

# The Grand Jury as an Investigating Body of Public Officials

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## THE GRAND JURY AS AN INVESTIGATING BODY OF PUBLIC OFFICIALS

IT is said that the Grand Jury System has broken down in the field of its greatest potential utility—as a restraining influence upon mis-government; that it has been ineffective in the exposure of official corruption. It has become an open question as to whether it is able to cope with the deep inroads which organized crime has made upon our economic, social and political life.<sup>1</sup> The problem is complicated by the fact that the extensive criminal network which enmeshes our larger communities today, is frequently linked with corruption of public officials.

These doubts have arisen, in part, from the frequency with which ordinary Grand Jury investigations fall short of their objectives. There has been recent evidence of the inability of juries to successfully conclude their inquiries in New York County, and in Kings County. In February, 1934, a New York Grand Jury made an effort to inquire into the policy racket. After eleven months of continued activity, it found itself stalemated, and handed up a recommendation that another Grand Jury take up the matter, and devote its entire time to it. The March, 1935, Grand Jury was charged with the duty of investigating all forms of organized crime, and any connection between such acts and law enforcement officials. In order that it might have a free hand, it dispensed with the aid of the District Attorney.<sup>2</sup> Though headed by a capable foreman, it made no progress,<sup>3</sup> and when the futility of the investigation became apparent, the Jury joined with the Grand Jurors' Association in urging upon Governor Lehman the need of an Extraordinary Grand Jury, and a

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<sup>1</sup> Dession and Cohen, *The Inquisitorial Functions of Grand Juries* (1932) 41 YALE L. J. 687. "While denying the traditional virtues of Grand Juries and discrediting them as wielders of the power of indictment, current criticism nevertheless remains non-committal as to their value for *John Doe* investigations into crime."

<sup>2</sup> *Quare* as to power to exclude the prosecutor. *Pro*: Matter of District Attorney's Relations to the Grand Jury, 14 N. Y. Cr. 431 (1900). *Contra*: *People ex rel. District Attorney v. Dist. Ct.*, 75 Colo. 412, 225 Pac. 829 (1924).

<sup>3</sup> Compare, the exposure of the Minneapolis system of graft which was forced through by the foreman. 2 LINCOLN STEFFEN'S AUTOBIOGRAPHY (1931) 327, 379.

Special Prosecutor to continue the inquiry. The rackets investigation is now being conducted by a carefully selected jury, with the aid of Thomas E. Dewey, Esq., and an appropriation of a quarter million dollars.<sup>4</sup> In Kings County also, an Extraordinary Grand Jury and a Special Prosecutor were called upon to conduct an inquiry into the circumstances of a murder, and charges of bribery of public officials and police brutality, after an ordinary Jury had ended its deliberations without finding an indictment.<sup>5</sup>

It is timely, therefore, to consider whether impairment of public confidence in this ancient institution is well founded; and whether it can be so adjusted to modern conditions as to become an indispensable aid in the administration of the law, with particular reference to the investigation of public officials. Does the Grand Jury have adequate inquisitorial power? Can it effectively exercise it under present conditions? How may it be adapted to modern needs? Can it forestall legislative investigations? These inquiries suggest the subject matter which will be discussed in this article.

#### INQUISITORIAL POWER.

The Grand Jury is required by statute to inquire "into the wilful and corrupt misconduct in office of public officials of every description, in the county."<sup>6</sup> It also is vested with the power and the "duty to inquire into all crimes committed, or triable in the county, and to present them to the court."<sup>7</sup> But, inasmuch as the wilful and corrupt acts of public officials are made crimes by the Penal Law,<sup>8</sup> and are the proper subject of inquiry by a Grand Jury in the first

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<sup>4</sup> N. Y. Times, Jan. 17, 1935, p. 3, col. 1; 13 THE PANEL (Sept.-Oct. 1935).

<sup>5</sup> *People v. Luckman et al.*, Supreme Court, Kings County. Defendants convicted of murder in second degree. See N. Y. Times, Feb. 21, 1936. No indictment found by April Grand Jury (1935). Resubmitted to November Grand Jury and indictment found; but Jury superseded and indictment abandoned.

<sup>6</sup> N. Y. CODE OF CRIM. PROC. § 260, subd. 3.

<sup>7</sup> *Id.* § 252.

<sup>8</sup> N. Y. PENAL LAW §§ 1820-76. See, particularly, § 1866; Medalie, *Grand Jury Investigations*, 7 THE PANEL (1929).

instance,<sup>9</sup> it would seem that the first quoted statute adds nothing to the broad powers which are otherwise prescribed. The commissioners who drafted the Code of Criminal Procedure stated in their report to the Legislature, that the provision relating to inquiries into official misconduct was merely "declaratory of the existing powers of the Grand Jury."<sup>10</sup> It was, indeed, one of its important functions at common law.<sup>11</sup>

It could make full investigation, upon its own motion, upon information derived from any source deemed reliable, and could originate charges against those believed to have violated the criminal laws.<sup>12</sup> A general investigation was permitted at common law even though there was no specific charge before it, and no suspect named.<sup>13</sup> This practice was carried over into this country. It survived the adoption of the Fifth Amendment to the Constitution of the United States, which provides for indictment by a Grand Jury of persons accused of infamous crimes. The Amendment was held to be applicable solely to offenses triable in the federal courts;<sup>14</sup> but similar provisions were adopted in the state constitutions and by legislative enactments, throughout the country.<sup>15</sup> Except in the state of Pennsylvania, the common law powers of the Grand Jury continue unimpaired. In that state the courts confine its inquisitorial activities to such matters as are specifically placed in its charge. It cannot proceed upon an inquiry unless and

<sup>9</sup> N. Y. CODE CRIM. PROC. §§ 56 and 56a. Apparently such offenses do not come within the classification of misdemeanors of which the Court of Special Sessions has exclusive jurisdiction in the first instance; Medalie, *Grand Jury Investigations*, 7 THE PANEL (1929); *In re Wilcox*, 153 Misc. 761, 276 N. Y. Supp. 117 (1934).

<sup>10</sup> FOURTH REPORT OF THE COMMISSIONERS ON PRACTICE AND PLEADING, CODE OF CRIMINAL PROCEDURE (1849) p. 131.

<sup>11</sup> *People ex rel. Livingston v. Wyatt*, 186 N. Y. 383, 79 N. E. 330, 10 L. R. A. (N. S.) 159 (1906); *People v. McCarthy*, 59 App. Div. 231, 69 N. Y. Supp. 513 (2d Dept. 1901); *People v. Osborne*, 158 N. Y. Supp. 572 (1916).

<sup>12</sup> *People ex rel. Livingston v. Wyatt*, *supra* note 11.

<sup>13</sup> Note (1906) 6 COL. L. REV. 347; Addison's Pa. Rep. (1791) App. 38.

<sup>14</sup> EDWARDS, THE GRAND JURY pp. 32-33; Morse, *A Survey of The Jury System* (1931) 10 ORE. L. REV. 101, 107, 121; *Hale v. Henkel*, 201 U. S. 43, 61, 26 Sup. Ct. 370, 375, 50 L. ed. 652 (1906); *Hendricks v. United States*, 223 U. S. 178, 184, 32 Sup. Ct. 313, 50 L. ed. 394 (1912); *Blair v. United States*, 250 U. S. 273, 282, 39 Sup. Ct. 468 (1919); *United States v. Thompson*, 251 U. S. 407, 40 Sup. Ct. 289 (1920).

<sup>15</sup> N. Y. CONST. art. I, § 6.

until the court prescribes the nature of the offense to be investigated, and the conditions to be exposed.<sup>16</sup> It is unlikely, however, that the courts of any other jurisdiction would follow the Pennsylvania rulings.<sup>17</sup>

To be sure, attempts have been made from time to time to limit the Grand Jury in the exercise of its inquisitorial power. Inasmuch as the New York Code of Criminal Procedure is the basis of numerous similar statutory compilations throughout the country, it may be of interest to recall that the original proposed draft of the Code contained many restrictions and limitations. This draft was prepared in the middle of the nineteenth century, when the Grand Jury had come into considerable disrepute. The widespread abuse of its powers as an instrument for the "gratification of private malignity",<sup>18</sup> evoked fervent pleas for its complete abolition. In England, it was called "a useless—nay, a mischievous—incubus", and its extinction urged as "a great boon to the public at large."<sup>19</sup> It was referred to as an "anomalous excrescence", and was characterized as "subversive of the moral interests of society."<sup>20</sup> This attitude was reflected in the Report of the Commissioners on Practice and Pleadings who drafted the New York Criminal Code. They urged that "limits must be set to the extent of its powers, and restraint must be placed upon their exercise."<sup>21</sup> They would have recommended the abolition of the Grand Jury had it not been safeguarded by the Constitution.<sup>22</sup>

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<sup>16</sup> Statutory limitations did exist in a few states in the past. In Pennsylvania they were set by the courts. Found currency in Wharton's Criminal Law (WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES, 7th Rev. Ed., Vol. 1, § 458). See Kidd, *Why the Grand Jury's Power Is a Menace to Organized Crime*, 12 THE PANEL (Sept.-Oct. 1934), asserting that there is no English authority for these restraints (cases cited); *supra* note 1, at 695.

<sup>17</sup> Kidd, *Why the Grand Jury's Power Is a Menace to Organized Crime*, 12 THE PANEL (Sept.-Oct. 1934).

<sup>18</sup> *Supra* note 10, at 35.

<sup>19</sup> Humphreys, *Observations on the Inutility of Grand Juries and Suggestions for Their Abolition* (1857) 486 PAMPHLETS 4 (N. Y. C. Bar Ass'n).

<sup>20</sup> Steigh, *The Grand Jury System Subversive of the Moral Interests of Society* (1852) 37 PAMPHLETS 53 (N. Y. C. Bar Ass'n). "I trust the days are numbered of an institution so cumbrous, so mischievous, so expensive and, incidentally, so demoralizing, as I submit the Grand Jury has proved to be."

<sup>21</sup> *Supra* note 10, at 37.

<sup>22</sup> CODE OF CRIMINAL PROCEDURE, REPORT COMPLETE BY THE COMMISSIONERS ON PRACTICE AND PLEADINGS (1850) p. 128.

The same tendency towards restraint appears in the notable charge to the Grand Jury by Justice Field (Circuit Court of the United States)<sup>23</sup> which has become a milestone in legal history. It is of passing interest to note that it was David Dudley Field, brother of Justice Field, and an ardent disciple of Jeremy Bentham, foe of the Grand Jury,<sup>24</sup> who incorporated the restrictive provisions in the draft of the New York Code.<sup>25</sup> The Legislature, however, disregarded the proposed draft, and the then existing laws found their way into the Code. Fortunate as it is that the broad powers of the Grand Jury were continued, it is regrettable that the opportunity to revise the Grand Jury system and increase its usefulness, should have been overlooked.

From its earliest days, the Grand Jury was recognized as a suitable medium for the exposure of political corruption. Even those who assailed it bitterly and wished for it an early demise, were constrained to admit its special value for offenses of a political character.<sup>26</sup> Current criticism also inclines to favor the continuance of the Grand Jury where the conduct of public officials is involved,<sup>27</sup> although it is non-committal as to its value for general investigations.<sup>28</sup> Peculiarly, however, the investigatory power of the Grand Jury has been utilized with relative infrequency, and seldom with satisfying results. Grand Juries have been prone to dabble with trivial matters, while closing their eyes to the seri-

<sup>23</sup> Field, J., Charge to Grand Jury, 2 Sawy. 667, Fed. Cas. No. 18255, in 2 BLACKSTONE'S COMM. (Jones ed.) n. 3, at 2525, 2528, 2529.

<sup>24</sup> 2 BOWRING, THE WORK OF JEREMY BENTHAM 139.

<sup>25</sup> Kidd, *Why the Grand Jury's Power Is a Menace to Organized Crime*, 12 THE PANEL (Sept.-Oct. 1934).

<sup>26</sup> Sleigh, *The Grand Jury System Subversive of the Moral Interests of Society* (1852) 37 PAMPHLETS 52 (N. Y. C. Bar Ass'n); Chambers, *On the Institution of the Grand Jury* (1858), (1858-1863) 2 JURIDICAL SOCIETY PAPERS 125. "It is time indeed that many persons who advocate the abolition of the Grand Jury in ordinary cases of felony, plead for its retention in political cases."

<sup>27</sup> Allen, *Juries and Grand Juries* (1932) 85 PAMPHLETS (N. Y. C. Bar Ass'n). "But the Grand Jury should be retained for use in capital cases, and to indict criminals against whom the prosecuting officer will not proceed, perhaps by reason of graft as the price of protection, and in cases of mal-administration, to proceed against the prosecuting officer himself and public officials, or other persons who may be in league with him."

<sup>28</sup> *Supra* note 1.

ous public evils.<sup>29</sup> There has recently been an increase of activity in that direction, undoubtedly as a result of the increasing public consciousness of the menace of large scale organized crime, and its link with law enforcing agencies. Five inquiries of this character were conducted in New York County in 1934; namely, the policy racket,<sup>30</sup> the misconduct of penitentiary officials,<sup>31</sup> charges of graft in the purchase of coal for the use of the city departments,<sup>32</sup> graft and the use of political influence and favoritism in the issuance of master plumbers' licenses,<sup>33</sup> and improprieties in the conduct of the courts, prisons and parole system.<sup>34</sup> It may be fairly said that, taken by and large, the investigations conducted by ordinary Grand Juries for the purpose of exposing official corruption, have proved inadequate, superficial, ineffective, and futile. As was pointed out by the Association of Grand Jurors, the inquiries "have become dead letters." Such inquiries "have very infrequently been made, and only when the misconduct of a public official has been so corrupt as to become a public scandal."<sup>35</sup> These investigations seldom result in prosecutions. They usually wind up with a written

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<sup>29</sup> Medalie, *Grand Jury Investigations*, 7 THE PANEL 5 (1929). Referring to the tendency of juries to give little consideration to the serious evils of their day and to embark on unimportant investigations, Mr. Medalie says: "Evidently the activity of the Grand Jury depended upon the mood or grievance of its most successful members". In support, he lists the investigations conducted in New York County between 1869 and 1929 as follows: 1869, carrying concealed loaded weapons; 1871, delay in criminal trials; 1872, traffic congestions; 1874, refuse discharge from gas houses; 1875, contemporary crime wave; 1876, necessity for suppressing bucket shops; 1881, filthy streets; 1882, free railroad passes; 1885, Board of Health; 1887, unsanitary courthouse; 1889, distribution of electric current; 1890, on recommendation that sheriff pay fees to county treasurer; 1913, danger of young girls dancing in hotels and restaurants, and commercialized vice; 1926, traffic conditions; 1928, improvements in policy of Holland Tunnel officials; 1929, certain abuses in connection with public markets and pushcart peddling.

<sup>30</sup> Wilkes, *1934 Presentments Expose Flagrant Conditions in New York County*, 13 THE PANEL (Jan.-Feb. 1935).

<sup>31</sup> *Id.* February Grand Jury. The indictment of Warden McCann of the New York Penitentiary at Welfare Island, which resulted from the investigation, was dismissed by Judge Bohan in General Sessions for failure to set forth a crime.

<sup>32</sup> *Id.* June Grand Jury.

<sup>33</sup> *Id.* June Grand Jury. Indictments followed.

<sup>34</sup> *Id.* May Grand Jury in session eight months. Report contained 52,000 words.

<sup>35</sup> Porter, *Making the Grand Jury What It Should Be*, 5 THE PANEL 2 (Jan. 1927).

report of the findings which is lodged with the court, published in the press, and then laid to rest indefinitely.

It is a curious fact that the practice of handing up reports, although generally disapproved by the courts, has continued without any abatement. The question of the power of a Grand Jury to file and publish its findings where no indictment has been lodged, has long been the subject of controversy. It has evoked passionate outbursts of rhetoric, and has been given an importance beyond all deserts. These reports, improperly called "presentments",<sup>36</sup> cover as broad a range of subjects as the combined ingenuity of a prosecutor and jury could conceive, and are frequently flavored by political considerations. For the most part they are harmless and of no consequence. At their worst, they contain *ex parte* excoriations of public officials whose identity is but thinly veiled, and accusations of criminal misconduct, but they are not accompanied by indictments, and the accused is thereby deprived of an opportunity to be heard in his defense.<sup>37</sup> At their best, with rare exceptions, they serve merely to give notice of the existence of public evils which require investigation and correction.

The value of such reports as a menace to organized crime, has been urged by Professor A. M. Kidd of the University of California, who contends that the "right to investigate implies the right to hand up presentments."<sup>38</sup> "It is by no means uncommon", he says, "for an investigation to disclose a general laxness and inefficiency, and an admin-

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<sup>36</sup> Field, J., Charge to the Grand Jury, 2 Sawy. 667, Fed. Cas. No. 18255: "A presentment differs from an indictment in that it wants technical form, and is usually found by the Grand Jury upon their own knowledge or upon the evidence before them, without having any bill from the prosecutor. It is an informal accusation, which is generally regarded in the light of instructions upon which an indictment can be framed. This form of accusation has fallen into disuse since the practice has prevailed—and the practice now obtains generally—for the prosecuting officer to attend the Grand Jury and advise them in their investigations."

<sup>37</sup> Matter of Osborne, 68 Misc. 597, 125 N. Y. Supp. 313 (1910); Matter of Hefferman, 125 N. Y. Supp. 737 (1909); Matter of Funston, 133 Misc. 620, 233 N. Y. Supp. 81 (1929); *In re* Wilcox, 153 Misc. 761, 276 N. Y. Supp. 117 (1934).

<sup>38</sup> Kidd, *Why the Grand Jury's Power Is a Menace to Organized Crime*, 12 THE PANEL (Sept.-Oct. 1934); *In re* Report of Grand Jury of Balt. City, 152 Md. 616, 137 Atl. 370 (1927); 1 STEPHEN, HIST. OF CRIM. LAW OF ENG. (1883) 253.



istrative setup in which responsibility is divided and may be shifted. The conditions imperatively demand a cleanup, but it is perfectly clear that no trial jury will find that the responsibility of any individual is proved to a moral certainty beyond a reasonable doubt, and it is therefore useless to return an indictment. Is the Grand Jury to remain silent?"<sup>39</sup> Pleading the same cause, the Association of Grand Jurors of New York County asks "and having been compelled to inquire into these various matters, what shall they do with their findings? Nothing! Was ever a law more absurd in its requirements?"<sup>40</sup> Professor Kidd finds a historical basis for the right to file reports, in the fact that the original function of the Grand Jury was to inquire into *all* matters of public interest, and in fact superintend legal details of executive government.<sup>41</sup>

Former United States District Attorney George Z. Medalie, on the other hand, asserts that there is "probably no common law basis for this power, because the historical origin of the Grand Jury, and the reasons for its existence negative the existence of any such power."<sup>42</sup> The courts have uniformly opposed the practice because of the inherent dangers involved in making accusations without giving an opportunity for defense.<sup>43</sup> "May a man of good repute in the world's ear have his reputation blasted in this man-

<sup>39</sup> *Ibid.*

<sup>40</sup> Porter, *Making the Grand Jury What It Should Be*, 5 THE PANEL (Jan. 1927).

<sup>41</sup> *Supra* note 25.

<sup>42</sup> Medalie, *Grand Jury Investigations*, 7 THE PANEL 5 (1929).

<sup>43</sup> *Matter of Osborne*, 68 Misc. 597, 125 N. Y. Supp. 313 (1910); *Matter of Hefferman*, 125 N. Y. Supp. 737 (1909); *Matter of Woodbury*, 155 N. Y. Supp. 851 (1915); *Matter of Gardiner*, 31 Misc. 364, 64 N. Y. Supp. 760 (1900); *Matter of Crosby*, 126 Misc. 250, 213 N. Y. Supp. 86 (1925); *People v. McCabe*, 148 Misc. 330, 266 N. Y. Supp. 363 (1933); *Matter of Funston*, 133 Misc. 620, 233 N. Y. Supp. 81 (1929); *In re Wilcox*, 153 Misc. 761, 276 N. Y. Supp. 117 (1934); *In re Report of Grand Jury*, 152 Md. 616, 137 Atl. 375 (1927); *In re Grand Jury Report*, 204 Wis. 409, 235 N. W. 789 (1931); *Beunett v. Kalamazoo Circuit Judge*, 183 Mich. 200, 150 N. W. 141; *Am. Cas.* 1916 N. 223 (1914); *Bennett v. Stockwell*, 197 Mich. 50, 169 N. W. 482 (1917); *Boston v. Wash, A. & Mt. Vernon Ry.*, 36 App. Cas. D. C. 359, 392, 32 L. N. S. 785 (1911); *Parsons v. Age Herald Publ. Co.*, 181 Ala. 439, 61 So. 345, 348 (1913); *Rector v. Smith*, 11 So. 302 (1860); *Matter of Charge to Grand Jury*, 3 Pitts. 174, 179; *Lloyd and Carpenter, Matter of Communication of Grand Jury*, 3 PA. L. J. 47; *Matter of Presentments of Grand Jury* (R. M. Charl. Ga. 149); *Grand Jury Report*, 4 Haw. 780 (1911); *State v. Bramlett*, 106 S. C. 323, 164 S. E. 873 (1932).

ner \* \* \*. The petitioner is accused of criminality. He has had no hearing, no trial, no opportunity for defense, and unless the court comes to his aid, he is left with no remedy, except an appeal to the Court of Mrs. Grundy. Scathing pronouncements by a Grand Jury are highly reminiscent of the days when the Star Chamber and the court of High Commission cast their baleful shadows over every English home."<sup>44</sup> The Court of Appeals of the State of New York has not passed on the question and except for one decision of an appellate tribunal which grants the right to hand up a report,<sup>45</sup> the cases are all opposed.<sup>46</sup> The claim that there is no legal basis for this practice would seem to be well founded. It is arguable, however, that such power is implied in Section 260, Subdivision 3 of the New York Code of Criminal Procedure, which deals with inquiries into official misconduct. Unless this statute was intended to give to the Grand Jury a broader authority than existed in the case of the ordinary investigation of crimes, why should the provision have been enacted at all, having in mind Section 252 of the New York Code, which as we have seen, adequately includes within its scope acts of official misconduct?

#### A PROBLEM OF EFFICIENCY, PERSONNEL AND EQUIPMENT.

The state of New York is one of the few jurisdictions where the Grand Jury is still an active functioning body. Its activity, however, is for the most part wasteful and may be easily dispensed with. In at least ninety cases out of every hundred, the jury merely reviews evidence which has been adduced at a preliminary hearing before a magistrate. So great is the volume of business to be transacted that the calendars are kept up to date with the greatest difficulty. The necessity of expedition precludes the possibility of a thorough consideration of the matters which come before it, and results frequently in proceedings which amount to little more than "going through the motions". Much less possible

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<sup>44</sup> Matter of Funston, 133 Misc. 620, 623, 233 N. Y. Supp. 81 (1929).

<sup>45</sup> Jones v. People, 101 App. Div. 55, 92 N. Y. Supp. 275 (2d Dept. 1905).

<sup>46</sup> *Supra* note 43.

is it to embark upon an effective, complete and extensive investigation of deep rooted public evils. When we consider that the Grand Jury in New York County meets only two hours a day, five days a week, for one month, and less often in the neighboring counties (twice a month in Queens County), the hopelessness of the situation becomes apparent.

The National Commission on Law Observance and Enforcement has called attention to the waste involved in the usual Grand Jury proceedings. It reported that "an excessive drain is made on the time of busy men who can ill afford to devote to public service the time which such a system \* \* \* demands. There is economic waste, also, in requiring witnesses to attend the preliminary hearings, one before a Magistrate, and one before the Grand Jury. \* \* \* Thus, the system wastes much time and energy, and diffuses responsibility in a field where responsibility ought to be concentrated. \* \* \* It is unusual for grand juries to go into a thorough, independent investigation of any ordinary cases \* \* \* the loose methods of investigating which prevail generally in large cities, cause that work to be mechanical and perfunctory, except in a small number of sensational and unusual cases."<sup>47</sup> It has been asserted that "in ninety-nine out of a hundred felony cases, the Grand Jury can never be of affirmative value, but it can always be burdensome to the People's witnesses, and often is the actual cause of the defeat of justice."<sup>48</sup> Because of the large number of cases handled, and the reliance of the Grand Jury upon the prosecutor, "it is seldom better than a rubber stamp of the prosecutor, and has ceased to perform or be needed for the functions for which it was established."<sup>49</sup>

It has long been recognized that there is no necessity of an indictment in the ordinary case—that it may be replaced by an Information filed by a District Attorney. This was urged almost a century ago,<sup>50</sup> but only in recent years have Legislatures taken heed. The tendency throughout the

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<sup>47</sup> REPORT OF NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, VOLUME ON PROSECUTION (1931) 35, 36.

<sup>48</sup> *The Grand Jury a Venerable Nuisance*, 8 AM. JUD. SOC. J. 99.

<sup>49</sup> *Supra* note 47, at 124, 125.

<sup>50</sup> *Supra* note 19.

country has been to whittle down the amount of business handled by the Grand Jury, and to confine its deliberations to matters for which it is peculiarly adapted. The American Law Institute in its draft of the Code of Criminal Procedure (1928), dispenses with the necessity of an indictment in the ordinary case, and makes provision for the summoning of a Grand Jury at least once a year, to make such investigations as may be required.<sup>51</sup> It mirrors the legislation which has been enacted in twenty-four states of the United States, which, to a greater or lesser degree, has relieved the Grand Jury of the duty of finding indictments.<sup>52</sup> In some states, such legislation has been delayed and complicated by the necessity of a constitutional amendment.<sup>53</sup> In New York State, the Legislature adopted a measure in 1927 permitting a prosecutor to proceed by information instead of indictment by a Grand Jury. It was declared unconstitutional. Governor Lehman, as part of his crime program, has recommended a constitutional amendment, permitting the District Attorney to proceed by information with the consent of the accused. Appropriate legislation has been introduced and is now pending.<sup>54</sup> Professor Raymond Moley, as a result of a survey conducted by him under the auspices of the Social Science Research Council, has advocated practically the abandonment of the Grand Jury in favor of a system of information by public prosecutors.<sup>55</sup> The National Commission on Law Observance and Enforcement has also recommended the abolition of the Grand Jury indictment in every felony case.<sup>56</sup> In the states where the indictments have been dispensed with, the Grand Jury has been called "in those

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<sup>51</sup> CODE OF CRIM. PROC., Tentative Draft No. 1 (1928) c. 4, § 119.

<sup>52</sup> *Supra* note 49, at 26; *supra* note 48, at 99.

<sup>53</sup> Special Message of the Governor to the Legislature, "RECOMMENDATIONS FOR THE IMPROVEMENT OF CRIMINAL LAW ENFORCEMENT." Legislative Document (1936) No. 57 (Albany, N. Y.).

<sup>54</sup> *Id.* at 18; N. Y. Laws of 1927, c. 597; Senate Introductory No. 1 (1936, Senator Buckley). Amends Section 6, Article I of the Constitution by permitting the defendant in lieu of being tried by indictment when he is accused of a felony, to consent to be proceeded against by the filing of an information. The bill was passed on Feb. 5. An identical bill was introduced in the Assembly (Assemblyman Moran) under Introductory No. 21.

<sup>55</sup> See Allen, *Juries and Grand Juries* (1932) 85 FOLIO PAMPHLETS (N. Y. C. Bar Ass'n).

<sup>56</sup> *Supra* note 49, at 180.

instances where a political scandal has necessitated the interrogating of many witnesses in secret for the purpose of securing information upon which to base a criminal charge."<sup>57</sup> In Florida, an information state, the reform has "resulted in a greater efficiency in the enforcement of law, and in economy of operation."<sup>58</sup> The substitution of the information for the indictment has been generally found satisfactory. In some states a "one man Grand Jury" system has been adopted, whereby a judge is vested with the powers of a Grand Jury.<sup>59</sup> This has proved to be effective in Michigan,<sup>60</sup> South Dakota and Vermont.<sup>61</sup> It was found to be "more expert, more economical, and more responsible",<sup>62</sup> and "public sentiment is unanimously in favor of the system."<sup>63</sup> By adopting the information system, the Grand Jury is relieved of most of its unnecessary functions, and a better opportunity is afforded for thorough, effective investigations. There remains, however, the necessity of a competent personnel.

In the rural communities and smaller cities it is probable that the juries are reasonably qualified to perform their usual functions. A special type of juror, however, is required in the large cities, where crime is highly organized and deep-seated, and its ramifications are far-reaching. The connection between public officialdom and the criminal elements is more difficult to ascertain because of the vast number of public officers and the extensiveness of their activities. An investigation which deals with such problems calls for a personnel that is peculiarly well qualified and equipped. It calls for integrity, patience, industry, intelligence, ability, courage, forcefulness, and political independence.<sup>64</sup> The Association of Grand Jurors of New York County recognizes

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<sup>57</sup> Marsh, *Michigan's One Man Grand Jury*, 8 AM. JUD. SOC. J. 121.

<sup>58</sup> (1934) 8 FLA. L. J. 43.

<sup>59</sup> *Supra* note 58.

<sup>60</sup> Mich. Comp. Laws of 1929, § 7217.

<sup>61</sup> S. D. Comp. Laws of 1929, § 4504; Vt. Gen. Laws of 1917, § 6617, as amend. by Pub. Acts of 1921, No. 207.

<sup>62</sup> *Supra* note 48.

<sup>63</sup> (1934) 8 FLA. L. J. 43.

<sup>64</sup> Special message of the Governor to the Legislature, "RECOMMENDATIONS FOR THE IMPROVEMENT OF CRIMINAL LAW ENFORCEMENT." State of New York Legislative Document No. 57 (1936) 21.

the necessity of increasing the standards of personnel,—such inquisitions require men “whose inclinations and education have equipped them for research and investigation and with a knowledge of business and accounting.”<sup>65</sup> It is doubtful that the manner in which juries are now selected, is likely to produce the required type. It is frequently charged that they are selected for political and other reasons unrelated to their responsibilities, and are therefore more likely to fall in with the wishes of the prosecutor than originate inquiries upon their own initiative.<sup>66</sup> It is manifest that an investigation of official corruption is less likely to be made under such circumstances; and that, where public opinion demands it, and an inquiry is commenced, it is less likely to succeed. Grand Jurors are vested with quasi-judicial authority; yet, they are not deemed to be public officers,<sup>67</sup> and “citizens have inadequate control over the selection and the functions of the Grand Jury.”<sup>68</sup>

Under present conditions, however, even a relatively independent and conscientious jury seems unable to bring an important investigation to a satisfactory conclusion.<sup>69</sup> Its efforts are frustrated by the lack of proper tools to work with. It may not employ detectives to collect evidence, nor may it engage accountants.<sup>70</sup> It is compelled to rely entirely upon the aid of a prosecutor who frequently owes his position to politics and is influenced by it in the administration of his office. It may not employ independent counsel. Should it wish to dispense with the prosecutor entirely (assuming that it has the power to do so),<sup>71</sup> it must proceed without legal aid or advice. Nor does it receive adequate appropri-

<sup>65</sup> Porter, *Making the Grand Jury What It Should Be*, 5 THE PANEL 2 (Jan. 1927); see Allen, *Juries and Grand Juries* (1932) 85 PAMPHLETS.

<sup>66</sup> N. Y. World-Telegram, Feb. 26, 1936, p. 2, cols. 1, 2; also see editorial, “Good and Bad Grand Juries.”

<sup>67</sup> MECHEM, TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS (1899) §§ 476-90.

<sup>68</sup> Comment (1934) 43 YALE L. J. 1317.

<sup>69</sup> *Supra* notes 4, 5.

<sup>70</sup> 12 MINN. L. REV. 761, 7 MINN. L. REV. 59, 26 A. L. R. 600 n.; *People v. Kempley*, (Cal. App. 1928) 265 Pac. 310 (1928); *Burns Int'l Det. Agency v. Doyle*, 46 Nev. 91, 208 Pac. 427 (1922); *Burns Int'l Det. Agency v. Holt*, 138 Minn. 165, 161 N. W. 590 (1917); *Woody v. Peairs*, 35 Cal. App. 553, 170 Pac. 660 (1917).

<sup>71</sup> *Supra* note 2.

ations for the proper conduct of a difficult investigation.<sup>72</sup> It is compelled to rely upon out-worn and out-moded weapons. It cannot, therefore, come to grips with the complicated setup of organized crime and official corruption.

Efforts have been made to meet this situation by the creation of Special Grand Juries who are charged with the responsibility of keeping a constant, watchful eye over the conduct of public affairs, and who are vested with the authority to employ the necessary assistance. Such juries are now functioning in California and Georgia.<sup>73</sup> In New York, the Grand Jurors Association proposed the formation of "Auditing" or "Official Conduct" Grand Juries, to meet twice a year for sessions lasting three months or more, to hear reports on the conduct of public officials, and to conduct special investigations with the aid of independent counsel and investigators. Such a body would devote itself exclusively to problems of mis-government. This proposal has been incorporated in a bill before the Legislature.<sup>74</sup>

#### AT THE CROSSROADS.

Legislative committees and other agencies have tended to displace the Grand Jury in the field of investigation of wrongdoings in government. So effective have they been at times, that doubts have arisen as to whether the Grand Jury should be continued at all as an inquisitorial body. Inasmuch as this ancient institution has been able to withstand the ravages of time, and to stubbornly resist the devastating shafts of criticism throughout the centuries, one must be

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<sup>72</sup> Dession and Cohen, *Inquisitorial Functions of Grand Juries* (1932) 41 YALE L. J. 687; Ward, *Powers of the Grand Jury and of the Attorney General*, 8 THE PANEL (Nov.-Dec. 1930).

<sup>73</sup> Chamberlain, *Official Conduct Grand Juries*, 12 THE PANEL (Jan.-Feb. 1934).

<sup>74</sup> Littleton, *Official Conduct (Auditing) Grand Juries*, 11 THE PANEL (Nov.-Dec. 1933); Darn, *Broadening the Scope of the Grand Jury*, 12 THE PANEL (Jan.-Feb. 1934); Senate Introductory No. 655 (Senator Esquirol, 1935) amends Sections 229-W, 248, 251, 260, 952-X and adds a new Section 225-A to the Criminal Code. Also amends Section 62 of the Executive Law. Provides for Special Grand Juries in the counties of New York City and relates to proceedings before Grand Juries. An identical bill was introduced in the Assembly (Assemblyman Brownell) under Introductory No. 465.

cautious in predicting its demise. It may be said, however, that the Grand Jury system is at the crossroads. It will either continue as a historic appendage to our legal system, lacking both utility and influence, or be revitalized into a powerful, integral part of the machinery of law enforcement. The growing dominance of legislative investigations indicates that a choice must inevitably be made.

More than a score of agencies are charged with the responsibility, and vested with the authority, to inquire into the conduct of governmental affairs. The investigation conducted by the Hofstadter Committee with the aid of Judge Samuel Seabury, is still fresh in mind.<sup>75</sup> In a report just made public by the Commissioner of Investigation and Accounts under the Fusion Administration in New York City, it appears that about one hundred major investigations were made of city departments, and that they resulted in the resignation or dismissal of twenty-two public officials and employees, and the indictment or conviction of seventy-nine persons.<sup>76</sup> One may recall also the Lexow investigation of corruption in the police administration, the Hughes or Armstrong investigation of insurance companies and misconduct of public officials, and the Untermeyer or Lockwood investigation of housing and building conditions.<sup>77</sup> The body of legislation which empowers public officers to investigate their subordinates covers almost the entire range of governmental departments. The Court of Appeals has sustained the constitutionality of such legislation.<sup>78</sup>

The investigatory power rests in other agencies as well. The Governor may order an investigation of official misconduct by the appointment of Moreland Commissioners. The exposure of the iniquitous "sewer ring" in Queens County, and the conviction and imprisonment of Borough President Connolly, were the result of the searching investigation con-

<sup>75</sup> *Supra* note 1.

<sup>76</sup> N. Y. Herald Tribune, Feb. 24, 1936, p. 9, col. 5.

<sup>77</sup> *Supra* note 1; Medalie, *Grand Jury Investigations*, 7 THE PANEL 5 (1929).

<sup>78</sup> For detailed list of governmental bodies vested with investigating power see Handler, *The Constitutionality of Investigations by the Federal Trade Commission* (1928) 28 COL. L. REV. 905, 928, n. 106; *Dunham v. Ottinger*, 243 N. Y. 423, 434, 154 N. E. 298, 301 (1926).



ducted by Judge Townsend Scudder and, later, Judge Clarence Shearn, acting as Moreland Commissioners.<sup>79</sup> More recently, the title companies were subjected to an investigation conducted by George W. Alger, as Moreland Commissioner. Numerous indictments of company officials resulted and they are now pending. The sum of \$50,000 has been appropriated to permit the District Attorney of New York County to engage special counsel to try the indictments. The Governor has had occasion to supersede ordinary juries and prosecutors by Extraordinary Grand Juries and Special Prosecutors, where a thorough investigation was desired.<sup>80</sup> There have been instances, also, where as a result of a breakdown in the local administration of justice, it was necessary for the Governor to have the Attorney General relieve the District Attorney and order that Special Grand Juries be impanelled; as, for example, during the draft riots, and during the Tweed regime. Hamilton Ward, former Attorney General, has commented upon the fact that he was required to supersede District Attornies seven times in two years.<sup>81</sup>

The courts too have been effective agencies in the investigation of official corruption. The ambulance chasing inquiry, and the scrutiny of the vice squad and the use of stool-pigeons in the New York City Police Department, were initiated by the Appellate Division of the Supreme Court.<sup>82</sup> On occasions, investigations were conducted concurrently by several official agencies. The inquiries by the Board of Health, the Grand Jury, Judge Kelby and Judge Tompkins sitting as a committing magistrate, into the "milk graft scandal", may be cited as an example.<sup>83</sup> Civic organizations, private individuals and especially the press have been credited with exposures of public evils. The Supreme Court of the United States has acknowledged the value of the press as a restraining influence upon mis-government.<sup>84</sup>

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<sup>79</sup> *People v. Connolly*, 253 N. Y. 330, 171 N. E. 393 (1930).

<sup>80</sup> *Supra* notes 4, 5.

<sup>81</sup> Ward, *Powers of the Grand Jury and of the Attorney General*, 8 THE PANEL 12 (Nov.-Dec. 1930).

<sup>82</sup> *Supra* note 77.

<sup>83</sup> *Supra* note 1, at 693.

<sup>84</sup> N. Y. Times, Feb. 11, 1936, p. 1, col. 1; *Re Grosgean, Supervisor, etc. v. Am. Press Co., Inc., et al.*, Appeal from Dist. Ct. of U. S. for Eastern Dist. of La. (Feb. 10, 1931).

Can the Grand Jury forestall the continued and increasing invasion of its province, by these numerous agencies? The special advantage of a Grand Jury inquiry should not be overlooked. Against the practical value of public hearings in eliciting sustained public interest, must be set down the fact that there is less opportunity for obstructive tactics in a Grand Jury inquiry,<sup>85</sup> and more likelihood of an untrammelled inquiry.<sup>86</sup> There is a wider range of availability of the summary power of contempt and a broader role of the "materiality" requirement in prosecutions for perjury.<sup>87</sup> That the Grand Jury can function effectively when it is carefully selected and is aided by a competent prosecutor and an adequate appropriation for the employment of investigators, is being demonstrated by the Dewey rackets investigation pending in New York County. It has been able to forestall legislative investigations when properly organized and equipped, in other jurisdictions.<sup>88</sup> It would seem, therefore, that its potentialities as an aid in law enforcement should not be wasted.

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<sup>85</sup> *Supra* note 1, at 699-702.

<sup>86</sup> *Carroll v. United States*, 16 F. (2d) 951, 953 (C. C. A. 2d, 1927); see Note (1927) 40 HARV. L. REV. 780.

<sup>87</sup> *Supra* note 1, at 700, refers to its particular use in the Southern District of New York, Second Federal Circuit.

<sup>88</sup> California; see Chamberlain, 12 THE PANEL (Jan.-Feb. 1934).