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## THE NATURE OF THE CALIFORNIA GRAND JURY: AN EVALUATION

Much discussed, often maligned, sometimes defended, the grand jury stands as one of the least understood of public institutions. Springing from somewhat cloudy origins, its character in England by the late Fourteenth Century was relatively fixed as an inquisitorial and accusatory body.<sup>1</sup> The functions of investigation and accusation were even then regarded as properly within the scope of the executive power.<sup>2</sup> Realistically, it could not be maintained that such functions were—or are—solely executive.<sup>3</sup> On the other hand, they certainly are incompatible with the well-recognized scope of judicial power. Judicial tribunals do not ordinarily have the duties of investigation and accusation, together with the duty of weighing the evidence supporting such presentment. To designate as judicial in character a body having these duties, is to breed anomaly.

Traditionally, the grand jury was to stand as a barrier to unjust and arbitrary action by the Crown and its officers. Without the jury's action, no person could be put to trial upon charges of felony, save in certain isolated instances.<sup>4</sup>

Upon its adoption in the United States, the grand jury became almost wholly a creature of statute. While generally there was in the United States no need for such protection as was found necessary in Britain, the basic purpose of the grand jury remained the same: Equally to protect the citizen against unfounded charges, as to bring charges where there existed sufficient evidence of guilt.<sup>5</sup> Beyond this basic similarity, however, substantial changes in the nature of the grand jury were wrought by the various statutes, including those in California.

In England, the basic character of the grand jury as a public executive body remained, despite attempts by Crown and judiciary to make it a "rubber-stamp" and to coerce verdicts.<sup>6</sup> Such judicial control as was

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<sup>1</sup> For discussion of the grand jury's history and development, see the opinion of Justice Matthews in *Hurtado v. California*, 110 U.S. 516 (1884).

<sup>2</sup> See Kennedy and Briggs, *Historical and Legal Aspects of the California Grand Jury System*, 43 CALIF. L. REV. 251, 257 (1955); see also 24 Am. Jur. *Grand Jury*, § 2 p. 832, et seq.; cf. CALIF. CONST. Art. 5 § 21 (West Ann. 1960).

<sup>3</sup> *Ex parte Battelt*, 207 Cal. 227, 277 Pac. 725, 65 A.L.R. 1497 (1929); The legislature has power to conduct investigations to determine necessity and expediency of contemplated legislation, notwithstanding separation of governmental powers.

<sup>4</sup> See 24 Am. Jur. *Grand Jury* § 3, p. 833.

<sup>5</sup> *In re Tyler*, 64 Cal. 434; 1 Pac. 884 (1884).

<sup>6</sup> Kennedy and Briggs, *op. cit. supra* note 2, at 257-8.

present appears to have been exercised through control of the jury's membership, rather than by check-reining its actions.<sup>7</sup>

In California, the grand jury is not a public executive body, but is adjunct to, and an arm of, the judiciary.<sup>8</sup> Its members are officers of the court, and contempt of the jury is contempt of the court.<sup>9</sup> By statutory definition, it is "a body of nineteen persons returned from the citizens of a county before a court of competent jurisdiction, and sworn to inquire of public offenses committed or triable within the county."<sup>10</sup> It has been defined further as "an instrumentality of the courts of this state . . . charged with a quasi-judicial inquisition into the conduct of citizens and public institutions and officials."<sup>11</sup>

If it is agreed that the grand jury's purpose in modern society is as indicated above, it then remains to examine more closely its nature to determine whether the announced judicial character (particularly as it might support close control by the impaneling court) may not be inconsistent with that purpose.

In some aspects, this "quasi-judicial" character may be to public advantage. For example, a juror is not civilly liable for determinations made by him in proceedings regularly before the grand jury.<sup>12</sup> Freedom from liability and from any compulsion to disclose matters of discussion or vote is clearly essential to the effective functioning of the grand jury as an investigative body. Yet, it must be asked whether such protection could not be afforded if the jury were not a constituent part of the court (as it is not, in many jurisdictions), and whether the evils of such attachment to the judiciary do not outweigh the benefits.<sup>13</sup>

In the exercise of its inquisitorial and accusatory functions, the grand jury must consider the evidence, in conformity with statutory obligations, in order to arrive at its decision. Traditionally, in order to keep that body untrammelled and free (from judicial control, *inter alia*) to fulfill its role, the jury was allowed to arrive at a charge after hearing only evidence for the prosecution. This was because, as Blackstone has written, "the finding of an indictment is only in the nature of an inquiry or accusation, which is *afterwards* to be tried and determined; and the grand jury are only to enquire upon their oaths whether there be suffi-

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<sup>7</sup> *Ibid.*

<sup>8</sup> *McFarland v. Superior Court*, 88 Cal.App.2d 153, 198 P.2d 318 (1948).

<sup>9</sup> *Greenberg v. Superior Court*, 19 Cal.2d 319, 121 P.2d 713 (1942). *Ex parte Bruns*, 15 Cal.App.2d 1, 58 P.2d 1318 (1936). See also 25 Ops. Cal. Atty. Gen. 259 (1955).

<sup>10</sup> CAL. PENAL CODE § 888 (West Ann. 1960).

<sup>11</sup> *Ex parte Shuler*, 210 Cal. 377, 405, 292 Pac. 481, 493 (1930).

<sup>12</sup> *Turpen v. Booth*, 56 Cal. 65, 38 Am. Rep. 48 (1880). See CAL. PENAL CODE § 924.3 (West Ann. 1960).

<sup>13</sup> See 24 Am. Jur. *Grand Jury* § 2 pp. 832-833.

cient cause to call upon the party to answer it."<sup>14</sup> Consonant with this principle have been frequent enunciations that deprivation of due process of law does not invalidate the indictment, because investigation and indictment by the grand jury do not constitute the defendant's day in court.<sup>15</sup>

Blackstone's provision for exclusion of defense evidence has been made law in California—in letter at least.<sup>16</sup> Bound by Section 939.7 of the Penal Code to order produced any evidence it believes may explain away the evidence already before it, the jury is placed in the unreasonable position of being able to close its eyes and conclude that what they do not see does not exist.<sup>17</sup> True, there is no waiver of the defendant's right to subsequently challenge the legality of the evidence which supported his indictment, since there is afforded him no opportunity to object during the jury's investigation. He always has the right to his day in court and judicial review.<sup>18</sup> But might not more weight be attached by a trial jury to determination of prima facie guilt by the grand jury than would be given the filing of an information, particularly when the grand jury is by law constituted an arm of the very court hearing the case? It is submitted that the "quasi-judicial inquisition" weighs more heavily on the average trial juror than an investigation reaching the same conclusion by an executive body.

Such a provision as Section 939.7 may sit reasonably well when applied to an investigative body of general executive character, but it would seem ill-laid upon a "constituent part of the court", charged with the duty of "quasi-judicial inquisition."<sup>19</sup> The statute provides that "the grand jury is not required to hear evidence for the defendant, but it shall weigh all evidence submitted to it, and when it has reason to believe that other evidence within its reach will explain away the charge, it shall order the evidence produced . . ." <sup>20</sup> If the jury is to be permitted, as here, to determine what it will hear and what it will not, and then decide as to whether there exists exculpatory evidence, the statutory provisions are contradictory by their very terms. How can the members of the jury properly determine whether or not evidence within their reach might explain away the charge if they have the option of rejecting it wholly before examining it?

Perhaps more serious question is raised regarding the duties enjoined upon the grand jury by this and companion provisions of the law which

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<sup>14</sup> 4 Bl. Comm. 303; (italics added). See also 24 Am. Jur. *Grand Jury* § 47 p. 865.

<sup>15</sup> See e.g., *People v. Dupree*, 156 Cal.App.2d 60, 319 P.2d 39 (1956).

<sup>16</sup> CAL. PENAL CODE § 939.7 (West Ann. 1960).

<sup>17</sup> *Ibid.*

<sup>18</sup> *People v. Prewitt*, 52 Cal.2d 330, 341 P.2d 1 (1959).

<sup>19</sup> CAL. PENAL CODE § 939.7 (West Ann. 1960).

<sup>20</sup> *Ibid.*

do nothing to clear the glass. Clearly, the weighing of evidence is a function proper to a trier of fact.<sup>21</sup> The same cannot be said as to the determination of admissibility of evidence.<sup>22</sup> Section 939.6 of the Penal Code provides in part that ". . . the grand jury shall receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence."<sup>23</sup> Such determination is obviously within the competence and proper purview of a judicial tribunal. Is it not asking too much to demand it of an "adjunct of the court," not necessarily trained in the intricacies of the laws of evidence, whose proceedings are in fact not trials?<sup>24</sup> How is this determination to be made? It is no answer to provide as does Section 934, that the district attorney or judge may be present to advise them upon the jury's request.<sup>25</sup> First, this might require the judge to rule, more or less out-of-hand, on a matter which might later be formally before him at trial. The defendant's objection to the legality of the evidence supporting his indictment, made at the trial, might place the judge in a rather peculiar position had he previously advised the jury regarding it.<sup>26</sup> Furthermore, the district attorney, as proponent of the evidence in question, is in questionable position to advise the jury regarding its admissibility or legality. His counsel would be open to much question in that instance, even if he were possessed of great perception and extraordinary conscience. More important, though the law permits the jury to ask for such advice, it nowhere requires that it be given.<sup>27</sup> No recourse is expressly given the grand jury in the event the requested counsel is not forthcoming.

It is submitted that this duty of determination is one properly borne by a quasi-judicial tribunal; however, its assignment to the grand jury is inconsistent with that body's express function of public investigation. In the last analysis, the legislature has determined that the grand jury can discharge properly two conflicting duties at one and the same time: the true judicial burden of determining the character of the evidence and the burden of public investigation. Whether the "fair character and approved integrity" required of a juror by Section 897 carries with it as a necessary concomitant the legal experience and judicial acumen requisite to such a task, is much open to question.<sup>28</sup>

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<sup>21</sup> See Witkin, *California Evidence* p. 620, and authorities there cited.

<sup>22</sup> *Ibid.*

<sup>23</sup> CAL. PENAL CODE § 939.6 (West Ann. 1960).

<sup>24</sup> 156 Cal.App.2d at p. 63.

<sup>25</sup> CAL. PENAL CODE § 934 (West Ann. 1960). In some counties, questions sought to be put to witnesses by the jurors must be passed to, and asked by, the district attorney. This may help ensure that the jury receive "none but legal evidence," but would appear to do further violence to the jury's duty to weigh and judge the evidence.

<sup>26</sup> *People v. Prewitt*, 52 Cal.2d 330, 341 P.2d 1 (1959). The problem would be most acute in counties having but one superior judge.

<sup>27</sup> CAL. PENAL CODE § 934 (West Ann. 1960).

<sup>28</sup> *Id.* § 897.

Additional problems are raised by Section 939.8, requiring indictment when the jury is convinced that the evidence before it, taken together, if unexplained or uncontradicted, would warrant a conviction by a trial jury.<sup>29</sup> Essentially, the section requires indictment upon prima facie finding of guilt. This is entirely proper for an investigative body. When the function of indictment, however, is mated with the responsibility of determining the character of the evidence that supports it, and with the right to exclude all evidence which *could* explain or contradict, the result is not proper. In short, it is both derogatory of the jury's basic purpose and devoid of fairness.

The law in its present state contemplates considerable judicial control over the actions of the grand jury. This control, like the duties of judicial determination cited above, is indeed proper if the body to whom it is applied is truly an adjunct of the court. It is at least arguable that many of the controls (particularly those in the budgetary area) have their *raison d'être* in the quasi-judicial character of the grand jury. It is obvious that these controls could, in a particular case, be exercised so stringently as to wholly hamstring the jury in the performance of its investigative function. If a fair and complete job of investigation is to be done, as the law enjoins, clearly the jury must be free both from controls which could stifle its function, and from duties which are incompatible with it.

To support further the proposition that the investigation to be performed by the grand jury is an executive rather than a quasi-judicial function, we need look only to the process of charging by information. The district attorney performs the same duties of evaluation and decision as are carried out on a broader scale by the grand jury in arriving at an indictment. Both must weigh the evidence and determine that it would warrant a conviction.<sup>30</sup> The district attorney is beyond any question an executive official, however, and it seems fair to conclude that the investigatory and accusatory functions lie particularly within the executive realm.<sup>31</sup>

In California, the grand jury is still with us; in many states and England, it has been eliminated as an anachronism. It behooves us to "use it or lose it."<sup>32</sup> If this statutory schizophrenia were eliminated, many of the controls attendant upon its peculiar status could be removed and its functions and limits could be more clearly set down. Once again, it

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<sup>29</sup> *Id.* § 939.8.

<sup>30</sup> The district attorney, however, need not receive and contemplate only "legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence." He also need not make formal determination of the character of the evidence upon which he relies. Cf. CAL. PENAL CODE § 939.6, 939.7 (West Ann. 1960).

<sup>31</sup> *Fleming v. Hance*, 153 Cal. 162, 94 Pac. 620 (1908); cf. *Singh v. Superior Court*, 44 Cal.App. 64, 185 Pac. 985 (1919), and *op. cit. supra* note 2.

<sup>32</sup> *Garvey, Use It or Lose It*, 34 S. BAR. J. 906 (1959).

could serve as a public body of the highest utility. The need for its investigative and protective functions has not diminished with the passage of time. However, its services may be needed in areas now closed to it. Under the present system, how could the jury investigate a matter which, although properly within its scope, the judge did not desire it to investigate? Such desire on the part of the court might be prompted by reasons less than proper. Judicial impropriety is noxious, but not wholly beyond the realm of possibility. To leave the law in its present state is to have the grand jury stand in perpetuity as a "body emasculate."

It is submitted that the grand jury is not properly a quasi-judicial body and should not be so denominated. Such characterization is not in keeping with traditional roles of investigator on the one hand, and judge on the other. Its present state —of not being a court but an adjunct of the court; of not holding trials yet having to weigh and evaluate evidence in judicial fashion; bound to investigate yet subject to controls incompatible with that duty— leaves it without the ability to fulfill any one role well. The question distills to this: Can the grand jury remain both an investigatory body and a quasi-judicial adjudicator required to make determinations which are properly reserved for the bench? We submit it cannot.

A thorough revamping, beginning with the nature of the grand jury, is needed. That the grand jury can be effective at all in its present hybrid form as a judicial adjunct charged with executive responsibility is high tribute to both jurors and bench; it does not justify leaving the situation *in statu quo*. To characterize the present-day grand jury in California as a quasi-judicial body, is to liken it to the classic impossibility of being a little bit gravid with child.

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