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R. Justin Miller

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INFORMATIONS OR INDICTMENTS IN
FELONY CASES.

By R. Justin Miller*

In England, prior to the American Revolution, felony cases were prosecuted solely upon indictments; and informations were used only for the prosecution of misdemeanors. The same practice was followed generally in the colonies and, when the federal constitution was adopted, it too embodied a recognition of that practice. However, it remained for the states to provide, each for itself, a similar constitutional guaranty or some other method of procedure. Most of the older states followed the established practice, but after a time, presumably because of the exigencies of life in the newer country, several of the states adopted an alternative method of procedure which permitted the trial of felony cases upon either indictments or informations. In some of these states, it has become the practice to use informations almost exclusively.

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It is interesting to note in this connection that in England itself the use of the grand jury and of the indictment has been practically abandoned in criminal cases. See 8 Minnesota Law Review 184. See also, regarding criminal procedure in Canada, 6 Jour. of Am. Jud. Soc. 14.

2Fifth amendment of the U. S. constitution; Ex parte Wilson, (1885) 114 U. S. 417, 29 L. Ed. 89, 5 S. C. R. 935; 36 Harv. L. Rev. 299.

3Minn. constitution, art. 1, sec. 7; Minn., G. S. 1894, p. xxi; 1 Bishop New Crim. Proc., sec. 144, 2nd Ed.; 1 Wharton’s Crim. Proc., 10th Ed., sec. 129.

4“This process (upon information) is rarely recurred to in America.” 2 Story, Constitution, 5th Ed., sec. 1786; 1 Bishop, New Crim. Proc., sec. 144, 2nd Ed.


6Excerpt from letter of Geo. C. Watson, Assistant Attorney General of Michigan, March 3, 1922: “We still retain the grand jury system in this state, but it is seldom used except in Wayne county, the county in which Detroit is situated.”

Excerpt from letter of Samuel Chutkow, Assistant Attorney General of Colorado, Dec. 31, 1921: “As a matter of fact, informations by district attorneys prevail to a great extent in this state. The bulk of criminal prosecution is initiated by those officials.”

Excerpt from letter of Frank C. Archibald, Attorney General of Vermont, Dec. 28, 1921: “Until a comparatively recent date criminal prosecu-
In Minnesota the law provides for proceeding upon indictment in all felony cases, with an alternative procedure upon information in cases in which the maximum punishment may not exceed ten years. Although this alternative procedure was made possible by constitutional amendment in 1904, followed by statutory enactment in 1905, the terms of the statute were not clearly understood, and it was not put into general use. It is probable too that as the more serious crimes required the consideration of grand juries, and thus insured their being called at regular intervals, there was never any very pressing necessity for or serious incentive to use the new method. At any rate it was not until 1922 that the supreme court of the state was called upon to interpret the statute of 1905.

Recently it has been proposed to extend the operation of the statute and to insure its use in Minnesota by providing for prosecution upon informations in all cases, retaining the grand jury and the indictment only for emergency situations. A special committee of the state bar association is charged with an investigation in county court were all based upon indictment made by the grand jury. But under existing law all prosecutions may be commenced upon information excepting those in which the punishment is death or imprisonment for life. Formerly the custom was to have a session of the grand jury in each county at least once a year. At present, no grand jury is summoned unless upon representation of the prosecuting officer that conditions require that there be a session thereof.”

Excerpt from letter of Harvey H. Cluff, Attorney General of Utah, Dec. 27, 1921: “But it is very seldom that we ever resort to the use of a grand jury in this state.”

Excerpt from letter from Sveinbjorn Johnson, Attorney General of North Dakota, Dec. 23, 1921: “We haven’t had a grand jury in Grand Forks county, for instance, but once in the last twenty-five years.”

Excerpt from letter of Leonard B. Fowler, Attorney General of Nevada, Jan. 6, 1922: “Nearly all of our felony cases are now prosecuted pursuant to this method (upon information). The grand jury system still exists but it is not extensively utilized and practically it amounts to nothing more than an inquisitorial body.”

Excerpt from letter of W. J. Galbraith, Attorney General of Arizona, Dec. 27, 1921: “The grand juries meet in the various counties once every four or five years at the discretion of the judge. In other words, most of our criminal proceedings are instituted by the filing of an information by the county attorney.”

Excerpt from letter of W. L. Walls, Attorney General of Wyoming, Dec. 24, 1921: “However, it may be said . . . that the use of the grand jury system is practically abolished in this state for the reason that it is rarely summoned and the practice of instituting criminal actions by informations is the general rule.”

7Minn., G.S. 1913, sec. 9134 et seq.
8Minn., G.S. 1913, sec. 9159 et seq.
9Minn., constitution, art. 1, sec. 7; Minn., G.S. 1913, 2072.
10Minn., Laws, 1905, chap. 231, p. 341; Minn., G.S. 1913, sec. 9159.
INFORMATIONS OR INDICTMENTS

tion of the subject.\(^{12}\) A bill covering the proposed change will undoubtedly be introduced at the next session of the legislature. In view of these circumstances it seems to be an appropriate time to classify and to appraise the value of the arguments advanced for and against the two methods of procedure.

Considered from the point of view of form, substance, or general appearance, there is today nothing any more dignified or impressive about the indictment to justify its preferment than the historically less important information;\(^{13}\) and so far as effectiveness is concerned, men guilty of murder have been just as effectively hanged, following prosecution upon informations in appropriate jurisdictions, as has ever been true in jurisdictions where prosecutions for murder are possible only upon indictments. The indictment is a declaration by a grand jury that a certain person has committed a certain crime, contrary to the law of the land.\(^{14}\) The information is exactly the same thing, except that the declaration is made by a duly authorized officer such as an attorney general or a district attorney.\(^{15}\) In the absence of an express constitutional limitation, a prosecution initiated by an information "is due process of law and violates none of the constitutional rights of the accused."\(^{16}\) What remains by way of distinction between the two is the different process which precedes the filing of the respective declarations. The very existence of an indictment presupposes, under normal circumstances, that the following steps have been taken: the arrest, the hearing before a magistrate,\(^{17}\) the commitment or "holding over" for trial,\(^{18}\) the imprisonment of the accused or his release on bail,\(^{19}\) the calling and formation of the grand jury, the presenting of the case by the prosecuting attorney to the grand jury,

\(^{12}\) 1923 Proceedings of the Minnesota State Bar Ass'n, pp. 6, 16-22, 126.
\(^{16}\) Hurtado v. California, (1884) 110 U. S. 516, 28 L. Ed. 232, 4 S. C. R. 111, 292; State v. Keeney, (1922) 153 Minn. 153, 155, 189 N. W. 1023, and many cases there cited.
\(^{17}\) Minn., G.S. 1913, secs. 9077-9083; Cal., Penal Code, secs. 858-877.
\(^{18}\) Minn., G.S. 1913, sec. 9084.
\(^{19}\) In some cases, comparatively few in number, no arrest is made until after the indictment is filed. In such cases, of course the steps outlined are not taken.
the grand jury's deliberation, the preparation of the indictment, its signing and its filing with the clerk of the court. The existence of an information, on the other hand, presupposes the taking of the steps outlined down only to the time of the commitment by the magistrate, at which time the prosecuting attorney intervenes, files an information, and proceeds to trial thereon just as he does on the indictment. In other words the vital difference between the two is the fact that in one case the grand jury is the body in which final discretion is vested, and in the other the prosecuting attorney, to determine whether a particular person shall be charged with a crime. And the question involved is one of policy as to where that discretion should best be located.

The case in favor of the information and against the indictment may be briefly stated as follows: The use of the information gives a speedier process, a more efficient process, a process more economical of money and labor, and one which avoids duplication of effort.

Not all persons are willing to concede that speed is a desirable characteristic of criminal proceedings. It generally is assumed however, that the defendant suffers most from delays and in practically all jurisdictions he is guaranteed a speedy trial at the next or at most the second term following his arrest. Where the information is used, it is entirely possible for the preliminary hearing to be held on the same day as the

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20Unless preliminary examination be waived. Minn., G.S. 1913, sec. 9161.
21Cal., Penal Code 809, "When a defendant has been examined and committed as provided in section eight hundred and seventy-two of this code, it shall be the duty of the district attorney, within thirty days thereafter, to file in the superior court of the county in which the offense is triable, an information charging the defendant with such offense. The information shall be in the name of the people of the state of California, and subscribed by the district attorney, and shall be in form like an indictment for the same offense."
23For a further classification of arguments pro and con, see an article by Paul J. Thompson in 6 MINNESOTA LAW REVIEW 615, and an article in 1 Can. L. Rev. 219.
24In 32 Law Times 239, there appears an argument by Mr. T. Chambers, common sergeant, against a proposal to extend the use of the information in England to the prosecution of felonies. Among other things he says: "My own opinion certainly is, that the stream of justice is not only more picturesque, but more useful and more fresh and wholesome, when it winds, perhaps slowly, between devious but natural banks, than when it rushes through professional and official conduits, where it not only loses a grace, but contracts a hardness."
arrest, for the commitment to be made and the information filed at once, and for the arraignment in the district court to be held the next day. This is especially true where the defendant wishes to enter a plea of guilty. On the other hand, where the indictment is used, delay begins immediately after the commitment and varies in extent according to the time which must elapse before the calling of the next grand jury. Every step from that time on is slow, deliberate, cumbersome, with many untrained minds working on unfamiliar matter; instead of one, in the person of the prosecuting attorney, who is accustomed to judging facts, people, and situations.

26Minn., G.S. 1913, secs. 153 and 9099; State v. Riley, (1910) 109 Minn. 434, 124 N. W. 11.

Excerpt from letter of A. P. Freeling, Attorney General of Oklahoma, Feb. 2, 1920: "Second, it [prosecution upon information] enables the county attorney to place the defendant on trial immediately, without having to wait many weeks, and in many cases, months for a grand jury to indict the accused. . . ."

Excerpt from letter of Fred L. Farley, county attorney of Red Lake county, Minn., Feb. 1, 1922: "Answering your second question I would say that there are a number of reasons why a presentment by the county attorney would be better than an indictment by a grand jury, one of the strongest being that, at least in the smaller counties where there are not over two regular terms of court each year, it would speed up very materially the disposition of criminal cases, for the court could adjourn from time to time and call the jury back for the trial of an important criminal case at any time between the two regular term days."

27Excerpt from letter of Harvey H. Cluff, Attorney General of Utah, Dec. 27, 1921: "I am of the opinion that the grand jury system is a useless and cumbersome portion of legal procedure."

Excerpt from letter of Clarence A. Davis, Attorney General of Nebraska, Dec. 28, 1921: "Ninety-five per cent of the time this work [upon information] is very satisfactory and saves a great deal of money that is spent by the more cumbersome grand jury."

Excerpt from letter of Godfrey S. Goodwin, county attorney of Isanti county, Minn., Feb. 1, 1922: "The grand jury is a cumbersome body and a somewhat expensive body and in a majority of the terms of court at which they are called upon to act, there have resulted cases of no great moral turpitude involved, and the county attorney is far better able to determine whether a certain person shall be prosecuted."

Excerpt from letter of Henry M. Gallagher, county attorney, Waseca county, Minn., Jan. 30, 1922: "I feel that the system is cumbersome, expensive and out of date."

Excerpt from letter of William E. Flynn, county attorney, Houston county, Minn., Feb. 1, 1922: " . . . the grand jury is an expensive, clumsy piece of machinery . . . ."

"But the grand jury works in secret, and therefore very few intelligent critics can see enough of the operations to appreciate how rude, clumsy and insufficient it is. It is the largest, most ignorant, most irresponsible and oftentimes most partisan tribunal known to our law, and it sits and adjudicates with closed doors!" Eugene Stevenson, 8 Crim. L. Mag. 715.

"A cumbersome piece of old-fashioned machinery; an old windmill, grinding exceedingly slow and very coarse withal, dependent for its very existence on the miller (the district attorney), who controls the flow of the stream which feeds it, who stops, if he so desire, the mill itself, or renders its work ineffectual by his supineness or corrupt practices." 7 Albany L. Jour. 103.
It is not alone the defendant who suffers from delay. In fact if he is in a position to afford delay, if he has no fear of his reputation, or no reputation to be fearful of, the defendant may court that very delay which our law is so anxious to save him. For in most cases successful prosecution depends on going ahead to trial while there is a present interest in the case. Just as mob blood runs hot and then quickly cools again, so does the interest of those concerned in the prosecution of criminal cases. The public is not usually long interested in any case; it is hard to convince the average trial jury that a case which has been long delayed prior to trial has much of merit in it; the innate sympathy of the average mortal goes out to the underdog who has been long confined. The enforcement officers too are more interested in the new fresh cases about which the community is talking, and the less striking ones fall by the wayside. Of course

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28 "The commission [Chicago Crime Commission] limits its activity to an investigation of crimes of violence, murder, burglary, and robbery. It early reached the conclusion, that crime flourished because criminals escaped punishment, and that the principal avenue of escape was the delay in the trial of criminal cases. Therefore it set out to bring about the more speedy punishment of criminals." 46 Am. Bar Ass'n Rep. 597.

29 "The public does not always rise to its responsibility. For example, not long ago a man was convicted by a jury of manslaughter arising out of reckless automobile driving in a rural county. He was sentenced by the trial court and the verdict and sentence were affirmed on appeal. On the eve of the departure of the defendant for the penitentiary his neighbors gave him a public testimonial banquet. Just about such a send-off as similar communities were giving a few years ago to the soldiers who were going to war." Oscar Hallam, former justice of the supreme court of Minnesota, in an address before the American Bar Association. 48 Am. Bar Ass'n Rep. 604.

30 "Our hereditary sympathies are for the under dog, for the man who is down and out, and the criminal is too frequently pictured as being only the victim of hard luck and bad environment, fighting for his life or freedom against the powerfully organized, impersonal forces of the commonwealth." Fosdick, American Police Systems, 44.

31 "With respect to the professional crook, I have but little to say. There is a tendency in many communities to mix so much misplaced maudlin sentiment with the application of the lawful force of government that this type of criminal has lost his fear of punishment. . . . If the well-meaning citizens who waste their sympathy on the criminal will use that sympathy in alleviating the grief of the widow and the orphan of the murdered man, the government's fight against crime will be materially aided." Floyd E. Thompson, Chief Justice of the Illinois supreme court, in an address before the American Bar Association. 48 Am. Bar Ass'n Rep. 595.

32 "Now is it surprising that judges and prosecutors, dependent upon passing public favor, will, consciously and unconsciously, cater to the prevailing mood of the newspapers as the molders and exponents of 'public opinion.' The exploitation of Judge Stevens' dramatic liquor fines, and the practical neglect by the papers of the judge's quiet remission of the some fines tells the tale." Felix Frankfurter in Criminal Justice in Cleveland, 524, 552.

" . . . the administration of the criminal law in any community,
there are exceptions to every proposition asserted, but they are true of the great majority, the "office run" of cases. And, the thing which is the greatest enemy of successful prosecution, true of all types of cases, is the weakening effect of delay on the evidence available to the state. Many witnesses are of a type who do not stay long in one place. Unless they are held in jail, a few months sees them scattered to the four winds. This is especially true of unwilling or hostile witnesses. As the state has no process to bring witnesses from another state, and no right to use their depositions, the result is obvious. Add to this the thing that every prosecutor learns to fear, that a witness may be paid to disappear, and the greatest obstacle of all confronts him; he cannot even find his witness when the case comes up for hearing. Unfortunately, too, it is not alone the unwilling or hostile witness who becomes an uncertain quantity. Sometimes even the prosecuting or complaining witness himself loses interest, inspired it may be by a money settlement, by friendly entreaty, or even by fear. Of course these things are present, being dependent upon public opinion, is in general just as efficient as the citizens of that community deserve.” Edwin R. Keedy, 31 Yale L. Jour. 262. See also, 6 Jour. of Crim. Law 762 and 4 Jour. of Crim. Law 701.


"Before the case has reached the grand jury the professional crook has usually bought off most of the witnesses who were to appear against him; other witnesses have left the state or been swallowed up in the city and can't be found. The result is no action is taken by the grand jury, or a no bill is voted." William N. Gemmill, municipal court judge, Chicago, 4 Jour. of Crim. Law 698, 705.

"The undersigned sat as jurors in the case of the people v. ———, charged with selling a bottle of whiskey, to one Mr. ———, some months ago, and after hearing the evidence we voted 'guilty.'

"The jury disagreed, three of its members voting 'not guilty,' and there was therefore a difference of opinion as to the truth of the charge. Mr. ——— [the defendant] has just shown us a liberally signed petition requesting the dismissal of the charge pending against him, and states that unless the case is dismissed he must again face a jury on next Monday.

"Having mind that the purpose of a prosecution of a person charged with offending against the law and punishing such offender is not solely
too, to some extent, where prosecution is on information, but they thrive prodigiously on delay, and the grand jury is the most serious delay-producing agency in the whole process of criminal procedure.

Another loss in efficiency from the point of view of law enforcement results from the fact that while many men accused of crime would gladly plead guilty and begin to pay the penalty if they were brought into court at once on information, they learn many of the tricks of the "repeaters" after they have lain in jail with them for a month or two waiting for a grand jury. Then begins the game of hunting for loopholes in our disorganized, headless system of criminal procedure. Every step in the process, every individual concerned, becomes a possible means of escape. The grand jury itself is one of the weakest parts for the purpose of inflicting the punishment, but is for the purpose of deterring others from committing similar offenses, and believing that although Mr. —— [the defendant] may have sold the bottle of whiskey as charged in the information against him, his experience with the law, if he is guilty, will, or at least should be a lesson to him, and as he states—as do also the citizens signing his petition—that since said time he has not kept in his place of business any alcoholic liquors for any purpose whatever, and with a desire to uplift a fellowman, and believing that the objects and purposes of the law have been accomplished in this case, even though the defendant may be guilty, we join with the other petitioners in requesting a dismissal of the action.

Respectfully

And see also, note No. 29.

38See, 29 Harv. L. Rev. 326.

39See, 4 Jour. of Crim. Law 706, 710; see also the following:

"The business of justice is like a complicated game, the odds favoring him who has the intense desire to win plus the skill of an expert on his side. As between defendants, the advantage lies wholly with the habitual offender, who has played the game before and knows the expert to employ. . . . The files of the bureau of criminal identification of the Cleveland division of police contain the records of the most successful players of this game. Only a few examples can be given here because of lack of space. . . .

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<th>Year</th>
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<tr>
<td>1911</td>
<td>Robbery</td>
<td>&quot;Bench parole&quot;</td>
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<tr>
<td>1911</td>
<td>Attempted burglary</td>
<td>Discharged in municipal court</td>
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<tr>
<td>1911</td>
<td>Violated parole</td>
<td>Turned over to Ohio State Reformatory</td>
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<td>1914</td>
<td>Forgery</td>
<td>No bill</td>
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<tr>
<td>1915</td>
<td>Burglary and Larceny</td>
<td>Plead guilty to petit larceny</td>
</tr>
<tr>
<td>1915</td>
<td>Suspicious person</td>
<td>Sentence, 30 days</td>
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<tr>
<td>1915</td>
<td>Assault to rob</td>
<td>&quot;Bench parole&quot;</td>
</tr>
<tr>
<td></td>
<td>(two cases)</td>
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<tr>
<td>1916</td>
<td>Assault to rob</td>
<td>No bill</td>
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<tr>
<td>1916</td>
<td>Burglary</td>
<td>Not guilty</td>
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<tr>
<td>1916</td>
<td>Contempt of court</td>
<td>Discharged</td>
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<tr>
<td>1916</td>
<td>Intoxication</td>
<td>Suspended sentence</td>
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<tr>
<td>1916</td>
<td>Intoxication</td>
<td>Sentenced $25 and 30 days</td>
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<tr>
<td>1916</td>
<td>Burglary and Larceny</td>
<td>&quot;Nolled&quot;</td>
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<tr>
<td>1919</td>
<td>Burglary and Larceny</td>
<td>Plead guilty to petit larceny</td>
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of the judicial sieve. The time to plead finally comes, if they have not already escaped, they plead not guilty and put the state to trial or to a dismissal. Many a man has served his term in the penitentiary on his own confession, when if he had pleaded not guilty, the state could never have made a case against him. The effect of the delay-producing grand jury method is to cut down the number of pleas of guilty, to increase the number of acquittals, dismissals and disagreements, and to increase the cost of securing convictions.

This cost can be figured more or less definitely in terms of salaries and expenses. When a guilty man pleads guilty, following an arraignment upon an information, the cost is a minimum one. When the same man lives at the expense of the county for a month or two, receives the attention of a grand jury and a prosecuting attorney for a day or two, stands trial in the district court for a day or two or three more, and finally arrives at the same point at which he would willingly have gone free of charge two or three months before, the expense to the county is a maximum one; and in addition twenty-three citizens have donated their valuable services in grand jury service, more than a dozen more for trial jury service, and many others have waited their turns as witnesses.

In addition to the per diem and

<table>
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<th>Found</th>
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<td>Guilty</td>
<td>Acquitted</td>
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In Municipal and Justice Courts

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<th>Found</th>
<th>% Pledged</th>
</tr>
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<tbody>
<tr>
<td></td>
<td>Guilty</td>
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<td>Acquitted</td>
</tr>
<tr>
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<td>4195</td>
<td>924</td>
<td>170</td>
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<tr>
<td>1922</td>
<td>5636</td>
<td>808</td>
<td>191</td>
</tr>
</tbody>
</table>

In both England and France the punishment of the offender unquestionably follows with greater swiftness than it does in America. We witnessed many instances of this, graphic, significant, convincing. The punishment is surer in both England and France. The number of convictions to the number of accusations is out of all proportion to that obtaining in the United States. There is no grand jury in France, and this institution has become a mere formality in England. Wade Ellis, in an address before the American Bar Association. 48 Am. Bar Ass'n Rep. 629.

At the recent quarter session for Cornwall, of which Mr. Justice Rowlatt has been elected chairman, twenty-four grand jurymen and fifty-

1919 Robbery Not guilty
1919 Suspicious person Discharged
1920 Burglary and Larceny Plead guilty to petit larceny
1921 Suspicious person Sentenced to $25 fine

Reginald Heber Smith in Criminal Justice in Cleveland, 238-9.

The following table, compiled from figures given at pages 26-31 of the report of the Attorney General of the state of Minnesota for the year 1922, will show the extent to which pleas of guilty are made by men accused of crime:
expenses of the jurors, consideration should be given to the sal-
aries and expenses of additional judges, assistant prosecuting
attorneys, jailers and court attaches, who must be provided to
care for the increased work which the grand jury system entails.
If the result of the delay is an acquittal or a disagreement, then
we have a miscarriage of justice to figure in to the total also.

It requires merely passing mention to indicate that where, fol-
lowing a preliminary hearing, the case is ripe for trial in the
district court, the whole process from then on is mere duplica-
tion. The prosecuting attorney does over again what he did at
the preliminary hearing; the grand jury does over again what
the magistrate did at the same hearing; the witnesses are re-
quired to state the evidence again, and when the case finally comes
on for trial the whole performance is repeated for the third
time.

This presentation of the case for the information may leave
one with the impression that while the arguments are incon-
trovertible, they are not satisfying or convincing. It will be
urged that the prosecution of men charged with crime cannot
properly be stated in terms of speed, efficiency, and economy.
Certainly the emphasis which has been placed on the process in
the past has been an entirely different one. And so it is that
the case for the indictment is usually stated in entirely different
terms. Its proponents insist that the grand jury proceedings
which lead up to the finding of "a true bill," or no bill at all,
are vitally important, because of the value of secrecy which re-
ults from working behind closed doors;45 because it is necessary
to have an independent body of citizens to initiate prosecutions;
because it is too great a responsibility to vest in the prosecuting
attorney; because the judgment of the grand jury is better than
his; because the very existence of the grand jury has a salutary
effect upon law enforcement officers and upon the public gen-
erally.

eight common jurymen—seventy-two jurors in all—were summoned to try
one prisoner who pleaded 'guilty.'" 49 Law Jour. 28.

45"In the secrecy of the investigations by grand juries, the weak and
helpless—proscribed perhaps, because of their race, or pursued by an un-
reasoning public clamor—have found, and will continue to find, security
against official oppression, the cruelty of mobs, the machinations of false-
hood, and the malevolence of private persons, who would use the machinery
of the law to bring ruin upon their personal enemies." Justice Harlan
in Hurtado v. California, (1884) 110 U. S. 516, 554-5, 28 L. Ed. 232, 4
S. C. R. 111, 292.
When the reputations of men are at stake we are hardly justified in proceeding ruthlessly, even though it be speedily or efficiently. Does the grand jury proceeding—through its secrecy—have the effect of saving reputations? There can be no doubt that in many cases in the past it has done so. A moment's consideration will show, however, that under present conditions at least, it can accomplish little in that respect.

In the first place it must be remembered that most of the cases considered by the grand jury are ones in which arrests already have been made, preliminary hearings have been held, and prisoners held in jail or released on bail. In such cases, of course, secrecy of subsequent proceedings can be of no benefit and may actually result in more harm than would be the case if the accused were given speedy trials. In the second place, it is unfortunately the fact that grand jury proceedings are frequently far from secret. Of course the law prohibits any person from

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46 "No case is tried nor is any sentence imposed unless there is an indictment by the grand jury. This is true of those cases in which a preliminary examination has been held by the Municipal Court, as well as those which are first instituted in the grand jury. The latter class of cases forms between 9 and 10 per cent of the whole. In over 90 per cent of the cases therefore, two preliminary examinations are held, one in the Municipal Court in the presence of the accused, and the second in the grand jury room without the presence of the accused." Alfred Bettman in Crim. Justice in Cleveland, 175. See also, 5 Irish L. Times 83, and 156 Law Times 64.

47 8 Crim. L. Mag. 721.

An example from my own experience will also illustrate this fact. A case was presented by the administrator of an estate to two successive grand juries, charging one who had presented a claim against the estate, with having forged the name of the decedent to the promissory note upon which the claim was founded. The grand jury each time refused to return an indictment. Within two or three days after each session the man against whom the charge had been made reported to me the fact that charges had been made against him, and stated the evidence which had been presented to the grand jury. He had not been called before either jury and could have heard of the proceedings only through illegal "leakage" from the grand jury room. R. J. M.

Excerpt from letter of John Swendiman, Jr., county attorney of Dodge county, Minn., Feb. 2, 1922: "Again in presenting your evidence to a grand jury, there is always the possibility of your evidence leaking out and getting to the defendant, so that if he has no bona fide defense, he is sure to have one when tried."

Excerpt from letter of George T. Olsen, county attorney of Nicollet county, Minn., Jan. 30, 1922: "In the ordinary case an investigation before the grand jury very often discloses by the presence of witnesses and the fact that strict secrecy of the proceedings before the grand jury cannot be maintained, matters which often would be of benefit to the state if the investigation was not conducted."

Excerpt from letter of Reuben G. Thoreen, county attorney of Washington county, Minn., Feb. 1, 1922: "I have had occasion to conduct grand jury investigations where the evidence has been insufficient to indict, but the fact that the grand jury was investigating the matter has had the
divulging what takes place in the jury room, but it is an amazing fact that in some communities, newspapers usually know just about what is going on and frequently keep their readers advised as to what cases are under consideration at a particular time.

In any event, it is very doubtful if the secret proceeding is of much value as a reputation protector, for the accused is not heard in the proceeding and as a rule only one side of the case is presented. This makes it possible for spite cases to get a hearing and to form the basis of nasty rumors, or even of extortion, although no indictment ever be found. Under the old desired result in putting a stop to the practices complained of, even though no prosecution has resulted."


“The grand jury have nothing to do with the defence (2 Hale, 157) and are not entitled to hear the evidence of the defendant's witnesses, nor of the defendant himself under the Criminal Evidence Act, 1898, 61-62 Vict. c. 36; Queen v. Rhodes, [1899] 1 Q. B. 77, 68 L. J. Q. B. 83.” Archbold's Crim. Pleading Evidence and Prac. 26th Ed., 76. See also, 72 Justice of the Peace 50; 4 Jour. Am. Jud. Soc. 78.

Excerpt from letter of John Swendiman, Jr., county attorney of Dodge county, Minn., Feb. 2, 1922: “In the ordinary criminal case the grand jury gets but one side of the case, so that as far as a defendant is concerned, his rights are not preserved any better by having his case passed upon by the grand jury, as I do not believe that a county attorney generally would prosecute a case unless he felt that the facts and circumstances justified it.”

[51] Excerpt from letter of J. S. Utley, Attorney General of Arkansas, Dec. 22, 1921: “... generally the grand jury hears only one side of the cases and many indictments that cannot stand the test of trial are returned; and lots of spite prosecutions are instituted that would never occur otherwise than behind closed doors.” See also, Schultz v. Strauss, (1906) 127 Wis. 325, 106 N. W. 1066; 15 Yale L. Jour. 178, 182, 183; 63 Cent. L. Jour. 67.

“In that year, [1859] it was provided by 22 & 23 Vic. c. 17, that no person should indict another for perjury, subornation of perjury, conspiracy, obtaining money by false pretences, keeping a gambling house, keeping a disorderly house, or any indecent assault, unless he is permitted to do so by a judge or the attorney or solicitor general, or unless he is bound over to prosecute by a magistrate. These provisions were extended to libels by 44 & 45 Vic. c. 60, s. 6. It is impossible to give any reason why the limitation so imposed on a dangerous right should not be carried much further, indeed it obviously ought to be imposed on all accusations whatever. It is a monstrous absurdity that an indictment may be brought against a man secretly and without notice for taking a false oath or committing forgery but not for perjury; for cheating but not for obtaining money by false pretences; and for any crime involving indecency or immorality except the three above specified, namely, keeping gambling houses, keeping disorderly houses, and indecent assaults. There are many such offences (rape, for instance, and abduction) which are quite as
INFORMATIONS OR INDICTMENTS

rule prohibiting any person from revealing testimony given before the grand jury for any purpose, there was nothing to prevent rampant perjury, and the enactment of statutes permitting prosecutions for perjury committed before grand juries, indicates the extent of an evil which has no doubt been considerably limited in later years.\(^2\)

It is insisted by some that secret grand jury hearings are more productive of real facts than in the case with either the preliminary examination or private investigation by the prosecuting attorneys. Here again it should be noted that in the great majority of cases the evidence is collected and the "case" for the prosecution "made" by the police department before either the grand jury or the prosecuting attorney knows anything about it. This is as it should be, and much of the work which remains to be done in improving the evidence-getting branch of law enforcement must be accomplished by improving the quality and training of the police. But conceding that in some mystery cases and in some cases of systematic law violation, a special type of investigation is necessary; it is hard to imagine a situation in which the grand jury can be of any real assistance. It cannot employ detectives and set about trapping criminals.\(^5\)

Whenever that is done, ostensibly by a grand jury, it is in reality under the direction of a prosecuting attorney. An investigator with twenty-three masters living all about the neighborhood in which he was working would be "in a bad way." Conceding that, in some cases, the witnesses are so fearful that they are likely to be made the subject of vexatious indictments intended to extort money. The criminal code commissioners of 1878-9 recommended that this act should be applied to all indictments whatever, and that the power of secret accusation, which came into existence only by an accident, should be altogether taken away."\(^1\)


\(^2\)Minn., G. S. 1913, secs. 9124, 9125. The prosecuting witness may be asked on cross-examination, for purposes of impeachment, as to his testimony previously given before the grand jury. State v. Trocke, (1914) 127 Minn. 485, 149 N. W. 944.

The language of the decision in the case of State v. Erinster, (1920) 147 Minn. 81, 86, 179 N. W. 640 indicates that even today in Minnesota, it is not certain that the testimony of grand jurors is admissible to "prove the facts in respect to any ground upon which defendant is given the right to move to quash an indictment . . .," although the court concedes that "it may well be that often the right is barren, unless the testimony of the grand jurors may be received." See also, Minn., G. S. 1913, secs. 9123, 9128, 8590; Loveland v. Cooley, (1894) 59 Minn. 259, 61 N. W. 138; State v. Beebe, (1871) 17 Minn. 241; Burns v. Holt, (1917) 138 Minn. 165, 164 N. W. 590; 30 Yale L. Jour. 421.

\(^5\)Burns v. Holt, (1917) 138 Minn. 165, 164 N. W. 590; 7 MINNESOTA LAW REVIEW 59.
afraid to tell what they know to the prosecuting attorney, or in an open preliminary hearing, what can it accomplish to have them tell it to the grand jury? The trial is to follow and then if the witness is of the fearful variety, the case fails. Better have it fail if it must before it comes to trial. The curse of the prosecutor's life is the man who "wants the law," but who insists "my name must be kept out of it." Conceding that the case is one in which the witness is so hostile that he will not tell the prosecuting attorney what he knows, then what is gained by forcing him to testify before the grand jury? He could be forced equally well to testify at a preliminary hearing. If it be answered that the prosecuting attorney does not wish to have the defendant know about the evidence, especially if he is not yet under arrest, the obvious answer is, if a hostile witness is forced to testify before a grand jury, he will tell the defendant about it anyway.

It seems a little inconsistent to insist that the secret grand jury proceeding is desirable because it protects reputations; and then in the same breath, to urge its continuance because it makes possible the building of a case against the defendant which will be a surprise and which he will not be able to meet. The desire of the prosecutor to avoid revealing his case until the time of trial is no doubt caused by the feeling that the defendant has an unfair advantage in that very respect, because he does not have to reveal his defense, until the state has put in all its evidence.

In this connection it has been suggested by some persons that the substituting of the information for the indictment should be accompanied by provision for some form of secret investigation. Thus, it has been urged that the prosecutor himself should be allowed to subpoena witnesses and examine them under oath, or that he should be permitted to examine them before a court commissioner. These suggestions are no doubt the result of long experience with secret investigations which have been assumed to be a necessary part of the building up of the state's case. Such methods of securing evidence have not been found necessary in states where the information is used as an alternative

54See notes 58, 59, 60.
55Sometimes it is impossible to procure evidence even by this method. The point is well illustrated by the case of Ex parte Jackson, (Tex. 1923) 253 S. W. 287, where the witness who refused to answer questions, was committed to jail for contempt "until he is [was] willing to testify;" and following the adjournment of the grand jury was released on a writ of habeas corpus. See also, Ex parte Rowe, (1857) 7 Cal. 184 and United States v. Collins, (1906) 146 Fed. 553.
It is possible in most cases for the prosecutor to call in the witnesses and to take their statements informally. If the witness is hostile or unwilling then he can be subpoenaed to appear before the magistrate at the preliminary hearing. In fact, that is the very purpose of the preliminary hearing. If it be urged that the defendant is warned of the evidence which the state has gathered, it can be truly said that in most cases he knows all about it anyway. There is a substantial advantage too in the examination before the committing magistrate: a record of evidence is made which can be used on the trial in case the witness has died or disappeared or in case he changes his testimony. This

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56 It is interesting to note in this connection that grand juries and indictments have never been known in Scotland except in the case of prosecution for treason; in which instance they were adopted as a part of an effort to assimilate the English law relating to high treason. 140 Law Times 415.

57 This was my own experience and that of many prosecutors with whom I have talked. R. J. M.

Even the person accused is usually willing to come in and talk the matter over. The following form suggests the method used by the district attorney of San Francisco, California:

**OFFICE OF THE DISTRICT ATTORNEY**

**Warrant and Bond Department**

**Hall of Justice**

No. 55

San Francisco .................................................. 192

M.................................................................

Dear .........................................................

Kindly call at this office on the ............................... day of ........................... 192........, at ............. o'clock, ............ M., relative to a complaint which has been made against you by .................................................................

It is the direction of the District Attorney that you be given an opportunity to present the facts as you understand them before final action is taken. In this way no injustice will be done to either party.

In the event you do not appear at said time, we shall assume that the facts as stated by complainant are correct.

.................................................................

Warrant and Bond Clerk


"The greatest advantage to the state lies in the fact that the People's witnesses are questioned and put on record while their memories are still fresh and before they have been reached by the accused." 4 Jour. of Am. Jud. Soc. 79.

State v. Schomaker, (1921) 149 Minn. 141, 182 N. W. 957; Bunkers v. Peters, (1913) 122 Minn. 130, 141 N. W. 1118; 4 Jour. of Am. Jud. Soc. 79.

This is not always true and in such cases of course the result is frequently equally as disastrous as in the case of the grand jury hearing. See the following statement by Roscoe Pound which probably refers both to preliminary hearings before magistrates and to hearings before grand juries:

"Nor is it strange that perjury is rife and prosecution ineffective when there is no stenographic report of the testimony in preliminary examinations. Under such circumstances the testimony at the trial may vary from
is not true of a grand jury hearing, nor of a deposition, nor would it be true of a secret hearing of any kind, for the very thing which makes it admissible when taken at a preliminary hearing is the fact that the defendant was faced by the witnesses against him and that he had an opportunity to cross-examine them. It is not necessary for a prosecuting attorney to reveal all of his evidence at a preliminary hearing; in fact, all that he is required to do is to make a prima facie case, and he can hold back any evidence which good generalship seems to require.

It is doubtful if the state reveals its case as much in a preliminary hearing where it is required to show only that "there is probable cause to believe the prisoner to be guilty," as it does in a grand jury hearing where it is required to prove its case to the same degree of certainty as would be required to convince a trial jury of the guilt of the defendant. It is certain that the indictment, carrying as it does the names of the state's witnesses, exposes them to corruption or harm far more than does the information which carries the names of no witnesses, especially where only one or two witnesses have been examined at the preliminary hearing. What should be sought for at this point, is a closer approach to the forming of real issues on the merits as in civil cases, rather than preserving age-old smoke-screens for either side.

that at the preliminary examination without any check, and there is not sufficient material available for preparation on the part of the trial prosecutor. Nor is any indubitable proof at hand upon which to prosecute for perjury. Crim. Justice in Cleveland, 621.


60See note 35.

61Minn., constitution art. 1, sec. 6; 16 C. J. 757; Minn., G. S. 1913, sec. 9081.

62Minn., G. S. 1913, sec. 9084.

63Minn., G. S. 1913, sec. 9118.

64Minn., G. S. 1913, sec. 9132.

65"In an information under G. S. 1913, sec. 9159 et seq., neither the constitution nor the statute requires the indorsement thereon of the words 'a true bill,' nor is it necessary to insert the names of the witnesses." State v. Workman, (Minn. 1923) 195 N. W. 776.

66See 53 Solicitor's Jour. 208; Letter of Judge Edward Freeman, 8 MINNESOTA LAW REVIEW 357; 49 Am. Law Reg. 191; The Function of Criminal Pleading, 12 Jour. of Crim. Law 500.

"In the first place then, the institution is useless; it has been so about these two hundred and fifty years. The defendant has been already sub-
If the defendant has a good defense which it requires evidence to prove and which he is willing to reveal in order to prevent the filing of either an indictment or an information, then the preliminary hearing offers an opportunity for him to do so. He can appear with counsel; he can face the witnesses against him; he can cross-examine them; and he can introduce evidence in his own behalf. On a proper showing the magistrate will dismiss the case and the prosecuting attorney is frequently glad to move for the dismissal. If on the other hand, in order to protect the defendant's reputation, he is not arrested, no preliminary is held; only one side of the case is presented to the grand jury, and an unfounded indictment returned; then the defendant must bring pressure to bear on the prosecuting attorney to procure a nolle prosequi or a dismissal, or else stand trial. In which case is the most harm done?

The contention that a grand jury is necessary as an independent body for the purpose of initiating prosecutions is equally without foundation. Several hundred years ago the contention was no doubt sound. In those days there was no organized police force, no county attorney, no adequate system for intercommunication of news. The grand jury then, no doubt, rendered an invaluable service in bringing in news of crimes which would otherwise never have been called to the attention of any constituted authority. In those days too, when such officers as there were, represented the king, and not the people, the grand jury acted as a real buffer between the two. Today these conditions do not exist. It is practically impossible now that the members of the grand jury should know more or even as much as the police department and the prosecuting attorney about crimes which have been committed. The unofficial service provided by the newspapers in revealing the commission of every human indiscretion is jected to the vexation from which he was thus to be preserved. From the middle of the sixteenth century, the examinations above described [preliminary hearings before magistrates] have taken place.

"In the next place it is mischievous. It is so in no small degree. One of the great boasts, as well as one of the greatest merits of English procedure is its publicity. This security, it has been seen, is sacrificed; sacrificed, and so continues to be after the object for which the sacrifice was made is gone. The consequence is an unlimited domination to popular prejudice; to party, if not personal interest and affection; to false humanity; to caprice under all its inscrutable modifications." 3 Bentham, Rationale of Judicial Evidence, chap. xv. sec. ii.

67 As a matter of practice many cases are disposed of in the office of the prosecutor on a proper showing by the defendant, without a preliminary examination. R. J. M.

68 1 Solicitor's Jour. 326.
—criminal or otherwise—is enough in itself to alter the entire situation. Add to that the fact that reports of crime are going in every hour, by telegraph, by telephone, by mail, by word of mouth, to those officers whose business it is to investigate such things, and it becomes obvious that the initiation of prosecutions cannot wait on the occasional, cumbersome meetings of a grand jury. What was once a necessary agency is now in fact a retarding agency.\(^9\) The very fact that grand juries are not allowed to employ detectives to carry on investigations,\(^7\) that they are in practice confined almost entirely to hearing evidence and passing on cases presented to them,\(^7\) shows that the change in their status is well and generally recognized. The fact that grand juries do no longer initiate prosecutions except as cases are presented to them is evidenced by the testimony of the prosecuting attorneys who work with them.\(^7\)

The contention that too great a responsibility is placed upon the prosecuting attorney when he is required to decide whether or not a person shall be charged with the commission of a crime, comes oddly enough, often from prosecuting attorneys themselves, and from those who have practised in states where prosecution is upon information.

\(^9\) See 1921 Minn. State Bar Ass'n Report 106; 37 N. J. Law Jour. 97; Crim. Justice in Cleveland, 515 et seq.

\(^7\) No grand jury can hear twenty to thirty cases a day as is often done in Hennepin county and have the action taken in these cases be anything more than perfunctory.” Paul J. Thompson, 6 MINNESOTA LAW REVIEW 616.

\(^7\) “No grand jury can hear twenty to thirty cases a day as is often done in Hennepin county and have the action taken in these cases be anything more than perfunctory.” Paul J. Thompson, 6 MINNESOTA LAW REVIEW 616.

\(^7\) Excerpt from letter of Henry M. Gallagher, county attorney of Waseca county, Minn., Jan. 30, 1922: “In the four years that I have acted as county attorney, I do not recall a single matter being brought to the attention of the grand jury by any member of the jury, and as I understand it, that was originally one of the purposes of a grand jury,—the bringing together of persons from all parts of the county who might be familiar with crimes committed in their respective sections of the county, but under modern times that feature of the usefulness of the grand jury is eliminated.”

Excerpt from letter of Geo. T. Olsen, county attorney of Nicollet county, Minn., Jan. 30, 1922: “In the ordinary criminal case the information to be submitted to the grand jury is simply the testimony of witnesses having some knowledge of the facts tending to show the commission of the crime. The testimony to be given or the facts to be brought out are usually, and I think in all cases should be, very well known to the county attorney.

“From my experience I have found exceedingly few instances where an investigation before the grand jury brought out anything new. The work of the grand jury therefore is not of any particular value as an investigating body, and a lot of time and expense is consumed which does not result in anything practical so far as the state is concerned.”

See also an article by Paul J. Thompson in 6 MINNESOTA LAW REVIEW 615, and another in 8 Crim. Law Mag. 711.
is the rule, this objection is not heard. It must be remembered that generally before an information is filed, a preliminary examination has been held before a committing magistrate, who must first have exercised his judgment on the subject.\textsuperscript{73} It must be remembered too that unless the case be dismissed, the filing of the information is followed by pleas in abatement and in bar, which are designed to test its sufficiency as a pleading, and by a trial before a jury to determine the sufficiency of the facts which support it. After all, the filing of the information is in a large majority of cases hardly more than a ministerial act.

But it will be insisted that it is not alone the filing of the information which is important; that it is the guiding hand and brain of the prosecuting attorney which carries the prosecution along from beginning to end. And that is very true; but it is in most cases equally true, even when grand juries take part in the process. In most cases it is not true that much independent judgment is exercised by grand juries. In the short time which they have to consider the cases which are placed before them,\textsuperscript{74} and especially as they hear only one side of the evidence,\textsuperscript{75} they are practically forced to accept the judgment of the prosecuting attorney, consciously or unconsciously expressed.\textsuperscript{76} He is the

\textsuperscript{73}In some jurisdictions the preliminary hearing must precede the filing of the information; Minn., G. S. 1913, sec. 9161; State v. Keeney, (1922) 153 Minn. 153, 189 N. W. 1023; Cal. Penal Code, secs. 872, 809. In others, the prosecuting attorney may act regardless of the judgment of the magistrate. 31 C. J. 626.

\textsuperscript{74}In some, leave of the trial court must first be obtained before the information can be filed; In re Migratory Bird Treaty Act, (1922) 281 Fed. 546; 36 Harv. L. Rev. 204; 31 C. J. 626.

\textsuperscript{75}See note 50.

\textsuperscript{76}"Generally the grand jury does little more than rubber stamp the opinion of the prosecutor. It is almost exclusively dependent upon him for its knowledge of the law, and for its information on the facts; it is almost entirely dependent on his zeal and willingness." Alfred Bettman in Crim. Justice in Cleveland 212.

"The grand jury is in all routine matters entirely dependent upon the prosecutor. It indicts those whom he suggests should be indicted and it dismisses presentments against those whom he thinks should go free." 4 Jour. of Am. Jud. Soc. 79.

Excerpt from letter of Alphonso E. Kief, county attorney of Chippewa county, Minn., March 3, 1922: "I do not consider it necessary to call a grand jury in ordinary criminal cases, as it is generally the rule that if a county attorney considers he has sufficient evidence to proceed, he can secure indictment, and if not he can have the matter dismissed without filing an indictment."

Excerpt from letter of Oscar C. Ronken, county attorney of Olmsted county, Minn., Jan. 31, 1922: "My experience is that the grand jury will return an indictment or will not find one, according to the recommendation of the county attorney. Nothing whatever so far as I have
only person who is fully advised in advance, of the theory and merits of each case; usually he determines what witnesses shall be called before the grand jury; it is he who interprets the evidence given, applies the law, and in each case advises as to whether or not the evidence shows that a crime has been committed. Of course the relations existing between the grand jury and the prosecuting attorney may depend very largely on the type of man who is the attorney, and the type of men who make up the jury. If the jury is indifferent and the prosecuting attorney dominant, assured, and of recognized standing, the jury may never go outside of his program so far as their investigation of criminal cases is concerned. If he is a man of poor judgment, poor training, or indifferent standing in the community, or if he antagonizes the members of the grand jury, they may proceed almost independently of him. Under normal circumstances, the prosecuting attorney being well advised, and they comparatively speaking only novices, he will present each case, been able to observe is gained in these instances by having the matter taken before a grand jury."

Excerpt from letter of A. O. Sletvold, county attorney of Becker county, Minn., Jan. 31, 1922: "It is a pretty well recognized fact that grand juries usually indict upon the recommendation of the county attorney and would hardly return such an indictment without such recommendation, so that in most every case the action of the grand jury simply carries out the wishes of the county attorney."

"The argument involves the further fallacy that the district attorney is purely an administrative officer. 'A public prosecutor is a quasi judicial officer, retained by the police for the prosecution of persons accused of crime, in the exercise of a sound discretion to distinguish between the guilty and the innocent, between the certainly and the doubtfully guilty.' Wight v. Rindskopf, (1877) 43 Wis. 344, 354; Rock v. Ekern, (1916) 162 Wis. 291, 156 N. W. 197, L. R. A. 1916D 459." Ex parte Bentine, (Wis. 1923) 196 N. W. 213, 216.

Excerpt from letter of E. H. Elwin, county attorney of Wilkin county, Minn., Jan. 30, 1922: "I find that the average grand jury have no more knowledge with respect to the legal evidence necessary to make a criminal case or prosecution stand before a petit jury than a child. They are instructed by the court that they must consider only legal evidence, and yet know absolutely nothing about what is and what is not legal evidence, and must of course, take the advice of the county attorney on that matter.

"As a matter of fact they are absolutely helpless without the advice of the county attorney, and unless he sanctions their action, they really cannot return an indictment, and even if it should so order an indictment against the advice of the county attorney, there would be naught for him to do but to ask the court to dismiss it, showing his reasons and ground for so doing."

See note 78, and also 47 Can. L. Jour. 714.

"A body of twenty-four untrained laymen, who are responsible to no one, who know but little law and none of the rules of evidence." Wm. N. Gemmill, municipal court judge, Chicago, 4 Jour. of Crim. Law 698, 705.
followed by his own recommendation; or if it be a case in which he is not certain of his course, he may ask for their independent judgment. If the particular case is one in which for any reason the attorney wishes to avoid a decision he may call for the action of the grand jury without expressing his own opinion. In that event, he can explain to those who would embarrass him that it was the grand jury, and not he, who found the indictment.80

It has been suggested that for the very reason that the prosecuting attorney may wish to avoid offending any person, or particular persons in particular cases, or that he may be under obligations, social, political or financial, which make him a prejudiced party, he should not be given sole discretion to initiate criminal proceedings. It has been suggested further that he is more apt to respond to public hysteria and passion by filing informations in cases which have no merit. This argument must stand the shock of several very damaging answers. In the first place, the prosecuting attorney in most cases, and in some jurisdictions, in all cases, files no information until the case has first been presented in a public hearing to a magistrate and a commitment has been made by him.81 Magistrates are sometimes of a type who follow the suggestions of the prosecuting attorney, but as a rule they use their own judgment. Having heard the evidence presented in an open hearing with a chance for reply by the defendant, they are in a better position to judge of the real merits of the case than is a grand jury. Having had usually a good deal of experience in criminal cases, they are better qualified to decide in a particular case than is the grand jury. In the second place, the prosecuting attorney must always look forward to the searching white light of public trial. There he must stand sponsor for the case which he has initiated, and he is far more apt to feel responsible for its being a meritorious case than if it had been initiated by a grand jury. For both of the reasons given, it will be seen that there is not as much danger that prosecutions in unmeritorious cases will be initiated by the prosecuting attorney as by the grand jury, which if it rejects his counsel, is entirely unrestrained either by the judgment of another

80 Excerpt from letter of E. H. Elwin, (see note 78): "About the only favorable phase of the ordinary grand jury action, is that it affords a weak-kneed prosecutor a shield behind which to take refuge in case of any adverse criticism as to his action in taking up any criminal case, where public opinion is about evenly divided as to the policy of it."

81 See note 73.
official such as the magistrate, or by fear of future accountability through trial. For another reason the grand jury is more apt to present indictments in unmeritorious cases, namely, lack of experience in the practical business of prosecuting cases. As has been suggested heretofore, a large number of cases fall by the wayside because of the failure of interest of the prosecuting witness. There are certain types of cases in which this tendency is particularly noticeable. One example is the case of the overdraft on a bank account. Merchants, hotel men, recreation hall proprietors, and others engaged in serving a more or less transient custom are frequently victimized in this way. It is easy to secure an adjustment of the case, if a criminal prosecution is threatened. The prosecuting attorney has learned from sad experience that the man who brings in the "bad" check in the first instance, full of righteous indignation and only interested in securing proper punishment, may become a begging supplicant for the defendant, as soon as the amount of the check has been made good. This is true also of actions by innkeepers for unpaid room-rent and other instances of similar nature. It is true also of cases in which aggrieved wives are anxious to prosecute erring husbands. The prosecuting attorney has learned that if he insists in advance that he will not initiate proceedings in such a case unless the complaining party will agree to go through to trial and not attempt to compromise or compound the crime, many of them lose all interest in proceeding at all. Of course in such cases there is, technically, violation of the law. The grand jury is satisfied without more. The result is that the state is required to go to the expense of initiating a criminal proceeding merely to collect a private bill or to settle a family quarrel, and when the case comes to the prosecuting attorney he finds himself with no witnesses or with unwilling ones who do all that they can to prevent successful prosecution. These are practical matters of everyday familiarity to the prosecuting attorney, but new and unusual to each new grand jury.

82 District courts are without power to review the evidence submitted to the grand jury upon which the indictment was returned, to determine its sufficiency, existence or legality. State v. Chance, (N.M. 1924) 221 Pac. 183, and cases cited; State v. Ernstner, (1920) 147 Minn. 81, 179 N. W. 640.

83 Criminal Justice in Cleveland, 136, 137.

84 In this category also should be classified the well known "gold-digger" blackmailing cases. See for an example, State v. Jouppis, (1920) 147 Minn. 87, 179 N. W. 678.
It is hard to imagine a situation, in fact, where a prosecuting attorney of any training or judgment at all would be so apt to respond to public hysteria or to private importunity as would the grand jury. Of course it is possible that an unprincipled man might use the office for blackmailing purposes or allow it to be so used. In that case, however, his action would be attributable not to poor judgment, but to poor ethics or poor morals; and then would be presented an emergency situation, proper indeed for investigation by a grand jury; or for drastic action at the hands of the governor.

Is the situation the same with regard to the possibility of refusing to initiate meritorious cases? It is very often true that the prosecuting attorney, just as the prosecuting witness, is subjected to all manner of influences designed to stifle the prosecution of criminal cases. The banker, the minister, the political friend, the relative, are all frequent visitors to his office. But does the grand jury investigation in the particular case make any difference? If the prosecutor wishes to "hush up" a particular case he can neglect to bring it before the grand jury, or he can present it with insufficient evidence to justify a true bill.


87The easiest path to improper influence upon criminal justice is through the office of the public prosecutor, and there is much evidence that professional defenders of professional criminals and professional extortioners from occasional offenders in more than one American city understand this thoroughly. . . . There is no effective check upon him. The series of mitigating agencies (including the grand jury) which were introduced into our criminal justice under different conditions offer abundant opportunity to cover up his tracks, and the pressure of judicial business makes the common law check of judicial approval (of the nolle prosequi) when required, a perfunctory ceremony. The chief pressure upon him is political, and this sort of pressure is easily exerted by politician-criminal-law practitioners, as a means of defeating enforcement of the law." Roscoe Pound in Crim. Justice in Cleveland, 595, 596.


87If a prosecuting attorney wished to misuse the criminal process for or against some person, he would not be prevented from doing so
If it be said that in such a case the aggrieved person may take up the matter with individual members of the grand jury, and thus secure favorable consideration, it can be said with equal truth that the banker, the minister, et al., are also acquainted with individual members of the grand jury and can exert equal or greater pressure on them. by the action of the grand jury. It would be entirely possible for him to continue to present a case to succeeding grand juries until he found one which through ignorance or indifference was willing to do his bidding. It is a fact of very recent happening that grand juries were so used in the great state of Massachusetts. See in this connection, Attorney General v. Pelletier, (1922) 240 Mass. 264, 134 N. E. 407; Attorney General v. Tufts, (1921) 239 Mass. 458, 132 N. E. 322, The Menace of Lawlessness by J. Weston Allen, formerly Attorney General of Massachusetts, 48 Am. Bar Ass'n Rep. 617.


"For instance it is said out in Minnesota that the grand jury has gotten into the habit of framing so-called 'reports' which traduce citizens, instead of reporting by presentment or indictment, and that bribery of its members is commonly effected." 8 Law Notes (N.Y.) 447.

"Judge Woods thinks that the lodges and brotherhoods are an element that does not hesitate to interfere with the administration of justice in order to secure immunity to their members, and that grand jurors are subjected to a heavy pressure from these classes, and too often to the obstruction and perversion of justice." 11 Can. L. T. 279.

"So common and so successful was this tampering in the early part of the present century that the grand jury was called the 'first hope of the London thief.'" 7 Law Mag. and Rev. 4th series, 14.

"During the years 1845, 1846, 1847 and 1848, the Middlesex Grand Jury made at least ten written presentments expressive of their inutility as an intermediate tribunal, and of their being frequently made the means of frustrating the ends of justice; and in addition to those written presentments, many verbal ones, to the same effect were made by them. During the same period the grand juries at the central criminal court made many similar verbal presentments, and in July, 1848, they made a written presentment expressing a decided opinion that the grand jury was no longer required for the furtherance of the public welfare, but that its existence was absolutely obstructive of the ends of justice, and favorable to the extension of crime." 7 Law Mag. and Rev. 4th series, 21.

A similar report was made by the Hennepin county grand jury in 1922. See report of grand jury, April 26, 1922.

"Another weighty objection to the grand jury is this: there is no challenge such as there is to the petit jury. Persons related to, or closely connected with the prosecutor or the accused, may be on the grand jury personally or politically connected, as friend or antagonist, or persons who have a strong personal or pecuniary interest in the matter to be dealt with, or men who hold and have expressed strong opinions on the case. Such persons, everyone will say, ought not to be on the grand jury in the particular case. But how is it effectually to be guarded against? The finding of a grand jury is by the majority, but who can calculate upon the influence that may be exerted in a secret tribunal by one or two of its members, moved by prejudice or influenced by unworthy and evil motives? Nor is such a thing improbable of occurrence." 23 Irish L. T. 215.
After the matter has passed from the hands of the grand jury, assuming that an indictment has been found, then it becomes very largely a matter of discretion with the prosecuting attorney whether it shall ever actually go to trial. If there is any person interested in preventing prosecution, it is just as easy for him to visit the prosecutor after indictment as before, and every lawyer knows that many cases are disposed of in just that manner. It seems to be regarded as a matter of course in most places that quite a large percentage of indictments are of no merit, and every so often the calendar is cleared of large numbers of old cases by nolle pros. or by motion to dismiss. In some jurisdictions the prosecuting attorney is not even required to give reasons for so doing; in others he gives some such formal

"We knew of one case when 'John'—only that was not his name—had a friend on the grand jury and 'John' was accused of a peculiarly horrible and repulsive crime. The witnesses summoned by the commonwealth had been examined and 'John's' friend said: 'Let's send for John.' He was summoned by the sheriff, appeared, testified and 'not a true bill' returned. We were 'John's' counsel and had warned him he was in a 'parlous case.' We knew nothing of his friend, actually 'at court,' and heard the result of the grand jury's finding with absolute amazement, which faded away, however, when we heard of his appearance before the grand jury. We believe 'John' would have been acquitted on the ground of a 'reasonable doubt' and he was a plausible fellow. We remain yet in doubt as to whether his appearance was regular, but it is a doubt which we wish some wise criminal lawyer would solve for us."

1 Va. Law Reg. (N.S.) 229.

90See note 86.

91"Of one thousand felony arrests, 127 were disposed of by the police; 85 were 'nolled' or 'no-papered' by the police prosecutor; 143 were discharged, or dismissed, or found guilty of misdemeanors in municipal court; 139 were 'no-billed' by the grand jury; 107 were 'nolled' by the county prosecutor [in other words, of 1000 felony arrests, 506 indictments were found; of these, 239 pleaded guilty and 107, or 21 per cent were 'nolled.' R. J. M.]; 91 made an original plea of guilty; 148 changed the plea to guilty; 42 were variously disposed of; 118 came to trial." Reginald Heber Smith in Crim. Justice in Cleveland, 236. See also pp. 180-182, idem.

The following table indicates the extent to which the nolle prosequi is used in states where prosecution is upon indictment, and the motion for dismissal in states where prosecution is largely upon information. The figures are taken in each case from the latest available reports of the attorney generals of the respective states:

<table>
<thead>
<tr>
<th>State</th>
<th>Years</th>
<th>No. persons Dismissed or nolled</th>
<th>Percent- Process</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>1914-22</td>
<td>35,776 7,309</td>
<td>20% Information</td>
</tr>
<tr>
<td>Michigan</td>
<td>1922</td>
<td>106,161* 20,485</td>
<td>19% Information</td>
</tr>
<tr>
<td>Montana</td>
<td>1916-18</td>
<td>1,937 495</td>
<td>25% Information</td>
</tr>
<tr>
<td>Maine</td>
<td>1915-16</td>
<td>2,725 1,814</td>
<td>66% Indictment</td>
</tr>
<tr>
<td>Minnesota</td>
<td>1921-22</td>
<td>3,654 814</td>
<td>22% Indictment</td>
</tr>
<tr>
<td>Texas</td>
<td>1916-18</td>
<td>16,399 6,649</td>
<td>40% Indictment</td>
</tr>
</tbody>
</table>

*Felonies and misdemeanors.

92"The father of the girl seduced testified that he was the prosecutor in the seduction case, and that he had never consented that the indictment should be nol. prosed, nor had he authorized any one to enter a nolle
reason as that there is not sufficient evidence to justify the expense of a trial. Even if public opinion or the will of the court forces the case to trial there are several ways in which it can be manipulated so that no conviction can be secured. The case may be continued from time to time until the witnesses have disappeared, or until it has become old and stale so that no one longer insists on trial. Or in the last event, the case may be so

prosecuted. Evelyn Wing, the girl seduced, testified that she did not consent that the indictment be nolle prossed as did also the solicitor general. One of the associate counsel for the state also testified that he had no knowledge of a nolle pros. being entered until a term or two afterwards.

"Defendant's testimony disclosed that the original nolle prosequi was found among some old discarded indictments in the clerk's office, that the costs of the prosecution had been paid by a brother of defendant, and that the solicitor general had received his part thereof." Wing v. State, (Ga. 1923) 120 S. E. 437, 438.

"Criminal Law—Power of prosecuting attorney to enter a nolle prosequi. Respondent was judge of the municipal court of Chicago, and had about 400 cases for violation of the Sunday liquor law pending in his court, when the relator, the state's attorney of Cook county, proposed to enter a nolle prosequi in every one of the cases. The judge refused to allow this to be done, and the instant case was selected as a test case, the state's attorney filing a nolle prosequi and the judge refusing to enter it. Petition for mandamus commanding Judge Newcomer to enter of record this nolle prosequi was denied, on the ground that the power of the state's attorney to enter nolle prosequi was not absolute, but was subject to the consent of the court." People ex rel. Hoyne v. Newcomer, (1918) 284 Ill. 315, 120 N. E. 244.

"At common law, in England, the power to enter a nolle prosequi was lodged exclusively in the attorney general, Regina v. Dunn, (1843) Car. & Kir. 730, and it was absolute, Queen v. Allen, (1862) 1 B. & S. 850, 9 Cox C. C. 120, 5 L. T. 636. In the United States the prevailing rule is that the prosecuting officer has the same power in this regard as the attorney general in England. Lizotte v. Dloska, (1909) 200 Mass. 327, 86 N. E. 774; People v. District Court, (1897) 23 Colo. 466, 48 Pac. 300; 16 C. J. 434. But there are a few cases which support the rule of the principal case. Denham v. Robinson, (1913) 72 W. Va. 243, 77 S. E. 970, Ann. Cas. 1915D 997; State v. Moody, (1873) 69 N. C. 529.

In others it is held that the consent of the court is necessary for a nolle prosequi after the trial commences to the jury, State v. Roe, (1840) 12 Vt. 93; State v. Hickling, (1883) 45 N. J. L. 152. In some states the consent of the court is expressly required by statute, Statham v. State, (1871) 41 Ga. 507; People v. McLeod, (1841) 1 Hill (N.Y.) 377, 405."

17 Mich. L. Rev. 186, 187. See also, 4 Jour. of Crim. Law 703.

93Minn., G. S. 1913, sec. 9220.

94"Owing to the Judge's inability to act intelligently on such motions, they have become largely a matter of form only, the judge accepting the prosecutor's statement of the facts. In the rush of the day's business, it is nearly impossible for the judge to go fully into any case before granting the motion nolle prosequi. . . . In other cases, however, the prosecutor is presumably exercising his judgment on the merits, and this often results in the function of judge and jury being quietly exercised by an assistant prosecutor. Since these motions are usually made orally, and no court record of the reason is made, the lack of opportunity for judicial curiosity furnishes an easy mode of escape in many cases." Reginald Heber Smith in Crim. Justice in Cleveland, 328.
indifferently presented on trial that no conviction results. Of course such methods would not ordinarily be used. They are referred to merely to show that even under the grand jury and indictment system, final control of the case remains in the hands of the prosecuting attorney.

The foregoing summary of the powers of the prosecuting attorney in controlling prosecutions proves clearly enough that in the particular case a grand jury hearing is of no particular efficacy in guaranteeing a conviction. At the same time, however, it proves that such power, unlimited and unchecked would be an extremely vicious thing. There can be no question that the mere fact that there is or may be a grand jury has a very salutary effect upon the whole group of law enforcement officers. It may be fairly said that in most instances, one hundred per cent of all criminal cases which come to the attention of the law enforcement officers will be properly taken care of. It is equally true that once in a while, even a very conscientious officer may be tempted from one motive or another, to neglect his clear duty. If that officer knows that the case which he is tempted to neglect, may be called to the attention of a grand jury, he will think again, and very seriously, before he acts. Occasionally, it happens that the law enforcement officers may be active participants in crime or in shielding criminals. If such a situation existed and it were not possible to initiate prosecution except through the agency of the very men who were responsible for the crime itself, the community would be entirely unprotected. Again it should be repeated that these are very unusual situations, but unless some provision existed for calling a grand jury, such situations might multiply.

Excerpt from letter of Paul C. Cooper, county attorney of Martin county, Minn., Feb. 10, 1922: “In counties which have efficient officials, there is little need for a grand jury, but if we were to abolish the grand jury, we would find in many instances that careless, negligent, inactive, incompetent and dishonest officials would grow more inactive, incompetent and dishonest, and there would be no way in which to show them up, so that they could either be defeated or so criticized as to make them bestir themselves; . . .”

Letter from R. D. O’Brien, county attorney of Ramsey county, Minn., Jan. 31, 1922: “I am inclined to think that public officials, with the knowledge that the grand jury will investigate their offices practically every month during the year, probably conduct and pay more attention to their offices than otherwise would be given them if there was no check.”

See also in this connection, Report of the California Grand Jury on the Administration of Justice in that State, 29 Am. L. Rev. 590.

See notes 87 and 88.
It is equally true that the custom of calling grand juries has a salutary effect on the general public. It gives an opportunity for persons who feel that they have been aggrieved, to present their cases to an unbiased tribunal. If that body of twenty-three fellow citizens refuses to act, then the aggrieved person may still continue to feel aggrieved, but at least he knows that he has had a fair hearing. It operates also as a striking reminder to people on the border-line of criminality, that the work of crime prevention and punishment is constantly going on. It is equally as effective in its deterrent effect as is punishment itself.

It is apparent then, that whatever change be made in the method of initiating prosecutions in criminal cases, provision should be made for periodic meetings of the grand jury. In order that notorious public scandals may be properly investigated, espe-

97Excerpt from letter of E. H. Canfield, county attorney of Rock county, Minn., Jan. 30, 1922: "Sometimes too there is a condition of the public mind. It could be better satisfied by the action of a grand jury when it would be desirable that the county attorney should avoid assuming unreasonable responsibility. I have in mind a case of several years ago where there was a clamor for prosecution, and not a syllable of evidence to support it. After a thorough investigation by the grand jury, whenever possible a witness was permitted to testify. No indictment was found and the public were satisfied to some degree. Had a county attorney assumed the responsibility he would have been open to all sorts of charges."

Excerpt from letter of Paul C. Cooper, county attorney of Martin county, Minn., Feb. 10, 1922: "As a rule, men selected for grand jury service are some of the very best men in the county, and the fact that they get together in that body, being conscious of the oath that they take under the instructions of the court sobers them to their duty, and they go about their work feeling that grave responsibility rests upon them; and I think the discussions of matters pertaining to a better enforcement of our laws and the investigations had by the grand juries has a very salutary effect."

98Excerpt from letter of R. D. O'Brien, county attorney of Ramsey county, Minn., Jan. 31, 1922: "It is also a well known fact that when the grand jury is sitting in the large cities, those who are inclined to commit crimes, such as gambling, will refrain for fear of the action of the grand jury."

99An interesting example of this kind is to be found reported in 33 N. J. Law Jour. 277. In that case the members of a board of education and other public officials refused to testify before an investigating committee of the state senate regarding misuse of school funds. A grand jury was summoned for the purpose of investigating the matter.

Excerpt from an address delivered by Clarence F. Lea, then district attorney of Sonoma county, California, now member of Congress from California, before the convention of the state district attorneys' ass'n at Oakland, Calif., Feb. 20, 1915: "The fact that the state has been benefited by thus withdrawing many cases from the attention of the grand jury does not mean that the state would be benefited by withdrawing all cases from their consideration by the abolishment of the jury. Such a method [preliminary examination and information] of instituting a prosecution is ordinarily sufficient, but in some very important case such a method would be absolutely futile where the public interest of very
cially if the law enforcement officers themselves be involved therein, in order that the salutary effect of the institution itself may be preserved for its influence on incipient criminals, on the general public and on law enforcement officers themselves, any proposal must include a practicable plan by which a grand jury can be easily impaneled in emergency situations. It is equally apparent, however, that there is no necessity for frequent or prolonged sessions of the grand jury. It would be absurd to insist that in order to preserve the right of appeal, appeals must be taken in all cases. It is equally absurd to insist that whatever virtues may still be attached to the grand jury system, can be preserved only by requiring a grand jury hearing and an indictment in all felony cases.

It is not in any sense true that there must be a grand jury hearing in all cases in order to "sweeten the process of the law," or in order to secure "a balance wheel in the administration of justice." Such a contention overlooks the fact that no man can be convicted of a felony except upon a verdict of a trial jury. It is not necessary that there should be so many balance wheels or so much sweetening in such close juxtaposition. In a very large percentage of cases, it is a pure waste of time, money, and effort, sacrificing the interests of both the accused and the representatives of the state.

Just how often the grand jury should be called is a matter of policy depending upon differing conditions. In some jurisdictions it is the practice to call it once a year in regular sessions, and more often in special sessions, if the occasion demands. In other jurisdictions, it is the practice to call a grand jury only when it is needed, and frequently several years elapse between sessions.100

As to just how long each session should be, that too is a matter which can hardly be determined in advance. Certain it is

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100 See note 6.
that if the great bulk of criminal cases were going through on informations filed by the prosecuting attorney most grand jury sessions would be of brief duration. The case which goes to trial on information gets a hearing at the hands of a jury of the peers of the accused. The case which has been denied prosecution can be considered anew by the grand jury. To the extent that the grand jury is relieved of the tremendous burden of reviewing uncontested cases, to the same extent will it have more time and greater patience to consider on their merits cases which have been rejected by the prosecuting attorney, or extraordinary cases which he may not be able to unravel; as well as to perform the other functions imposed upon it by law.\(^{101}\)

\(^{101}\)One immediately practicable improvement is to eliminate unnecessary steps in prosecution. In state cases all the steps in the municipal court and the grand jury ought to be dispensed with, reserving the grand jury for those occasional situations where a special inquiry is necessary for some particular reason. The grand jury has been done away with in many jurisdictions and the matter is no longer one of conjecture or experiment. Only good results have followed from eliminating it as an every-day agency. . . . A practice which operates successfully in eighteen states need not be feared by the most conservative, and relief of prosecution from the burden of two preliminary investigations must strengthen the administration of criminal justice." Roscoe Pound in Crim. Justice in Cleveland, 633.