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The Pretrial Proceeding With Special Reference to the Kentucky Court of Inquiry

By KENNETH E. VANLANDINGHAM

During July, 1968, a public inquiry conducted by the county judge of Fayette County, Kentucky, into charges of bribery involving the chairman of the Lexington-Fayette County Planning Commission and persons having business connected therewith, focused widespread attention within the state upon a long-authorized, but seldom used and consequently little known, procedural device for ferreting out public wrongdoing; namely, the pretrial proceeding known in Kentucky as the court of inquiry.¹

As noted by a federal district court,

Court of Inquiry are (sic) an old institution of the military establishment of the United States... Unlike court-martial, the proceedings of

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¹ The term “court of inquiry” is used to denote the pretrial proceeding in Kentucky very likely for the reason that, prior to 1850, courts of inquiry were authorized in the state in connection with the state militia. Military courts of inquiry in Kentucky appear to have been accusatorial in nature, and were empowered to assess fines. Those accused before them were permitted to cross-examine and to interrogate witnesses. See F. LOUGHOROUGH, A DIGEST OF THE STATUTE LAWS OF KENTUCKY, tit. 74, §§ 44-47 (1837).
courts of inquiry do not involve a trial of issues in which anyone is formally a party. Their traditional function, both in this country and in England, has been to investigate and advise whether further proceedings shall be had.

An old case in the Court of Claims [Walter B. Chester's Owners v. United States, 19 Ct. Cl. 681, 683 (1884)] sums up the purpose of courts of inquiry...

A naval or military court of inquiry is not a judicial tribunal. It is instituted solely for the purpose of investigation. . . There is no issue joined between parties, and its proceedings are not judicial. United States v. Shibley, 112 F. Supp. 734, 743 (S.D. Calif. 1953).

Although little known within the state, the Kentucky court of inquiry is not unique in the United States, inasmuch as similar inquisitorial agencies are authorized under different names in at least nine additional states.²

Most of these agencies for inquisitorial or pretrial proceedings were authorized during either the last century, or the first quarter of the present century, although Kentucky's is among the few predating adoption of the Fourteenth Amendment to the U.S. Constitution. The Connecticut proceeding is indicative of the age of some authorizing acts, as it originated in a 1731 statute.³

The Wisconsin proceeding, which was first authorized in the Revised Statutes of the Territory of 1839, is believed by the Wisconsin Supreme Court to have been perhaps borrowed from a New York statute of 1828.⁴


³ Laws and Acts of 1731, ch. 70. "An Act for Requiring the Justices, Grand Jurors, etc., in every town in the Colony to meet together twice in a Year, to advise what may be most proper to suppress Vice and Immorality." See also McCarthy v. Clancy, 110 Conn. 482, 148 A. 551 (1930), in which the development of the Connecticut pretrial proceeding is discussed.

⁴ State v. Keyes, 75 Wis. 288, 44 N.W. 13 (1889). The history of the Wisconsin proceeding is discussed in this opinion. Whatever may have been the past situation in New York state, the pretrial proceeding is no longer judicially permitted there because it is not authorized by statute. Concerning the lack of judicial authority to conduct such a proceeding in that state, the New York Supreme Court has commented: "To the grand jury, and to it alone is given the power of investigation without a definite charge. The secrecy of the grand jury (Continued on next page)
Inasmuch as no statistics are available, it is impossible to know how widely the proceeding has been conducted in any state; but in most states it appears to have been held only infrequently. Wisconsin, however, has used it quite often, and Michigan has evidently employed it on numerous occasions. Although Texas appears to have utilized courts of inquiry rather seldomly, the device has been used to investigate such important cases as the Billie Sol Estes case. It was intended to have been used to investigate the assassination of President John F. Kennedy until the Warren Commission was appointed. Save for the Lexington-Fayette Planning Commission case, there is apparently only one other instance wherein it has been used in Kentucky during the past fifty years. Moreover, no case involving the county judge's holding a court of inquiry has ever been for review before the Kentucky Court of Appeals, the state's highest court.

I. THE NATURE OF THE PRETRIAL PROCEEDING

By whatever name it is called, the pretrial proceeding is a general preliminary investigation not directed against a specific
person, held solely for the purpose of discovering commission of crimes or public offenses and identifying those who may have committed them. It differs from the usual preliminary investigation, whose purpose it is to determine whether a person already accused and arrested shall be held for further examination by the grand jury or proceeded against by information. It differs also from a legislative or administrative investigation which only incidentally may discover commission of crime. The pretrial proceeding is justified on several grounds. First, it may protect innocent persons from arrest and imprisonment on charges based on frivolous or groundless suspicion. Secondly, since it is conducted by a single judicial officer, it is arguably a more efficient method for gathering and sifting evidence of commission of crime than the common law grand jury. Thirdly, if publicly conducted, as it sometimes is, it may create an aroused public opinion which could possibly induce an otherwise tardy grand jury into returning indictments. On the other hand, as will be noted later, the proceeding possesses serious disadvantages, inasmuch as conducting it may result in violation of constitutional rights of the witnesses testifying before it.

Depending upon statutory provision, the proceeding or investigation may be initiated in various ways. In some states, e.g. Kentucky and Texas, a judge acting on his own initiative may begin an investigation, while in several jurisdictions, e.g. Vermont, Kansas, Arizona, and South Dakota, a judge may act only upon formal request made by a public prosecutor. Sometimes, as in Wisconsin, a complaint filed with a judge by an individual may set the investigative process in motion.

The pretrial proceeding, presided over in some states by a

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10 State v. Keyes, 75 Wis. 288, 44 N.W. 13, 15 (1889).
11 In re Colacasides, 379 Mich. 69, 150 N.W.2d 1, 11 (1967).
12 In several states, however, the grand jury is infrequently convened; rather, indictments are based on information filed by the public prosecutor. Grand jury indictment, however, remains very much a part of the criminal-judicial process in Kentucky.
13 See text at Part V, infra. The proceeding is sometimes conducted in a manner which violates the average person's sense of justice or fair play. Inasmuch as the United States Supreme Court has not ruled that witnesses at the proceeding are entitled to the same federal constitutional protection of their rights as witnesses at felony trials, it cannot be said that, from the technical standpoint of constitutional caselaw their constitutional rights are violated.
judge who is not constitutionally required to be an attorney, differs considerably from an actual trial in that its procedure, which is *ex parte* in nature, is much less formal. This difference is well illustrated by a United States District Court opinion in a case involving a Texas Court of Inquiry:

"[T]he Court of Inquiry is purely a fact-finding proceeding. It may issue subpoenas, take testimony, and do nothing else. There are no parties. There is no accused. No trial is conducted. The Justice of the Peace sitting in this capacity cannot determine any civil or criminal liability. If the facts developed indicate that a crime has been committed, the Justice of the Peace may issue an arrest warrant."[5]

The nature and purpose of a pretrial proceeding is illustrated further by a Kentucky Court of Appeals' definition of a court of inquiry as "...a more or less informal proceeding authorized to enable the magistrate as an officer of the law to obtain information that will enable him to take the necessary steps to institute criminal action against whomever may have committed a public offense...."[6] The scope of the inquiry, according to the Kentucky Court, is not "...controlled by the strict rules of evidence that would prevail in the trial of a case. It may take a wide range so long as it is directed to the ascertainment of the nature of the offense or the identity of the offender."[7]

In some states, it has been held that a judge conducting a pretrial proceeding acts in a judicial capacity.[8] Although this view has on occasion been questioned for the reason that the *ex parte* proceeding does not involve a contest between litigants,

14 Although the county judge in Kentucky is not constitutionally required to be an attorney, judges in urban counties frequently are attorneys. The judge who conducted the court of inquiry in the Lexington-Fayette County Planning Commission case was an attorney.

15 In re McClelland, 260 F. Supp. 182, 184 (S. D. Tex. 1966). Texas has repealed its statute authorizing the justice of the peace to conduct a court of inquiry. Judges of county and district courts are now empowered to conduct this proceeding. District judges, but not county judges, are constitutionally required to be attorneys. See VERNON'S TEXAS STAT. ANN., CODE OF CRIM. PROCED., § 52.01 (1965). For a comparison of the pretrial proceeding and the grand jury proceeding, see text accompanying notes 87-89, infra.


the essence of the judicial function, it seems not constitutionally improper to permit a judge to conduct it, inasmuch as it is at least incident to the judicial function. Evidently, however, a judge holding a proceeding does not act in a purely judicial capacity, because investigations can be, and sometimes are, conducted by administrative agencies, at both the national and state level. Investigations of commission of criminal offenses, moreover, are also commonly conducted by public prosecutors. Actually, classification or definition of the nature of the investigative function of a pretrial proceeding is almost impossible since governmental functions cannot be fitted with precision into neat compartments. It seems probable that a judge conducting a pretrial investigation acts alternatively in both administrative and judicial capacities.

In any event, the matter appears of little import for, although it has been held that a judge cannot conduct an investigation solely in aid of the executive department, there is apparently no decision, federal or state, holding that a state legislature cannot constitutionally authorize a judge to conduct a pretrial proceeding.

II. THE KENTUCKY COURT OF INQUIRY

Legislation authorizing the Kentucky court of inquiry appears to have been first enacted following adoption of Kentucky’s third constitution in 1850. Upon declaring the presiding judge of the

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19 See especially Gallagher, supra note 6, at 20-21. By holding that, under the common law, conservators of the peace possessed authority to conduct judicial investigations, the Michigan Supreme Court advanced the argument that a judge conducting an investigation does not act in a non-judicial capacity in violation of the separation of powers principle. See In re Colacasides, 379 Mich. 69, 150 N.W. 2d 1, 11 (1967); In re Slattery, 310 Mich. 458, 17 N.W. 2d 251 (1945). The Michigan Constitution designates judges as conservators of the peace. See Mich. Const. art. VI, § 23. On the other hand, the Kentucky Court of Appeals, probably correctly, has stated that a judge who is constitutionally designated a conservator of the peace possesses no inherent authority to conduct a judicial investigation. See Ketcham v. Commonwealth, 204 Ky. 168, 175, 263 S.W. 725, 727 (1924).

20 See McCarthy v. Clancy, 110 Conn. 482, 148 A. 551, 560 (1930). The Connecticut Supreme Court has said that a judge conducting a proceeding acts in both an administrative and judicial capacity. McCarthy v. Clancy, 110 Conn. 482, 148 A. 551, 558 (1930). The proceedings of military courts of inquiry have been held to be non-judicial. See note 1 supra.

21 In re Richardson, 247 N.Y. 401, 150 N.E. 655, 658 (1928). This opinion was written by Justice Cardozo when a member of the New York Court of Appeals.

22 Gen. Stat. of Ky. 1852, ch. 27, art XVII sec 1. It is impossible today to discover the original legislative intent concerning the nature and purpose of this

(Continued on next page)
county court a conservator of the peace, this legislation vested him with "all the powers of a justice in penal and criminal proceedings, and in a court of inquiry in such proceedings." But, according to an early opinion of the Kentucky Court of Appeals interpreting this legislation, the judge could conduct a court of inquiry only along with another justice of the peace (the county judge being considered a justice of the peace), because any recognizance required to be issued as a result of an inquiry had to be approved by two justices. Later, the statute was amended to permit the county judge acting alone to conduct an inquiry.

The present statute provides, "The county judge is a conservator of the peace within his county, may administer oaths and may exercise all the powers of a justice in penal and criminal proceedings, and singly hold a court of inquiry in such proceedings."

This brief provision, containing no reference to either the scope or procedure of an inquiry represents the sole statutory authority for the holding of a court of inquiry by a Kentucky county judge. This statute has never been interpreted by the Kentucky Court of Appeals under the presently effective Constitution of 1891. Instead, all court of inquiry case law has developed out of judicial interpretations of now repealed section 32 of the former Criminal Code of Practice, which was derived from section 29 of the Criminal Code of Practice of 1854. Repealed section 32, which was last adopted in 1948, authorized investigations of commission of public offenses by the county judge, the city or (Footnote continued from preceding page)
police judge and the justice of the peace. Under the headnote "Examination of Witnesses to Ascertain Person Guilty of Crime," it provided,

A magistrate, if satisfied that a public offense has been committed, shall have power to summon before him any person he may think proper for examination on oath concerning it, to enable him to ascertain the offender, and to issue a warrant for his arrest.

In opinions interpreting this provision, the Court of Appeals has used the term "court of inquiry" to denote investigations conducted under it although this now repealed provision paradoxically contains no specific reference to a court of inquiry. Inasmuch as all Kentucky court of inquiry case law rests upon it, and the only statute which actually authorizes a court of inquiry has never been interpreted by the Court of Appeals, this now repealed statute appears to be the basis for convocation of such proceedings.

III. THE LEXINGTON-FAYETTE COUNTY PLANNING COMMISSION CASE

Because of the state and federal constitutional questions it raised, most of which are raised by pretrial proceedings generally, the Fayette County judge's court of inquiry investigation into alleged unlawful conduct in connection with the Lexington-Fayette County Planning Commission seems to possess signal importance. This court of inquiry was publicly conducted with extensive coverage of its proceedings by the various news media. Its procedure, like that of most pretrial proceedings, was ex parte in

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28 Under the 1854 Criminal Code of Practice, a felony was required rather than any public offense.

29 In its opinion in the Lexington-Fayette County Planning Commission case, the Fayette Circuit Court incorrectly states that KRS § 25.150 was construed in Bryant v. Crossland, and in Hollen v. Commonwealth. Keller v. Johnson, Fayette Cir. Ct., No. 23208 (August 1968). Repealed section 32 of the Criminal Code of Practice, rather than KRS § 25.150, was cited in both cases. For more extensive discussion of the Lexington-Fayette County Planning Commission case, text at Part IV, infra.

Apparently without examining its legal basis, lower federal courts assume the constitutionality of the court of inquiry statute. See, e.g., Ray v. Huddleston, 212 F. Supp. 343 (W.D. Ky. 1963); aff'd, 327 F.2d 61 (6th Cir. 1964). See also Lynch v. Johnson, F. Cas. No. 19896 (1870). On the other hand, the constitutionality of this statute is properly a matter to be determined by the Kentucky Court of Appeals.
nature. Apparently to protect their constitutional rights to counsel and against self-incrimination, witnesses called to testify were permitted assistance of counsel, but counsel made no attempt to examine their own clients or to cross-examine other witnesses. While the court of inquiry was in session, three witnesses acting on behalf of themselves and other citizens brought an action in Fayette Circuit Court seeking issuance of a writ of prohibition of further proceedings.

Counsel for plaintiffs seeking the writ stated four principal reasons why it should be issued: (1) the statute establishing the court of inquiry is unconstitutional, because of its vagueness and uncertainty, and because the state constitution does not expressly authorize a court of inquiry while Section 135 of the Kentucky Constitution provides that no court save those established by it may be created; (2) the county judge possesses no authority to conduct a court of inquiry, inasmuch as in its repeal of section 32 of the former Criminal Code of Practice, which authorized investigations into commission of public offenses, the General Assembly has by implication repealed the court of inquiry statute; (3) even if the statute is not repealed, it authorizes investigations only into commission of misdemeanors; and (4) even if the statute is constitutional, the county judge in conducting the court was applying it in such a manner as to deprive plaintiffs of their constitutional rights.\textsuperscript{30}

In rejecting the argument that the court of inquiry statute is unconstitutional because of its vagueness and uncertainty, the circuit court first noted that the validity of an inquiry by a judge authorized to issue warrants for commission of felonies has been upheld by the state Court of Appeals in at least two cases.\textsuperscript{31} The circuit court erred, however, in stating that these cases arose under the court of inquiry statute, since actually they arose under section 32 of the repealed Criminal Code of Practice, which does not use the term “court of inquiry.”\textsuperscript{32} The circuit court continued by adding that, if a court of inquiry is conducted according to

\textsuperscript{30} Keller v. Johnson, Fayette Cir. Ct., 1st Div., No. 23208 (1968). The arguments stated in the text are not in the same order as stated in the court's opinion.

\textsuperscript{31} Hollen v. Commonwealth, 185 Ky. 582, 215 S.W. 174 (1919) and Bryant v. Crossland, 182 Ky. 556, 206 S.W. 781 (1918).

\textsuperscript{32} See Keller v. Johnson, Fayette Cir. Ct., 1st Div., No. 23208 (1968) at 4-5. For the text of both section 32 of the Criminal Code and the court of inquiry statute, see text at Part II, supra.
the well-settled meaning given to its limits by the law of Kentucky, there is nothing concerning its purpose and procedure which will render it unconstitutional.\textsuperscript{33} Here the court again appears to confuse the court of inquiry statute with repealed section 32 of the former \textit{Criminal Code}. Evidently, the "law of Kentucky" referred to is the case law arising from repealed section 32. As earlier noted, the court of inquiry statute merely creates a court of inquiry; it prescribes neither its procedure nor the scope of its investigatory authority. Since the court of inquiry statute itself has never been judicially interpreted, there exists no "law of Kentucky" stemming from it prescribing the purpose and procedure of a court of inquiry.

By adopting the view, perhaps correctly, that a court of inquiry conducting an investigation is acting in a capacity similar to that of an administrative agency conducting an investigation such as those frequently authorized by statute in Kentucky and other states, the circuit court denied the argument that a court of inquiry is a court and thus rejected the argument that it is statutorily established in violation of the \textit{Kentucky Constitution}'s prohibition of courts not enumerated therein.\textsuperscript{34}

The circuit court also ruled in the negative on the argument that a county judge possesses no statutory authority to conduct a court of inquiry, because repeal of section 32 of the former \textit{Criminal Code of Practice} has the effect of repealing by implication the court of inquiry statute. It noted first that courts do not favor repeal of statutes by implication; and, secondly, called attention to the fact that another statute [Kentucky Revised Statutes § 432.260 (2) (1962)] recognizes the existence of a court of inquiry by limiting its contempt powers. Taking the view that neither of these two statutes is repealed, and that they can stand by themselves, the court ruled that the county judge possesses authority to conduct a court of inquiry.\textsuperscript{35}

To the contention that the court of inquiry statute authorizes investigations only into commission of misdemeanors, the circuit court, relying largely on judicial interpretation of section 32 of the repealed \textit{Criminal Code of Practice}, ruled that the right of the county judge to inquire into commission of felonies is incident to

\textsuperscript{33} Keller v. Johnson, Fayette Cir. Ct., 1st Div., No. 23208 (1968).
\textsuperscript{34} Id.
\textsuperscript{35} Id.
his authority to issue arrest warrants. Actually the court of inquiry statute does not specifically mention the type of crimes or public offenses a court may investigate. However, it does appear clearly to give the judge authority to conduct a court of inquiry in penal and criminal proceedings. Inasmuch as it includes no language to suggest that investigations must be limited to misdemeanors, it seems quite logical to conclude that it would permit inquiries into commission of felonies.

Although it made no binding declaration or finding of fact that, in conducting the court of inquiry, the county judge had actually deprived plaintiffs of their constitutional rights, the circuit court noted the widespread publicity attending its proceedings and issued a limited restraining order against the county judge's holding the inquiry in public. Taking the somewhat questionable view that a court of inquiry proceedings is the same type of inquisitorial proceeding as that of a grand jury proceeding, the court directed the county judge to conduct it in secret. After conducting the inquiry the judge could either issue arrest warrants against those whom he had reason to believe guilty of public offenses or present evidence of commission of such offenses to the grand jury.

No appeal to the state Court of Appeals was taken from the ruling of the circuit court. Following it, the county judge continued to conduct the court of inquiry in secret as directed by the circuit court. He later presented to the grand jury evidence alleging commission of public offenses, but it returned no indictments.

IV. The Fayette Circuit Court's Decision Analyzed

A. Constitutionality of the Court of Inquiry Statute

There appears some merit to the argument advanced by plaintiffs in the Lexington-Fayette County Planning Commission case

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36 Id.
37 Id.
38 Id. Concerning the difference between a grand jury proceeding and a pretrial proceeding, see text accompanying notes 87-89 infra.
40 Two indictments resulted from the court of inquiry, both of which were apparently based on evidence gathered while the inquiry was publicly conducted. A trial based on one of these indictments was held under a change of venue in (Continued on next page)
that, due to its vagueness and uncertainty, the court of inquiry statute is unconstitutional. Indeed, since it has not been interpreted by the state Court of Appeals, its meaning, apart from judicial interpretation accorded section 32 of the repealed Criminal Code of Practice, an entirely different provision, is unknown. The undoubted purpose of repealed section 32 is that of authorizing a judge to conduct an investigation to determine whether an arrest warrant shall be issued. Although the court of inquiry statute may possess the same meaning and purpose, the Court of Appeals has never in any case before it said as much. Indeed, the origin of the court of inquiry statute is surrounded by considerable mystery; and, although it has long existed, there appears to have been very little judicial awareness that it authorizes the county judge to conduct a court of inquiry. Further, no certain evidence exists to prove beyond doubt that, when originally enacted following adoption of Kentucky's third constitution in 1850, it was intended to authorize a purely fact-finding tribunal as a court of inquiry or what is ordinarily conceived today as a pretrial proceeding. It may have been intended to be accusatorial. Military courts of inquiry authorized earlier in Kentucky, from which the present-day court of inquiry evidently derives its name, do appear to have been accusatorial and apparently functioned much like trial court. Opinions in the two principal court of inquiry cases decided by the Kentucky Court of Appeals cite section 32 of the repealed Criminal Code of Practice rather than the court of inquiry statute itself as authority for holding a court of inquiry. In one of these opinions, the appellate court noted that without section 32 of the Criminal Code there can be no court of inquiry since "... it is the only statute we have authorizing a court of inquiry to be held." Further, in

(Footnote continued from preceding page)

the city of Nicholasville, some fifteen miles from Lexington. It resulted in a "hung" jury and the charge was later dismissed. No trial based on the second indictment has been conducted. Assuming the correctness of the circuit court's ruling that the inquiry must be secret, the argument can perhaps be made the evidence collected while it was publicly conducted is inadmissible in court.

41 See note 33 supra and accompanying text.
42 See infra this section.
43 See note 1 supra. Whatever may have been the original legislative intent concerning the purpose of the court of inquiry, if it were regarded as an actual court today its existence would violate Ky. Const. § 135.
44 See note 27 supra, and accompanying text.
45 Bryant v. Crossland, 182 Ky. 556, 559-60, 206 S.W. 791, 793 (1918).
a 1963 opinion of a federal district court involving a court of inquiry conducted by a county judge, section 32 of the former code rather than the court of inquiry statute is cited as sanctioning the inquiry. However, in its opinion in that case, the U.S. Court of Appeals cites both statutes as authority for courts of inquiry.\footnote{Ray v. Huddleston, 327 F.2d 61, 62, (6th Cir. 1964).} It seems unfortunate also that Kentucky Court of Appeals opinions have used the term "court of inquiry" to denote investigations conducted under section 32, even though that statute does not include the expression. Such designation may have tended to create confusion leading to the belief that section 32 and the court of inquiry statute possess the same meaning and purpose. This is a matter which, if the court of inquiry statute remains unamended, will have to be resolved eventually by the state Court of Appeals.

B. Absence of Specified Inquiry Scope and Procedure

Whether the fact that the court of inquiry statute does not prescribe procedure for conducting an investigation or place limits on its scope is sufficient to invalidate it is a question which only the state Court of Appeals, or perhaps a federal court, can answer.\footnote{Cf. State v. Brady, 18 Utah 2d 434, —, 425 P.2d 155, 157 (1967).} In most states, statutes authorizing proceedings similar to the court of inquiry are exceedingly vague concerning scope of investigatory authority, procedures, and rights of witnesses. Perhaps due to pressure of public opinion, and also to fear that they might be invalidated by federal courts, Texas, Wisconsin, and Michigan have amended their statutes to grant witnesses the right to counsel; but in the latter two states counsel is authorized only for the purpose of enabling them to assert their constitutional right against self-incrimination.\footnote{See note 2 supra. The Kentucky Attorney General has ruled that witnesses at a court of inquiry are entitled to representation by counsel. Op. ATTY. GEN. No. 34031, January 14, 1954. See also note 84 infra.} Texas now grants witnesses the same rights as witnesses testifying at felony trials. If the court of inquiry is to continue to be authorized in Kentucky, the General Assembly should enact legislation prescribing its procedure, placing limits upon the scope of its investigatory authority, and specifying rights of witnesses. But apart from consideration of these important matters, a court of inquiry conducted today by

\footnote{Ray v. Huddleston, 327 F.2d 61, 62, (6th Cir. 1964).}

\footnote{Cf. State v. Brady, 18 Utah 2d 434, —, 425 P.2d 155, 157 (1967).}

\footnote{See note 2 supra. The Kentucky Attorney General has ruled that witnesses at a court of inquiry are entitled to representation by counsel. Op. ATTY. GEN. No. 34031, January 14, 1954. See also note 84 infra.}
a county judge in Kentucky appears to rest upon a nebulous and precarious legal foundation. The question of the constitutionality of the statute authorizing it can be finally determined only by the state Court of Appeals.

C. Public or Secret Proceeding?

Apart from the question of the constitutionality of the court of inquiry statute, the question remains whether the Fayette Circuit Court was correct in its ruling that a court of inquiry proceeding, like a grand jury proceeding, must be conducted in secret. This ruling may be in error, inasmuch as the court of inquiry statute does not specifically require secrecy. Although the secrecy question has never been for decision directly before the state Court of Appeals, there is no suggestion in any of its opinions that an inquiry must be conducted in secret. On the other hand, its opinions indicate that all inquiries conducted thus far have been public. Moreover, in the Attorney General's official opinion, a court of inquiry can be held either publicly or privately in the discretion of the judge. Some other state supreme courts which have examined this question have concurred with the Kentucky Attorney General. A Wisconsin statute expressly empowers a judge to conduct it either in public or in private.

A Texas proceeding is required to be public, with witnesses statutorily granted the same rights when testifying as witnesses at felony trials. Inasmuch as grand jury proceedings are always required to be secret, judicial rulings in some other states that, in the absence of an express secrecy requirement, the proceeding may be public appear logical.

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40 See notes 37 and 38 supra, and accompanying text.
51 In re Ferris, 175 Kan. 704, 267 P.2d 190, 197 (1954); Ex parte Jimenez, 159 Tex. 183, 217 S.W.2d 189, 195 (1958); McClelland v. Briscoe, 359 S.W.2d 635, 638 (Tex. Civ. App. 1962); State ex rel. Kowaleski v. Dist. Court of Milwaukee County, 254 Wis. 363, 36 N.W.2d 419 (1949). Although the Kansas statute is silent on the matter, the Kansas Supreme Court has held that an inquiry may be conducted in secret. It has been said that "John Doe" (pretrial) proceedings should be open hearings and in this they are distinguishable from a grand jury investigation. Letter from C. J. Kelley, Assistant Attorney General, State of South Dakota, to Kenneth E. Vanlandingham, (October 9, 1968).
52 See note 2 supra.
In the recent case of *Kennedy v. Justice of the District Court of Dukes County*, however, the Massachusetts Supreme Judicial Court ruled that the judicial inquest into the death of Mary Jo Kopechne, an inquisitorial proceeding, different from but still very similar to a pretrial proceeding, had to be conducted in secret. This ruling was made despite a Massachusetts statute which provides that a judge conducting such an inquest may exclude “all persons not required by law to attend.” Although the United States Supreme Court has never ruled on the secrecy question, the ruling of the Fayette Circuit Court and the Massachusetts court appear to have been made for the purpose of preventing undue pretrial publicity. If these rulings should eventually be adopted by the Supreme Court, they could cast doubt upon the legality of statutes of some states, such as Wisconsin's, which give a judge discretion to hold a public proceeding.

The problem of excessive pretrial publicity which may prejudice the right of a person later indicted to a fair trial is one not admitting of easy solution. It has been said that pretrial publicity can be even more harmful than publicity during an actual trial, inasmuch as it can establish in the public mind the question of guilt or innocence of a person later accused. Courts,

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54 252 N.W.2d 201 (Mass. 1969).
55 Id. at 207.
56 ANN. LAWS OF MASS., ch. 38, § 8 (1966). The ruling in the *Kennedy* case requiring the judicial inquest to be conducted in secret appears contrary to the general rule that, where a statute does not specifically require secrecy, the judge conducting a hearing or inquest has discretion to determine whether it be public or private. See note 51 *supra*, and accompanying text. Prior to the decision in the *Kennedy* case, some Massachusetts inquests had been public, while others had been private. *Kennedy v. Dist. Court of Dukes County*, 252 N.E.2d 201, 205 (Mass. 1969).
57 It is also interesting that the Massachusetts inquest statute is very similar to the Ohio statute authorizing the State Fire Marshall to conduct an inquiry relative to the origin of a fire. This latter statute provides that, in conducting an investigation, “The marshall may exclude . . . all persons other than those required to be present . . . .” PAGE'S OHIO REV. CODE § 3737.13 (1954).
58 In the case of *In re Groban*, 352 U.S. 330 (1957), the Ohio State Fire Marshall, rather than the Ohio Supreme Court, made the decision to conduct a secret inquiry. It seems very possible that the Massachusetts court's decision relative to secrecy is tantamount to judicial legislation. The same can also be said for the secrecy ruling of the Fayette Circuit Court in the Lexington-Fayette County Planning Commission case.
59 In his memorandum in the case of *Martin v. Texas*, 382 U.S. 928 (1965), in which the Supreme Court denied certiorari, Chief Justice Warren does, however, mention *Estes v. Texas*, 381 U.S. 532 (1965), a case widely noted for its condemnation of pretrial publicity.
of course, have a duty to take adequate precautions to prevent excessive publicity. Under most circumstances, prejudicial effects of pretrial publicity can be lessened or removed by change in the time and place of trial and by judicious selection of jurors. Moreover, even though the state itself causes prejudicial publicity by publicly conducting a proceeding, it has the right, absent constitutional provisions to the contrary, to request a change of venue for conducting a later trial, inasmuch as the due process clause of the fourteenth amendment to the United States Constitution does not guarantee to a person accused of a crime the right to be tried in the jurisdiction wherein it is alleged to have been committed.

V. INHERENT DIFFICULTIES IN CONDUCTING THE PRETRIAL PROCEEDING

Although the pretrial proceeding may serve the useful purpose of protecting the innocent from arbitrary arrest and imprisonment, conducting it either in public or private usually involves serious federal constitutional questions, only some of which have been decided by the United States Supreme Court. Moreover, no single case involving all questions raised by conducting it has ever been before the Court for decision. Some of these ques-

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62 In a now famous memorandum denying certiorari simply because four justices did not vote to grant it in a case involving a Texas court of inquiry proceeding, Chief Justice Warren commented, "It is clear that grave constitutional questions are raised by conducting such a proceeding." Martin v. Texas, 382 U.S. 928 (1965). The statute under which this court of inquiry was conducted has since been amended. See notes 97 and 98 infra, and accompanying text. Most questions involved in conducting the proceeding are raised in the recent case of Jenkins v. McKeithen, 395 U.S. 411 (1969). This case involved a Louisiana statute establishing a Labor-Management Commission of Inquiry to investigate facts concerning criminal violations of Louisiana and United States labor laws. The Supreme Court made no decision in the case but remanded it to (Continued on next page)
tions, however, have been decided in cases involving investigations conducted by state and federal administrative agencies.\textsuperscript{63}

Conducting the proceeding presents a constitutional dilemma, inasmuch as witnesses testifying before it do not possess the same federal constitutional protection of their rights as do accused persons on trial. They are not granted this protection because this \textit{ex parte} proceeding is supposedly conducted only for fact-finding purposes.\textsuperscript{64} As one federal district court said, "[i]n the range of constitutional permissiveness a clear distinction exists between a mere investigatory proceeding on the one hand and a judicial or adjudicatory one on the other."\textsuperscript{65} Since witnesses at a proceeding are not accused and are not on trial, it has never been held that the due process clause of the fourteenth amendment to the United States Constitution entitles them to the right to assistance of counsel,\textsuperscript{66} the right to confront and cross-examine their accusers, or the right to introduce evidence on their own behalf.\textsuperscript{67}

Absence of these federal constitutional protections can have serious consequences, for without them witnesses can render themselves liable to later criminal prosecution.\textsuperscript{68} Although state statutory provisions differ as to procedures for conducting the proceeding and rights accorded witnesses therein, witnesses some-

\small{(Footnote continued from preceding page)}

the District Court for trial. In his dissent in this case, Justice Harlan commented, "The prevailing opinion appears understandably reluctant to commit itself to very much." \textit{Id.} at 438.

\textsuperscript{63} Witnesses before the U.S. Civil Rights Commission investigating violations of voting rights have no right to confront and cross-examine their accusers. Counsel is permitted only for advisory purposes. Hannah v. Larche 363 U.S. 420 (1960). Witnesses at a secret state judicial inquiry into improper practices of the local bar have no right to counsel. Anonymous Nos. 6 and 7 v. Baker, 360 U.S. 287 (1959).

\textsuperscript{64} See text at Part I, \textit{supra}. Although the pretrial proceeding is considered non-accusatorial, when the testimony of several witnesses points the finger of guilt toward a specific person, he can become an accused without actually being made a defendant. \textit{See Ex parte} Smith, 383 S.W.2d 401, 403 (Tex. Cr. App. 1964).


\textsuperscript{66} \textit{In re} Groban, 352 U.S. 330 (1957); \textit{See also} text at Part V, Section A, \textit{infra}.

\textsuperscript{67} \textit{See} text accompanying note 83 \textit{infra}. Concerning the evils occasioned by conducting the grand jury in public without witnesses being permitted to confront and cross-examine their accusers, see text accompanying note 87 \textit{infra}.

\textsuperscript{68} Inasmuch as the sole purpose of the pretrial proceeding is the apprehension of criminals, and since it is an integral part of the state's machinery for the administration of justice, the argument can plausibly be advanced that witnesses appearing before it ought to be afforded all the protection the Fourteenth Amendment to the U.S. Constitution gives criminal defendants. Cf. Martin v. Beto, 397 F.2d 741, 750-51 (5th Cir. 1968).
times are not granted the aforementioned rights. Further, when a proceeding is publicly conducted, with representatives of the various news media present, sufficient harm may be done to the reputation and character of a person later accused and indicted as will make a fair and impartial trial very difficult, if not impossible.

Assuming the constitutionality, if not always the wisdom, of the pretrial proceeding, it is sometimes conducted in such fashion as to offend the conscience of those concerned with the guarantee of due process of law. As an illustration, one witness was refused the right to assistance of counsel, and was not permitted to confront and cross-examine his accusers while forced to testify for some four days at a public pretrial proceeding with representatives of the various news media present.69 On another occasion, a witness, who was without representation of counsel at a secret proceeding, was charged with contempt and tried in the proceeding by a judge who considered his answers false and evasive.70 Consequently, questions are logically raised concerning how this proceeding, if authorized at all, should be conducted to accomplish its intended purpose of obtaining evidence to determine whether an arrest warrant should be issued, while not violating what those with an innate sense of justice ordinarily consider fundamental rights.

Experience amply demonstrates that, unless proper precautions are taken, violation of these rights can occur whether the proceeding be publicly or privately conducted. If it is publicly conducted, a witness not accorded the right through counsel to confront and cross-examine his accusers not only may be indicted on criminal charges, but also may suffer such irreparable damage to his character and reputation as will prejudice his right to a fair trial. There are, however, some serious practical objections to conducting a public proceeding with witnesses being granted the right to confront and cross-examine their accusers. However desirable granting this right may be—and it seems essential to protecting the integrity of the fact-finding process—it would alter the proceeding's ex parte nature by converting it into a proceeding somewhat similar to that of a formal trial. It has therefore been urged with considerable logic that granting this right would

70 See In re Oliver, 333 U.S. 257 (1948).
hamper the conduct of the proceeding. In the language of Chief Justice Warren, it "...would make a shambles of the investigation and stifle the agency in its gathering of facts."\textsuperscript{71} Conducting it in this fashion also possesses the additional disadvantage of requiring a person later indicted to undergo, in substance, virtually two trials.

Considering the disadvantages associated with conducting a public proceeding, a private proceeding appears much preferable, provided witnesses are granted assistance of counsel to protect their fundamental rights. But it should be recalled that the United States Supreme Court has not as yet ruled that the due process clause of the fourteenth amendment entitles witnesses in such proceedings to assistance of counsel. This seemingly fundamental right is assured by statute in only a few states.\textsuperscript{72}

A. The Right to Counsel

Since protection of all other constitutional rights vitally depend upon it, the right to assistance of counsel is the most important of all rights required by a witness at a pretrial proceeding; yet, as previously noted, the Supreme Court has never interpreted the due process clause to require this right. Only when a person is actually accused of a specific crime is he constitutionally entitled to representation by counsel.\textsuperscript{73} But without counsel present to assist him at the pretrial inquiry, a witness incurs the risk of having his constitutional rights violated because the average person, grossly ignorant of judicial procedure as well as his constitutional rights, is in no position to defend himself. Not only may he be unable to assert his undoubted constitutional right against self-incrimination, but also his testimony given without guidance of counsel may lead him into the charge of contempt. Further, if the proceeding is conducted in secret, without the presence of counsel to corroborate his account of his testimony, he runs the risk of having the judge conducting it giving an incor-

\textsuperscript{71} Hannah v. Larche, 363 U.S. 420, 444 (1960). This statement is made in an opinion involving an investigation conducted by the U.S. Civil Rights Commission, but it seems applicable equally to a pretrial proceeding. See also note 83 infra, and accompanying text.
\textsuperscript{72} See text of Part V, section A, infra.
rect, or even false, version of it. Once he is formally charged following the proceeding, assistance of counsel at the formal trial may, then, avail him little, for as Justice Black has said, "The right to assistance of counsel at the formal trial is a very hollow thing when, for all practical purposes, the conviction is already assured by the pretrial examination."

Assistance of counsel for witnesses at the proceeding not only would protect their constitutional rights, but also would enhance the integrity of the judicial fact-finding process. Although the United States Supreme Court has never ruled counsel necessary for witnesses, there appears to be a growing recognition of the necessity for it. Evidently, in some instances, such as in the Lexington-Fayette County Planning Commission case, the court conducting the proceeding authorized counsel. Further, as noted previously, it is currently authorized by statute in Texas, Michigan, and Wisconsin, in the latter two states its expressed purpose being primarily that of enabling witnesses to exercise their constitutional right against self-incrimination. It seems significant also that the Massachusetts Supreme Judicial Court ruled in the Kennedy case that, while testifying, witnesses at the secret judicial inquest into the death of Mary Jo Kopechne were entitled to be accompanied and advised by counsel.

Although no precise reason can be assigned for the refusal thus far of the Supreme Court to rule that the due process clause entitles witnesses at the pretrial proceeding to counsel, its refusal to enter such a ruling may be because the proceeding is considered only fact-finding and not accusatorial in nature, and

75 Id. at 344.
79 Perhaps the simplest and most obvious reason is that there has never been on the Court at any one time five justices who believed that this right ought to be authorized. In re Groban, 352 U.S. 330 (1957), it should be noted, was decided by a 5-4 vote. Some public prosecutors may prefer to question witnesses who are without representation of counsel. At least, it has been reported that the grand jury, before which one does not have a constitutional right to counsel, has been more frequently used in Wisconsin since that state authorized counsel for witnesses at the pretrial proceeding. Letter from Robert W. Warren, Attorney General of Wisconsin, to Kenneth E. Vanlandingham, Feb. 3, 1969.
because counsel for witnesses is not permitted at the common law grand jury proceeding. But, although sometimes compared with it, it has never been held that a pretrial inquiry is on a par with a grand jury proceeding. Indeed, in addition to the fact that some states authorize counsel for witnesses at the pretrial proceeding but never for witnesses at the grand jury proceeding, there are several other significant differences between the two types of proceedings. As previously noted, the pretrial proceeding is sometimes public, but the grand jury proceeding is always secret. The inquiry is conducted by a single judge holding a definite term of public office, but the common law grand jury consists of some twelve to twenty-three members drawn somewhat randomly from the community at large. Since its members serve only temporarily, and possess no official connection with the administration of justice, the grand jury is more likely to be less biased in its investigation of crimes or public offenses than a judge conducting a pretrial proceeding. Although witnesses testifying before the grand jury are not constitutionally entitled to representation by counsel, it is extremely unlikely that a public prosecutor meeting with the grand jury can take advantage of them or violate their constitutional rights; because grand jurors, selected as they are, usually possess sufficient notions of justice as not to tolerate such conduct. Moreover, they are likely to report it publicly if it does occur. This situation is in marked contrast to the possible circumstances arising from a secret proceeding held by a single man, though a judicial officer, conducting an inquisition of a witness not represented by counsel.

Since there actually exists a vast difference between a pretrial proceeding and a grand jury proceeding, it would seem altogether appropriate for the Supreme Court to reverse its previous ruling by holding that, in order to afford them constitutional protection of their rights, witnesses at a pretrial proceeding, whether public or private, are entitled to representation by counsel.

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81 United States v. Crumble, 331 F.2d 228, 231 (7th Cir. 1964); State ex rel. Alford v. Thorson, 202 Wis. 31, ——, 231 N.W. 155, 156 (1930).

B. The Right to Confront and Cross-Examine Witnesses

Largely because of its ex parte nature, witnesses at a pre-trial proceeding are not permitted to confront and cross-examine their accusers save in Texas where the right is now authorized by statute. Indeed, as Chief Justice Warren said for the court in Hannah v. Larche, "[W]e think it is fairly clear . . . that witnesses appearing before investigatory agencies, whether legislative, executive, or judicial, have generally not been accorded the rights of appraisal, confrontation, or cross-examination." Although recognizing as Chief Justice Warren points out that the right to confrontation and cross-examination can impair or stifle an investigatory proceeding, the fact remains nevertheless that granting it to witnesses at a pretrial examination concerned with sifting evidence involving commission of crime can not only serve to prevent damage to character and reputation, but also can aid in discovery of fact and truth. Indeed, unless this right is granted, a witness at a public pretrial examination is more or less at the mercy of any person whom the state chooses to have testify against him. Although testimony taken under such circumstances may not necessarily lead to later criminal prosecution, it can result in ruination of reputation and character.

The case against a public ex parte investigation of commission of crime is forcefully stated in an 1873 ruling by Chief Justice Pearson of the North Carolina Supreme Court that a grand jury proceeding cannot be conducted in public. In his opinion Chief Justice Pearson commented:

If the man is to be exposed without inquiry as to the sufficiency of the evidence, to the scandal and disgrace of a trial in public, it may well be done on the information of the State's Solicitor; for the protection of a grand jury amounts to nothing if the citizen is to be first exposed to scandal and disgrace by a public examination of the witnesses on the part of the State, in order to see whether he ought to be exposed to

84 See note 71 supra, and accompanying text.
85 Cf. Note, Confrontation and Cross-Examination in Federal Administrative Procedure, 12 Syracuse L. Rev. 206, 218 (1960). Justice Clark, in Estes v. Texas, 381 U.S. 532, 544 (1965), made the comment that the "chief function of our judicial machinery is to ascertain the truth." Truth, it seems, cannot be discovered when only one side—the State—is heard.
86 State v. Branch, 68 N.C. 133 (1873).
the scandal and disgrace of being tried in public on a criminal charge; and, if upon the public examination of the witnesses for the State, he has no right to cross-examine and no right to offer witnesses to contradict the witnesses of the State, or to prove their bad character, and to be defended by counsel, it would be better for him to have a trial at once, upon information, where he has the right 'to confront the accusers and witnesses with other testimony and to have counsel for his defence' instead of being in the first place, put in the condition of a victim tied to a stake, while his reputation is being tortured to death. If the witnesses for the State are to be examined in public . . . in all fairness the accused should be allowed to cross-examine and to offer witnesses to contradict or explain, and to have the benefit of counsel.87

Although a grand jury proceeding and a pretrial proceeding are admittedly different, the same kind of injury to character and reputation which can result from conducting a grand jury proceeding in public can also come from publicly conducting a pretrial proceeding. Although its decision may amount to judicial legislation, it seems that the Massachusetts Supreme Judicial Court acted wisely when it held that the judicial inquest in the Kennedy case had to be conducted in secret. Moreover, the same can be said for the Fayette Circuit Court's decision that the court of inquiry investigation in the Lexington-Fayette County Planning Commission case had to be conducted in secret. It seems that, if the pretrial proceeding is publicly conducted, witnesses appearing before it should be granted the same constitutional rights as witnesses at felony trials, inasmuch as granting these rights would not only impede conducting it, but also would require a witness later indicted to endure the equivalent of two trials. A serious question thus exists concerning the wisdom and desirability of publicly conducting the proceeding.88

VI. GENERAL CONCLUDING OBSERVATIONS

Perhaps the principal argument for the pretrial proceeding, as compared with the grand jury, is its allegedly greater efficiency

87 Id., at 135.
88 If conducted in secret with witnesses granted the right to counsel for the purpose of protecting their right against self-incrimination, a proceeding could

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in gathering and sifting evidence of commission of public offenses. Still, the conduct of this proceeding, which is authorized in only a few states, has caused so much abuse of ordinarily accepted constitutional rights that there may be sound reason to seriously question its usefulness and desirability as an investigatory device. Since they were enacted during either the last century or the first quarter of the present century, statutes of most states, Kentucky included, authorizing this proceeding stipulate very little concerning either its investigatory procedure or rights of witnesses testifying therein. The Kentucky statute, for example, merely authorizes the county judge, who frequently is not an attorney, to conduct a court of inquiry without prescribing any formal rules or guidelines for holding it. In an inquiry authorized under a statute, particularly one conducted by a judge who is not an attorney, anything can occur leading to violation of constitutional rights. Such a possibility indeed causes pause to believers in due process of law.

Largely because the proceeding is considered non-accusatorial and ex parte in nature, the United States Supreme Court, though holding that witnesses testifying before it are entitled to federal constitutional protection against self-incrimination, has never ruled that the due process clause of the fourteenth amendment entitles them to the right to assistance of counsel, the right to confront and cross-examine their accusers, or the right to introduce evidence on their own behalf. However, the right to assistance of counsel is granted by statute in Texas, Michigan, and Wisconsin, but in the latter two states it is granted only for the purpose of assertion of the right against self-incrimination.

Depending upon statutory provision, the proceeding may be conducted either in public or in secret. When it is publicly conducted, unless a witness is granted virtually the same constitutional rights as a witness testifying at a felony trial, particularly

(Footnote continued from preceding page)

be conducted without violation of constitutional rights. On the other hand, there is question whether the proceeding could accomplish more than an investigation conducted by a grand jury.

80 In North Dakota, save in an instance where a person is likely to flee his jurisdiction, a county justice, who is not constitutionally required to be an attorney, cannot after a hearing issue an arrest warrant without the approval of the State's attorney. N. D. CENT. CODE § 29-05-06 (1960). Although the pretrial proceeding is usually considered nonaccusatorial, a witness before it can become an accused without actually becoming a defendant. See note 64 supra.
the right through counsel to confront and cross-examine his accusers, the possibility exists that publicity engendered by conducting it will prejudice the right of any witness later indicted to a fair trial. If it is conducted in secret, a witness without counsel incurs the risk of having his constitutional rights violated by the judge conducting it. Undoubtedly, assistance of counsel is the most vital right needed by a witness, because assertion of all other constitutional rights depends upon it. Unless counsel is permitted by statute, however, to assert these constitutional rights which are ordinarily granted witnesses at felony trials, a witness runs the risk of having them violated.

Considering the problems and difficulties thus encountered by conducting it, it seems that the proceeding should either be reformed or otherwise abolished. It is noteworthy that it is not authorized and does not function in the vast majority of states, which appear none the worse by its absence. Further, when authorized without proper constitutional safeguards, it is fraught with possible judicial mischief, particularly if conducted by a judge without legal training, and can possibly produce more harm than good. The Texas state bar's suggested criminal code recommended abolition of courts of inquiry, but the Texas legislature enacted legislation designed to improve it. As originally enacted, this legislation empowered district judges who are constitutionally required to be attorneys to conduct it, and provided that witnesses be granted the same rights as witnesses testifying at felony trials. Since the Texas proceeding is required by statute to be conducted in public, the right of a witness through counsel to confront and cross-examine his accusers will likely protect its fact-finding integrity. But this legislation, though protecting constitutional rights, seems to place a witness later indicted in the position of having to endure two public trials. This appears to represent questionable public policy. The passage of more time is required before the wisdom of this legislation can be fully evaluated.

The public interest might be as well served and individual

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91 Texas Acts 1965, Ch. 722. In 1967, this act was amended to authorize county judges, who are not constitutionally required to be attorneys, to conduct courts of inquiry. Texas Acts 1967, ch. 659, § 34.
liberties better protected if courts of inquiry were abolished.\footnote{As evidenced by the fact that they have amended rather than repealed their statutes, the legislatures of Texas, Michigan and Wisconsin apparently believe the pretrial proceeding a useful device in the discovery of crime. For reasons stated in this article, however, the author does not share their view.} Responsibility for conducting investigations of commission of crimes or public offenses should be vested solely in the public prosecutor and in the grand jury. That ancient institution the grand jury, though certainly capable of being improved in areas where it is often criticized, tardiness and inefficiency in performing its investigatory duties, has not failed. Since time has proved it a generally careful and zealous guardian of individual liberties, perhaps it should be the only official agency authorized to conduct investigations of commission of crime.