Criminal Indictment Function of The Grand Jury

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"The value of a system is determined by its use."¹ With these words Justice Holmes provided American jurisprudence with a standard; a standard to evaluate the importance, the practicality and the justice of the various structures that determine the law. Thus, one must look not so much to the theoretical formulation of a system as to its use—how it works, not how it should work. With this standard as a guide, the following work attempts an evaluation of an instrument within the criminal law system—the grand jury.

The nature of the grand jury system is often defined as an investigatory and inquisitorial body and a constituent part or agency of the court, created for the protection of society and enforcement of law. But the search must go deeper. Questions must be asked: (1) What is the procedure of the grand jury system? (2) What are its weaknesses? (3) What are its advantages? Further, the subject itself must be limited in order to adequately survey its practical operation. For this reason the following study is limited solely to the criminal aspect of the grand jury as it operates in Santa Clara County. This work does not attempt to determine the life or death of a system nor solve the many problems inherent in the grand jury itself; rather, the authors hope that in some of the issues presented, in some of the weaknesses and advantages evaluated, a valid basis may be formed to determine from use the value of the grand jury.

**The Indictment**

The criminal function of the grand jury is principally centered in one weapon—the indictment. The Penal Code defines it as "an accusation in writing, presented by the grand jury to a competent court, charging a person with a public offense."² In order to secure such an indictment against an individual, however, the initiating force lies not so much with the grand jurors as with the office of the district attorney. It is the district attorney who will determine the channel by which a defendant may be brought to trial; i.e., the preliminary hearing or the grand jury indictment. If the offense is considered worthy of a grand jury hearing or the reasons weigh in favor of such process, the delay of the preliminary hearing and the decision of a judge will be replaced by the decision of nineteen jurors.

¹ Holmes, Collected Legal Papers 182 (1920).
The process itself commences when the jury foreman is notified by the
district attorney that an indictment will be sought. A meeting is called at an
appropriate time depending on the urgency of the particular case, and the
district attorney is allowed to present his evidence.\textsuperscript{8}

In arriving at this evidence, the preliminary investigation as a practical
matter rests entirely with the district attorney's office, working in conjunction
with the city police, the sheriff's department, and the many other local law
enforcement agencies. Further, many federal agencies are often used in
constructing the body of evidence for narcotic cases, acts of forgery, em-
bezzlement and other federal violations. It should be noted, however, that in
cases involving action against the district attorney himself or a member of
his office, the jurors may request the Attorney General to employ special
counsel and special investigators, whose duty it would be to investigate such
situations and present the evidence to the jury.\textsuperscript{4}

The evidence itself is limited to "such as is given by witnesses produced
and sworn before the grand jury, furnished by legal documentary evidence
\ldots and [the grand jury] shall receive none but legal evidence, and the
best evidence in degree, to the exclusion of hearsay or secondary evidence."\textsuperscript{5}
The jurors may ask the advice of the district attorney, the court or the judge\textsuperscript{6}
in evaluating the evidence and may further question each witness with
regard to his or her testimony. As to the particular defendant, the grand
jury is "not required to hear evidence for the defendant, but shall weigh all
the evidence submitted to it \ldots" and further "when it has reason to believe
that other evidence within its reach will explain away the charge, it has the
power to order the evidence to be produced and for that purpose may re-
quire the district attorney to issue process for the witnesses."\textsuperscript{7}

Following the hearing, the jurors must determine their decision accord-
ing to the following statutory test: "The grand jury shall find an indictment
when all the evidence before it, taken together, if unexplained or uncontra-
dicted would, in its judgment, warrant a conviction by a trial
jury."\textsuperscript{8} In practice, the task of the district attorney is that of establishing the corpus
delicti—the occurrence of a criminal act and its relation to the defendant.
If the evidence is felt to be sufficient, an oral vote of thirteen or more jurors
will return the indictment. Basically, there is no process of appeal on the
indictment, but Penal Code 995 allows a setting aside of the indictment:

\textsuperscript{8} \textit{Cal. Pen. Code} § 935.
\textsuperscript{5} \textit{Cal. Pen. Code} § 939.6.
\textsuperscript{6} \textit{Cal. Pen. Code} § 934.
\textsuperscript{7} \textit{Cal. Pen. Code} § 939.7.
\textsuperscript{8} \textit{Cal. Pen. Code} § 939.8.
(1) where it is not found and presented as prescribed in the code; or (2) where the defendant has been indicted without reasonable or probable cause.⁹

If the indictment is not set aside, the trial is set in the superior court and the worth and value of the grand jury’s opinion meets its ultimate test.

**Major Criticisms of the Grand Jury**

Criticisms leveled by legal theorists against the criminal indictment function of the grand jury have formed the subject matter of numerous articles and provided the impetus to countless crusades, all aimed at complete abolition of the system. Heavier in quantity than quality, when petty and insignificant objections are filtered away along with the criticisms of a personal nature, there remain only three arguments which carry any serious logical weight.¹⁰

The more legalistic of the system’s attackers object to what they call the unconstitutional, or at least unjust, deprivation of the right of the accused to offer evidence in his own defense. Although the grand jury may permit the defendant to appear and testify, it is not in any way bound to afford him this privilege. Even if so allowed, under no circumstances may he take advantage of the advice of his attorney during the hearing. With this coloring, the grand jury is painted at worst as a sinister vigilante committee secretly deciding from which tree to lynch its innocent victim, and at best as an ignorant pawn of the district attorney, deciding the probable guilt of the accused solely on evidence presented by the prosecution without being allowed to consider the defendant’s own story.

The further objection is often presented that the grand jury, in deciding whether or not to indict and in determining whether there is probable cause to believe that a crime has been committed, must necessarily consider precise legal concepts which they have not been trained to comprehend. The elements of the individual crimes are often technical in nature and not easily explainable to a layman. The theory therefore is that the decision as to the indictment should be more correctly made by a trained legal mind as is done in the preliminary hearing before the municipal court.

Those who are more concerned with fiscal than legal problems, contend that the grand jury’s chief function is to serve as a political expedient for the district attorney, a body to which he can shift the responsibility of important decisions on criminal cases of high public interest, a shield which he can

¹⁰ Due to the nature of the grand jury system, there are few cases or documents to be cited as authorities. Hence, the greater part of the material upon which this study was based was obtained by personal interviews with various Santa Clara County officials.
count on to protect himself from the possible adverse feelings of the county’s registered voters. Thus, they argue that the grand jury is little more than the personal pet of the district attorney’s office, an elegantly pampered scapegoat which consumes far more county funds than it is actually worth.

The essence of the above criticisms tends to conclude that the criminal function of the grand jury has lost its purpose and value in view of the time and expenditures involved in the process. It is pointed out that the preliminary hearing would just as adequately handle the criminal procedure required to bring a defendant to trial.

**ADVANTAGES OF THE GRAND JURY SYSTEM**

Despite criticism, however, the grand jury system does have definite advantages. These may be found in several exclusive powers which have been denied to the committing magistrate at the preliminary hearing, and which can make the grand jury an effective agency for the administration of criminal justice.

The speed with which an indictment may be brought is an important consideration. In cases in which the district attorney considers time to be an important element, the grand jury is an expeditious means by which the proceedings against the accused may be commenced, and the delays of arraignment and extensions in preliminary hearings may be avoided.

The grand jury may issue an indictment even before the actual arrest of the individual. If the district attorney knows who the defendant is, but does not know where he is, the lack of a requirement for the presence of the defendant at the hearing becomes an asset rather than a liability to the grand jury. They may issue the indictment immediately and thus insure against the possible running of the statute of limitations on the particular crime involved.

The secrecy behind which grand jury proceedings may be conducted, far from being a mantle which deprives the defendant of his constitutional rights, often serves as armor plate to protect the individual witnesses and to add strength to the county law enforcement bodies. In combating the current narcotics problem, police districts and sheriffs’ offices have made liberal use of undercover agents and informants. These persons may present their evidence to a grand jury without the defendant, or more important, without other potential defendants, being made aware of their identities. Hence, one such agent may be of continuous service to his superiors, rather than available for the apprehension of only a single offender.
Along with the power of indictment, the grand jury possesses the power to correct the wrongdoings of the county officers themselves and if necessary, bring them to trial. The California Penal Code authorizes the grand jury to inquire into “the wilful or corrupt misconduct in office of public officers of every description within the county,” and on proper consideration of the evidence to issue an “accusation” against the official to the district attorney. Indeed, not even the district attorney himself is beyond the grand jury’s reach. The Government Code provides special procedure by which an “accusation” may be issued against him.

This “watchdog” power of the grand jury is often criticized as too vague, or too weakly defined to be effective. But the fact is that it does exist, and that the county officials are aware of it. Ineffective as it might be in the hands of a lethargic jury, its very existence is enough to arouse considerable consternation in any county office which is the recipient of a visit from a grand jury member. Wielded by an energetic and conscientious panel of jurors it is probably the people’s biggest deterrent to and most powerful weapon against malfeasance in public office.

What conclusions, if any, may be drawn from the principal weaknesses and advantages presented in determining the value of the grand jury system? Is it really an archaic system of justice made obsolete by modern legal procedures? Should it be revised? Should it be abolished? Or rather should it retain its present structure in the hope that inherent weaknesses and problems will be adequately handled by competent jurors? In determining the answers to the above questions, one point seems clear: that considering the close attention it has always received from the legislature (as indeed evidenced by the recent revisions of the California code sections pertaining to grand jury proceedings), it would seem rash to conclude that the grand jury has no effective powers or structure. Yet, if it possesses an effective structure, if it possesses the powers it needs, then where does the weakness of the system lie?

The initial weakness indicated was with respect to the possible denial of an individual’s constitutional rights in that he may be prevented from presenting his case before the jury. The essential purpose of the grand jury is not to try or determine the guilt of the defendant, rather it is to determine

\[11 \text{CAL. PEN. CODE § 919(c).}\]
\[19 \text{CAL. GOV. CODE § 3060.}\]
\[28 \text{CAL. GOV. CODE § 3073.}\]
whether there is sufficient evidence to warrant a trial. Further, to allow the defendant or his attorney to present their case before every hearing would turn an investigatory and inquisitorial function into a judicial determination reserved specifically for the courts. It should also be noted that, if competent jurors are empaneled, and properly instructed by the court, the grand jury must be expected to extend due regard to the rights of the defendant in considering the sufficiency of the evidence.

The second objection centered on the difficulty of the lay juror in comprehending the technical elements of an alleged crime. As a practical matter, most juries often possess the benefits of one or more attorney members. As an example, Santa Clara County has had on its grand jury at least one attorney each year for the past seven years. Further, even in the absence of an attorney member, "The grand jury may, at all times ask the advice of the court, or the judge thereof, or of the district attorney." It should also be noted that the ability of the grand jurors to understand and evaluate the sufficiency of the evidence presented is reflected in the high percentage of indictments which eventually result in criminal convictions.

The final criticism related to the district attorney's use of the grand jury as a means of shifting responsibility. Granting that this is a valid criticism, the weakness stems not from the grand jury system itself, but from an abuse of the system by individuals primarily responsible for its operation. This in fact seems to be the primary difficulty pervading the entire grand jury system. The powers have been well established by the legislature, and the structure and procedure of the system have been defined. Its effectiveness, however, can never be established by the legislature, for its ultimate operation is dependent on the competency of the individuals involved. Such competency extends not only to the grand jurors but to the judges who direct the jury, and to the district attorney and county counsel who advise and initiate its actions. Thus, the problem of the grand jury is not so much one of a questionable system as one of questionable men. Annihilation is not the answer. Its final value will be determined not by revision but by the encouragement of competent endeavors by a responsible and operative grand jury.

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14 CAL. PEN. CODE § 934.
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