

YALE LAW JOURNAL

VOL. XLII

DECEMBER, 1932

No. 2

FROM INDICTMENT TO INFORMATION— IMPLICATIONS OF THE SHIFT

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RECALLING Bentham's assertion that the grand jury had been performing no useful function since the beginning of modern prosecution, and remarking the unanimity of modern expert studies to the same effect, the Report on Prosecution by the National Commission on Law Observance and Enforcement concludes:

"that under modern conditions the grand jury is seldom better than a rubber stamp of the prosecuting attorney and has ceased to perform or be needed for the function for which it was established and for which it was retained throughout the centuries; that . . . an unnecessary work burden upon the administration of justice . . . should be lightened by eliminating the necessity of indictment and permitting prosecution to be instituted and accusation to be made through the simpler processes of information."¹

Twenty-four of the states had already—in some instances long before—abolished the traditional requirement of indictment in felony prosecutions. The draftsmen of the American Law Institute's Code of Criminal Procedure had recently embodied in it a recommendation that the remaining jurisdictions follow suit.²

But the grand jury was still not altogether without friends. Charges that the use of indictment dissipated responsibility by cloaking prosecutors who ought to come out in the open were countered by suggestions from many that, as put by Charles H. Tuttle, then United States Attorney for the Southern District of New York: "The prosecutor who is conscious of his heavy responsibility will be glad to have it shared by a body representative of the com-

†Assistant Professor of Law, Yale University. See the author's article, with Isadore H. Cohen, *The Inquisitorial Functions of Grand Juries* (1932) 41 YALE L. J. 687.

1. (1931) 124.

2. CODE OF CRIMINAL PROCEDURE, PROPOSED FINAL DRAFT (Am. L. Inst. 1930) Introductory Note to c. 4.

munity.”³ His successor in office, George Z. Medalie, added with particular reference to federal grand juries: “. . . in many sections of the country Washington is regarded more or less as a distant agency. Unless the people through their own representatives are able to voice the local sentiment concerning the law, and the local sense of justice, they will feel decidedly insecure, and the Grand Jury is the particular body that breathes the spirit of the community.”⁴ The growth of a number of voluntary grand jurors’ associations in such outstandingly urban and industrialized centers, among others, as New York City and Chicago, offered tangible evidence of the vitality of the institution.⁵ In addition, there were, in the experience of many prosecutors and ex-prosecutors, certain concrete collateral advantages afforded by grand juries regularly available to the State in investigating and building up its cases.

The draftsmen of the American Law Institute’s Code of Criminal Procedure accordingly sought further proof to support their codified preference for an information system, “some more objective standard than opinions, even expert opinions.”⁶ Data were collected, under the direction of Professor Raymond Moley on behalf of the Social Science Research Council, from court records in the information states of California, Connecticut, Indiana and Michigan. For comparison with these, data were taken from criminal justice surveys in the grand jury states of Illinois, New York, Pennsylvania and Virginia. Further evidence was secured, under the direction of Dean Wayne L. Morse, through a questionnaire drawing replies from 545 judges of 41 states; and through reports on various aspects of 7,414 felony cases presented to grand juries, made out by 162 prosecutors of 22 states. On conclusion of this project Professor Moley reported that: “The evidence revealed by this study supports the contentions favorable to the information . . . when all allowances have been made, it is difficult to avoid the conclusion that the use of the information seems to be more efficient, economical and expeditious.”⁷

The conclusions advanced after this survey must, however, be read in connection with their accompanying ‘hedging clause’:

3. Reported in (1929) 7 THE PANEL No. 1, at 8.

4. Medalie, *Grand Jury’s Value — Presentments — Fraudulent Bankrupts* (1931) 9 THE PANEL No. 2, at 16.

5. Dession and Cohen, *Inquisitorial Functions of Grand Juries* (1932) 41 YALE L. J. 687, 711, n. 98; Davis, *Grand Jurors Federation of America Organized in Chicago* (1932) 10 THE PANEL No. 3, at 30.

6. Moley, *The Use of The Information in Criminal Cases* (1931) 17 A. B. A. J. 292.

7. *Id.* at 294.

"The statistical method followed . . . does not yield a final definitive answer to the questions under consideration. This should be fully acknowledged and understood. Vast numbers of pertinent factors cannot be subjected to statistical analysis. . . . It is useful in providing "leads" for further intensive study. It gives lines which if followed will yield new and important light upon problems of administration. It is also useful in verifying impressions gained in other ways, such as empirical observation, etc. It is in this restricted sense that this whole exposition is offered. It provides evidence, not an answer. It does not purport to prove anything. The student of this subject may interpret the data we offer in whatever way his inclinations direct."⁸

However, accumulations of data on those points which did lend themselves to the method—*i.e.*, speed, economy of operation, efficiency and rubberstamping, even in the artificial sense in which these had to be defined in response to the exigencies of the data—are apt to be quite disproportionately influential. Here, as elsewhere, the imponderable encountering the ponderable is likely to be honored chiefly in gesture. In the whirl of discussion eddies come into being, sweeping together those tangible, measurable particles of data into masses which catch the focus of attention, relegating the incoherent intangibles to the out-of-focus. It is the familiar process by which, under compulsion of a feeling that the mind must be made up regardless, a problem susceptible of varied pose is transformed into a set of conventional issues which can be answered on the data at hand. Attention on both sides to date has, moreover, been concentrated on the alleged shortcomings of grand juries. The alternative program—initiation by information—has been much less scrutinized.

Consider, for example, the curious obscurity of the objective sought to be realized by the information proposal. From observations like the following out of the Wickersham Report on Prosecution one might infer that no longer is any preliminary check on prosecutors desired: ". . . the grand jury had its real justification in the system of private prosecutions which never obtained in the United States. . . . There was no need of such a check in a regime of public prosecutions."⁹ Such an inference would, however, apparently be too hasty, for elsewhere the Wickersham Commission records considerable dissatisfaction with the personnel, facilities and conduct of the office of prosecutor in our states.¹⁰ The leading advocate of the in-

8. Moley, *The Initiation of Criminal Prosecutions by Indictment or Information* (1931) 29 MICH. L. REV. 403, 410-412.

9. 1 REPORT NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT (1931) No. 4, at 34.

10. *Id.* at 6-27.

formation writes in the same vein: "Politics, embodied in the prosecutor, administers the criminal law, for its own objectives, and in its own image,"¹¹ and negatives the suggestion that all preliminary checks on prosecution be removed (by permitting the prosecutor himself to conduct the preliminary examination of an accused) in the observation that: "It is doubtful whether such a change would make it possible to provide the proper kind of control over the preliminaries to trial by a responsible person."¹²

From what source, then, is this "proper kind of control" to emanate? By a process of elimination it must be the magistrate's preliminary examination, the notion held by Jeremy Bentham and incorporated in the Wickersham Report on Prosecution as follows:

"Even where the accusation may be initiated through the grand jury, as a matter of actual practice a predominant percentage of the cases also receive a preliminary hearing in a municipal, police, magistrate's, or similar tribunal. Consequently a predominant percentage of the cases which reach trial will have gone through two preliminary trials or hearings, namely the preliminary examination and the grand jury presentation. A goodly percentage of those which do not reach trial will also have gone through these two preliminary hearings."¹³

Professor Moley and other critics of the grand jury accordingly characterize it as a "useless repetition" of the preliminary examination.¹⁴ One is again cast into doubt, however, on encountering the following passage by Professor Moley:

"The value of the preliminary examination as a means for getting down the testimony of witnesses in a dependable record, and early in the prosecution, is negligible. In a great many of the magistrates' courts no stenographic record is made at all. . . . A casual, careless and unintelligible presentation of evidence precedes a hasty guess of judgment. . . . The most serious side is that the confusion that is present at the preliminary hearing does little to protect the public interest against back-stair wire-pulling and fixing. . . . Machine politics is always heavily entrenched in the inferior courts. . . . Nearly everyone in the system believes the preliminary hearing to be practically unnecessary. The police, feeling that a large number of well-prepared cases is unjustly dismissed and that the others are carried through more by chance than plan in the preliminary hearing, are bitterly antagonistic toward the magistrate and seek every means to bring their cases directly before the grand jury or prosecuting officer."¹⁵

11. MOLEY, *POLITICS AND CRIMINAL PROSECUTION* (1929) 94.

12. MOLEY, *OUR CRIMINAL COURTS* (1930) 36.

13. *Op. cit. supra* note 9, at 124.

14. MOLEY, *op. cit. supra* note 11, at 138.

15. MOLEY, *op. cit. supra* note 12, at 29 *et seq.*

Much the same version is presented in the various crime survey reports, rural justices of the peace faring quite as badly as the urban magistrates.¹⁶

At this point one begins to wonder whether the question is not, after all, one of selecting a scapegoat. As a proceeding in the name of raising standards it would not be unprecedented, and in many respects the grand jury affords a convenient subject. Its emotional appeal as a bulwark against tyranny is not what it was, now that the publicized breakdowns of law enforcement against racketeers and the diversion of popular interest from the county courthouse to other sports have inclined us to think less of the historic cases of Shaftesbury¹⁷ and Swift¹⁸ and more of the mortality and delay table. Dismissing such an interpretation, however, is there perhaps reason to believe that preliminary examination, despite its dubious aspect, does after all offer a promising mode of control of the preliminaries to trial? The conceptions of criminal practice and policy embodied in this belief on the part of many adherents to the information are, for the moment, more arresting than the factual evidence adduced against initiation by indictment; for out of those conceptions were framed the issues about which the evidence clusters, the standards by which it is proposed that the relative merits of grand jury and information systems be judged. An analysis of these in the light of existing practice will accordingly be attempted, and thereafter the evidence adduced against grand juries re-examined.

CONTROL THROUGH PRELIMINARY EXAMINATION

With the New York City exposé of its magistrates courts barely off the front page and the continuing barrage from crime commissions and Professor Moley directed against rural and urban committing justices alike, deficiencies in the calibre of our various types of magistrates courts have surely been sufficiently publicized. But these are not the sole, or even the major, obstacles to realization through preliminary hearing of any adequate protection to the accused and control of prosecution in this stage. Probably much more in point are certain obstacles of a legal order, vaguely hinted by the Wickersham Commission: "None of the surveys contains a definite facing or discussion of the problem of the need for, and appropriate function of, the preliminary examination under modern American urban conditions."¹⁹

16. Dession and Cohen, *op. cit. supra* note 5, at 712, n. 100.

17. 8 How. St. Tr. 759 (1681).

18. See COTTEE, *JUSTICE CRIMINELLE EN ENGLETERRE* (2d ed. 1822) 54.

19. *Op. cit. supra* note 9, at 121.

In the absence of any "definite facing or discussion" it will not be surprising if the magistrate's examination, in role and purpose, turns out to be little different in a jurisdiction embracing the information than in one adhering to the indictment; *i.e.*, a procedure which has always presupposed a subsequent grand jury hearing and check. In practically all indictment jurisdictions, including the federal, the holding of a preliminary hearing (or securing of a waiver) and subsequent bindover has never, despite the wish of the New York Code Commissioners of 1848 that it might be otherwise,²⁰ been required as a condition precedent to the further progress of felony prosecution. A prosecutor may accordingly ignore this step completely, initiating prosecution in the first instance by securing an indictment or filing an information. If a preliminary hearing happens to be held and the accused discharged, an indictment may still be found against him and the accused brought in on a bench warrant. If bound over, the prosecutor may still—aside from possibilities of nolle-ing or pigeonholing the case—change the bindover charge to one more or less serious in drafting the information or securing the indictment. The same situation prevails in some of the information states.

Besides the power of the prosecutor thus to avoid a preliminary hearing or to circumvent its effect, there must be taken into account certain strategic considerations inevitably influencing the conduct of both sides at this stage, and thereby further determining the nature of the preliminary hearing. From the prosecution point of view, any real disclosure of its case so early in the game would as a rule prove disadvantageous, aiding the defense immeasurably in concocting plausible versions to explain away the evidence, in framing alibis, and in "reaching" the key witnesses of the government. From the defense point of view rather similar considerations obtain, and so little is required in any case to establish probable cause for bindover that it would rarely be a profitable stage in which to fight on the merits.²¹

Aside from these strategic considerations, it would be impracticable in most cases to expect prosecutors to be present at preliminary hearings, so long as justices of the peace are scattered throughout counties, and municipal or police courts throughout large cities, at considerable distances from one another and from the offices of the district attorneys. It would also be impracticable to assume any thorough investigation and preparation of the case on the part

20. FOURTH REPORT OF THE NEW YORK COMMISSIONERS ON PRACTICE AND PLEADINGS (Code of Criminal Procedure 1849) xxxvii.

21. A situation exceptional in this regard is presented in *People v. Hebbord*, 96 Misc. 617, 162 N. Y. Supp. 80 (Sup. Ct. 1916).

of the state at so early a stage, in view of the more or less prevailing notion that preliminary hearing ought to follow immediately upon the heels of arrest.²² Suppose, however, that the practice be adopted by magistrates of regularly postponing hearings, pending investigation and decision by the district attorney, and that arrangements be made for him to be represented at all the hearings—a system which has been adopted in a few localities. The relationship between magistrate and prosecutor, in terms of comparative prestige, influence, information about the case and responsibility for its outcome, renders it inevitable and desirable that the magistrate should, as a general proposition, follow the prosecutor's recommendation.

All these circumstances, coupled with the prosecutor's power to omit altogether or circumvent the effects of a preliminary hearing, combine to force the magistrate in felony prosecution to emerge as an official whose chief functions comprise merely the issuance of warrants for search and arrest, fixing of bail, and affording the police an opportunity to relinquish accused persons from their temporary custody and thereby to terminate any possible liability for false arrest and imprisonment. While thus in part a convenience to the police, the preliminary hearing is also intended as a partial protection to the accused from *incommunicado* detention by the police, as witness general and rather futile statutory provisions commanding that arrested persons be brought before a magistrate "forthwith," or "as soon as possible," or "within a reasonable time."²³ But as a preliminary inquiry into the merits of the case for the protection of the accused and in the interest of an early sifting of the wheat from the chaff—the sole aspect and specific function involved in the common assertion that grand juries merely duplicate preliminary hearings—the magistrate's examination under common law rules and legislation of the type now under discussion, can scarcely be regarded as seriously conceived.²⁴

22. REPORT ON LAWLESSNESS IN LAW ENFORCEMENT OF THE NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT (1931) 33.

23. These are summarized in CODE OF CRIMINAL PROCEDURE, TENTATIVE DRAFT No. 1 (Am. L. Inst. 1928) 117, 177.

24. The following administrative patterns from different jurisdictions serve to illustrate the rôle of the non-compulsory magistrate examination:

Type 1 (a Western federal district wherein distances are great): When a person is brought before the Commissioner charged with committing a crime and arrested at a point far distant from the Commissioner's office, he is immediately bonded—or, if he cannot raise bail, committed to jail—and the hearing continued over. No prosecuting attorney is present and no witnesses are heard at this stage. In the meantime the prosecutor is likely to secure an indictment and, in some instances, even have the case finally disposed of in the district court. The Commissioner then makes his report, usually in the form "bonded to appear before the district court". The recorded date of dis-

The adoption in many of our states of an information procedure was coupled with no departure whatever from the conception of preliminary hearing outlined above. In seven of these there is still no requirement that the filing of an information be preceded by a preliminary hearing (or waiver) and commitment.²⁵ In the remaining eighteen information states, however, one does find either constitutional or, more frequently, statutory acknowledgment of the novel and magnified significance attached by the justification of the information in felony cases to the preliminary hearing before a committing magistrate.²⁶ The requirement is in some instances subject to exceptions, as (1) where the information is filed with leave of court, or (2) where the accused is a fugitive from justice, or (3) where the accused is a corporation, or (4) where the offense is committed during or just previous to the term of court wherein the information is to be filed.²⁷

Is the role of the committing magistrate now substantially altered and squared with the premises of the usual argument for the information procedure? It is obvious that this will depend entirely on the spirit read into the general requirement by the courts as they dispose of detailed procedural disputes. The possibilities are richly varied, as may be illustrated by the vagaries of a single jurisdiction.

After the adoption of California's constitutional requirement of preliminary examination in all felony cases to be prosecuted on in-

position by the Commissioner in this district is accordingly often subsequent to the date of disposition in the district court.

Type 2 (an Eastern metropolitan federal district where distances are negligible): When an accused is brought before the Commissioner he is at once bonded and the hearing automatically continued over for one week. An assistant district attorney is present to make a recommendation as to the amount of the bond. In the meantime the prosecutor's office begins its investigation of the case. At the expiration of the week the hearing is denied, if not waived, and the case actually initiated by the securing of an indictment or the filing of an information.

Type 3 (a New England rural county): Preliminary examinations are conducted by justices of the peace scattered throughout the county. No prosecuting attorney is as a rule present at these hearings, and in the usual case the charge first comes to the attention of the State's Attorney's Office after the hearing has been held and the bind-over papers forwarded. In drawing up his information the prosecutor is influenced not at all by the magistrate's disposition, framing the counts as his own judgment dictates from the evidence available and all the circumstances of the case. When convenience dictates a prosecution is initiated in the first instance by filing an information or securing an indictment, the preliminary hearing stage being omitted altogether.

25. *Op. cit. supra* note 23, at 349.

26. *Id.* at 345 *et seq.*

27. *Loc. cit. supra* note 26.

formation,²⁸ the courts of that state took the view that nothing in the general requirement prohibited a district attorney from charging in his information offenses not specified in the magistrate's order of commitment, so long as they were based upon the evidence adduced at the preliminary hearing.²⁹ In *People v. Nogiri*, however, the Supreme Court of that state called a halt, interpreting the constitutional requirement as follows:

"The result of these [earlier] decisions is to vest in a ministerial and executive officer—the district attorney—supervisory, appellate, and judicial powers controlling the judgment of a judicial magistrate, who alone, under the Constitution, is empowered to hold the examination, and who alone is empowered to declare by his commitment the offense for which the accused person shall be put upon trial. . . . It is to be remembered that the examination and commitment by a magistrate for a felony is but substituted process for the action of the grand jury in finding an indictment, and the district attorney occupies no higher nor different place in the one mode of investigation than he does in the other."³⁰

The legislature was thereafter moved to attempt an express statutory authorization of the practice declared unauthorized in the above decision.³¹ The validity of this statute was questioned in a series of cases before the District Courts of Appeal,³² until finally, twenty-seven years after the *Nogiri* decision, the Supreme Court of California expressed itself in *People v. Bird* as of the opinion that:

"Whether the action of the district attorney in the *Nogiri* case, . . . was contrary to any constitutional provision of the State was a question which

28. Art. I, § 8 of the California Constitution reads: "Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment by a magistrate, as may be prescribed by law."

29. *People v. Lee Ah Chuck*, 66 Cal. 662, 6 Pac. 859 (1885); *People v. Vierra*, 67 Cal. 231, 7 Pac. 640 (1885); *People v. Giancoli*, 74 Cal. 642, 16 Pac. 510 (1888). A commentator on the constitutional provision in question, discussing the proceedings of the constitutional convention of 1878, relates that: "After most of Art. I, section 8 had been passed, one of the members proposed a 'mere verbal amendment', which added the present center of controversy, the phrase, 'after examination and commitment by a magistrate.'" (1931) 19 CALIF. L. REV. 330, 331.

30. 142 Cal. 596, 76 Pac. 490 (1904).

31. Sec. 809 of the PENAL CODE, as amended (Statutes 1927, at 1045) provides that the information "may charge the offense, or offenses, named in the order of commitment or any offense, or offenses, shown by the evidence taken before the magistrate to have been committed." (Deering, 1931).

32. *People v. Barnett*, 99 Cal. App. 409, 278 Pac. 885 (1929); *People v. Sanders*, 102 Cal. App. 237, 283 Pac. 136 (1929); *People v. Linton*, 102 Cal. App. 608, 283 Pac. 389 (1929).

obviously did not receive the consideration to which it was entitled. . . . If a state may, consistently with due process, dispense with the preliminary examination entirely and authorize the prosecutor to initiate the criminal proceeding (*Lem Woon v. Oregon*, supra), it is difficult to perceive why the state should be denied the power through its Legislature to authorize the district attorney to designate the crime to be laid in the information. Certainly Section 8 of Article 1 of our Constitution does not work such a denial for it does not provide that the magistrate shall have the power to designate the crime, much less the exclusive power to do so. When the magistrate has concluded that a crime has been committed and that there is sufficient cause to believe the defendant guilty thereof, he has performed his function under the common law practice . . . " 33

In the same opinion it was also observed that "An examination of the cases in other jurisdictions discloses at most that they are not altogether in harmony."

There are, then, these fundamental differences in spirit of approach to what is otherwise the same general requirement of a preliminary hearing. But something more than a change of spirit is involved in the transition from the *Nogiri* to the *Bird* decisions in California. The court in the former case appears to have assumed that a change of rule could happily transmute the comparatively insignificant preliminary hearing into something approximating that of the grand jury. Here was indeed a pouring of new wine into old bottles. The institution of committing magistrate had not, like the grand jury since prosecution became public, been designed or remodeled with a view to any wielding of this magnified power and responsibility. The magistrates are still for the most part scattered justices of the peace and petty city tribunals or police courts.

33. 212 Cal. 632, 639, 300 Pac. 23, 26, (1931). On a complaint for murder, the accused herein was committed for manslaughter. The district attorney filed an information for manslaughter, and then moved for leave to amend so as to charge the defendant with murder. This application and a subsequent one were denied, after which the district attorney's motion to dismiss the information was granted. On a new complaint for murder the defendant was again committed for manslaughter by a second magistrate. The district attorney then filed an information charging murder. Defendant's motion to set aside the information was denied, after which he was tried and found guilty of manslaughter, from which conviction he appealed. Affirmed.

A certain limitation which might be read into Section 809, as amended, is suggested by the following dictum of the court in this case, at page 28: "It is conceivable that the action of the district attorney might be without the pale of the legislative sanction. For instance, if the defendant should be complained against for grand theft and be informed against for bigamy, because, forsooth, there might be testimony before the magistrate that the defendant was guilty of the latter crime, a serious problem might be presented." Cf. *People v. Wyatt*, 8 P. (2d) 901 (Cal. D. C. App. 2d, 1932).

It is still impracticable for the district attorney to be represented at all these hearings; tactical considerations would still militate against any full presentation of the state's case at this early stage.

Contrast the grand jury. In place of scattered justices we have one body sitting at the county courthouse. The prosecutor is in attendance, directing the state's case, drafting the bills of indictment, and in general acting as legal adviser. Unlike the hearing before a magistrate, a grand jury session is *ex parte* and more or less secret,³⁴ whereby possible tactical objections to disclosure are obviated. Under all the circumstances, it is clear that bindover charges are apt to be too sketchy, untenable or impolitic, to warrant their being accorded the finality of indictments, *i.e.*, the carefully framed charges to which accused persons are to plead and on which they must be brought to trial, if at all. On the other hand, how recognize this impracticability of requiring conformity between the magistrate's order of commitment and the prosecutor's information without completely whittling away the significance attached by proponents of prosecution on information to the preliminary examination?

In order to determine what has happened to the preliminary hearing under information procedures—the extent to which it may be regarded as a check or control on prosecution—it will be necessary to review detailed practices and rulings in the premises. Given some requirement as to preliminary examination like section 8 of article I of the California Constitution, or section 115 of the American Law Institute Code, questions then arise, first, as to how far a prosecutor may depart in framing his information from the magistrate's order of commitment; second, as to how far a bindover obligates a prosecutor to file an information; and third, as to how far a dismissal by the magistrate prevents a prosecutor from proceeding further. The rulings on questions such as these determine the true rôle and significance of preliminary examination in an information procedure. All else is fiction.

The first question posed goes to the heart of the matter. The impracticability of attempting, as in *People v. Nogiri*, to place committing magistrates on a par with grand juries in their relationship to the prosecutor was demonstrated by an experience culminating in *People v. Bird* and apparently acknowledged in section 117 of the American Law Institute's draft Code: "Whenever a defendant has been held to answer at a preliminary examination, . . . the prosecuting attorney shall file an information charging the commission of an offense according to the evidence presented at such examination. . . ." Of the remaining information states, five are in

34. But *cf.* the limitations to secrecy discussed by Kidd in *Secrecy vs. Inspection of Grand Jury Minutes* (1928) 6 THE PANEL No. 1, at 4.

accord with *People v. Bird*,³⁵ six more, having no requirement whatever as to any preliminary examination, accord still wider discretion to the prosecutor,³⁶ and only six appear to restrict him in drafting his information to the bindover charges, or to the complaint before the magistrate.³⁷

With respect to the second question, the answer is substantially the same as in the case of an indictment. In a number of the information states, once a person has been bound over, the prosecutor is required to file in writing his reasons for not desiring to file an information; whereas in others the matter resides entirely in his discretion.³⁸ In the event of a dismissal at preliminary hearing the situation is rather different from that where a grand jury has not true-billed. In many of the information states the prosecutor, acting in conjunction with the court, is here accorded more leeway, as recommended by the American Law Institute's draft Code: "If upon the preliminary examination the defendant is discharged, an information may be filed against him only by leave of court."³⁹

Professor Moley suggests: ". . . the thing that is necessary . . . is a magistrate of much greater significance than the present one . . . ;" and adds ". . . with authority to control the whole process of conducting the hearing, accepting bail, and, to some degree, controlling the preliminary activities of the prosecutor."⁴⁰ Herein may lie the explanation of that seeming inconsistency between the brief for the information, on the one hand, and the harsh views of magistrates elsewhere expressed by some of its advocates on the other. In discussing preliminary examination under the information system reference is had to some development *in futuro*—not a familiar justice of the peace on a fee system nor again one of those recently removed New York City magistrates. For purposes of comparison the grand jury is usually portrayed in its actuality—that last collection of more or less ordinary fellows impanelled at the county courthouse. Is this magistrate "of much greater significance" even now in process of being evolved whilst the grand jury institution rests static, or is this but an opposing of actuality with ideal?

In the rank of widely urged and familiar proposals, there are the several programs for centralization of inferior courts, in some instances in consolidation with trial courts and under the supervision

35. *Op. cit. supra* note 23, at 359.

36. *State v. Myers*, 8 Wash. 177, 35 Pac. 580 (1894); *State v. Pritchard*, 35 Conn. 319, 326 (1868) *semble*; *op. cit. supra* note 23, at 349.

37. *Op. cit. supra* note 23, at 358.

38. *Id.* at 354.

39. CODE OF CRIMINAL PROCEDURE, OFFICIAL DRAFT (Am. L. Inst. 1930) c. 4, § 116.

40. *Loc. cit. supra* note 12.

of administrative chief justices.⁴¹ Where the fee system remains there are proposals for its abolition. In New York City, Judge Seabury has proposed that the appointment of magistrates be taken from the mayor entirely and vested in the Appellate Divisions of the Supreme Court.⁴² Many of the advantages of such changes are obvious. Judgeships can be made more attractive and important. Better facilities can be provided, and the various functions of a centralized court departmentalized. The keeping of more adequate records—a continual accounting of the business of the court—is facilitated, to bear fruit as the accumulation indicates desirable rules of court and legislative changes in procedure. The trial of petty cases and the administration of bail are bound to be benefited.

These are attractive features, but do not particularly advance our present problem. For the difficulty in controlling prosecution of felony cases through the preliminary hearing lies not primarily in the laxness resulting from decentralization or in the low calibre of justices on a fee system as in the very uncertain niche left by our procedure—and in particular that portion dealing with the powers of the prosecutor and his relationship to other agencies in the process—for preliminary examination of any significant kind. If the examination is not absolutely required a prosecutor will still omit, dominate, or over-ride it in cases where he has arrived at a decision of his own. Nor will the defense be less apt to waive this hearing than now in cases where a fight is to be made later in the trial court. If the examination is required, how far will a centralized court alter the California situation discussed above? The following comment on the workings of Detroit's centralized court is suggestive: "But very few respondents want an examination and the prosecuting attorney has found the examination unnecessary from the state's position. The preliminary examination is a relic of pioneer conditions. It serves but a limited purpose in a unified court which provides a trial speedily."⁴³

CONTROL THROUGH THE GRAND JURY

In view of the foregoing difficulties in the way of envisaging any noticeable control of prosecution through the magistrate's hearing, the contemporary dissatisfaction with our prosecuting authorities already noted might readily appear to furnish a justification of the

41. Galloway, *Reform of Magistrates' Courts* (1931) 1 EDITORIAL RESEARCH REP. 237, 251.

42. See MOLEY, *TRIBUNES OF THE PEOPLE* (1932) 246.

43. HARLEY, *DETROIT'S NEW MODEL CRIMINAL COURT* (1921) 11 J. CRIM. LAW AND CRIM. 398, 405.

grand jury. Unlike a committing magistrate under one of the prevailing types of information system, a grand jury is amply endowed with legal powers for the exercise of its function as a lay leaven of bureaucracy, a check on corruption, and in general a citizens' agency for overseeing and controlling the initiatory activities of the prosecution. Witnesses may be subpoenaed to testify and produce documentary evidence. It has the unlimited power to dismiss complaints brought before it by returning no-true-bills and, conversely, may indict despite the wishes of the prosecutor and, almost universally, irrespective of the results of any preliminary examination which may have been held before a magistrate.⁴⁴ Ordinarily, too, it may indict on its own knowledge. The privacy of the grand jury room and provisions for the secrecy of its proceedings are well known. Any attempt by prosecutor or court to coerce action by the jurors may be successfully resisted.⁴⁵ An indictment found under such coercion would be subject to quashing.⁴⁶

The actual influence exerted by grand juries upon the course of prosecution, however—and this is the key issue of the entire problem, has long been the subject of widely differing opinions. Discounting on the one hand extravagant eulogies of the institution couched largely in terms of ideal potentialities and invoking memories of the occasional historic instance, and on the other, more prosaic, but decidedly sweeping assertions that grand juries exercise no independent initiative whatever and are, in fact, but rubberstamps of the prosecuting attorney, it is well to consider carefully what nature of participation is desired from these lay juries—what, in short, the standards of evaluation are to be.

In the first place, to what extent should a grand jury originate cases in the first instance, as distinguished from merely considering cases brought before it through bindover or by the prosecutor? The power is ancient and unquestioned.⁴⁷ Charges to the grand jury often conveyed an impression that twenty-three lay jurors might be expected in a few weeks to out-do the combined efforts at crime detecting and law enforcement of all the other agencies of prosecution combined. But since the advent of public prosecutors and modern departments of police the initial task of uncovering crimes deserving of prosecution is no longer considered the grand jury

44. *Op. cit. supra* note 5, at 704.

45. *Shaftesbury's Case*, *supra* note 17; *In re The District Attorney's Relations to the Grand Jury*, 14 N. Y. Crim. Rep. 431 (1900); THOMPSON AND MERRIAM, JURIES (1882) § 597; Note (1895) 28 L. R. A. 367.

46. *State v. Will*, 97 Iowa 58, 65 N. W. 1010 (1896); *Blau v. State*, 82 Miss. 514, 34 So. 153 (1903).

47. 2 WILSON'S WORKS (Andrews ed. 1896) 213, 214.

function that it once was in England. Under our system, origination of charges by the grand jury must be the unusual sequence, as in cases where the local authorities and in particular the prosecutor should refuse to act. Or it may occur as a matter of convenience when the first suspicion that certain charges should be brought happens to come to light in the course of a grand jury investigation. Then, too, the extent to which a grand jury should roam afield in search of crimes to be prosecuted is surely limited by the volume of cases originated elsewhere and brought before them for consideration—*i.e.*, the routine which must have first claim on their attention. Nor do our codes and decisions altogether favor inquiry by grand juries "on their own." Bills for the services of private detectives and investigators retained by grand juries to further their independent investigation have been held void on policy grounds.⁴⁸ Courts have even intimated that such zeal on the part of jurors is unseemly and indicative of "prejudice," not in keeping with the judicial nature of their functions.⁴⁹ The briefness of a typical grand jury term—a few weeks—has also its bearing on the general question. Grand juries can be continued over or re-impletted, to be sure, but a leading argument for the information is the disinclination to spend county money on the maintenance of grand juries!

When a case comes before a grand jury in any way,—and here is the second question—how thoroughly are the jurors supposed to inquire into the state of the evidence, how far substitute their judgment for that of other agencies in the process? The prosecutor may be expected to have an opinion. Should the case go on to trial it will then receive its most thorough consideration. The grand jury stage is, after all, no more than preliminary. The catch phrase embodying its standard is but *probable cause*. Even ascribing to grand juries the same "political" function so often ascribed to petit juries—that of disregarding technical guilt where quasi-equities run counter—it may still be asserted that a grand jury's function with respect to accusation is simply to control prosecution in the exceptional case. Any other standard for grand jury conduct would imply a decidedly pessimistic conception of prosecuting attorneys. Our codes contemplate coöperation between grand jury and prosecutor.⁵⁰ To him in the first instance and to the court in the second the jurors are directed to turn for legal advice and experience.

48. (1922) 7 MINN. L. REV. 59; Note (1923) 26 A. L. R. 605; (1928) 12 MINN. L. REV. 761.

49. See Burns International Detective Agency v. Doyle, 46 Nev. 91, 95, 208 Pac. 427, 428 (1922); Burns International Detective Agency v. Holt, 138 Minn. 165, 167, 164 N. W. 590, 591 (1917).

50. *Op. cit. supra* note 5, at 697.

With respect to the assertion that grand juries are through domination by prosecutors reduced to the level of mere rubberstamps, Professor Moley explains that "It seemed appropriate as a part of our study to check this point with some degree of accuracy."⁵¹ Dean Morse accordingly prepared card forms calling for appropriate information on this matter to be filled out by prosecutors for each case considered in the grand jury room. One hundred and sixty-two prosecutors from twenty-one of the states requiring indictment in major crimes coöperated. The largest number of reports were returned from Illinois, Iowa, Ohio and New York. A total of 7,414 cases were reported.⁵² It turned out that 353 cases out of the lot (4.76%) were initiated in the first instance by grand juries—and most of these from Texas (85 cases out of a total of 627), Arkansas (50 cases out of total for that state of 123), Kentucky, Ohio and Mississippi. New York produced but 2 cases out of its total of 842.⁵³ Of all these cases initiated by grand juries, 261 (73.94%) were non-liquor cases and 92 (26.06%) liquor cases.⁵⁴ The non-liquor charges so initiated comprised 36 of grand larceny, 33 of forgery and fraud, 29 of assault, 18 of burglary, 8 of murder, and the balance of lesser offenses such as non-support, desertions and breaches of the peace.⁵⁵

In 6,453 out of the 7,414 cases the prosecutors expressed their own preferences as to what disposition should have been made. Out of 6,119 cases initiated by the prosecutors there was disagreement between prosecutor and grand jury in 315.⁵⁶ Of 334 cases initiated by grand juries the action finally taken disagreed with the opinions of the prosecutors in 33.⁵⁷ The percentage of disagreements is, in total, 5.39%. Where disagreements occurred, the grand juries appeared more often to lean in the direction of leniency.⁵⁸

It is necessary to differentiate between a certain majority group of the cases going through the criminal law mill and the others. The "open and shut" quality of this majority group is altogether familiar. Most cases are not complicated. Absence of sufficient proof or a clear case for conviction is usually apparent at the outset. So it is that the overwhelming majority of cases are disposed of before reaching a trial stage and that so large a percentage of the convictions are arrived at through guilty pleas. It is this circum-

51. *Op. cit. supra* note 8, at 414.

52. Morse, *A Survey of the Grand Jury System* (1931) 10 ORE. L. REV. 101, 134, 135.

53. *Ibid.*

54. *Ibid.*

55. *Ibid.*

56. *Id.* at 151.

57. *Id.* at 152.

58. *Id.* at 151.

stance which makes possible the preëminence of plea-bargaining or "administrative handling" in criminal law administration. In cases of this group there could scarcely be many disagreements between prosecutor and grand jury as to *probable cause*. There is probably very little necessity or point in requiring grand jury consideration in all these cases, felonies though they be, not because of rubber-stamping but because agreement is practically inevitable. It is by its record in those other cases—the small minority group—that the reputation of grand juries as indicting agencies should be made or broken. Nothing in the data of the survey directed by Professor Moley bears directly on the issue of the actual value of grand jury participation in cases of this minority group—the true and only field for operation of "checks on prosecution" and "protection to the accused." The prosecutors' reports indicate merely that in about five per cent of the cases grand jury influence does unquestionably alter the result.

As to the situation in the country generally and as to any prevailing calibre of grand jury discretion and judgment we have no direct or "objective" evidence. There is conflicting opinion gleaned from individual experiences with grand juries. There are also material differences from place to place in the methods provided for the selection of grand jurors with respect to discretion on the part of officials charged with the selection.⁵⁹ Communities differ in their attitudes toward juries and in the attitudes of the jurors toward their duties. Aside from these differences, moreover, there are now evidences here and there of a certain dynamic quality and modernizing growth in the ancient institution, sufficient perhaps to discount the significance of static and generalized interpretations of grand jury calibre however accurate on the basis of performance to date.

The reference is, of course, to the grand jurors' associations established and functioning in a number of our most urban state counties and federal districts, and to the Grand Jurors Federation of America recently organized in Chicago by members of the Better Government Association of that city. These represent a program for supplementing fleeting and short-lived grand jury panels with permanent, local, voluntary organizations which will instruct jurors with respect to their powers and possibilities, husband and bring to bear through the panels an ever growing accumulation of experience, and offer some continuity of program in order that each grand jury, although impanelled only for one month, may take up some one item in addition to its routine.⁶⁰

59. For a summary of the various statutes, consult *id.* at 226-239.

60. Davis, *op. cit. supra* note 5.

ADMINISTRATIVE CONSIDERATIONS

Were the case for the information rested solely in the issue thus far considered—the relative potentialities of committing magistrates and grand juries for controlling the discretion of prosecutors in the initiatory stage of felony prosecution—it would seem to merit at most a scotch verdict of “not proven.” There are other objections urged against indictment, however, comprising appeals to various administrative values such as speed, economy, convenience and efficiency. How do the procedures by indictment and information compare on these scores?

Delay

“Many of the surveys contain more or less elaborate statistics upon the time intervals between the various stages of the cases, as, for instance, the time interval, in terms of number of days, between arrest and disposition in the court of preliminary examination, arrest and grand jury indictment, arrest and trial, arrest and disposition in the trial court and the like. Such statistics are exceedingly difficult of trustworthy interpretation.”⁶¹

The stage in prosecution with which we are concerned ends with arraignment in the trial court on an indictment or information. Among the possible sequences of events leading up to this point several may be considered: (1) The accused may have been first arrested, with or without a warrant, next bound over by a magistrate to await, either while out on bail or confined in the county jail, action by the grand jury or by the prosecutor, and finally indicted or had an information filed against him by the prosecutor; (2) the finding of the indictment or filing of the information may have been the first step, followed by arrest of the accused on a bench warrant, after which there may or may not have been a preliminary examination; (3) extradition of the accused may have intervened between the lodging of a charge against him, either before the magistrate or by indictment or information, and the subsequent steps. In cases following sequence (1)—by far the majority—a major time interval is likely to be that from disposition in the preliminary hearing to disposition by the grand jury or prosecutor. The contention is that this period is generally less where prosecution is by information than where it is by indictment, and that the process is accordingly appreciably speeded up by eliminating the requirement of indictment.

For the very large cities, as it happens, these times intervals are in any case very brief. Of cities where prosecution is by indictment, New York exhibited intervals ranging from 12 to 15 days (median), Chicago ranging from 13.3 to 15.9 days (median), Philadelphia, 18

61. *Op. cit. supra* note 9, at 71.

days (median), and Cleveland, 18 days (average).⁶² Of cities where prosecution is by either information or indictment, St. Louis exhibited periods ranging from 17 to 24 (median number of days between arrest and information or indictment), Milwaukee ranging from 7 to 14.5 (median), Detroit 8 days (median), Indianapolis 9 days (median) and Los Angeles 20 days (median).⁶³ A comparison of these two groups seems to yield no preference for one mode of initiation over the other, and in any case the periods appear reasonably brief. The explanation is obvious. Terms of court are more frequent in the larger cities, grand juries more frequently impanelled. In New York City, for example, grand juries are continuously in session, the usual number being two or three in each county at a time.

The disparity, if there be a significant one, between the speeds of indictment and information, will accordingly be found in the smaller cities and rural counties. For, here, terms of court are much less frequent, and consequently grand juries not so often impanelled. In the rural counties of New York, Illinois and Oregon, for example, there are but two grand juries a year—not an unusual number. Under these prevailing circumstances, it is argued, months are apt to be wasted awaiting the coming of grand jury sessions in non-metropolitan America. Professor Moley presents a comparison of median time intervals from bindover to indictment with those from bindover to information for non-metropolitan areas. Of indictment jurisdictions, the rural counties and small cities of New York exhibit median intervals ranging from 34 to 58 days; Illinois' seven less urban counties a median interval ranging from 29 to 75 days and her eight more urban counties ranging from 30 to 49.6 days; the state of Pennsylvania as a whole, a median interval of 40 days.⁶⁴ Of information jurisdictions Missouri's rural counties exhibit median intervals between arrest on indictment or information ranging from 19 to 33 days; California's non-metropolitan counties a median interval of 8 days (but this covers only those cases ending in conviction by a jury); and Michigan's non-metropolitan counties a median

62. REPORT OF THE NEW YORK STATE CRIME COMMISSION (1928) 141, 142 (groups of cases classified in terms of final disposition); ILLINOIS CRIME SURVEY (1929) 97; Moley, *op. cit. supra* note 8, at 429; CRIMINAL JUSTICE IN CLEVELAND (1922) 170.

63. These intervals are taken respectively from the MISSOURI CRIME SURVEY (1926) 329, 330; ILLINOIS CRIME SURVEY (1929) 97; Moley, *op. cit. supra* note 8, at 429.

64. The intervals are taken respectively from the REPORT OF THE NEW YORK STATE CRIME COMMISSION (1928) 141, 142; ILLINOIS CRIME SURVEY (1929) 97; Moley, *op. cit. supra* note 8, at 428.

interval of 17 days (likewise covering only those cases ending in conviction by a jury).⁶⁵

This comparison unquestionably shows longer intervals for the indictment states. But does it follow, as suggested by Professor Moley, that "Data collected in the various surveys show forcefully that the most important cause for delay is in the stage of procedure in which action by grand jury is being awaited"?⁶⁶ The accused must not only await indictment or information; he must also await a term of court for an opportunity to be arraigned, plead, and be tried, or, if the plea be guilty or *nolo contendere*, sentenced. Suppose the wait for a grand jury is eliminated. There will ordinarily still be a long wait for a term of court. For these terms are usually as infrequent in rural counties as the impanelling of grand juries. The latter are, after all, but "arms of the court." In brief, one would expect a shortening of the interval from bindover to information to be compensated by a lengthening of the interval between information and arraignment.

How do the crime survey data bear out this hypothesis? The largest median intervals between bindover and indictment were in the grand jury states of New York and Illinois. But the median intervals between indictment and arraignment in rural New York for 1925 were only 4 days for one group of cases, and 6 for another; for 1926 only 3 and 5 days respectively.⁶⁷ On the other hand, for the thirty-six rural and partly urban counties of Missouri—an information state relied upon by Professor Moley in his comparison as exhibiting a very short interval between bindover and information—the median periods from information (or indictment) to arraignment are all of 20 and 43 days for 1922-24.⁶⁸ A somewhat similar check may be obtained by comparing the total time intervals (arrest to final disposition) of indictment and information states. Illinois, as a whole, shows median intervals ranging from 66.8 to 110.7 days, Pennsylvania as a whole ranging from 18 to 97 days, and rural New York ranging from 52 to 71 days.⁶⁹ But the inform-

65. These intervals are taken respectively from the MISSOURI CRIME SURVEY (1926) 329, 330; and Moley, *op. cit. supra* note 8, at 429.

66. Moley, *op. cit. supra* note 8, at 427.

67. *Op. cit. supra* note 9, at 217 (cases grouped in terms of final dispositions).

68. *Ibid.* These intervals are not exactly comparable with the foregoing, however. Some cases initiated by indictment are included in the groups, and the periods calculated seem to be those from indictment or information to the *date set for trial*. See table XVI in the MISSOURI CRIME SURVEY (1926) 329, on which the table cited from the REPORT ON PROSECUTION is apparently based.

69. These intervals are taken respectively from the ILLINOIS CRIME SURVEY (1929) 94; REPORT TO THE GENERAL ASSEMBLY, OF THE PENNSYLVANIA CRIME

ation state of Missouri shows median intervals of from 50 to 139 days.⁷⁰

Two changes in the procedure of indictment and information, taken together, each of which has already been adopted in a few jurisdictions, may indicate lines along which practicable plans for eliminating delay in this stage are to be developed. The first of these is provision for waiver of indictment. One might well expect the result to be waivers in the great majority of cases. Demand for grand jury consideration would presumably, like the demand for a jury trial in states permitting waiver thereof, work out in practice as an exceptional move, and carry the same implication of a more severe sentence in the event of conviction. At the same time grand jury consideration would be available to the accused in the very sort of exceptional situation, calculated to breed unfairness for which grand juries are in theory designed. Provision for such waiver was advocated by President Hoover in his Message to Congress on Bankruptcy and Crime, on February 29, 1932, and a bill to that effect has passed the Senate and awaits action by the House of Representatives.⁷¹

The second type of change is found in a North Dakota statute providing that a defendant bound over and prepared to plead guilty may, on petition by the state's attorney, be brought before a district judge sitting anywhere within the judicial district of which the county is part, and that the defendant may thereupon be arraigned before the district judge in chambers, may plead, and be sentenced without waiting for a term of court.⁷²

Expense

The data requisite to any comparative cost accounting in this field is unavailable, save for certain reports secured by Dean Morse covering 244 counties in grand jury states and 49 in dual method (*i.e.*, information) states, for the year 1928.⁷³ These were computed from jurors' and witnesses' fees, mileage fees, bailiffs' fees, and in some instances reporters' fees.⁷⁴ Of counties of over 100,000 population,

COMMISSION (1929) 61; and REPORT OF THE NEW YORK STATE CRIME COMMISSION (1928) 141, 142.

70. MISSOURI CRIME SURVEY (1926) 329.

71. Mitchell, *Reform in Federal Criminal Procedure* (1932) 18 A. B. A. J. 732, 733.

72. N. D. COMP. LAWS ANN. (1913) § 10628 (6). See also similar English developments discussed in the SECOND AND FINAL REPORT OF THE ROYAL COMMISSION ON DELAY IN THE KINGS BENCH DIVISION (1913) 16 *et seq.*

73. Morse, *op. cit. supra* note 52, at 341.

74. *Ibid.*

those wherein indictment was required averaged a \$5,834 expenditure on grand juries, as against a \$3,347 average for those wherein indictment was not required; for counties of from 50,000 to 100,000 population the averages were \$2,197 as against \$579; for those of 25,000 to 50,000 population, \$1,184 as against \$633; and for those of under 25,000 population, \$550 as against \$858.⁷⁵ These figures cover, of course, but a few of the items which would figure in any complete estimate of the cost of a requirement of indictment. As Dean Morse suggests, one would have to pro-rate, amongst other items, portions of the salaries and expenses of prosecuting attorneys, judges, sheriffs, jailers, court attachés and all others for whom increased work is entailed by the use of indictment.⁷⁶ The expenses of holding accused persons and material witnesses in jail, but only to the extent that delay in these matters might be attributable to the necessity for indictment, would be pertinent items. Expenses traceable to grand jury blunders and inefficiencies—however impossible of estimation—would likewise have to be taken into account.⁷⁷

Inroads on the time and energy of jurors and witnesses, entailed by grand jury operation, are also specified as a ground of objection to the requirement of indictment. In a county as busy as New York, for example, a grand juror is apt to be called upon to devote five mornings a week of two hours each for one month to the performance of his duties. The extent to which this constitutes an unwarranted inconvenience, however, is open to argument. Even in metropolitan counties there are apparently citizens who can be voluntarily enlisted in Grand Jurors Associations. One is inclined to refrain with Monte Lemann from embracing the conclusion of the Wickersham Commission that frequent jury terms without adjustments to the exigencies of callings or business "call for more than the citizen may reasonably be expected to do."⁷⁸

Efficiency

The claim is made that under an information system more of the cases which will not ultimately go through to conviction are weeded out before trial. This, according to Professor Moley, is one aspect

75. *Ibid.*

76. *Id.* at 338.

77. Miller, *Informations or Indictments in Felony Cases* (1924) 8 MINN. L. REV. 379, 387.

78. REPORT ON CRIMINAL PROCEDURE OF THE NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT (1931) 50.

of the "efficiency" of prosecution which can, to a considerable degree, be subjected to measurement:

"Our concern here is with one step; that wherein judgment is passed upon cases at the 'information' or 'indictment' stage. To measure the 'efficiency' of this step it is necessary to measure the extent to which it selects for further prosecution really meritorious cases. This is indicated by the ratio between the number of cases initiated, either by information or indictment, and those carried through to a determination of guilt; in other words, by the proportion of 'successful prosecutions.'" ⁷⁹

Before considering his tables of ratios showing the data for information states contrasted with that for indictment states, the nature of this test of "efficiency" requires some analysis.

The ultimate disposition of a case—where it turns out to be dismissal or acquittal instead of conviction—is thus taken as an indication that that case should never have been passed on to trial by indictment found or information filed. Is this a satisfactory test for action at the accusation stage? The degree of foreseeability apparently predicated is hopeful in the extreme. Dismissals at the instance of the prosecution, whether by nolle or otherwise, may be inspired by any number of motives scarcely ascertainable from a court record. Acquittal or dismissal by direction of the court may likewise result from a variety of circumstances. Witnesses may have changed their testimony and thrown the case; a trial assistant may have failed to make adequate preparation or to understand the value of the evidence; the court may have misunderstood the facts or taken an unexpected view of the law. As for acquittals by a jury or by the court where no jury is used, the multiplicity of factors relevant and irrelevant which contribute to the result is too unfamiliar to require particular discussion. And yet these eventual results, without relation to explanations and contributing circumstances, are offered as tests of action at the earlier grand jury or information stage.

It may still be urged that true-billing or filing an information is "inefficient" when an acquittal or dismissal will later follow defects in the state's case which were in existence even at that preliminary stage. This contention is, however, somewhat at odds with our schemes of initiating prosecution. Consider a grand jury: it is charged to indict when it finds *probable cause*. The defendant is privileged against being called to tell his story, and even should he so desire, our codes do not contemplate his being permitted to appear before the grand jury as a regular practice. Prosecutors, more-

79. *Op. cit. supra* note 8, at 416.

over, usually try to discourage a too zealous grand jury from "trying the case" at this preliminary stage. Consider preliminary hearing under an information system: when there is contest, complete disclosure of the defense case before trial is again scarcely contemplated by our procedure. Even when the examination is or must be held, the defense is not required to present its evidence, and in practice rarely does so. To what extent in any case should a prosecutor substitute his judgment for that of the triers of fact? Beyond generalities in terms of *probable cause* and *prima facie case*, set standards in these matters are none too familiar. To use the state of the evidence as developed at trial as a basis for judging the efficiency of action by the agencies of initiation is to beg a great many questions.

Any conclusion unfavorable to grand juries on the basis of this test, moreover, seems to involve showing that they exert an appreciable influence on the disposition of cases at this stage—a possibility which Professor Moley elsewhere repudiates.⁸⁰ But, taking the view that they do exert an influence, is there any evidence that it is predominantly in the direction of true-billing cases that the prosecutor would rather dismiss? On the contrary, the data indicated, as expressed by Dean Morse, that "the prosecutors disagreed much more often when the grand juries 'not true-billed' than when they 'true-billed'." ⁸¹ Out of a total of 6453 cases in which prosecutors reported their opinions on the grand jury dispositions, they disagreed in 19.51% of the cases initiated by themselves in which the grand juries not true-billed, but only in 2.53% of these cases which the grand juries true-billed.⁸²

So much for the data adduced as to disagreements between prosecutors and grand juries. It scarcely inclines one toward a belief that grand juries pass on more cases to trial than would the prosecutors. It may still be argued, of course, that grand juries, by their very presence, lead prosecutors to feel differently about dropping cases at this stage than they would under an information system. As to this, of course, there can be no proof. Professor Moley offers tables, however, showing ratios of "successful prosecutions" to informations returned, ranging from 50 - 79 for five information states, the average ratio being 67.⁸³ His range of ratios for four indictment states is from 46 - 57, the average being 52.⁸⁴ But the five information states used are predominantly agricultural, whereas

80. *Id.* at 430.

81. Morse, *op. cit. supra* note 52, at 151.

82. *Id.* at 151, 153.

83. *Id.* at 313.

84. *Id.* at 313.

the four indictment states include three of the most populous in the country. Moreover, as one commentator has pointed out, "what would happen to Dr. Moley's statistics, if he selected 5 Indianas and 4 Virginias" for comparison?⁸⁵ The ratio for Indiana (information) was 50, for Virginia (indictment) 57, and for Pennsylvania (indictment) 54.

Procedural Hazards

" . . . the requirement of indictment by a grand jury in all prosecutions for infamous crimes involves a number of needless procedural difficulties which do not obtain in a regime of prosecution by information."⁸⁶

The various requirements as to organization of a grand jury and the necessity for going through the process of impanelling again and again in each county or district, presupposed by the current system of using grand juries in indictment jurisdictions, involves more or less inevitably the occurrence of irregularities in their drawing and composition. This particular hazard is of course obviated under the information procedure whereby single magistrates are substituted for these relays of relatively complicated lay agencies. But without eliminating the requirement of indictment there is still a wide range within which the trouble and waste occasioned may be enhanced or minimized as rules of practice with respect to these irregularities are designed to the one end or without regard to the other.

Grand juries have frequently been operated under rules extravagantly conceived in their tolerance of defense tactics of a sort recently commented upon by Attorney General Mitchell:

"Many instances have occurred where indictments returned after long and expensive hearings have been invalidated by the discovery of the presence on the grand jury of a single ineligible juror. Often the objection is not sustained until the case reaches an appellate court, and meanwhile the Statute of Limitations may have barred another indictment. Delays in raising the objection are deliberately incurred to allow the Statute to run."⁸⁷

But they may also be operated under rules of a sort proposed in a bill now pending in Congress. It provides that a motion to quash an indictment because of irregularity in drawing or impanelling a grand jury, or upon the ground of disqualification of a grand juror,

85. Hall, *Analysis of Criticism of the Grand Jury* (1932) 22 J. CRIM. L. AND CRIM. 692, 702.

86. *Op. cit. supra* note 9, at 36.

87. Mitchell, *op. cit. supra* note 71, at 734.

must be made before or within ten days after the defendant is presented for arraignment; that where such a motion is made, the running of the Statute shall be tolled until the termination of the term of court next subsequent to final judgment on the motion; and that an indictment is not to be quashed upon the ground of the presence of an unqualified juror, if it appears that twelve or more qualified jurors concurred in finding the indictment.⁸⁸

Other dilatory and technical objections associated with grand juries and used as arguments for the elimination of the requirement of indictment give rise to quite similar considerations. The very narrow scope within which amendment of indictments has been permitted, the readiness to quash where a third party has been present in the grand jury room, the practice of reviewing the evidence before the grand jury on motion to quash which arose in some of our jurisdictions along with the innovation of keeping grand jury minutes,⁸⁹ the construction placed on New York's guaranty of indictment in *People ex rel. Battista v. Christian* to render invalid a statute designed to permit waiver,⁹⁰ and the general tendency to treat many irregularities in grand jury procedure as jurisdictional—are these not the expressions of a certain procedural attitude which happens to have co-existed with and been imposed upon grand jury operation rather than conditions inherent other than historically in the employment of citizens' groups to supervise and check the discretion of a prosecutor before trial?

In contrast with this procedural environment which has imparted its style to the grand jury, contrast that which chances to co-exist with and garb the information procedure: "The whole system of procedure by information is subject to control and regulation by the legislature."⁹¹ That the respective environmental attitudes might quite conceivably be reversed is suggested on the one hand by the federal bill referred to above, the refusal of many courts to grant inspection of grand jury minutes and review the evidence in all cases,⁹² the gradual enactment of provisions authorizing waiver of indictment,⁹³ the manner in which grand juries have been insulated against dilatory and technical objections on the part of witnesses even in a *John Doe* investigation;⁹⁴ and on the other by the

88. *Ibid.*

89. Kidd, *op. cit. supra* note 34.

90. 249 N. Y. 314, 164 N. E. 111 (1928).

91. *People v. Foster*, 198 Cal. 112, 122, 243 Pac. 667, 671 (1926).

92. Kidd, *op. cit. supra* note 34.

93. Notes (1929) 14 CORN. L. Q. 206; (1928) 28 COL. L. REV. 976.

94. See *Carroll v. United States*, 16 F. (2d) 951, 953 (C. C. A. 2d, 1927); *Blair v. United States*, 250 U. S. 273, 281 (1919).

quite plausible view of the requirement of preliminary examination under an information system taken by the California Court in *People v. Nogiri*, quoted above, and by the practice in some information states of reviewing the sufficiency of the evidence before the magistrate on motion to set aside the information and again on appeal from a conviction—bewailed by a note writer as making the preliminary examination into “another loophole for the criminal, and another pitfall for the prosecution.”⁹⁵

COLLATERAL FUNCTIONS OF THE GRAND JURY⁹⁶

Exaggerated as the contentions in favor of information as against indictment on the foregoing debit items of expense and trouble finally appear, there remains some difference and, such as it is, doubtless in favor of the information. Our main issue, however, involves something further—an inquiry into what, under each of these competing modes of initiating felony prosecution, we get in return for the respective expenditures of money, time and energy entailed. Quasi-judicial review and control of a district attorney's discretion in the initiatory stage—the only grand jury role for which equivalents under the information have thus far been discussed—is but one of several major services in the course of law enforcement performed by regular grand juries.

To the prosecution, for example, a grand jury affords an early, secret, and *ex parte* hearing, where unwilling or timid witnesses may be subpoenaed and questioned before or after the lodging of a specific charge against anyone, and under the circumstances most favorable to disclosure. Barring an occasional “leak”, no premature disclosure of the state's case is entailed. Persons called before such a body have the vulnerable status of mere witnesses. They are unattended by counsel. The value of such a “deposition mill” is constantly attested by federal prosecutors and by continued reliance on optional grand juries for this purpose in some of the information states.

Grand juries have also long been distinguished with substantial though not absolute accuracy as “the only general criminal inquisitorial bodies known to the law.” Where suspicion of crime but as yet no sufficient evidence to substantiate *prima facie* charges against particular offenders is the situation, a *John Doe* inquiry is the form of proceeding indicated. To reach its maximum effectiveness such

95. Note (1930) 28 MICH. L. REV. 451.

96. For references on which this section is based, see Dession and Cohen, *op. cit. supra* note 5.

an inquiry must be served by the power to subpoena witnesses and compel the production of evidence. This is traditionally a grand jury rôle, shared in its completeness by no other agency. The extent to which positive law enforcement is dependent upon the availability of this type of inquiry is evidenced by the recurring investiture of the innumerable administrative and regulatory boards and commissions of today with similar powers in aid of their respective functions. A *John Doe* investigation may be required to build up an isolated criminal case, or it may serve to uncover a whole organized system of corruption. A history of grand jury activity in this country would be one long chronicle of instances of both.

There has been no discrediting of these investigative or "deposition mill" activities of grand juries. If they are to be lost, any promised benefits from a shift to the information must be offset to that extent. If they are not to be lost, some considered substitution should form an integral part of the case for the information. Legislation setting up the method for initiating prosecution by information has, to be sure, uniformly retained the possibility of impanelling optional grand juries on motion of the prosecutor or court. In a few of the information states, notably Missouri, Indiana and Iowa, the prosecution has kept such grand juries in frequent session to avail of the power to subpoena and examine witnesses in secret and get their testimony on record at an early stage. But more generally the adoption of an information system has meant the disappearance of grand juries and with them the facilities embodied in grand jury powers. This has been the experience of Connecticut, Michigan, Nebraska, Washington and Wisconsin. The procedure is soon forgotten. A grand jury that must be specially impanelled is not sufficiently available for everyday needs. The unusual expense to the county is apt to prove a deterrent. Prosecutors come into office who have never known grand jury practice, and naturally enough a habit of getting along without grand jury process soon becomes the rule. In an exceptional or difficult case where a prosecutor is loath to take all responsibility for initiating a prosecution, or for purposes of an unusual, widespread investigation, an optional grand jury may be impanelled. These are the only instances of its use in Connecticut, for example, and they are rare indeed. Dean Morse quotes a Michigan judge for the statement that "Under our state laws, no grand jury is summoned, except by special order of circuit judge. In this county there has been no grand jury sitting for upwards of thirty years." From a Wisconsin judge: "Since 1880 but one grand jury was called in this circuit. It did not accomplish anything." From a Washington judge: "Since I have been on the bench, 25 years,

we have had only two or three grand juries, hence my observation has been so limited as to be of little value." From a Nebraska justice: "We have had no experience in the selection of grand juries. The grand jury system in Nebraska, while available, in practice is used only to meet exceptional circumstances."⁹⁷

At this point one may well ask how it is that prosecutors in such states consider themselves quite able to get along without the subpoena power and *ex parte* hearing afforded by grand juries, while in the federal jurisdictions and many grand jury states these facilities are deemed of the utmost importance, if not conditions precedent to vigorous enforcement of the criminal law? It is interesting to speculate on the effects of throwing the entire burden of criminal investigation on prosecutors and police while at the same time withholding from them the *legal* means of compulsion embodied in grand jury powers. In predominantly rural counties prosecution is, for the most part, of course, confined to rather simple police business of an "open and shut" variety. But in the cities and, above all, in the federal jurisdictions, more complicated situations are often involved. The lack of an investigatory procedure with "teeth" may well be felt. It seems not unlikely that the lack of legal means for compelling testimony and the unavailability of investigatory process will be compensated by extension of such *sub rosa* practices as that of holding suspects *incommunicado* for questioning of a "third-degree" or "quasi-third degree" character. The questioning of witnesses in the prosecutor's office is likely to develop in the same direction. Failing these developments, are not prosecutors likely to confine themselves more and more to those charges brought up and cases practically prepared by the police—*i.e.*, to adopt a policy of not looking for trouble?

There is, indeed, the alternative of lodging grand jury powers elsewhere, and setting up substitutes for these phases of grand jury activity in the information states. Connecticut offered the first example, with its provision for the conduct of *John Doe* inquiries into crime by three justices of the peace or three grand jurors of a town. The possibility has, however, been but rarely invoked. Michigan has for some years had provision for similar investigations by "one man grand juries," consisting of justices invested with inquisitorial power. A few other states have similar provisions, empowering either justices or prosecuting attorneys to exercise these grand jury functions. But these "one man grand juries" are still too exceptional to be viewed as integral parts of the information system of prosecution. Even where authorized, it turns out that they are but rarely

97. Morse, *op. cit. supra* note 52, at 223, n. 116.

utilized, save in a few localities as a convenient means of evading the privilege against self-incrimination—the *John Doe* form serving to cloak the calling as a mere witness of a suspect against whom prosecution was contemplated from the start.

For one reason or another these statutory substitutes for grand juries have not materialized as genuine substitutes in practice. The recent development in Michigan—the jurisdiction of the most publicized “one man grand jury”—of six months grand juries in all well-populated counties, in order that the facilities of *John Doe* inquiry and the *ex parte* hearing of subpoenaed witnesses might be readily available, is of interest in this connection.⁹⁸ These again are isolated instances. The American Law Institute’s draft Code of Criminal Procedure would require the impanelling of a grand jury at least once a year in each county, presumably not for an entire year, nor again for six months, but rather for the usual period of a term of court. During the other terms of court—assuming more than one per annum—the provision continues to be one for merely “optional” grand juries. This rather uncertain recognition of the possible value of some grand jury uses is suggestive of the Wickersham Commission’s conclusion that the grand jury is still useful as a general investigating body and “should be retained as an occasional instrument for such purposes,” that is, for inquiry “into the conduct of public officers and in case of large conspiracies.”⁹⁹ But as has been suggested, this quite overlooks the importance of grand jury facilities in the everyday investigation and preparation of more ordinary cases.

While shortcomings of the evidence adduced in support of contentions as to grand jury rubberstamping, expense and procedural hazards may be taken to discredit the case constructed for the information, they also suggest the existence of some other appeal to account for the widespread support accorded the information procedure. This appeal seems to lie in that distinctive feature of the information procedure which from some points of view would constitute its chief defect—the wider discretion and power enjoyed under it by the district attorney.

There is a growing demand for assumption of ever greater responsibility by the agencies of prosecution, fostered by the recognition of plea-bargaining and administrative handling as existing practices and by the recognition that more is involved in criminal

98. See Toy, *Michigan's New Law For Six Months Grand Juries* (1932) 10 THE PANEL No. 1, at 3.

99. *Op. cit. supra* note 9, at 37.

law administration than the dealing out of "penalties to fit the crime." The "socialization" of our procedure for dealing with persons accused of crime or delinquency, if one may judge by that outstanding modern development—the juvenile court—unquestionably presupposes an unprecedented reliance on the discretion of officials in charge.¹⁰⁰ The juvenile court procedure is, moreover, often regarded as pointing the line along which the handling of adults accused of crime is to develop.

100. Cf. *People v. Lewis*, 235 App. Div. 559 (3d Dep't 1932); Van Waters, *Socialization of Juvenile Court Procedure* (1922) 13 J. CRIM. LAW AND CRIM. 61, 64; Waite, *How Far Can Court Procedure be Socialized* (1922) 12 J. CRIM. LAW AND CRIM. 339.