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A Layman Looks at the Grand Jury

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THE GRAND JURY system has been challenged throughout the country. Twenty-four states have severely limited the functions of the grand jury. It is said that the system is outmoded, that it is no longer needed to protect the individual, and that it is expensive and cumbersome. Here in Ohio the grand jury system has considerable popular prestige; yet the average person knows very little about it. Even the average lawyer, if a layman may be pardoned for saying so, seems to have slight knowledge of the grand jury and its place in the administration of criminal justice. Under these circumstances an appraisal of the grand jury system by a layman who recently served as foreman of the Cuyahoga County grand jury may have some value.

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The primary basis for this article is the experience of the grand jury for the January, 1952, term of the Criminal Division, Court of Common Pleas, Cuyahoga County, State of Ohio, as interpreted by the foreman. In connection with his assignment the foreman did a modest amount of research on the subject of the grand jury and this work is also drawn upon.

At the outset a simple description of the organization of the Ohio grand jury may be in order. A grand jury is composed of fifteen persons. One of these is the foreman who is appointed by the presiding judge of the criminal division. The foreman's name need not be drawn from the jury wheel. He may be selected by the presiding judge from the community at large. This is the practice in Cuyahoga County. The other fourteen grand jurors are selected by the jury commissioners from the jury wheel, in the same manner as petit jurors. A grand jury serves for the term of court, usually three to four months. The presiding judge administers the oath to the grand jurors and charges them with respect to their duties. The prosecuting attorney, often referred to as the county prosecutor, is the legal advisor of the grand jury and is responsible for the presentation of cases to it. The superintendent of criminal records acts as bailiff for the grand jury and schedules the cases and the witnesses in each case.

The Ohio grand jury has two principal functions. The first is the holding of hearings in felony cases. The second is the conduct of investigations into crime in the community on its own initiative or at the direction of the court or the prosecutor. This article will be concerned with these two major functions of the grand jury.

I—*Hearings in Felony Cases*

The Ohio Constitution provides that " no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury "[1] Under this provision the grand jury hears the cases of persons "bound over" from police court or the justice of the peace as well as cases resulting from original investigations instituted by the prosecuting attorney, the court, or the grand jury itself. After a hearing the grand jury either sends the accused to trial in criminal court by means of an indictment, called a "true bill," or dismisses the case by means of a refusal to indict, called a "no bill." The grand jury, therefore, does not decide guilt or innocence but only determines whether, on the evidence presented, a crime has been committed and, if so, whether the person accused may reasonably be supposed to have committed it.

This grand jury function of holding hearings in felony cases has been severely attacked. One of the major criticisms is that by presenting cases in secret the prosecutor is able to escape responsibility for the decision in the case. The grand jury of which the writer was foreman, hereinafter referred to for convenience as our grand jury, stated in its report that: "This system places the prosecutor in a position of great power. It is not so much the power to prosecute unjustly an innocent person, an evil which the grand jury was originally designed to prevent. The grand jury can prevent this, and if it does not subsequent public trial will. The power of the prosecutor is that of so presenting a case that a "no bill" results. In this manner persons who should be sent to trial may escape prosecution. This can easily be done by the questions asked, or not asked, of witnesses; by the instruction given on the law; or by the emphasis used in the presentation of facts or law."[2] Others have commented on this aspect of the grand jury system. Raymond Moley, noted student of the administration of criminal law, says that: "Unless a grand jury is provided with unusual experience and competence in its membership, the prosecutor becomes absolute master of its decisions. In a process which usually depends entirely on matters of legal definition the sole legal advisor of the grand jury is able to have his way in nearly every case Thus the function of the grand jury is merely to provide

[1] OHIO CONST. Art. I, § 10.

[2] Report of the Grand Jury, Cuyahoga County Court of Common Pleas, January 1952 Term, 8.

a means by which the prosecutor may, while exercising his own discretion and enforcing his own will, escape responsibility."[3]

A second criticism of the grand jury function of holding hearings in felony cases is that it is inefficient, costly, and contributes to delays in justice. The report of our grand jury states that: "The present system for handling felony cases involves some duplication of hearings. Very briefly the procedure (assuming it is a case from Cleveland, which most are) is: arrest, statements taken by detective, charge by the police prosecutor, preliminary hearing in municipal court (with the county prosecutor represented), hearing before the grand jury, and, if the grand jury indicts, trial in criminal court. The defendant may waive the hearing in municipal court and in approximately 70 per cent of the Cleveland cases this is done. In many cases, however, the principal prosecution witnesses appear three times — in municipal court, before the grand jury, and at the trial. This is costly to the government and to the witnesses. It takes time and contributes to the delay in justice."[4] An ably staffed governor's commission in Ohio, headed by Mr. Charles Taft, himself once a county prosecutor, found that in felony cases "responsibility for bringing an alleged offender to trial is thus divided amongst the police authorities, the city prosecutor, the court of preliminary examination, the grand jury and the county prosecutor. The same set of facts must be reviewed by all five separate and distinct authorities and acted upon affirmatively by all in order that the accused may be actually brought to trial."[5]

Doubts have been expressed that the grand jury felony hearings any longer serve the original purpose of protecting the innocent citizen from injustice. A writer of a layman's work on criminal justice states: "But at present we need no such protection against a government of and by the people, and indeed such a body, deliberating secretly and hearing the evidence against an accused person without giving him the opportunity to be heard, seems strangely out of harmony with the spirit of our institutions."[6]

For reasons such as these, twenty-four states, to a greater or less degree, have in felony cases eliminated the grand jury and substituted for it an "information" drawn by the prosecutor. This pins the responsibility definitely on the prosecutor, is less expensive since a jury is unnecessary, and saves time for the prosecutor and the witnesses. If a constitutional convention is approved by the voters of Ohio on November 4, 1952, the convention might well consider revising the existing constitutional requirement of grand jury hearings in felony cases. For purposes of the remainder of this article, however, it is assumed that the present system will continue.

[3] 7 ENCYC. SOC. SCI. 149 (1932).
[4] See note 2 *supra.*
[5] THE REORGANIZATION OF COUNTY GOVERNMENT IN OHIO 119 (1934).
[6] Train, FROM THE DISTRICT ATTORNEY'S OFFICE (1939).

This system, of course, can be defended. To the layman the most impressive defense, perhaps, is that the grand jury constitutes a means of citizen participation in the administration of criminal justice. This is recognized in the report of our grand jury.[7] That view is shared by a student of the development of the grand jury. "It is no mean advantage of the grand jury system that it calls upon the people largely to participate in judicial functions; and this makes them in a degree responsible for the purity of proceedings of courts of law."[8]

If the present grand jury system is to be effective as a means of citizen participation in the administration of criminal justice, however, certain improvements should be seriously considered. The charge that the grand jury, in its function of holding hearings in felony cases, tends to be a mere rubber stamp for the prosecutor would be deprived of some of its force if independent counsel were readily available to the jury. At present the prosecutor is the sole legal advisor of the grand jury. Only in certain extraordinary circumstances can the jury secure the services of counsel other than the prosecutor. In its report our grand jury recommended that independent counsel be readily available.[9] The mere availability of such counsel would be an incentive to the prosecutor's office to function so effectively as to make it unnecessary to call upon independent counsel. The prosecutor should welcome the opportunity to secure independent corroboration for a legal ruling which he may have given the grand jury but upon which the jury might want an independent opinion. The theoretical independence of the grand jury would become more real if it could turn to someone other than the prosecutor for legal advice.

The need for independent counsel is underscored by the problem of evidence before the grand jury. The determination of the weight of evidence required to justify an indictment is the most difficult question which a grand jury faces. Our jury had considerable trouble with this problem. It is not surprising that evidence should be a thorny problem for laymen. It is understood that even the lawyers regard this as a complicated subject. A jury may well challenge the prosecutor's definition of the weight of evidence required in a given case. Our jury certainly did so. In such instances the availability of independent counsel would quickly resolve the issue.

A prosecutor's office may seem to tend to the view that the evidence should demonstrate guilt "beyond a reasonable doubt." This is understandable since, if the grand jury indicts, the prosecutor's office must conduct the case in criminal court where the "beyond reasonable doubt" stand-

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[7] Report of the Grand Jury, *supra* note 2, at 9.

[8] Glaser, *The Political and Historical Development of the Grand Jury*, 9 LAW. SOC. J. 193 (1938)

[9] Report of the Grand Jury, *supra* note 2, at 9.

ard is clearly applicable. The *Handbook for Ohio Jurors,* however, which is distributed to all grand jurors by the Grand Jury Association, says that "The purpose of the grand jury is not to decide the guilt or innocence of the accused person, but only to determine whether a crime has been committed, and if the defendant probably committed it."[10] This handbook, written by a former assistant police prosecutor of the City of Cleveland, had a definite influence on our jury. The definition in the handbook, moreover, is supported by the Ohio court decision that "the rule applicable to trials requiring the evidence to be strong enough to establish the guilt of the accused beyond a reasonable doubt has no application to the evidence necessary to return an indictment by a grand jury."[11]

It is submitted that if the grand jury is to function effectively in hearing felony cases, it must be given a clear exposition of this question of the volume or weight of the evidence. This raises the larger question of the general indoctrination of the jurors with respect to their duties. In its report our jury stated that: "The members of the Grand Jury at present receive almost no instruction in their duties before or after taking office. The Grand Jury Association provides a handbook which is helpful and the Association is also a fruitful source of information for the foreman. It is recommended, however, that the judges and the prosecutor develop a more effective indoctrination program for grand jurors."[12] In this connection attention is directed to the handbook put out by the New York Grand Juror's Association.[13] It is a very good attempt to deal with some of the major problems facing a grand jury, including the problem of evidence. A handbook or manual is only one aspect of effective indoctrination but it certainly is important.

The availability of independent counsel, a clear exposition on the subject of evidence, and a good indoctrination program have been suggested as methods of strengthening the grand jury for the effective performance of its function of holding hearings in felony cases. In addition to these the experience of our grand jury indicates that consideration should be given to certain procedural improvements. Under this heading will be discussed the quorum requirement, the voting requirement, the manner of presenting cases to the grand jury, and the minutes of the proceedings of the grand jury.

Under existing Ohio law a quorum consists of all fifteen members of the grand jury.[14] No business can be conducted unless everyone is present. Our

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[10] Wyner, HANDBOOK FOR OHIO JURORS 5 (1951).

[11] *In re* Investigation of County Commissioners, 7 Ohio N.P. 450 (1900).

[12] Report of the Grand Jury, *supra* note 2, at 10.

[13] MANUAL FOR GRAND JURORS IN THE COUNTY OF NEW YORK (1938).

[14] OHIO GEN. CODE §13436-2. *Cf.* Doyle v. State, 17 Ohio 222 (1848).

jury found this requirement to be a distinct handicap. Each day the jury met there was the question of whether all the members would appear. If there was an absentee, it was necessary to delay the hearings until another juror was qualified. Considerable time was wasted for the other jurors, the witnesses, and the prosecutor.

Even more serious, however, is the fact that the quorum requirement results in the loss of able, conscientious jurors. At present if a juror misses a day because of illness, or any other reason, he is immediately replaced and his services are lost. Not only is an experienced, and perhaps an able, juror lost but a new juror must be "broken in." Furthermore, when evidence in a given case is presented over several days, or weeks, and there are changes in the jury, there is the practical problem of securing twelve votes for an indictment since some of the jurors may not have heard the most convincing witnesses. There also may be a legal problem if the law requires that all the jurors must hear all the witnesses.

In the case of our grand jury, nine of the original fifteen jurors served the complete term. Twenty-four jurors served in all. In view of its experience the jury recommended in the report that consideration be given to an arrangement like that in New York where there are twenty-three on the jury and sixteen constitute a quorum.[15] Such a provision would permit a more businesslike and efficient conduct of the felony hearings.

Our grand jury also questioned the present Ohio voting requirement which calls for twelve out of the fifteen jurors to vote "yes" in order to secure an indictment.[16] This means that only four votes are necessary to dismiss the charge against the accused. The apparent reason for this strict requirement is that only the prosecution is heard before the grand jury. The accused does not appear and neither do his witnesses or his attorney. The requirement of twelve out of fifteen votes for an indictment, therefore, may have been considered a greater protection to the accused. There is a question, however, as to whether this requirement does not give the accused too much protection. After all, the grand jury is not deciding guilt or innocence as is the case with a petit jury, where unanimous votes or substantial majorities may be justified. If, as has been suggested in this article, "the power of the prosecutor is that of so presenting a case that a no bill results,"[17] then the fact that only four votes are required for a no bill adds to the power.

In New York the voting requirement calls for twelve out of twenty-three jurors to vote "yes" to secure an indictment.[18] That type of require-

[15] Report of the Grand Jury, *supra* note 2, at 10.

[16] OHIO GEN. CODE § 13436-17

[17] See note 2 *supra.*

[18] N. Y. CODE CR. PROC., §§ 224,268.

ment seems to meet the needs of justice better than Ohio's. Consideration should be given to changing the present requirement. Both the voting and the quorum requirements are matters of state law and any changes would require action by the state legislature.

A third procedural question arises out of the manner of presenting cases to the grand jury. Under the procedure used with our jury, and which it is understood has been generally followed in Cuyahoga County, the assistant prosecutor questions the witnesses on the basis of statements previously given to the police by the witnesses. The members of the grand jury, of course, may, and do, ask questions but they do not have the statements before them. It is difficult, if not impossible, for the jury to know if all pertinent points have been brought out. The foreman, or any other juror, may ask to see the statements. This is not usually done, however, since each new foreman and his jurors require some time to familiarize themselves with the hearing of felony cases. It may not occur to them to ask for the statements. It is suggested, therefore, that the prosecutor's office adopt as standard procedure the practice of placing copies of the statements in each case before the foreman. Such a procedure would have the advantage of protecting the prosecutor from any ill-founded suspicions that any evidence was being held back. The jury would better be able to know whether a witness had changed his story. And, very important, the grand jury would be more closely integrated into the hearings process.

The final procedural matter to be considered here is that of the minutes of the grand jury. Only in a few original cases were transcripts taken of the testimony before our grand jury. In the usual case, no transcript was made. There were, therefore, no minutes of the evidence in the sense of a record of the testimony of the witnesses. It has been suggested that such a record be made but such a procedure would be very expensive. In the absence of a transcript of the testimony before the grand jury, however, the question arises as to what are the "minutes" of the grand jury. Since the foreman is required by Ohio law to turn over to the prosecutor the "minutes" of the grand jury,[19] what shall he turn over?

The only record which the Cuyahoga County grand jury keeps is a record of how the individual jurors voted on each case. This record is kept on a form which lists the names and numbers of the cases across the top and the names of the jurors down the left hand side. The clerk of the jury, who is a member of the jury named by the foreman, calls the roll, when the jury is ready to vote on a case, and checks whether the juror votes "yes" or "no." It has been the practice for the foreman to turn these voting records over to the prosecutor, at the end of the term, as the "minutes" of the grand

[19] OHIO GEN. CODE § 13436-6.

jury. By law the prosecutor is not allowed in the grand jury room while the jury is discussing a case and while it is voting.[20] Thus the question arises as to whether it is not illegal for the grand jury to make available to the prosecutor the record of how the individual jurors voted on individual cases. It is claimed that the prosecutor must have these "minutes" as a part of the record in the case to support the indictment. To the layman, however, the foreman's signature on the indictment seems to constitute adequate certification that the indictment was properly voted. This view apparently has some support in law. "An indorsement of a 'true bill' signed by the foreman of the grand jury shows that the indictment was found by the concurrence of the requisite number of grand jurors."[21]

It is clear that the names of the jurors present and voting are part of the record of a criminal case.[22] It is not at all clear, at least to the layman, that the prosecutor is legally entitled to know how each juror voted in each case. The practice of permitting the prosecutor to examine jurors' voting records should be carefully considered, particularly in terms of the effect which it may have on jurors to know that the prosecutor, while barred from the room when they are voting, is in a position to review their voting records.

Our grand jury relinquished its voting records in compliance with a request from the prosecutor and upon the advice and direction of the court. This was in accordance with the practice of considering the voting records to be "minutes." The writer feels, however, that there is grave doubt that such records are "minutes" as contemplated by the statute.[23] It is also believed that the voting record serves no real purpose for the prosecutor, and if delivered to him or anyone else outside the jury room probably does violence to the secrecy statute relating to all proceedings of, and votes taken by, the grand jury.[24]

Before turning from the grand jury function of holding hearings in felony cases, attention is directed to the problem of the enforcement of the secrecy statute. The grand jury, the prosecutor, and the other public officials involved are sworn to secrecy regarding proceedings in the grand jury room. Our grand jury felt that the secrecy statute was not rigidly adhered to.[25] Newspaper stories revealed testimony given in the grand jury room and the stories were not always based on statements made by witnesses, who are not bound by the secrecy statute as far as their own testimony is concerned.

One of the objectives of the secrecy statute is to protect witnesses. Yet

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[20] OHIO GEN. CODE § 13436-7
[21] State v. Hartley, 22 Nev. 342, 40 Pac. 372 (1895).
[22] Mahan v. State, 10 Ohio 232 (1840).
[23] See note 19 *supra.*
[24] OHIO GEN. CODE §§ 13436-3, 13436-8, 13436-16.
[25] Report of the Grand Jury, *supra* note 2, at 10.

the list of witnesses subpoenaed is apparently available to newspaper reporters. They know in advance who is to appear before the grand jury and frequently publicize the fact. Under such circumstances the witnesses have little protection.

II—*The Conduct of Investigations*

Up to this point the discussion has been devoted to the grand jury function of holding hearings in felony cases. A second major function is the conduct of investigations. There is considerable controversy over the extent of the authority of the grand jury to conduct investigations and make reports of its findings. Some aspects are more controversial than others. There seems to be little doubt, for example, that the grand jury has independent powers of investigation and need not wait upon action by the prosecutor or the court. This authority comes basically from the oath taken by the grand jury, which reads, in part: "You and each of you do solemnly swear that you will diligently inquire, and true presentment make of all such matters and things as shall be given you in charge or otherwise come to your knowledge ..."[26] It has been stated that: "The exercise of inquisitorial power not be preceded by the submission of a formal charge to the grand jury or by the approval of the court. Indeed, the oath administered to the grand jury clearly indicates its right to act on its own volition."[27]

There is also little doubt that the grand jury may conduct investigations, whether initiated by it or by other competent authority, when the investigation results in or is likely to result in an indictment. The Cleveland Citizens League, in a recent release, states that this is the opinion of the present Cuyahoga County prosecutor.[28] The view also has general support through the country.

The controversy becomes more pronounced over the authority of the grand jury to conduct broad investigations or surveys which result in "presentments" or reports but not in indictments. One nation-wide survey on this question concludes that "the courts have indicated that grand juries may sometimes make a presentment in the nature of a general report, merely pointing out the existence of evil conditions without giving any specific instructions sufficient to be made the basis of a bill of indictment ..."[29] In Ohio the general conclusion is that the grand jury "is comparatively without limit in the scope of its investigation, the bills that it may return, or the general findings that it may make."[30]

It has been the practice in Cuyahoga County, furthermore, for grand

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[26] OHIO GEN. CODE § 13436-3.
[27] 24 AM. JUR. 857.
[28] GREATER CLEVELAND 74 (August 12, 1952).
[29] Note, 17 N.C.L. REV. 49 (1938).
[30] State *ex rel.* Doerfler v. Price, 101 Ohio St. 50, 128 N.E. 173 (1920).

juries to make reports containing general findings and recommendations without intending that an indictment should necessarily follow. The practice has had the support of the court through charges calling upon the grand jury to make general investigations or surveys and through the acceptance of reports containing general findings and recommendations. Our grand jury followed in this tradition and made a survey of the status of crime in the county, investigated the enforcement of the new federal gambling tax law, and made an analysis of the grand jury system. The grand jury report contains findings and recommendations on these subjects.

The controversy becomes sharp over the question of whether a grand jury, in a general report or presentment, may criticize or reflect upon the conduct of a public official or a private citizen. According to one authority, "Although presentments or reports may be returned in those cases authorized by statute, it appears that the practice has largely fallen into disuse in this country; and in the absence of statute, a grand jury has no right to file a report reflecting on the character of conduct of public officers or citizens, unless it is followed by an indictment."[31] Other views have been expressed, however, insofar as the situation in the country generally is concerned. A distinction, for example, has been drawn between reports reflecting on private citizens and those reflecting on public officials. "But, where such reports are recognized, restraints have been imposed so as to prevent any reflection on the conduct of specified private individuals or placing them in a position of public scorn without affording them opportunity to answer the accusations made against them. Where the report concerns public officers' misconduct in office the courts vary as to whether the same restraints should be imposed."[32]

A justice of the Appellate Division of the Supreme Court of New York, moreover, has pointed to a broad definition of the authority of the grand jury: "In addition to this usual procedure, the grand jury, in the exercise of the inquisitorial and visitorial powers vested in it, has the authority to make general reports (or presentments) on conditions in prisons or public offices within its jurisdiction; notwithstanding that such reports may not result in the actual indictment of any person Acting upon its own initiative, or under the direction of the court, the grand jury has a right to conduct investigations into the administration of public institutions and the law generally, or any particular law, and the conduct of public officers. Such investigations may result in the presentment of public officials and others for the commission of crimes or may bring about useful recommendations for improvements and for the public welfare Our grand juries, by showing their willingness to inquire into any slipshod careless attitude on the

[31] Coons v. State, 191 Ind. 580, 134 N.E. 194 (1922).

[32] See note 29 *supra.*

part of law enforcement agencies, will cause the latter more effectively to perform their tasks."[33]

A New Jersey court found[34] in the common law authority both for and against grand jury reports criticizing public officials. "A libel action was brought against the members of a grand jury for having published, in an official report to the court, charges of unethical conduct by the plaintiffs, former prosecuting attorney and his assistant, while they were performing their official duties. On a motion to strike the defendants' defense of absolute privilege as insufficient in law, it was *held,* that the motion be denied. The grand jury in publishing the charges, even though it might have no actual authority to do so, was acting within the color of its jurisdiction as defined by the common law and, therefore, is absolutely immune from any libel suit."[35]

To the layman, therefore, it appears that there is a legal foundation for surveys and investigations by grand juries which do not result in indictments but in "presentments" of conditions which in the judgment of the jurors call for a public report. To the layman, furthermore, there can be little question of the value of having fifteen citizens participating in the administration of criminal justice and free to comment on crime conditions and on the conduct of public officials, especially those concerned with law enforcement. To the layman it is unthinkable that a grand jury of fifteen conscientious citizens could not report on conditions in public office if, in their considered judgment, public exposure was warranted. If a jury is convinced that there is corruption or inefficiency in public office, or feels that improvements can be made, or that criticism or commendation is deserved, should it be denied the right to issue a public report?

There seems to the layman to be strong support for such grand jury reports in the law. If there is any serious question about it, however, the law should be clarified to permit the making of such reports to the court. It has been well said that "The administration of the criminal law must in the last analysis be in the hands of the community itself. This is essential, first in order that crime may not escape punishment by reason of the incompetence or corruption of public officers, and, second, in order that the innocent and the free may not be subjected to illegal compulsion through the encroachment of governmental power." This conclusion is obtained in an article with the significant title "The Grand Jury—Use It or Lose It."[36]

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[33] Francis Martin, Presiding Judge, Appellate Division, Supreme Court New York in MANUAL FOR GRAND JURORS IN THE COUNTY OF NEW YORK 55, 58, and 60 (1938).
[34] O'Regan v. Schermerhorn, 25 N. J. Misc. 1, 50 A.2d 10 (1946).
[35] 31 MINN. L. REV. 500 (1947).
[36] Shaw, 32 J. AM. JUD. SOC'Y 6 (1935).

It is granted that the power of the grand jury is great. It is possible that this power may be used in an unfounded or unjust attack upon a good public official. There are, however, adequate safeguards against a misuse of the power of the grand jury. First, there is the influence of the court. The presiding judge selects the foreman of the grand jury. He has the responsibility for selecting a citizen who will be honorable, intelligent, and careful in the exercise of power. The record in Cuyahoga County shows that the court has faithfully discharged its responsibility. The Court also charges the grand jury as to its functions. This is another opportunity to impress the jury with the need for care in the exercise of its power. The court advises the foreman and the jury, from time to time, during the term and can do a great deal to keep the jury from going off half-cocked. While the court can influence and guide the jury, however, the jury is independent and the court cannot be held responsible for all the actions of the jury. "As to matters within their personal knowledge the grand jurors act according to their own discretion and the court should not attempt to control their findings."[37]

Another safeguard against the abuse of the power of the grand jury is the good judgment and sense of fair play of the average citizen serving on the jury. This faith in the members of the jury is a part of our democratic faith. A belief in democracy includes a belief in the soundness of the decisions of our juries.

Many regard the investigatory power of the grand jury as much more important, substantively, than its function of holding hearings in felony cases. It is generally agreed, however, that the grand jury has not been able to exercise effectively this power of investigation. "Peculiarly, however, the investigatory power of the Grand Jury has been utilized with relative infrequency, and seldom with satisfying results."[38] If the grand jury, therefore, is not to sink into "innocuous desuetude," vigorous steps must be taken to strengthen it. One of the most effective steps would be to free the grand jury from what seems to the layman to be an excessive dependence on the prosecutor. If a prosecutor is vigorous, cooperative, ambitious and energetic, the grand jury as an investigatory body seems to work. If the reverse is true, the grand jury is practically impotent. The Cuyahoga County grand jury, January 1952 term, reported that " the prosecutor is the key man. He is in a position to provide continuity and leadership. It does not seem right, however, that the grand jury, supposedly independent, should be so dependent on one official, an official who is elective and, therefore, in

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[37] State v. Hoover, 17 Ohio N.P.(N.S.) 65 (1913), *aff'd*, 91 Ohio. St. 41, 109 N.E. 626 (1914).

[38] Konowitz, *The Grand Jury as an Investigating Body of Public Officials*, 10 ST. JOHN'S L. REV. 223 (1936).

politics."[39] The jury went on to recommend that independent counsel be readily available to the grand jury not only to assist it in felony hearings, as discussed above, but also to assist in the planning and conduct of investigations, when necessary.

Another handicap of the grand jury in the performance of its investigation function is the lack of funds with which to employ independent investigators. For many investigative assignments the grand jury can turn to the Director of Public Safety or the Chief of Police of the City of Cleveland. Our grand jury called upon these officials and the response was excellent. Such an arrangement, however, depends upon the willingness of the officials concerned to give active cooperation. The grand jury should not be in a position of such dependence. The occasion might well arise, furthermore, for the use of investigators not connected with the Department of Public Safety. Funds should be available, therefore, for the use of the grand jury, subject perhaps to the approval of the presiding judge. Our grand jury made such a recommendation in its report.[40] A similar conclusion has been reached by other analysts of the grand jury system.[41]

III—*Summary*

In summary, the grand jury as an institution has been under fire. Twenty-four states have done away with it, to a greater or lesser degree as a body for holding hearings in felony cases. Its effectiveness as an investigating body has been questioned. The grand jury, however, has been defended as an agency for citizen participation in the administration of criminal justice. If it is to be retained and if it is to be effective, the grand jury needs to be strengthened. Some of the means of strengthening it suggested in this article, it is believed, would require changes in the law. These include providing for independent counsel, making funds available to the jury, changing the quorum and voting requirements, and, if not existing under present law, specifically giving the jury authority to conduct broad investigations and to submit written reports of its work. Other of the proposals for strengthening the jury require no legislation. These include tightening the enforcement of the secrecy statute, placing before the foreman the statements used as a basis for questioning witnesses, clarifying for the jury the weight of evidence necessary for an indictment, improving the indoctrination of the jurors, and stopping the practice of turning over to the prosecutor the voting records of the jurors. These objectives can be attained by cooperative action by the court, the prosecutor, and the grand jury.

The grand jury itself, and particularly the foreman, has a responsibility.

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[39] Report of the Grand Jury, *supra* note 2, at 9.

[40] *Ibid.*

[41] Konowitz, *supra* note 37, at 235.

Its work cannot and should not be left entirely to the county prosecutor. The Cuyahoga County jury, with the assistance of such citizen groups as the Grand Jury Association, the Cleveland Crime Commission and the Citizens League, can do much to make itself more effective, even under existing laws. "Every citizen should know what a Grand Jury is, does and what it ought to be and do. He should know it will hear and investigate his grounds for believing a crime has been committed. Unless the Grand Jury is content to be a rubber stamp it had better start educating the public by showing what it can do."[42]

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[42] Shaw, *The Grand Jury — Use It or Lose It,* 32 J. AM. JUD. SOC'Y 6 (1935).