that body's history and in the grand jury's preoccupation with the quasi-mechanical operations of handling routine indictments.