



1956

Criminal Procedure--Should the Grand Jury System be Abolished?

Beauchamp E. Brogan
University of Kentucky

Follow this and additional works at: <https://uknowledge.uky.edu/klj>

 Part of the [Criminal Procedure Commons](#)

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Brogan, Beauchamp E. (1956) "Criminal Procedure--Should the Grand Jury System be Abolished?," *Kentucky Law Journal*: Vol. 45 : Iss. 1 , Article 8.

Available at: <https://uknowledge.uky.edu/klj/vol45/iss1/8>

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

CRIMINAL PROCEDURE—SHOULD THE GRAND JURY SYSTEM BE ABOLISHED?

Much discussion has revolved around the question of whether the grand jury should be abolished in the United States. Those who would abolish it argue that it has served its purpose and is no longer useful in our modern-day society. However, opponents of this movement argue that the grand jury still serves as a bulwark of protection for the citizen against an unfounded public accusation of crime. Others would retain the grand jury but would make reforms. It is the purpose of this note to discuss the grand jury system as it now exists in the United States and to suggest needed reforms.

The history of the grand jury in England dates from the Assize of Clarendon, issued by Henry II of England in 1166.¹ It was based on the Frankish inquest as developed in Normandy, its purpose being to discover and present to the King persons suspected of committing serious crimes. It was usually composed of from twelve to twenty-three members, with twelve required to return an indictment.² The grand jury heard only the side of the prosecution, and witnesses were not called for the accused. The proceedings were private, the jurors were sworn to secrecy, and no records were kept except the names of witnesses.

In its inception the primary purpose of the grand jury was to aid the King in discovering persons suspected of committing crimes. However, as the grand jury became firmly established, it was recognized as a means of protecting the citizen against tyranny and unlawful accusations by members of the crown, since it stood between the accused and the prosecutor. Because of the continuing threat of oppression by members of the crown, the grand jury was considered to be one of the paramount protections of the securities and freedom of Englishmen.³

The grand jury operated effectively in England until it was abolished in 1933, primarily for reasons of economy.⁴ Arguments that the grand jury was protection against oppression were rejected. The grand jury was thought to be archaic, too expensive to maintain, and no longer necessary, since the procedure of preliminary examination by a highly efficient system of police and minor courts made action by the grand jury an unnecessary duplication. Hence the abolition of the system in England. Under the present English system, any person may prefer a bill of indictment charging an indictable offense, provided the accused has been committed for trial or that the bill is preferred by

¹ Orfield, *Criminal Procedure From Arrest to Appeal* 137 (1947).

² 1 Stephen, *History of the Criminal Law of England* 273-274 (1883).

³ Edwards, *The Grand Jury* 28 (1906).

⁴ Heyting, *The Abolition of Grand Juries in England*, 19 A.B.A.J. 648 (1933).

the direction or consent of a judge of the High Court.⁵ The bill becomes an indictment when signed by a proper officer of the court, who must be satisfied that the requirements for filing have been met. This provision gives the prosecutor an opportunity of getting a decision of the examining magistrate overruled if he is not satisfied. Most charges, however, are made by magistrates who have conducted the preliminary examination.

The present-day American grand jury, like the common law, was brought over from England. When the Constitution of the United States was framed, it was provided in the Fifth Amendment that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury. . . ." One can readily see that the drafters of the Constitution were concerned with the protection of individual rights and liberties. This amendment, however, applies only to the Federal Government, and not to the States.⁶ They are left free to abolish or modify the grand jury as they see fit. Nor can a person claim that his constitutional guaranty under the due process clause of the Fourteenth Amendment has been violated when he is prosecuted by a state without an indictment by a grand jury.⁷ The state constitutional provisions vary, some having provisions similar to the Fifth Amendment, and some permitting the legislature to modify or abolish the grand jury.⁸ The constitutions of about one-half of the states, in addition to prosecution by indictment, permit prosecution of nearly all cases by information.⁹ One can thus see that while the grand jury is historically grounded in the American system of criminal procedure it has been losing ground in recent years. It, therefore, becomes important that we re-examine the current value of the grand jury to determine if the reasons which brought about its creation still exist, whether new reasons for its continuance have come into being, or whether, perhaps, it should be abolished here, as in England.

What are the primary purposes and functions of the grand jury? It has two. One is to make accusations, and the other is to investigate. A basic and indispensable document in every criminal case is a written accusation.¹⁰ This accusation cannot be waived.¹¹ The accusation by indictment is the major function of the grand jury. The other

⁵ Lieck, *Abolition of the Grand Jury in England*, 25 *J. Crim. L. & Criminology* 624-625 (1935).

⁶ *Hurtado v. California*, 110 U.S. 516 (1884).

⁷ *Ibid.*

⁸ *A.L.I. Code of Crim. Proc., Commentaries to Sec. 113*, p. 431 (1931).

⁹ *Id.* at 414, *Commentaries to Sec. 113*.

¹⁰ *Robinson, Cases on Criminal Law and Procedure* 265 (1941).

¹¹ *Albrecht v. United States*, 278 U.S. 1 (1927).

function is to investigate crime and corruption in the community. In most states, the grand jury can investigate almost any offense which it thinks has been committed and has plenary power to indict on its own motion. Other states limit the grand jury to investigation of matters contained in the charges of the prosecutor.¹²

But how often are these inquisitorial powers exercised? One writer found that of all the cases heard by grand juries only about five percent are initiated by them.¹³ Therefore, as to the commission of crimes in the community, almost the entire function of the grand jury is to return indictments on charges brought before it by the prosecuting attorney. In order to determine whether the grand jury indictment can be safely eliminated, it becomes necessary and important to discuss briefly how the present system operates and to decide if a more satisfactory system could be substituted.

Generally an accused person is given a preliminary hearing by a magistrate or justice of the peace, and is either released or bound over to the grand jury. If he is released, it means the magistrate did not believe there was sufficient evidence to go before the grand jury. If he is bound over, the magistrate believes there is sufficient evidence to sustain the accusation. In that case, the magistrate grants bail or confines the man to jail without bail. In some states a preliminary hearing is a prerequisite to taking a man before the grand jury.¹⁴ But in most states, the prosecuting attorney can omit the preliminary hearing altogether and seek an indictment.¹⁵ And, if the prosecutor thinks an accused person whom the magistrate has dismissed should be indicted, he can still seek an indictment before the grand jury.

After the accused has been bound over to the grand jury, it is the responsibility of the prosecuting attorney to conduct the proceedings and seek the indictment. The prosecutor presents the written accusation, calls witnesses, and presents any evidence which would be admissible at a subsequent trial. The accused is given no opportunity to go before the grand jury to defend himself. It is purely a one-sided affair. After the prosecution has presented all its evidence, the members vote to determine if on the evidence there is probable cause for the prosecution to continue.

It is not the function of the grand jury to pass on the innocence or guilt of the accused. Its purpose is to decide if there is probable cause

¹² *Comm. v. Klein*, 40 Pa. Super. Ct. 352 (1909).

¹³ Moley, *The Initiation of Criminal Prosecutions by Indictment or Information*, 29 Mich. L. Rev. 403, 415 (1931).

¹⁴ 27 Am. Jur. 596 (1940).

¹⁵ Dession, *From Indictment to Information—Implications of the Shift*, 42 Yale L.J. 163, 168 (1932).

for the prosecution to continue. If it decides that there is sufficient evidence to go to trial, it makes a formal accusation by indictment. Where no preliminary hearing has been held prior to indictment and the accused has not been told of the charge, he is arrested and confined to jail or granted bail. If the grand jury decides that there is insufficient evidence to go to trial, it returns a "no bill" and the charge is dismissed. Thus, in the great majority of cases the accused is given two hearings before he ever gets to trial. Let us then look at the criticisms that have been directed toward such a repetitious procedure.

First, it may be suggested that there is no reason for a second hearing, provided a full and adequate hearing is given by the magistrate. The grand jury, in general, follows the advice of the prosecutor in acting on charges brought before it. Where two hearings are held, there is unnecessary delay in the administration of justice. Witnesses must appear at both hearings and again must be dragged before the trial court in case the accused is indicted. Much time usually elapses between the preliminary hearing and the empaneling of the grand jury. This can be detrimental to both sides. If the accused is innocent and the charge dismissed, he may have been made to wait in jail for a long period of time. This is especially true in smaller cities and counties where the grand jury meets at infrequent intervals. It seems unjust to compel a person to remain in jail without bail pending the calling of a grand jury only to find there was not sufficient basis for the accusation. Yet, this frequently happens. On the other hand, the delay also hurts the prosecution. Witnesses may have moved from the jurisdiction of the court and cannot be found. It is estimated that about twenty percent of the cases originally instigated have to be dropped for lack of witnesses.¹⁶ If the accused is actually guilty, there has been a miscarriage of justice. Delay is what the guilty want. Furthermore, there is little public interest in the prosecution of stale cases, and, as a practical matter, this affects prosecution of cases since officials are responsive to public opinion. The public is not usually interested in the prosecution of particular cases, and the jurors may even feel sympathetic toward an accused who has been confined for a long period of time. The successful prosecution of a case depends on going ahead with the case as rapidly as possible. Even the interest of the law enforcement agencies is diverted from stale cases. They have other cases to investigate and the public to satisfy. And, many accused persons who would normally have pleaded guilty find that they have a good chance to win by making the prosecution prove its case. Thus,

¹⁶ Moley, *Politics and Criminal Prosecutions* 137 (1929).

the state is put to added expense in prosecuting a case which it ordinarily would not have had to prosecute. The greatest delay in criminal prosecution is in the interval between the preliminary hearing and the meeting of the grand jury.

Second, the elimination of the grand jury for the purpose of returning indictments would save the public much money. However, one might well argue that the expense is a part of our criminal procedure and should rightly be borne by society. If the grand jury were a smoothly operating and efficient body, and if justice were done, the expense might well be justified. If, instead of going before the grand jury, an accused could be charged and brought to trial immediately, much expense could be saved. However, when the accused is committed to jail for several months preceding the calling of the grand jury, he is an expense to the community. The cost of the services of the prosecuting attorney, the members of the grand jury, and all who are involved in the grand jury system must be taken into account. And, after several months the position of the accused is probably the same had no grand jury been called. In short, if the time is ripe for trial, nothing can be lost by proceeding. Following the preliminary hearing, the action by the grand jury is a duplication of effort.

Third, the grand jury imposes a burden on citizens who must leave their jobs to serve as jurors. Most people try to avoid jury duty since they cannot afford to take time off from work to sit for days while the grand jury is in session. And, like the trial jury, the grand jury may consist of "professional jurors" who are always available for service. Thus the argument that the grand jury is the citizen's opportunity for overseeing and controlling the initial phases of prosecution is not as valuable as it is often thought to be.

Fourth, an argument can be made against the lack of an opportunity for the accused to be heard. Every person should have an opportunity to be heard when an accusation is made against him regardless of the fact that he is later given a full hearing. The grand jury is supposed to return an indictment if in its judgment the evidence is sufficient to justify a trial. But how can it determine validly such sufficiency if the accused may not present rebutting evidence. Often a simple explanation or rebutting evidence would break down what seemed to be a *prima facie* case. Many accusations would be tossed out if the accused were given an opportunity to present his side of the case. The purpose of the grand jury is to protect the citizen from an open and public accusation of crime and from the trouble, expense, and anxiety of a public trial before probable cause is established.¹⁷ But

¹⁷ Jones v. Robbins, 8 Gray 329 (Mass. 1857).

does it do that if the accused is later brought to trial and presents evidence which entirely destroys the prosecution's case? The ends of justice would be better met if the accused were permitted to establish his side of the case before trial. And, may not the fact that he is taken before a grand jury prejudice his right to a fair trial? The fact that a grand jury has indicted influences the jurors of a trial court in many ways. As one layman so aptly put it, "He must have done something or he wouldn't be here." The accused is presumed to be innocent. But does not that presumption vanish in the eyes of a juror when told that the grand jury has indicted him? And, have not the reasons for a secret tribunal vanished? In England the grand jury was the principal means through which a person could express his views of the crown without being threatened or deprived of his liberties. He was afraid to make an open accusation against the members of the crown. However, today the reverse is true. A shield is no longer required to protect citizens from aggression by the State. The liberties of the individual today are no longer subject to the baneful influences of despotism which existed in the dark ages.¹⁸ Has not society progressed to a stage in this country where secret tribunals are no longer necessary?

Fifth, it might be argued that the prosecutor avoids responsibility by getting the grand jury to return "no bills". If he does not wish to prosecute a case, he can present it in such a way that the grand jury will probably not return an indictment. It is believed that if he alone has this responsibility, he will be more apt to perform his duties more efficiently. Usually it is the prosecuting attorney who guides the grand jury in its action. The fact that grand juries seldom initiate prosecutions except as cases are presented to them is evidenced by the testimony of the prosecuting attorneys who work with them.¹⁹ However, an argument might be made on the other side that the abolishment of the indictment would center too much responsibility in the hands of the prosecutor, and that he could greatly abuse his authority by making unfounded accusations. But this is not altogether true. The required preliminary examination by a magistrate would supply this check. Furthermore, the magistrate who hears the case and who gives the accused a chance to reply has a better chance of deciding the real merits of the case than a grand jury. In fact, the prosecutor may not be as likely to make unfounded accusations as the grand jury. He must

¹⁸ There are those who differ strongly with this position, believing that when the safeguards are abandoned the evils they were designed to prevent are likely to recur.

¹⁹ Miller, *Information or Indictment in Felony Cases*, 8 Minn. L. Rev. 396 (1924).

always look forward to the searching white light of a public trial. If he loses a case because the charge was unfounded, he alone is considered the sponsor and must stand before the public as a poor prosecutor. He is usually an elected official, and responsibility would make him more conscious of his duties to the public.

Sixth, the abolishment of the indictment might actually reduce the number of persons brought to trial. It is true that a grand jury eliminates many cases before a trial is held.²⁰ But it is also true that many cases go to trial that would not have if the accused had been given an opportunity to defend himself before the grand jury. And, the grand jury in some instances returns indictments over the objection of the prosecuting attorney and when there is no evidence to sustain the accusation. In many instances where eliminations are made, they are based on the prosecutor's recommendation. Fewer cases might actually reach the trial docket if the requirement of an indictment were abolished. The magistrate has a way of dodging responsibility and of passing the buck to the grand jury. He is more apt to hold the prisoner on less convincing evidence when he knows the grand jury will examine him. He thus places the onus on the grand jury to return an indictment or to dismiss the bill. However, the grand jury may think the magistrate held a hearing and had reasonable cause to bind him over and is less likely to give another "full" investigation. Thus, both sides have dodged their responsibility. If the grand jury function of returning indictments is abolished, more responsibility will be placed in the hands of the magistrate. He will be subjected to public opinion and will endeavor to become more efficient. And, if an open examination is conducted where all witnesses can be examined by counsel and confronted by the accused, there is even more probability that fewer cases will reach the trial docket than do under our present system.

Seventh, a current defect of the present grand jury system is the inability to amend an indictment. A substantive defect discovered after the grand jury has been dismissed cannot be corrected until a subsequent grand jury is convened.²¹ Even in cases where the grand jury is still in session, it must be sent back for correction. Thus, there is even more delay injected into the present complicated criminal procedure.

If the requirement of an indictment by a grand jury were abolished, what would take its place, and how would the substitute operate? An information which is filed by the prosecuting attorney has been offered

²⁰ Orfield, *Criminal Procedure From Arrest to Appeal* 177 (1947).

²¹ Chaplin, *Reform in Criminal Procedure*, 7 *Harv. L. Rev.* 192 (1893).

as an answer to this problem. An information is a declaration by a duly authorized officer of the law, usually the attorney general or prosecuting attorney, presenting an allegation in written form to the court charging a person with the commission of some crime. An information differs from an indictment only in regard to the person who signs it. The indictment can only be filed by a grand jury, whereas the information is filed by the prosecuting attorney or some other duly authorized official. Thus, the main question is whether a criminal charge should be by indictment or information.

It is believed that accusation by information is the better method. Twenty-four states now permit accusation of major offenses by information.²² The information cuts off the need for the grand jury and shortens the process through which an accused person must be brought to trial. It would thus seem that states are getting away from the use of the indictment. But if the information is to take the place of the indictment, how will it work? Should the prosecutor be left free to accuse anyone whom he pleases? This is a major objection to the information. Many feel that the prosecutor will abuse his power to prosecute. However, as will be developed, it would seem that the preliminary examination would supply a check on an abuse of power by the prosecuting attorney if the magisterial system were improved as suggested and a preliminary examination is made a prerequisite to the filing of an information. Section 115 of the American Law Institute Code provides that no information may be filed against any person, except a fugitive from justice, for any offense which may be punished by death or imprisonment in the penitentiary until there has been a preliminary examination or a waiver of such an examination. A further provision is made, however, to the effect that a failure to conduct a preliminary hearing shall not invalidate the information unless the accused objects before pleading to the merits. The Arkansas Supreme Court has ruled that the omission of a hearing does not deprive the defendant of due process of law under the Fourteenth Amendment.²³

If the magistrate is to conduct the sole preliminary hearing, reforms must be made at that level. It is not believed that the present system is as adequate as the English system for conducting the preliminary examination. Trained officials should conduct the preliminary examination, and they should be given the power to subpoena witnesses. A reporter should record the proceedings, depositions should be taken

²² Morse, *A Survey of the Grand Jury*, 10 *Ore. L. Rev.* 101, 122 (1931).

²³ *Penton v. State*, 194 *Ark.* 503, 190 *S.W.* 2d 131, 136 (1937).

to be used in case a witness leaves the jurisdiction of the court before trial, and the accused should have an opportunity to present evidence himself. One might argue, however, that it is impossible for the prosecuting attorney to be represented at every magistrate and police hearing, and that he does not have time to prepare his case at so early a stage. To some extent this may be true. However, just as the grand jury meets in a specific place at a specified time, similar regular proceedings could be held by magistrates. Everyone knows when and where the grand jury sits. Preliminary hearings could also be centralized in the hands of magistrates who would conduct all hearings in an orderly and efficient manner. Thus, disposition of cases could be made without any undue lapse of time. It might even be possible to conduct the preliminary hearing on the same day the arrest is made, for the information to be filed at once, and for the arraignment in open court to follow. This is especially true where the defendant wishes to plead guilty. But where the grand jury is used, this is impossible. The accused must wait until the grand jury meets.

Therefore, it would seem that our criminal procedure could be greatly simplified and made more efficient if the requirement of indictment by a grand jury were eliminated from our state constitutions. The filing of an information by the prosecuting attorney would be a suitable substitute.

Should the grand jury be abolished completely? It is the opinion of this writer that it should not. Section 113 of the American Law Institute Code of Criminal Procedure provides that, "All offenses heretofore required to be prosecuted by indictment may be prosecuted either by indictment or information." A provision such as this would leave the state free to prosecute by information but would leave the door open to prosecution by indictment. There are also other invaluable functions which the grand jury performs and which are of great benefit to society. It is especially suitable for inquisitorial purposes, such as investigating riots, public disorders, corruption in office, and to handle such other cases as the prosecuting attorney might not be able to cope with.²⁴ And in case the prosecuting attorney or local officials refuse to act, the grand jury can be called by the court. This is especially true in larger cities where the check of an informed local opinion is absent and where the prosecuting attorney might be prone to abuse his discretion in filing informations. Furthermore, the custom of calling a grand jury has a salutary effect on the public in general. It gives an aggrieved person an opportunity to present his case if public

²⁴ For further expansion of this thought, see Orfield, *supra* note 20 at 187.

officials refuse to act. It strikes fear in the hearts of would-be criminals. The very fact that it will meet at stated intervals serves as a check on local officials and insures that they will carry out their duties in a proper manner. Therefore, it is clear that a provision should be made for periodic calling of the grand jury. Section 114 of the American Law Institute Code of Criminal Procedure provides that "No grand jury shall be summoned to attend at any court except upon the order of a judge thereof when in his opinion public interest so demands, except that a grand jury shall be summoned at least once a year in each county." The requirement of empaneling a grand jury each year has been criticized on the ground that it would subject some counties to needless expense since grand juries are not always needed that often. It has been suggested that the grand jury should be convened only when the prosecuting attorney asks the judge for the assistance of one or whenever the judge himself thinks there is a necessity for one.²⁵ However, it is believed that if the calling of a grand jury is to have the desired effect on the public, it should be called at periodic intervals. The judge or prosecuting attorney for reasons of his own may not desire the calling of such a body. Therefore, it is apparent that a provision should be made for the periodic calling of a grand jury, since this will enable any aggrieved person to present complaints. If no complaints are presented, the grand jury can be dismissed.

In summary, there should be no objection to a system which would authorize the prosecution of all felonies by either information or indictment and which would still allow the court an opportunity to summon a grand jury if one were deemed necessary, and, in any event, at least once a year. It is believed that the return of an indictment by a grand jury, in each and every case, is no longer necessary for a certain and safe administration of justice.

Beauchamp E. Brogan

PERSONAL PROPERTY—DELIVERY OF GIFTS IN KENTUCKY

There are three traditional requirements for a valid gift: (1) donative intent, (2) delivery by the donor, and (3) acceptance by the donee.¹ This note is concerned only with the requirement of

²⁵ Morse, *supra* note 22 at 364-365.

¹ Brown, *Personal Property*, 132 (1936). This author states that the requirement of acceptance is frequently omitted in modern cases in view of "the well-nigh universal holding that when the gift is beneficial the presumption is that the gift is accepted by the donee." The Kentucky Court of Appeals subscribes