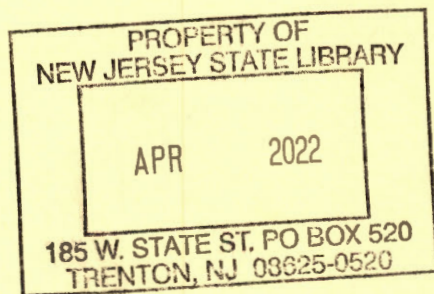


THE GRAND JURY: A BLUEPRINT FOR REFORM

NEW JERSEY SUPREME COURT  
CRIMINAL PRACTICE COMMITTEE

Joseph P. Lordi, Chairman



Submitted by the Subcommittee to Study the Grand Jury

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January 18, 1977

Re: COMMITTEE TO STUDY THE GRAND JURY

Dear Prosecutor:

On November 30, 1976, Prosecutor Champi formed a committee to evaluate our present grand jury system and to review possible alternative charging mechanisms. Pursuant to its mandate the committee met and surveyed constitutional and statutory provisions relating to the grand jury which are currently in force in other jurisdictions. In addition, we reviewed the studies of other organizations with respect to this subject. Prosecutor Champi has asked me to apprise you of the results of our review.

Our efforts are in keeping with those of other prestigious organizations, both governmental and private. In short, the grand jury system has been the source of much public concern. In 1971, the State Advisory Commission on Intergovernmental Relations proposed the elimination of the grand jury requirement except for special situations where the traditional investigatory functions were to be preserved.<sup>1</sup> Only recently, the National Advisory Commission on Criminal Justice Standards and Goals noted that "any benefits to be derived from a requirement that all offenses be charged by grand jury indictment are...outweighed by the probability that such a process will be ineffective as a screening device by the cost of the proceedings and by the procedural intricacies involved."<sup>2</sup> The Commission thus recommended that "grand jury indictment should not be required for initiation of any criminal proceeding."<sup>3</sup>

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1. Advisory Commission on Intergovernmental Relations, State-Local Relations in the Criminal Justice System, p.51 (1971).
  2. National Advisory Commission on Criminal Justice Standards And Goals, supra at 75.
  3. Ibid.

At present the New Jersey Bar Association's Special Committee to Study the Grand Jury and the Supreme Court's Criminal Practice Committee are reviewing proposals which if adopted, would greatly alter our system. On June 10, 1976, the Bar Association's Committee presented its tentative recommendations. In short, the Committee recommended adoption of a constitutional amendment authorizing initiation of criminal prosecutions by information. Under the proposal an extensive preliminary hearing would be required at which the defendant would have the right to cross-examine witnesses against him and to present evidence on his own behalf. Following a finding of "sufficient cause to proceed," the prosecutor could, in his discretion, file an information. The Bar Association did not suggest abolition of the grand jury. Its unique role in the criminal process was to be preserved. Discretion was to be conferred on the prosecutor as to whether a complaint would be presented to the grand jury or processed by way of information. Since the proposal calls for retention of the grand jury, various procedural reforms were also suggested. As noted, the Bar Associations's recommendations are merely tentative. The final report of the Association will probably be released next month.

A similar proposal is presently being considered by the Supreme Court's Criminal Practice Committee. Last year, a subcommittee of that organization issued a report recommending further study of a proposal which would permit prosecution by information. The full Committee is to issue its final report in April, 1977.

There is also some indication that the New Jersey Legislature intends to study our present system. A resolution was recently introduced in the Assembly by Assemblyman William Perkins recommending that a task force be established to study "abuses" of the grand jury's powers.

Other legislative initiatives deserve our attention. The Senate Judiciary Committee recently released Senate Bill No. 423. That bill directs the Chief Justice to appoint, on an experimental basis, attorneys to act as advisors to grand juries in one county of the first class and one county of the second class. Unfortunately, this bill is premised upon the erroneous assumption that the grand jury has become the mere "rubber stamp" of the prosecutor and does not exercise sufficient independent judgment.

As you know, the Attorney General opposes enactment of Senate Bill No. 423. We have taken steps to advise legislators of our views and to correct the fallacious impression that prosecutors commonly intrude upon the independence of

the grand jury. However, the studies and reports previously described are generally grounded on the view that the grand jury does not constitute an effective buffer between the State and one suspected of having committed a criminal offense. Our present system is frequently characterized as inefficient and cumbersome. Many commentators, including prosecutors, have claimed that the volume of matters required for grand jury presentation precludes careful consideration of each case. It has thus been charged that the sheer weight of statistics often denies the grand jury the opportunity to effectively examine potential criminal prosecutions.

Our present system also has its defenders. They argue that the grand jury properly fulfills its extraordinary dual obligations. "It both indicts persons whom the State seeks to prosecute, and protects citizens from inquisitional conduct on the part of government officials."<sup>4</sup> The grand jury's broad investigative powers, the need for secrecy in some instances, and its ability to process multi-defendant cases, all militate against abolishing the institution. Aside from these functional reasons for retaining the grand jury, it must be recognized that it also serves as a vehicle for citizen participation. The grand jury is consistent with the nature and goals of our democratic society. Commentators have asserted that it is essential in affirming public confidence in government. Finally, supporters of the grand jury system have questioned the ability of the judiciary to effectively screen criminal cases. They contend that judges are no more capable than grand juries in performing this important function. They argue that adoption of an adversarial preliminary hearing would be costly, unduly time consuming and would not result in any discernible public benefit.

Quite obviously, the effectiveness of the grand jury is a question upon which reasonable men can and do differ. Resolution of the issue depends upon whether one views the grand jury as consisting of twenty-three men of average intelligence or twenty-three men of average ignorance. At this posture, we have decided not to adopt a preference for prosecution by indictment or by information. Rather we stress the need for elimination of duplicative procedures. We see no reason for retention of our present system which requires dual probable cause findings by the municipal court judge and by the grand jury. We emphasize that adopting a system of prosecution by information will require in-depth empirical studies as to finances, efficiency and other important aspects of any elemental systematic alteration. In short, the feasibility of such a radical change must

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<sup>4</sup> See Committee on Criminal Courts, Law and Procedures; and the Committee on the Federal Courts, "Strengthening the Role of the Federal Grand Jury: Analysis and Recommendations," 29 Ass'n of the N.Y. Bar, Number 516 (May/June 1974).

involve studies within the expertise of other disciplines. We recommend that the probable cause hearing be abolished at least until such time as our Constitution is amended to permit prosecution by information.

I am enclosing a copy of my survey of constitutional and statutory provisions with respect to grand juries in other jurisdictions. I hope that this report will assist you in reviewing possible alternatives to our present system.

Very truly yours,



David S. Baime  
Chief, Appellate Section

DSB: ebs  
Encl.

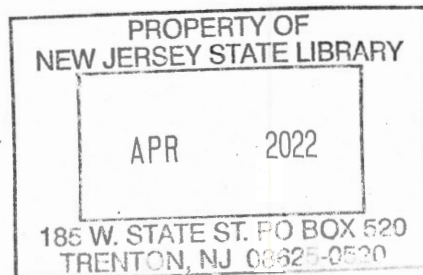


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## THE GRAND JURY

### I. INTRODUCTION

On April 18, 1975, the President of the New Jersey Bar Association formed a special committee to review this State's grand jury system. The articulated objective was to engage in a "comprehensive wide-range study of the grand jury" and to prepare recommendations "together ... with proposed legislation and rule changes." The efforts of the Bar Association were in keeping with those of other organizations, both governmental and private, which have initiated studies regarding grand jury reform. In short, the grand jury system has been the source of much concern and criticism throughout the country and in other nations. In 1933, Great Britain abolished the grand jury "when it became apparent that it had outlived its usefulness..."<sup>1</sup> In 1971, Edward Bennett Williams recommended similar action in the United States when he spoke before the National Conference on the Judiciary.<sup>2</sup> Shortly thereafter, the Advisory Commission on Intergovernmental Relations proposed the elimination of the grand jury requirement except for special situations where the traditional investigatory functions were to be preserved.<sup>3</sup> Only recently, the National Advisory Commission on Criminal Justice Standards and Goals noted that "any benefits to be derived from a requirement that all offenses be charged by grand jury indictment are ... outweighed by the probability that [such a] process will be

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1 Elliff, "Notes on the Abolition of the English Grand Jury," 20 J. Crim. L. and Criminology 3 (1968).

2 National Advisory Commission on Criminal Justice Standards and Goals, p. 75 (1973).

3 Advisory Commission on Intergovernmental Relations, State-Local Relations in the Criminal Justice System, p. 51 (1971).

ineffective as a screening device, by the cost of the proceedings,<sup>4</sup> and by the procedural intricacies involved." The Commission thus recommended that "grand jury indictment not be required for initiation of any criminal proceeding."<sup>5</sup>

Many commentators have questioned whether the grand jury is effective as a buffer between the State and one suspected of having committed a criminal offense.<sup>6</sup> It has been argued that the presentation of evidence is under prosecutorial control and the grand jury merely "agrees to the actions" of the state's attorney.<sup>7</sup> According to the National Committee on Criminal Justice Standards and Goals, "in most cities where the grand jury is used, it eliminates fewer than 20 percent

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4 National Advisory Commission on Criminal Justice Standards and Goals, supra at 75.

5 Ibid.

6 See, e.g. Boylan, "On Restructuring the Grand Jury System," 98 N.J.L.J. 473 (1975); Brogan, "Should the Grand Jury Be Abolished," 45 Kentucky L. Journal 151 (1956); Calkins, "Abolition of the Grand Jury Indictment in Illinois," U. of Ill.LF 423 (1966); Coates, "The Grand Jury, The Prosecutor's Puppet, Wasteful Nonsense of Criminal Jurisprudence," 33 Pennsylvania Bar Association Quarterly 311 (1962); Kaufman, "The Grand Jury - Its Role and Its Powers", 17 F.R.D. 331 (1955); Kuh, "The Grand Jury 'Presentment': Foul Blow or Fair Play?" 55 Colum. L.Rev. 1103 (1955); Scigiliano, "The Grand Jury, The Information and the Judicial Inquiry," 38 Or. 303 (1959) Whyte, "Is the Grand Jury Necessary," 45 Va. L.Rev. 461 (1959).

7 National Advisory Commission on Criminal Justice Standards and Goals, supra at 75.

of the cases it receives."<sup>8</sup> In Baltimore, Maryland, for example, statistics revealed that the grand jury returned indictments in 98.18 percent of those cases presented to it. In Cleveland, Ohio, only seven percent of the matters presented to the grand jury were "no billed"; in the District of Columbia, 20 percent, and in Philadelphia, Pennsylvania, two or three percent.<sup>9</sup>

Comparable statistics are not available in New Jersey. Although each county prosecutor maintains statistics with respect to the number of cases presented, "true billed" and "no billed", prosecutorial discretion makes it impossible to draw any valid conclusions. In Essex County, for example, each case is presented to the grand jury. Approximately, 40 percent are "no billed." In Mercer and Atlantic counties, a large percentage of cases are administratively terminated prior to the grand jury stage. Thus, the Mercer County grand jury "no bills" approximately ten percent of the matters presented to it, and the Atlantic County grand jury "no bills" approximately 20 percent.

Our present system also has its defenders. They argue that the grand jury properly fulfills its extraordinary dual obligations. "It both indicts persons whom the State seeks to prosecute, and protects citizens from inquisitional conduct on the part of government officials."<sup>11</sup> Moreover,

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8 Ibid.

9 Ibid.

10 See Note, "Prosecutorial Discretion," 1 Crim.Jus.Quar.146 (1973).

11 See Committee on Criminal Courts, Law and Procedures; and the Committee on the Federal Courts, "Strengthening the Role of the Federal Grand Jury: Analysis and Recommendations," 29 Ass'n of the N.Y. Bar, Number 516 (May/June 1974).

it provides a mechanism for active citizen participation in government. Finally, the grand jury insulates the criminal charging process from political considerations.

The object of this report is to review our present grand jury system within the perspective of its historical purposes and to examine the broad range of alternatives which exist in other jurisdictions. We will not make recommendations regarding possible reforms of the system at this time. That must await the outcome of the Bar Association's review. However, we will present a proposal which, if adopted, would provide an alternative to the present system which requires mandatory presentation of criminal matters to a grand jury. It is not our purpose to recommend adoption of this proposal at present. Rather, we suggest that our proposal be the subject of further study. In any event, assuming that our present system should be retained, we will suggest specific areas of study in which grand juries might be improved and strengthened.

## II. HISTORICAL BACKGROUND

### A. England.

Bodies similar to grand juries met in England as early as 997, when Ethelred ordered that twelve senior thegns were to act as the judicial committee of the hundred.<sup>12</sup> However, the authorities agree that these Anglo-Saxon committees probably did not evolve into modern grand juries.<sup>13</sup> Rather, the institution's foundations are Norman and not Anglo-Saxon.

Throughout Frankish Europe, sovereigns used proceedings called inquests to summon subjects before royal deputies to testify about any matters relevant to public administration,<sup>14</sup> including the commission of crimes. These inquests were derived from a Roman treasury (fiscus) proceeding called an "inquisitio."<sup>15</sup> When the Normans invaded France in the tenth century, they adapted the inquest to their own needs in controlling

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<sup>12</sup> 1 Holdsworth, A History of English Law (1922), p. 312. (hereinafter cited as Holdsworth); 1 Pollock and Maitland, The History of English Law Before the Time of Edward 1 (2d ed. 1952) p. 141; (hereinafter cited as Pollock and Maitland); Morse, "A Survey of the Grand Jury System," (Pt. 1). 10 Ore. L. Rev. 101, 104-05 (1931) (hereinafter cited as Morse). See Schwartz, "Demythologizing the Historic Role of the Grand Jury," 10 Am. Crim. L. Rev. 701, 703 (1972) (hereinafter cited as Schwartz). A source comparison indicates that Professor Morse drew largely from Pollock and Maitland and Holdsworth, with significant further researches. Morse's articles on grand juries are classic, and Schwartz's is an important step in historical reevaluation.

<sup>13</sup> Id.

<sup>14</sup> 2 Pollock and Maitland, note 1 supra at p. 642; Morse, note 1 supra at 104.

<sup>15</sup> Id.

the subject provinces of Normandy.

After William conquered England in 1066, he used a modified inquest procedure to compile the Domesday Book.<sup>17</sup> Four Norman knights were assigned to each local jurisdiction where they selected twelve Anglo-Saxon freemen to aid in assessing property for taxation. The King maintained royal control, as in the older inquest, with his deputies, but used local residents to overcome problems of language and unfamiliarity with the locales. Fines and other penalties for falsification further kept the inquests under royal control.<sup>18</sup>

These groups of neighbors were summoned from time to time to give true answers upon oath to various other administrative questions.<sup>19</sup> For example, the Grand Assize of 1139 provided that special juries were to determine rights to real property.<sup>20</sup> Four knights were to select twelve freemen, and if twelve of the sixteen could not agree more members were added until twelve could.<sup>21</sup> Simple arithmetic demonstrates that the maximum size of such a jury was 23. Since the variance was from 16 to 23, with 12 as a determinative majority, the basis

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1 Pollock and Maitland, note 1 supra at 141.

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2 Id. at 643. 2 Holdsworth, note 1 supra at 555 et seq. Morse, note 1 supra at 166; Note, "The Grand Jury as Investigatory Body," 74 Harv. L. Rev. 590 (1961).

18

2 Pollock and Maitland, note 1 supra, at 648.

19

Morse, note 1 supra at 106.

20

Id.

21

Id.

of the common law grand jury's size is evident. However, the criminal prosecution functions of the grand jury had not yet crystallized.

Anglo-Norman criminal law and procedure was a maze<sup>22</sup> of competing systems in the 11th and 12th centuries. There were public and private prosecutions, as well as royal, feudal, and ecclesiastical prosecutions. Detailed exposition of the various systems would prove overly lengthy and largely irrelevant. Their existence, however, reflects a diffusion of sovereign power and an ineffectual central royal authority.

Henry II sought to remedy the situation. He appointed<sup>23</sup> his friend Thomas Beckett, Chancellor and Archbishop of Canterbury. Despite St. Thomas' independence, for which Henry ultimately had him murdered, the King did extract various concessions of ecclesiastical legal authority to the secular system. Contemporaneously, Henry assaulted the legal bastions of feudal power. In 1166, he promulgated the Assize of Clarendon. That statute had two important effects. First, it brought the more serious felonies under exclusive royal jurisdiction. Second, it<sup>24</sup> established the modern grand jury.

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See generally Carter, A History of English Legal Institutions (4th ed. 1910), p. 206; Holdsworth, note 1 supra at 312 et seq. 3 id.; Morse, note 1 supra at 103-05.

23

E.g., Schwartz, note 1 supra at 703-05.

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Id.

The Assize provided that 12 men from each hundred, and 4 men from each vill, or township, upon oath, were to present persons suspected of crimes to the sheriff.<sup>25</sup> These grand juries did not hear witnesses.<sup>26</sup> Rather, they gave voice to the "common repute" of the locality.<sup>27</sup> The men of the vill presented to the men of the hundred and together they presented to the sheriff.<sup>28</sup> The presentment was an informal charge in two respects: 1) its substance was rumor and suspicion, and 2) its form was the lingua franca and not Latin. The latter formality was fulfilled by the King's prosecutor.<sup>29</sup> The former deficiency was remedied by the jury itself. Since its members had sworn only that the accused was suspect, by swearing out another oath, they were legally competent to sit as a petit jury, and the 12 men of the hundred so acted.<sup>30</sup> Nonetheless, there was much popular resentment of a system which permitted the accusers to judge, so within 100 years the grand and petit juries were made separate both in composition and function.<sup>31</sup> Returning to Henry's time,

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Id.

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See Carter, note 11 supra at 209; 2 Pollock and Maitland, note 1 supra at 642.

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Id.

28

E.g., 1 Holdsworth, note 1 supra at 321-22; Schwartz, note 1 supra at 706.

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See e.g., 1 Morse, note supra at 103-05.

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2 Pollock and Maitland, note 1 supra at 643-44.

31

See sources cited note 1, supra.

the Assize of Northampton, in 1176, further extended royal power and law by adding more crimes to the royal jurisdiction,<sup>32</sup> and therefore, to the grand jury's scope of general inquiry.

The end of Henry's reign marks the first reconsolidation of royal power since the conquest. Grand juries were of great importance in the consolidation, and their contemplated role was not to protect the subject, but to increase the royal power. There are recorded instances in the next centuries where grand juries did provide "protection," but there are real questions of whether the protection was justly given. Most notable, in 1249, grand juries in Wiltshire were "in league" with "outlaws and thieves," and the King's attorney-general could obtain no indictments there.<sup>33</sup> It is difficult to judge the propriety of "no true bills" returned seven hundred years ago, but the fact itself raises a recurring question. Namely, whether, and under what circumstances, a grand jury ought to protect from prosecution someone who has probably broken a law. It is somewhat easier to formulate an hypothesis applicable to absolute monarchies than for presumably free democracies.<sup>34</sup> Regardless, it must be remembered that recourse to grand juries as protectors of the people has historically proven inefficient. This is

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Morse, note 1 supra at 111; Schwartz, note 1 supra at 706.

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Pollock and Maitland, note 1 supra, at 655.

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But cf. e.g., 2 Tocqueville, Democracy in America (Vintage ed. 1945), pp. 12, 334-40 ("tyranny of the majority").

evident from a further exposition of English history and will be equally obvious from a similar examination of American history.

As English criminal procedure began to modernize in the 14th and 15th centuries, so too did the role of grand juries. However, another mode of modernization, or perhaps centralization, was the utilization of the information as an alternative method of criminal prosecution. There are varying views as to its utilization but it seems clear that Edward I (1272-1307) made use of informations.<sup>35</sup> They apparently fell into disuse until 1495, when Henry VII promulgated a statute which permitted murder to be prosecuted on information of his Council.<sup>36</sup> Misdemeanors then, more through usage than positive permission, likewise began to be prosecuted by information,<sup>37</sup> especially in Star Chamber and in "political" cases. A statute enacted in 1554 permitted prosecutions for felonies to proceed solely upon accusation followed by a judicial preliminary examination.<sup>38</sup> This, then, clearly represents the line of demarcation between pre-modern and truly modern criminal prosecutions. The procedure, though, was designed to give the English monarch many of the benefits inherent in the continental inquisitorial legal systems<sup>39</sup> and eventually fell into disrepute. The Puritans, nonetheless, did not abolish informations, as they did the Star

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<sup>35</sup> Morse, note 1 supra at 118-22; 9 Holdsworth, note 1 supra at 241 et seq.

<sup>36</sup> Id. See 4 Holdsworth, note 1 supra at 524.

<sup>37</sup> Id.

<sup>38</sup> 2 Ph. & Mary, c. 3§13 (1554) cited in 4 Holdsworth at 525.

Chamber, but regulated them.

Charles II and James II, during the Stuart Restoration, made great use of informations in political cases during their attempt to establish an absolute monarchy.<sup>41</sup> Concurrently, various events involving grand juries gave that institution its reputation as a protector of English liberties. In 1667, a court held for the first time that grand jurors could neither be fined nor imprisoned for failure to return a true bill which the King desired.<sup>42</sup> Then, in 1681, an overwhelmingly Whig London grand jury refused to indict John Colledge for seditious libel.<sup>43</sup> However, Charles II changed the venue to Oxfordshire, largely Tory, obtained a true bill, and had Colledge tried, convicted and executed.<sup>44</sup> Colledge's mentor, the Earl of Shaftesbury was also left unindicted by a London grand jury.<sup>45</sup> This time, however, Charles packed the Corporation of London's electoral board, thus assuring the selection of Tory Sheriff's who chose a Tory grand jury which then indicted Shaftesbury.<sup>46</sup>

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See sources cited notes 24 and 25 supra.

41

Id. See also e.g., Carswell, The Descent on England: A Study of the English Revolution of 1688 and Its Background, (1969).

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R. V. Wyndhym, 34 Eng. Rep. 684 (K.B. 1677).

43

Schwartz, note 1 supra, at 710-19.

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Id.

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Id.

46

Id.

Learning well from the fate of Colledge, the Earl fled the country. During the same period, informations were freely used where no indictments were returned, and still permissible coercive measures were used against recalcitrant grand juries.<sup>47</sup>

In 1683, a grand jury in Chaester presented several favorite royal officials without indicting them.<sup>48</sup> It is not entirely clear whether the royal prosecutor first refused to frame an indictment, but the grand jury nonetheless made public its presentment. Among the presented officials was Charles, Earl of Macclesfield, who sued the grand jurors for libel. Charles, Earl of Macclesfield v. John Starkey, Esq., et al., 10 How. St. Tr. 1330 (H.L. 1684). The Court's unanimous verdict for the grand jury consequently established the legality of the modern grand jury presentment or report. Shortly thereafter, in 1688, James II was deposed. William and Mary, the new monarchs, effected several procedural reforms, including, for the first time, granting subjects the right to see their indictments prior to trial.<sup>49</sup>

By this period in English history, American colonization was proceeding apace, so the examination of American criminal procedure his a next logical step. Prior to such examination, though, relevant English developments may be briefly summarized.

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Id. For a different view of these cases, see Antell, "The Modern Grand Jury: Benighted Supergovernment," 51 A.B.A.J. 153, 156 (1965).

48  
Kuh, "The Grand Jury Presentment: Foul Blow or Fair Play?" 55 Colum. L. Rev. 1103, 1109-10 (1955).

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7 & 8 Wm. III, c. 3 (1695).

The Eighteenth Century was a relatively static one, in terms of grand jury development. Criticisms, however, began to appear during the Nineteenth Century, notably those of Jeremy Bentham, focusing on the unrepresentative, largely upper and middle class composition of English grand juries. Various 19th century statutes diminished grand juries' powers. Further inroads were made during the early 20th century, especially the 1917 suspension of grand juries as a wartime economy measure. This measure was made permanent, and English grand juries were abolished in 1933.

B. America.

Grand juries were first empanelled in America as follows: Massachusetts Bay, 1634-35; Plymouth, 1635-36;

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Bentham, The Art of Packing Special Juries (1824).

51  
See generally Oliver, "The Grand Jury: An Effort to Get a Dragon Out of His Cave," 1974 Wash. U.L.Q. 166, 182-84.

52  
Id.

53  
Administration of Justice Act, 5 & 6 Geo. V, c. 36, §1 at 578-79 (1933).

54  
Younger, note supra at 6.

55  
Id. at 7.

Maryland, 1637;<sup>56</sup> Rhode Island, 1640;<sup>57</sup> Virginia, 1641;<sup>58</sup> Connecticut  
1643;<sup>59</sup> New Jersey, 1675;<sup>60</sup> Pennsylvania and Delaware, 1652;<sup>61</sup> and  
New York, 1683.<sup>62</sup> Grand juries also met in the Carolinas and Georgia  
shortly after English colonization.<sup>63</sup> Methods for selecting grand  
jurors varied from colony to colony, as did the requirements for  
juror qualification.<sup>64</sup> Aside from indictments, colonial grand  
juries returned presentments much earlier than did their English  
counterparts.<sup>65</sup>

The presentments covered a broad range of subjects, from  
towns' failures to keep proper weights and measures, to requests  
for various legislative activity.<sup>66</sup> In view of the lateness of  
British judicial affirmation of the right to present, the legal

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<sup>56</sup>  
Id. at 12.

<sup>57</sup>  
Id. at 8.

<sup>58</sup>  
Whyte, "Is The Grand Jury Necessary?" 45 Va.L.Rev. 461, 466 (1959)

<sup>59</sup>  
Younger, supra at 8.

<sup>60</sup>  
Id. at 13.

<sup>61</sup>  
Id. at 15.

<sup>62</sup>  
Id. at 14.

<sup>63</sup>  
Id. at 16-18.

<sup>64</sup>  
Id. at 5-26.

<sup>65</sup>  
Id.

<sup>66</sup>  
Id.

validity of these early presentments must be deemed questionable. The early presentments, nonetheless, were probably justified by necessity for at least three reasons.

First, it must be remembered that as late as the 17th century, formal indictments were still largely in Latin. Even when the indictments were written in English, the signature of a royal prosecutor was necessary to fulfill the requisite formalities. Royal prosecutors, though, were not always available in the "wilder-ness." They often rode circuit, and grand juries were in session seeking to return indictments when no royal prosecutor was present. Therefore, the presentments often were not indictments only in the formal sense, since they lacked the requisite formalities of either Latin or prosecutorial endorsement.

Second, as noted, the presentments were often concerned with matters involving public affairs. These were often forerunners of the modern presentment or report in that they called upon public officials to better administer their offices. A significant number, however, were directed not at public officials, but at the public-at-large for failure to tend to matters of public concern, such as bridge or highway repairs. In a relatively crude governmental system, where the responsibility for such matters was unexpressed, uncertain, or forgotten, grand jury presentments served as both citizens' complaints and, in a sense, investigative reporting as it exists today. Given low literacy rates, general exclusion of women and later slaves from the governmental process, and the relative informality of government, grand jury presentments filled a gap between the real state of

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See generally Id.

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See infra.

the commonweal and that as it might otherwise have been locally perceived.

Third, grand jury presentments provided a means for the colonists to communicate with their rulers in England. For example, in the 1730's, Georgia grand juries requested that their proprietors increase the size of land grants, and, also, that they legalize slavery.<sup>69</sup> South Carolina grand jurors, in 1741, actually presented as unjust a law which required that land forfeit<sup>70</sup> upon the owner's failure to pay the requisite quitrent. They were successful. Although this function of transatlantic communication was used less frequently than the addressing of local problems, grand jury presentments in this sense filled what would otherwise largely have been a void.

Grand juries, though, have primarily been instruments of criminal prosecution rather than custodians of public affairs. It is therefore necessary to return to the grand jury's criminal prosecution role. Colonial grand juries initiated prosecutions for the 18th century equivalents of modern "street crime," i.e., robbery, murder, etc.<sup>71</sup> However, the more spectacular prosecutions of the colonial period proceeded either without indictment or without the grand jury protecting against "injustice." Anne Hutchinson was simply summoned before

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69

Younger, supra at 22.

70

Id. at 24.

71

Id. at 5-26.

Court of Assistants in Massachusetts Bay in a civil  
trial in 1637.<sup>72</sup> The Quakers who travelled as missionaries to  
Massachusetts Bay during 1656-1665 were at first summarily  
exiled, without benefit of trial much less formal accusation.<sup>73</sup>  
Later arriving Quakers appear to have been tried at General  
Court in legislative trials.<sup>74</sup> Still others though, were presented  
by the Puritan grand juries, convicted and then punished.<sup>75</sup>  
In Virginia, Nathaniel Bacon's rebel followers were court-  
martialled, rather than being bound over to civilian process,  
as was the custom with rebels in the 17th century.<sup>76</sup> In the  
1690's, the Salem witchcraft defendants appear to have been  
given "probable cause hearings," but not indicted.<sup>77</sup> Finally,  
John Peter Zenger's 1720 prosecution for seditious libel

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72 Erikson, Wayward Puritans (1966) p. 92.

73 Id. 114-15.

74 Id. at 116-21.

75 Id. at 122.

76 Morison, The Oxford History of the American People, (1965),  
p. 115.

77 Erikson, note 61 supra at 715.

proceeded upon information, after two "no true bills" were  
78 returned. It is therefore clear that colonial grand juries  
were ineffectual, ignored, or shared complicitly in many  
prosecutions of, from a modern viewpoint, doubtful justice.

Furthermore, as noted, the information had early  
reached the American colonies. Despite various provincial  
efforts at curbing its use, royal prosecutors proceeded against  
colonists by information throughout the colonial period. 79 As  
with prosecutions by information in pre-Hanoverian England, the  
prosecutor and the people in America held and represented  
diametrically opposed views on the laws which were to be  
enforced. In America, the eventual result was, of course, the  
Revolution. Grand juries played a relatively important role in  
that era.

During the middle of the 18th century provincial grand  
juries regularly refused to indict fellow Americans for violations  
of the various British colonial acts, e.g., Navigation, Tea, etc. 80  
The English eventually responded by establishing admiralty courts

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Schwartz, note 1 supra 715.

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See Younger, supra at 25-26.

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Younger, supra at 27.

and transporting the suspected offenders to England.<sup>81</sup> The grand jury therefore became ineffective in protecting American patriots from prosecution. However, throughout the remainder of the Revolutionary period, grand juries became tools for the American cause. Perhaps most notably, a local grand jury indicted the British perpetrators of the "Boston massacre."<sup>82</sup> In view of the riot which preceded the "massacre", there can be little doubt of the grand jury's political motivation. About the same time, royal attorneys-general discovered an effective means of hampering grand jury actions by simply refusing to proceed with prosecutions upon the indictments.<sup>83</sup> Immediately before and during the War of Independence, grand juries played an active role in prosecuting royalist sympathizers.<sup>84</sup> After the War, grand juries continued to prosecute ex-tories, to an extent greater than conciliatory political leaders would have preferred.

By the 1789 ratification of the Constitution, grand juries were well established in the American system. Fear of the central government of course, led to the Bill of Rights and the Fifth Amendment's implied prohibition on prosecutions

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81

Id.

82

Id. at 29-30.

83

Id.

84

Id. at 32-40.

by information. Nonetheless, the federal grand jury became an effective tool for various executive administrations in attempting to stifle dissident factions. In this regard, the federal grand jury has an especially sorry history.

John Adams' federalists had no trouble in obtaining indictments under the Alien and Sedition Acts.<sup>85</sup> Then, Jefferson literally hounded Aaron Burr around the country, failing to obtain indictments against him in Louisiana and Tennessee,<sup>86</sup> finally succeeding in Virginia.<sup>87</sup> Federal grand juries likewise enforced the Fugitive Slave Act throughout the North prior to the Civil War.<sup>87</sup> After the War, federal grand juries in the South<sup>88</sup> were probably overzealous in prosecuting ex-confederates. Federal grand juries then took the lead in prosecuting socialists and anarchists.<sup>89</sup> More recently, federal grand juries were the key in the late 1960's and early 1970's in prosecuting black power and anti-war activities.<sup>90</sup> In the latter category, of 200 indictments returned, only 20 convictions, or 10%, were obtained, during a period when the general federal conviction rate was

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85  
Schwartz, note 1 supra at 718-27.

86  
Id. at 727-39.

87  
Id. at 739-48

88  
Younger note supra at 106-33.

89  
See generally Clark, note supra.

90  
Id. Schwartz, at 750 et seq.

much higher.

C. New Jersey.

New Jersey was originally divided into two colonial provinces, East and West Jersey.<sup>92</sup> As noted, the first grand jury was empanelled in 1676.<sup>93</sup> The earliest still extant records of grand juries dates from almost the same time. Burlington County's first recorded indictment was returned on June 14, 1680, charging theft.<sup>94</sup> Monmouth County's grand jury indicted 16 persons, in 1687, for violations of the Sabbath.<sup>95</sup> During this early colonial period, the prosecutor drew the bills of indictment and then sent them to the grand jury.<sup>96</sup> Also, court was held by proprietary commissioners, rather than by judges.<sup>97</sup>

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Clark. See generally, e.g., Younger at 82; Van Voorhis, "Note on the History in New York State of the Powers of Grand Juries," 26 Albany L. Rev. 1 (1962). Mar, "The California Grand Jury: Vestige of Aristocracy," 1 Pacific L. J. 36 (1970); Note, Evaluating the Grand Jury's Role in a Dual System of Prosecution: An Iowa Case Study, 54 Iowa L. Rev. 1354 (1972); Shannon, "The Grand Jury: True Tribunal of the People or Administrative Agency of the Prosecutor?" 2 N.M.L. Rev. 141 (1972).

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See generally, e.g., Ponfret, The Province of West New Jersey, 1609-1702 (1959); Ponfret, The Province of East New Jersey, 1609-1707 (1962).

93

Note supra.

94

The Burlington Court Book of West New Jersey, 1680-1709 (Reed and Miller, ed., 1944), p. 1.

95

Appelgate, Early Courts and Lawyers of Monmouth County (1911), p.14.

96

Id.

97

Burlington County Court Book, passim.

The nature of proprietary government and the infrequent presence of both prosecutors and commissioners, however, led<sup>98</sup> to great usage of presentments throughout the two provinces. These presentments included not only criminal offenses, but also, as in the other American colonies, matters of public<sup>99</sup> affairs. Moreover, New Jersey courts were empowered to levy taxes in 1694 and grand juries, as in earlier English history,<sup>100</sup> assessed the taxes. Additionally in 1700, the Burlington County grand jury went so far as to propose a head tax on<sup>101</sup> cattle and slaves which proposal the County Court accepted.

During this period, prosecutions by information were in common use. There appear to have been great abuses in the use of informations, and in 1713, the Provincial Assembly sought<sup>102</sup> to regulate them. The act provided that prosecutions by information could proceed only by order of the governor signed<sup>103</sup> in council. However,<sup>104</sup> criminal informations were not totally abolished until 1795. New Jersey's 1776 Constitution contained

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See generally, In re Camden County Grand Jury, 10 N.J. 26, 41-44 (1952).

99

Id.

100

Younger, note supra at 13.

101

Id. at 13-14.

102

Tanner, The Province of New Jersey, 1664-1738 (1967) pp. 465-67.

103

Id.

104

In re Camden County Grand Jury, note 88 supra at 37 citing Pattersons Laws, p. 172.

no prohibition on such prosecutions, and it was not until 1844  
that the State Constituton ordered indictment as the sole method  
of prosecution.<sup>105</sup>

Thus, the New Jersey grand jury, with but slight  
diminution of powers, has existed virtually in its present  
form for 300 years. As one of the original colonies, the revolu-  
tionary generation's fear of centralized power led to prohibition  
of prosecution by information at a relatively early date. Finally  
the investigative and presentment functions have remained almost  
unchanged since 1676.

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Id.

### III. A NATIONAL SURVEY: COMPARATIVE LAW ANALYSIS

This part of our report constitutes a survey of state laws concerning: 1) modes of initiating criminal prosecutions for offenses indictable under New Jersey law, and 2) the role of the grand jury in investigating official misconduct. Although the United States Constitution guarantees that no one be prosecuted by federal authorities for any "capital or otherwise infamous crime unless on a presentment or indictment of a grand jury,..."<sup>106</sup> That requirement has never been held binding on the states.<sup>107</sup> In lieu of indictment, due process requires only notice and pretrial magisterial determination of probable cause if the suspect's liberty is to be restrained.<sup>108</sup> The states have been, and remain, free to devise their own modes of prosecution. New Jersey, of course, adheres rather strictly to the ancient common law notion of a grand jury and its function.<sup>109</sup> As this report demonstrates, however, New Jersey is in the minority in this respect. Although no state has yet abolished

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<sup>106</sup> U.S. Const., Amend. V. E.g., Beck v. Washington, 369 U.S. 541 (1962). The amendment's protection, of course, does not apply to purely statutory offenses, i.e., mala prohibita, which may be prosecuted by information, libel, or any other form of accusatory instrument. See, e.g., Ocampo v. United States, 234 U.S. 91 (1914).

<sup>107</sup> E.g., Hurtado v. California, 110 U.S. 516 (1884). See Lem Woo v. Oregon, 229 U.S. 586 (1913).

<sup>108</sup> Gerstein v. Pugh, U.S. \_\_\_, 95 S.Ct. 854 (1975). The determination of probable cause need not be made in an adversarial contest. Id. at 856 n. 25.

<sup>109</sup> See generally R.D. Younger, The People's Panel: The Grand Jury in the United States, 1634-1941 (1963) (probably the best historical work on American Grand Juries). See also L.D. Clark, The Grand Jury: The Use and Abuse of Political Power (1975) (restricted to federal Grand Juries, excellent critique of investigative functions).

the grand jury as an institution, most permit formal accusation by prosecutors' informations.

Furthermore, no other state, except perhaps California, appears as deeply committed to the grand jury as a watchdog on public officials. Although many states require grand juries to investigate public officials and public institutions, only six provide their grand juries with statewide jurisdiction. Further, only New Jersey requires that its statewide grand jury sit continuously. Presumably, in the remaining states the grand jury's obligations are over, four states have abolished presentments or reports, while only five states specifically allow them. The following is an in-depth examination of the operating law governing the grand jury systems of the various states.

A. State Constitutional Requirements: Indictments and Informations

Twenty-one states, including New Jersey, have retained grand jury indictment as the only permissible mode of initiating felony prosecutions. Thirteen states constitutionally require that all indictable offenses be presented by grand jury indictment. Ala. Const., Art. I. §6; Alaska Const., Art. I., §8; Ark. Const., Art. II. §8; Del. Const., Art. I. §8; Hawaii Const., Art. I. §8; Ky. Const., Bill of Rts., §12; Me. Const., Art. I, §7; Miss. Const., Art. III, §27; N.Y.

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110 Excluding New Jersey.

Const., Art. I, §6; N.C. Const., Art. XXII; Ohio Const., Art. I, §16; S.C. Const., Art. I, §XI; W. Va. Const., Amend. V. Six other states, whose constitutions are silent concerning permissible methods of prosecution, have statutorily retained grand jury indictments for all offenses. Ga. Const., Art. 2405; Ga. Code Ann. §27-504; Mass. Const., Pt. I, Art. XII; Mass. Code, tit. 276, §4; N.H. Const., Pt. I, Art. 5; N.H. Rev. Stat. §601:1; Tex. Const. Art. I, §10; Tex. Code Crim. Pro., Art. I, §10; Tenn. Const., Art. I, §9; Tenn. Code Ann., §17-19-1; Va. Const., Art. I, §8; Va. Code Ann. §19.1-162. The Illinois Constitution explicitly permits the legislature to alter or regulate grand juries, but, to date, the Legislature has specifically declined. Ill. Const., Art. I, §7; Ill. Rev. Stat., tit. 38, §111-3.

In four states, grand jury indictments, limited to capital offenses, have been retained by statute or constitution. Conn. Const., Art. I, §8; Con. Gen. Stat. Ann., §54-46; Fla. Const., Art. I, §15 (a); Fla. Code Crim. Pro., §3.140 (a); Minn. Const., Art. I, §6; Minn. R. Crim. Pro., §17.01; R.I. Const., Art. I, §7.

Twenty-five states permit prosecution by information in all cases. Ten states constitutionally permit all offenses to be prosecuted by information or by indictment. Ariz. Const., Art. II, §30; Calif. Const., Art. I, §14; Idaho Const., Art. I, §8; La. Const., Art. I, §9; Mont. Const., Art. III, §8; Nev. Const., Art. I, §8; N.M. Const., Art. II, §14; Okla. Const., Art. II, §17; Utah Const., Art. I, §13. Seven state legislatures, pursuant to constitutional

permission, have established prosecution upon information. Colo. Const., Art. II, §8 effected in Colo. Rev. Stat. Ann., §16-5-201(a), (b); Iowa Const., Art. I, §11 as amended by Amendment No. 3, effected in Iowa Code, §769.1; Neb. Const., Art. I, §8, effected in N.D.R. Crim. Pro., 7(a); Wash. Const., Art. I, §25 effected in Wash. Code, §10.37.026; Wyo. Const., Art. I, §9 effected in Wyo. R. Crim. Pro. 9.

Additionally, eight other states, whose constitutions are silent as to the mode in which prosecutions may be commenced, judicially or legislatively permit informations. Ind. Const., Art. I, §13, supplemented by Ind. Code, §§9-903(d), 9-904; Kan. Const., Art. I, §10, supplemented by Kan. Stat. Ann., §22-3201; Md. Const., Art. 21, construed in Heath v. State, 85 A.2d 43 (Sup.Ct.Md. 1951); Mich. Const., Art. I, §20, supplemented by Mich. Code Ann., §§28-941, 28.942; Ore. Const., Art. I, §11, supplemented by Ore. Rev. Stat. Ann., §131.010; S.D. Const., Art. VI, §7, supplemented by S.D. Comp. L., §23-2-5; Vt. Const., ch. 1, Art. 10, supplemented by Vt. R. Crim. Pro., 7; Wisc. Const., Art. I, §7, supplemented by Wisc. Stat. Ann., §955.17. Finally, in 1973, Pennsylvania, by constitutional amendment, delegated to its Common Pleas courts the task of deciding whether or not prosecutions in each county are to be by indictment or information. Pa. Const., Art. I, §10.

In sum, of the 49 states studied, 29 permit non-capital felonies to be prosecuted by information. Twenty-four permit all offenses to be prosecuted by information. Only 21 states, including New Jersey, require indictments for all offenses.

B. Prosecution by Information: Providing a Substitute for the Grand Jury.

Theoretically, the grand jury's basic and most important function is to protect the citizenry from unfounded or malicious prosecutions. This function is corollary to the grand jury's power to either return an indictment or to reject a prosecution. However, commentators have frequently questioned whether the grand jury fulfills this ancient role or whether it is merely a prosecutorial "rubber stamp."<sup>111</sup> Nonetheless, the mere presence of a grand jury within our system of criminal procedure establishes a safeguard that otherwise might not be present. That is, the existence of a grand jury provides an additional procedural step that a prosecutor would otherwise omit.

Indeed, the mere existence of this additional step, and not that of the grand jury as an institution, may suffice to safeguard the rights of the accused and the integrity of the system.

However, just as there is no federal constitutional right to indictment, there is no federal right to a preliminary review of a prosecutor's decision to prosecute. Gerstein v. Pugh, supra,

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E.g., sources cited in note 4, supra. Antell, "The Modern Grand Jury: Benighted Supergovernment," 51 A.B.A.J. 153 (1965); Bouding, "The Federal Grand Jury," 61 Geo.L.J. 1 (1972); Moley, "The Initiation of Criminal Prosecutions by Indictment or Information," 29 Mich. L. Rev. 403 (1931) (one of the classic articles); Morse, "A Survey of the Grand Jury System," 10 Ore. L. Rev. (Pt.1) 107, (Pt.2) 217, (Pt.3) 295 (1931) (another classic); Shannon, "The Grand Jury: True Tribunal of the People or Administrative Agent of the Prosecutor?" 2 N.M.L. Rev. 141 (1972); Tigar & Levy, "The Grand Jury as the New Inquisition," 24 Mich. S.B.J. 693 (1971). Contra, e.g., Brown, "Ten Reasons Why the Grand Jury in New York Should Be Strengthened and Retained," 22 Record 471 (1967); Dession, "From Indictment to Information--Implications of the Shift," 42 Yale L.J. 163 (1932); Gaines, "Complaints, Informations and Grand Jury Indictments," 41 Chic. B. Rec. 456 (1960). See also Carp, "The Harris County Grand Jury--A Case Study," 12 Hous. L. Rev. 96 (1974) (social science analysis of grand jurors' self-perceptions).

95 S.Ct. at 865. The federal Constitution only requires that a determination of probable cause be made if a person's liberty is restrained prior to trial. Id. Unfortunately, it is not clear from Gerstein, supra, whether detention alone or any pretrial restriction involves such restraint.<sup>117</sup>

Regardless, virtually every state, including New Jersey, does provide for some form of preliminary examination at which the existence of probable cause is tested. Obviously, the potential impact of these hearings is greater in those jurisdictions not requiring a grand jury determination of probable cause.

In fact, the probable cause hearing may well be an ancillary benefit of systems which no longer require indictments. First, as a matter of convenience, and indeed logistics, for law enforcement personnel, the abolition of grand jury indictment would mean one less testimonial appearance. Second, for defense counsel, the hearing may provide an opportunity not only for discovery, but also for actual cross-examination of prosecution witnesses. Third, and perhaps most important, the probable cause hearing substitutes the deliberations of a neutral magistrate for those of a body as vulnerable to the passions of the times as the general community.<sup>112</sup> It must be remembered, though, that due process does not require that the probable cause hearing have any binding effect on a prosecutor's decision to prosecute. Gerstein, supra. However, as a matter of fairness, a system that substitutes the probable

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But cf. Hensley v. Municipal Court, 411 U.S. 345 (1973).

<sup>113</sup> See e.g., Clark, note 4, supra.

cause hearing for the grand jury indictment should give the former the same effect as the latter. In either case, if prosecution by information is to be permitted in New Jersey, then by necessity, the probable cause hearing will have to assume a more important role. Likewise, more definite rules must be established concerning the conduct and effect of such hearings. There are several possible rule formulations which might provide a better model for New Jersey hearings. The remainder of this section is devoted to a discussion of these procedural system.

1. California: An Adversarial Model.

California permits prosecution of all felonies to commence either by indictment or by information. Const., Art. I, §14; Penal Code §682. No information may be filed unless a magistrate has determined probable cause at a preliminary examination and has "held the defendant to answer" in a court of competent jurisdiction. At the outset, it should be noted that the preliminary examination may be waived. E.g., People v. Conner, 40 Cal. Rptr. 603 (Ct.App. 1964). Penal Code §872. Thus, the filing of an information completes the pre-arraignment process. Obviously, though, the process is initiated by arrest, and it is the arrest that provides the initial focus for the California system.

A police officer, immediately after arresting a person, either with or without warrant, must prepare a written complaint. Penal Code §§848, 872. That person must then be taken before a magistrate "without unnecessary delay." Penal Code §849(a). At this "initial appearance," the

magistrate must inform the defendant of the entire panoply of rights he is accorded, appoint counsel if the defendant is indigent, and fix bail if the offense is bailable. Penal Code §§850 to 858.

At this hearing, if counsel appears and the offense is a non-capital felony, the court must read the complaint, and may accept a guilty plea. Penal Code §859a. If a defendant pleads not guilty, counsel for both parties are to be given a "reasonable time," at least two days, to prepare for the actual preliminary examination. Penal Code §859b. Subpoenas are to be issued at the request of both parties. Id. Capital offenses may not be pleaded to without counsel. Penal Code §859c. If any defendant has appeared without counsel, the court must allow him two to five days to either retain counsel or to have counsel appointed. Penal Code §860.

No specific time is fixed for continuation of the proceedings, but it would appear that if a defendant required five days to procure counsel, and counsel were ready within the allotted two days, the preliminary hearing would be held one week from the date of the initial appearance. It should be noted that one weakness of this system is that although California grants counsel a minimum of two days for preparation, there is no maximum time limit other than that deemed "reasonable."

With regard to the procedure itself, once a date has been set, the examination "must be completed in one session, unless the magistrate, for good cause shown

by affidavit, postpones it." Penal Code §861. The examination may not be postponed for more than two days at a time nor more than a total of six days unless the defendant so moves or consents, Id. Defendant has the right to be present and to have the State's witnesses cross-examined in his presence. Penal Code §865. At the end of the State's case, the defendant's witnesses must be allowed to testify. Penal Code §866. If, after consultation with counsel, defendant elects to testify, he may. Penal Code §866.5.

The magistrate must then decide whether "sufficient cause" has been shown to hold defendant to answer in a court of competent jurisdiction. See Rogers v. Superior Court of Alameda County, 291 P. 2d 929 (Sup.Ct.Calif. 1956) ("sufficient cause" equivalent to "probable cause"). If no sufficient cause appears, then the court must discharge the defendant from custody. Penal Code §871. Otherwise, he must endorse the complaint and order that defendant be held to answer. Penal Code §872. Thereafter, the prosecutor has 15 days in which to file an information. Penal Code §739. These provisions provide the great advantage of an automatic nolle prosequi. Clearly the California system is generally set forth in explicit detail, and provides a model for other states in regard to

pre-arraignment procedure. The system is adversarial and substitutes the probable cause hearing for the grand jury indictment.

2. The Federal Rules of Criminal Procedure: Another Adversarial Model.

As noted, federal felonies may not be prosecuted except upon indictment. However, the Federal Rules of Criminal Procedure provide for preliminary examinations, albeit in less detail than California's Penal Code. Actually, the federal rules resemble California's provisions, but establish certain stricter time limits. As in California, a federal suspect must be taken before a magistrate without unnecessary delay. F.R. Crim. P. 5(a). Again, he is to be advised of his rights, and provision is to be made for obtaining counsel. F.R. Crim. P. 5(b). However, the preliminary examination must be held within 10 days of the initial appearance if the defendant is in custody and 20 days if he is not. F.R. Crim. P. 5(c). These time limits may be relaxed only if good cause is shown and if the defendant consents to the relaxation. Id.

At the preliminary examination, defendant may cross-examine the witnesses and may introduce evidence. F. R. Crim. P. 5.1(a). However, either party may introduce hearsay, if the magistrate finds that such evidence is

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Compare, e.g., Idaho Code §§19-501 et seq. and §§19-504 et seq.; Iowa Code Ann. §§754.1 to 769.17; Kan. Stat. Ann. §§22-2301 to 2303, 2901 to 2905. Me. R. Crim. Pro. 3,4,5; N.C. Gen. Stat. §§15A-601 et seq.; N.M. Rev. Stat. §§41-6-4 et seq.; Utah Code §77-15-1 et seq.; Wash. R. Crim. Pro. 2; Wisc. Stat. Ann. §954.01 to 955.18.

credible and that a proper foundation will be laid at trial. Id. Then the magistrate must determine probable cause and either discharge the defendant or hold him to answer. F.R. Crim. P. 5.1(c).

Clearly, the federal rules contain most of the same procedures as the California rules, but in capsule form. Also, the federal rules are more certain as to time requirements. Several states have adopted provisions similar to the federal procedures, perhaps because of the greater flexibility.<sup>115</sup> It must be remembered, however, that the federal rules are designed for a system in which most high-grade crimes are prosecuted on indictment and not on information.

3. The Model Code of Pre-Arrest Procedure (Tentative Draft No. 5, Alternative.

The American Law Institute is in the process of preparing a Model Code of Pre-Arrest Procedure. As the subsection heading indicates, it is still in the preliminary stages. Nonetheless, the Code is sufficiently complete to provide an alternative model for the purposes of this report. The Code resembles both the California and federal provisions, but is more explicit and certain than either. For purposes of description and clarity, it is presumed that the Code, in its entirety is already in

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<sup>115</sup> Compare, e.g., Ariz. R. Crim. Pro. R. 5.1 to 5.6; Colo. R. Crim. Pro. 7; Ind. R. Crim. Pro. 9-701 to 9-704; Mich. Rev. Stat. §§28.855 to 28.931; Minn. R. Crim. P. 5.01 to 5.03; Nev. Rev. Stat. §§171-186 to 171.196; Ore. Rev. Stat. §135.070 et seq.; Wyo. R. Crim. P. 7.

effect in some hypothetical jurisdiction.

A police officer must bring a defendant before a magistrate within 24 hours of arrest, either with or without a warrant. Model Code §310.1(1) (hereinafter cited as M.C.). At this time, the State must produce the warrant and supporting affidavits. M.C. §310.1 2 (a). If the arrest is without warrant, the State must produce an affidavit by the arresting officer or by a prosecuting official, setting forth the facts that led to the arrest. M.C. §310.1(2)(b). The magistrate is then to advise defendant of the nature of the proceeding and of his rights. M.C. §310.1(3), (4). The court must then adjourn the matter until defendant obtains counsel or counsel is appointed. M.C. §310.1(5). When a defendant either appears with counsel or waives representation, the court must permit him to make a statement, and in exceptional cases, to take evidence. M.C. §310.1(6). It must determine whether reasonable cause exists to believe that defendant has committed an offense. Id. The court must then proceed to fix bail. M. C. §310.1(7). Thereafter, an adjournment may be granted for either two days if the defendant is in custody or longer if he is not. M.C. §310.1(8). No further adjournments may be granted for more than two days. M.C. §310.2(1). At the adjourned session, defendant may present written and testimonial evidence. M.C. §310.2(2). The court may allow hearsay to be admitted if it is credible and a factual basis is shown. M.C. §310.4. The court must

again determine "reasonable cause." Id.

Then, the magistrate must advise defendant of his right to a preliminary hearing, and likewise, his right to waive it. M.C. §§310.5(1), (2). If defendant demands the hearing, it must be held within 10 days if he is in custody and within 30 days if he is not. M.C. §310.5(3). The filing of an information will not terminate the right to a hearing. M.C. §330.1. As for the hearing itself, an adjournment of up to one or two weeks may be granted, again depending upon whether defendant is in custody. M.C. §330.2(1), (2).

At the hearing, defendant may move for suppression of evidence on Fourth Amendment grounds. M.C. §330.2(3). However, failure to so move does not result in a waiver, and if the evidence is admitted, the defendant may again move its suppression at trial. Id. A full-scale adversarial hearing is then held, at which the rules of evidence apply, except that hearsay is admitted as before. M.C. §§330.4(1) et seq. Cross-examination and the introduction of evidence by defendant is permitted. Id. The magistrate must then determine whether the State has shown reasonable cause to believe that defendant would be found guilty at trial. M.C. §§330.5. Defendant is then released or held to answer. Id.

It would appear that the Model Code is the most complete paradigm available. However, at first glance it may seem to be too much of a full scale hearing to be of pragmatic value. The repetitive determinations of probable cause may

be unnecessary. There are undoubtedly other problems with the procedure, but its explicitness is its worth. Arizona, Florida, Minnesota, New Mexico, Utah and West Virginia have followed the Model Code in establishing their procedures. See Appendix A. infra.

#### 4. Rhode Island: A Non-Adversarial Model

Thus far, this section of our report has focused on adversarial probable cause determinations. However, such determinations may be made in a non-adversarial context. See Gerstein, supra. Rhode Island has recently attempted to establish this type of system. There the prosecutor is required to attach to his information all exhibits upon which he relies to demonstrate probable cause. R.I. Gen. Laws Ann. §12-12-15. The defendant then has ten days in which to move for dismissal. Id. §12-12-1.6 to 1.7. If defendant does move, the prosecutor is forced to rely on his attached exhibits, unless the court grants leave to supplement. R. I. Gen. Laws Ann., §§12-12-1.5, 1.8. Theoretically, this system will diminish the number of occasions in which defendants seek dismissals. See complier's notes to above sections, quoting R.I. Law Rev. Comm'n Report (1974). In either case, the emphasis is to encourage waiver. Moreover, if the court grants defendant's motion, the State is precluded from again moving on the same accusation. R.I. Gen. Laws Ann. §12-12-1.10. Otherwise, the system is less explicit than other models.

It does provide a model for a potentially nonadversarial procedure, if that is deemed preferable.<sup>116</sup>

C. The Grand Jury As An Investigative Body.<sup>117</sup>

Regardless of whether prosecution by information is permitted, every state requires that its local grand jury investigate offenses committed within the vicinage. However, in several states which prosecute largely by information, a grand jury may be summoned sua sponte by the local district's judge at his discretion (e.g., "in the interest of justice"), on petition of a percentage of the district's registered voters.<sup>118</sup>

While these "sometime" grand juries may have no adverse effect on the day to day prosecution of street crime, there may be a serious problem presented by the lack of an effective, vigilant "watchdog" on public officials who may fall prey to organized crime, or who, independently, may constitute, in effect, a criminal

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<sup>116</sup> See also Ind. Rev. Stat. §§9-701 et. seq.

<sup>117</sup> Excluding New Jersey.

<sup>118</sup> E.g., Colo. Rev. Stat. Ann., §13-72-101 (court's discretion); Idaho Code, §19-307; Ind. Ann. Stat., §9-801 to 803; Kan. Stat. Ann., §22-3001; La. Code Crim. Pro., Art. 435; Neb. Rev. Stat., §29-1041(1), (2) (10 % registered voters may petition for grand jury); Nev. Rev. Stat., §6.130; N.M. Stat. Ann., §41-5-1; N.D. Cent. Code, §29-10.1-02(1) (discretion), (2) (county commissioners petition), (3) (10% of registered voters request).

organization. Aside from the possibility of the potential corruption of the law enforcement process, the individual prosecutor, functioning without the compelling subpoena power, may be helpless against other public officials who are suspected of misconduct. Likewise, official conduct which should require lengthy inquiry but does not rise to the level of misconduct, might be ignored. Thus, sixteen states statutorily or constitutionally charge and empower local grand juries to inquire into the public official's affairs and institutions within their vicinages. Five states specifically allow grand juries not only to indict, but also to evaluate the performance of public officials. Fla. Stat. Ann., §105.28; N.Y. Penal Law, Art. 190.85; N.C. Gen. Stat. §15A-628; Utah Code Ann. 77-19-12 (recommendations concerning governmental functions). However, four states have specifically abolished presentments. Ala. Code, tit. 15, §228; La. Code Crim. Pro. Ann., Art. 444; Minn. Stat. Ann., §18.06(3); Neb. Rev. Stat., §29-1407. Additionally, New Hampshire's courts have held that presentments are within the inherent power of its grand juries. Powell v. Pappagananis, 238 A.2d 733 (Sup.Ct. N.H. 1968).

- 119 See the President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: Organized Crime (1967) pp. 83-91; Grand Jury Ass'n. of New York County, Inc., The People's Big Stick (1963); Kuh, "The Grand Jury 'Presentment': Foul Blow or Fair Play?" 55 Colum. L. Rev. 1103 (1955).
- 120 This point is made forcefully and in detail in the Task Force Report: Organized Crime, *supra*, note 8. Of course, there is an inherent potential for abuse, especially in sensitive political areas. See generally, Clark, *supra*, note 4.
- 121 Ala. Code, tit. 30, §§76-82; Alaska Stat., §§12.40.030 to .60; Ariz. Rev. Stat. Ann., §21-407; Ark. Stat. Ann., §43-907(2)(3); Cal. Penal Code, §§914.1, 919(1) (see also Cal. Gov't Code, §§3060 to 3072; Ga. Code Ann., §771.2(3); Mo. Const., Art. I, §16; Mont. Rev. Stat., §95-1405; N.Y. Crim. Pro. Law, Art. 190.05; N.C. Gen. Stat., §15A-628(5); N.D. Cent. Code, §29-10.1-22(2); S.D. Comp. Laws Ann., §23-30-5; Utah Code Ann., §17-19-1. See also In re Opinions of the Justices, 88 A.2d 128 (Del. Sup.Ct. 1952) (Delaware Grand Jury held to be historic common law body in structure and function).

Three states, in which grand juries no longer function as such "censors," have established "one-man grand jury" procedures to compensate for the limited investigative role now assigned to grand juries. In Michigan, judges of the Superior Court, sua sponte or on motion of the state's attorney, may order an "investigation" on any matter. This essentially replaces the grand jury with the court. The court exercises both its inherent powers to subpoena, punish contempts, and grant immunity as well as those same powers ordinarily exercised by a grand jury. Mich. Rev. Stat. §§28.943 to 28.944. Connecticut has a similar procedure. Conn. Gen. Stat. §54-47 et. seq. In Kansas, a state or local prosecuting official may move before a district judge that the court conduct an "inquisition" into any matter. This resembles the Michigan "investigation" in all respects except that the court apparently may not sua sponte order such action. Kan. Stat. Ann., §22-3101 to 3105.

Few states, however, have advanced as far as New Jersey in recognition of the necessity of statewide grand juries in dealing with modern crime and corruption and as a review board for public officials' conduct in general. Only six other states have statewide grand juries, and those are summoned only on motion to a court by either the Governor, the Attorney General, or a local prosecutor. Colo. Rev. State. Ann., §§13-73-101 et seq.; Fla. Stat. Ann., §§905.32 to 905.34 (Gov. petition to State Sup. Ct.; oriented to organized crime and bribery); Mass. Gen. Laws Ann., Ch.277,

§1A, 2A (clerk on motion of A.G. may empanel "special grand jury"). See generally, e.g., Scigliano, "The Grand Jury, The Information, and the Judicial Inquiry," 38 Ore. L. Rev. 303 (1959); Winters, "The Michigan One-Man Grand Jury," 28 J.Am. Jud. Soc. 139 (1945); See also In Re Murcheson, 349 U.S. 133 (1955).

jury"); Nev. Rev. Stat. §6.135 et seq. (Governor or legislature may petition district court, or Supreme Court if district court refuses, to empanel); R.I. Gen. Laws Ann. §12-11.1-1; Wyo. Stat. Ann., §7-177.1 (Governor or Attorney General may petition district court to empanel). Consequently, it would seem that, although many states recognize the need for grand jury investigative action, few have made explicit provision therefore on a statewide scale.

California: A Model Investigatory System.

If grand juries are no longer necessary for day-to-day accusations, it would seem logical to consider expansion of their investigative role. Currently, New Jersey public officials may be presented for misconduct, but no further action may proceed from the presentment itself. That is, the presentment is of no legal effect. A grand jury may indict, and the public official may be suspended and eventually removed on conviction, but the presentment itself may well be meaningless. While the presentment may provide a further basis for administrative or criminal proceedings, some officials' conduct may be beyond the reach of either.

California, however, has theoretically solved the problem. First, as noted, a California grand jury must inquire into county, district, and housing authority affairs. See note 10, supra. It must also inquire into all official misconduct. Penal Code, §919 (a). It must investigate real property in the county for purposes of escheat. Id. §920. It may examine books and records of all public institutions, and investigate and report on the need for increases or decreases

in public revenues. Id. at §§925(a), 927. These provisions, however, are relatively ordinary and have numerous analogues throughout the country.<sup>123</sup>

However, several unique statutory provisions make the California grand jury an even more important safety valve on public affairs and officials. Within one month from the end of the county fiscal year, the grand jury must report to the presiding judge of the Superior Court on all subjects except fiscal affairs. Penal Code, §933(a). The grand jury reports two months thereafter, again to the presiding judge, on fiscal affairs for the preceding fiscal year. Id. at subsection (b). Within 60 days, the county supervisors (i.e., freeholders), and any county or local public officer named in the report, must respond. Id. at subsection (c).

These reports and answers are not simple pro forma affairs, for the California grand jury, unlike its New Jersey counterpart, may take further action. With or without report, the grand jury may return an accusation against any district officer for misconduct. Calif. Gov't Code, §3060. The accusation is sufficient to initiate a civil removal proceeding, tried by a petit jury, which may result in a judgment of removal. Gov't Code, §§3070, 3072. Since the action is civil, the burdens and perhaps even the jury vote, are not nearly as difficult obstacles as in a criminal proceeding. Returning to the grand jury, the body itself

18. E.g. Ala. Code, tit. 30, §§76-82; Alaska Stat., §§12.40.050 to 12.40.060; Fla. Stat. Ann., §905.28; Ind. Rev. Stat., §9-824; N.Y. Penal Law, §190.85.

is an important weapon in another manner. Upon motion of the grand jurors and either the district attorney or attorney general, the Superior Court may permit the grand jury to hold public evidentiary sessions in any cases relating to official misconduct. Penal Code, §939.1.

Adoption of these two procedures, the accusation for removal, and the public session, could transform the New Jersey grand jury, and especially the State Grand Jury, into even more awesome forces against official misconduct.

D. Conclusion.

A clear majority of states permit accusation by information for most felonies. Several permit accusation by information in all but capital cases. New Jersey is therefore among the minority of states which retains the grand jury and its indictment for all felonies.<sup>124</sup>

While the Constitution does not require a substitute for the indictment process, it does mandate probable cause determinations in cases where the suspect's liberty is restrained. The practical effect in many states, however, is the substitution of probable cause hearings for indictments. Several potential paradigms are available for structuring a New Jersey probable cause hearing should a prosecution by information procedure supersede the indictment. Of the available models, three are adversarial, and one is not.

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124 New Jersey has had a long history of anti-grand jury commentary, all to no avail. Editorial, 29 N.J.L.J. 329 (Nov.1906); 37 N.J.L.J. 97 (April 1914); 45 N.J.L.J. 208 (July 1926); 54 N.J.L.J. 352 (Dec.1931).

However, it has been suggested herein that an adversarial hearing may be fairer and provide more systematic benefits than a non-adversarial proceeding.

If the day-to-day grand jury functions are abrogated, the grand jury as an institution will probably need to be retained for lengthy investigations and to issue presentments. Alternatives are available, but since the current New Jersey grand jury investigative role seems well-suited to the needs of the State, it might best be retained. Perhaps, it might be strengthened in that regard.

In sum, it would appear that the grand jury may no longer be required for day-to-day, street crime types of prosecutions. The probable cause hearing can substitute for the grand jury, and the information for the indictment. Therefore, if change is sought, it can be effected with relative ease, once the requisite constitutional, statutory, and court rule changes are made.

## APPENDIX A

The foregoing section provides a general survey overview of the current status of state grand juries. This overview, however, fails to provide a basis for selective comparisons. Therefore, the within appendix briefly describes the grand jury and preliminary hearing in each state. Some grand juries are described as "common law bodies" and those states, of course, have grand jury systems similar to New Jersey's. Additionally, rather than detailing the probable cause hearing provisions, most states have been classified as similar to one or several of the models used as illustrations in Part III of the report. Finally, it must be remembered that: 1) the explicitness of statutory schemes vary from state to state; and, 2) the object of the appendix is not in-depth analysis, but, rather, brief description.

## ALABAMA

Alabama forbids prosecution by informations in cases involving indictable offense. Const., Art. 1, §8.

The Alabama grand jury consists of 18 members. Code tit. 30, §37. Twelve grand jurors must concur to return a true bill. Code tit. 30, §89. The number of grand juries to be empanelled varies with the size of the county, from 2 in counties with less than 50,000 population to 4 in counties with more than 50,000. Code tit. 30, §72. Grand jurors must take an oath of secrecy. Code tit. 30, §73. The state's attorney "must attend the grand jury when summoned," and apparently may be present during its deliberations and vote. Code tit. 30, §94. Additionally, the grand jury has specific duties relating to investigation of the conduct of public officers, offices, and affairs. Code tit. 30, §§76 to 82. However, the distinction between indictments and presentments has been abolished. Code tit. 15, §228. There is no statutory provision for reports.

Alabama provides for a preliminary hearing which resembles the California model. Code tit. 15, §§119 to 152, 160, 167. No preliminary examination is guaranteed where an arrest is effected pursuant to an indictment. Code tit. 15, §168.

## ALASKA

Alaska's constitution provides that all felony prosecutions be upon indictment returned by a majority of a grand jury. The grand jury must consist of at least 12 members. Additionally, the grand jury power "to investigate and make recommendations concerning the general welfare shall never be suspended." Const., Art. 1, §8.

By statute, grand juries may consist of 18 members. Stat. Ann. §12.40.020. The local prosecutor is to act as counsel. Stat. Ann. 12.40.070. The presiding judge in each judicial district must summon one or more grand juries each year, as frequently as necessary, but at least once. R. Crim. Pro. 6 (a). Grand jurors must swear to keep secret the proceedings. R. Crim. Pro. 6 (b), (h). They may, but need not, hear defendant's evidence in any matter. R. Crim. Pro. 6 (k). Once the grand jury fails to indict on a charge, the matter may not again be investigated, except on court order. Stat. Ann. §12.40.080. The grand jury's constitutional right to present is an affirmative statutory duty. Stat. Ann. §12.40.030, 050, .060. Five members of any grand jury may make a presentment where there is insufficient evidence to prove the elements of a criminal offense or where the statute of limitations has run. R. Crim. Pro. 6 (j).

The Alaska Rules provide for a federal-type preliminary hearing. R. Crim. Pro. 5 (a to d).

## ARIZONA

Arizona's constitution mirrors California's in permitting prosecution by information upon a magistrate's probable cause preliminary hearing. Compare Ariz. Const. Art. 2, §30 with Calif. Const. Art. 1, §14.

Arizona grand juries are composed of from 12 to 16 members, with 9 constituting a quorum. Rev. Stat. Ann. §21-322. Nine must concur to indict. Rev. Stat. Ann. §21-414. The grand jury in counties with more than 200,000 people must be summoned three times each year. Rev. Stat. Ann. §21-402 (a). In counties with fewer than 200,000 people, the grand jury is to be summoned by the court in its discretion if the public interest requires or on petition of the county attorney. Rev. Stat. Ann. §21-402 (b). The local prosecutor must "attend the grand jurors" upon request, and may also do so, though not requested, to examine witnesses or give legal advice. Rev. Stat. Ann. §21-408 (a). The grand jury may, but need not, hear defendant's evidence. Rev. Stat. Ann. §21-412. The grand jury also has access to all county public records and institutions in the county. Rev. Stat. Ann. §21-407.

Arizona provides an elaborate set of rules for preliminary hearings which follow the model code of pre-arraignment procedure. R. Crim. Pro. 4,5. However, motions to suppress may not be heard at this hearing. R. Crim. Pro. 5.3 (b).

## ARKANSAS

Arkansas permits prosecution by either indictment or information. Const. Art. II, §8 as amended by Amend. No. 21.

Arkansas grand juries have 16 members of which 12 must concur to indict. Rev. Stat. Ann. §§39-217, 43-1002. If the grand jury fails to indict, the charge may be re-submitted only by direction of the court. Rev. Stat. Ann. §43-921. Grand jurors must take an oath of secrecy. §43-927. The grand jury must inquire into the condition and management of public prisons and offices, but there is no provision for the panel to issue a report or presentment. Rev. Stat. Ann. §§43-907, 910, 911.

Prosecutions by information proceed in much the same manner as in California. Rev. Stat. Ann. §§43-601 et. seq. However, Arkansas' provisions contain the unique limitation that only five witnesses for each party need be heard unless the attorney swears under oath that more are needed. Rev. State. Ann. §43-607.

CALIFORNIA

This state's procedures have been covered in depth in the body of the report. The size of the grand jury is either 19 or 23, depending upon whether the county population is under or over 4,000,000. Penal Code §888.2. Twelve members of 19, or 14 of 23 must concur to indict. Penal Code §940. However, only 12 are necessary to concur in an accusation against a governmental official. Gov't Code §3060.

COLORADO

Colorado's criminal prosecutions may be commenced either by indictment or by information Const. Art. II, §8. Rev. Stat. Ann. §16-5-201.

Colorado grand juries are summoned only once every 18 months, by the local district court sua sponte or on motion of the district attorney. Rev. Stat. Ann. §13-72-101. The grand jury consists of 12, 9 of whom must concur to indict, unless the district attorney moves and shows good cause to empanel a 23 member grand jury, in which case 12 indict. Rev. Stat. Ann. §13-72-102. Grand jurors swear to secrecy. Rev. Stat. Ann. §13-72-105. There are no provisions for reports or presentments, but a state-wide grand jury may be summoned by the Chief Judge of the Superior Court. Rev. State. Ann. §73-103.

Colorado provides for preliminary hearings in much the same manner as the Federal rules, but the time sequence appears to resemble the Model Code. R. Crim. Pro. 5, 7

## CONNECTICUT

Connecticut allows all non-capital offenses to be prosecuted on information. Const. Art. 1, §8.

The Superior Court, when necessary, may summon an 18 member panel, of whom 12 must concur to indict. Gen. Stat. Ann. §54-45. The grand jurors must swear to secrecy. Gen. Stat. Ann. §1-25. The remainder of Connecticut's grand jury law is derived from the common law. E.g., State v. Gray, 196 A. 2d 599 (Super. Ct. 1963) (no counsel permitted; defendant may present evidence). See, e.g., State v. Aikins, 216 A. 2d 838 (Super. Ct. 1966). See also State v. Cobbs, 324 A. 2d 234 (Sup. Ct. Err. 1973). Additionally judicial investigations, i.e., "one-man grand juries," are permitted. Gen. Stat. Ann. §§54-46, 54-47.

Connecticut's probable cause hearings resemble none of the models. Time sequences are not contained in the statutes, nor does there appear to be an initial appearance procedure. The only provision governing the probable cause hearing mandates that it be held within a "reasonable time" from initiation of the criminal process, that the rules of evidence apply, and that the defendant plead to the offense. Gen. Stat. Ann. §54-76 a.

DELAWARE

Delaware's constitution mandates prosecution by indictment. Const. Art. 1, §8. Each of the three Delaware counties' grand jury size and requisite vote for indictment is set forth in the article. Id. In New Castle County, 9 of 15 must concur; in Sussex and Kent counties, 7 or 10 must vote to indict. Id.

The Delaware grand jury is unregulated by statute except that its members must swear to secrecy. Code Ann. tit. 11, §1273. In all other respects it exists as an historic common law body. In re Opinion of the Justices, 88 A. 2d 128 (Sup. Ct. 1952).

Delaware provides a preliminary hearing which follows the federal model. Code Ann. tit. 11, §1909. R. Crim. Pro. (J.P. Courts) 2,3,4.

## FLORIDA

All non-capital offenses may be prosecuted on information. Const. Art. 1, §15 (a).

A Florida grand jury of from 15 to 18 persons is to be summoned in the discretion of the circuit court judge. Stat. Ann. tit. 23, §§905 (1), (2). Twelve members must concur to indict. Stat. Ann. tit. 23, §905-24. The state's attorney may be present at all times except during the deliberations and vote. Stat. Ann. tit. 23, §§905.17 (2), 905.19. The grand jury may present or report as well as indict. Stat. Ann. tit. 23 §905.165. The subject official has 15 days in which to respond to such presentment. Stat. Ann. tit. 23, §905.28. Florida also has provisions for a state-wide grand jury, which is empanelled on petition of the governor to the state supreme court. Stat. Ann. tit. 23, §§905.32 to 905.34. See In re Advisory Opinion to the Governor, 240 So. 2d 473 (Sup. Ct. 1973) (empanelling state-wide grand jury held to be mere ministerial act).

Florida provides preliminary hearings based generally on the model code. R. Crim. Pro. 3.121 et seq. Of course, the filing of an information no longer vitiates the hearing. Gerstein v. Pugh, supra.

GEORGIA

Georgia's constitution guarantees only the right to know the nature of an accusation, but indictment by grand jury is established by statute. Const. Art. 2-105. Code Ann. §27-704.

The Georgia grand jury is summoned at each court term. Code Ann. §59-201. It consists of from 18 to 23 members, of whom 12 must concur to indict. Code Ann. §§59-202. The grand jurors must take an oath of secrecy. Code Ann. §59-208. The grand jurors must inspect public prisons, and may inquire into the conduct of public offices, officers, and institutions within the county. Code Ann. §§59-305 to 315, 406. Uniquely, the grand jury may appoint a citizens' committee to do that investigative work. Code Ann. §59-310. However, special presentments are treated as indictments. Code Ann. §27-703. Two returns of "no true bill" bar future prosecutions for the same charge. Code Ann. 27-702.

Additionally, Georgia provides for a preliminary hearing on the federal model, except that the accused must be brought before a magistrate within 48 hours of warrantless arrest and 72 hours of arrest upon a warrant. Code Ann. §§27-208 to 214.

HAWAII

Hawaii retains the right to indictment. Const. Art. 1, §8.

The grand jury consists of from 18 to 23 members, of whom 12 must concur to indict. R. Crim. Pro. 6 (a), (f). The jurors are sworn to secrecy R. Crim. Pro. 6 (c). Otherwise, the grand jury appears to exist as it had at common law. See generally R. Crim. Pro. 6. See also Atty. Gen. Op. No. 68-10.

A preliminary hearing is granted, similar to the federal model. See R. Crim. Pro. 5.

IDAHO

The constitution of Idaho permits prosecution by indictment or information, but if a grand jury returns a no bill, an information may not be filed in the matter. Const. Art. 1, §8.

An Idaho grand jury is summoned only in the local district court's discretion and consists of 16 members of whom 12 must concur to indict. Code Ann. §§2-502, 19-1401. Despite the constitutional prohibition concerning informations where no indictment has been returned, Idaho permits a "no true bill" to be resubmitted to a grand jury on order of the court. Code Ann. §§19-1402, 19-1403.

Idaho's prosecutions by information mandate preliminary hearings which parallel the California system. Code Ann. §§19-501 et seq., 19-801 et seq., 19-1308.

## ILLINOIS

Although Illinois' legislature may do away with indictments, that body has retained grand juries and indictments. Const. Art. 1, §7; Stat. Ann. §38-111-2 (a).

Illinois grand juries are summoned for indeterminate periods at least once every 18 months in counties with populations over 1,000,000, and on court order sua sponte or on the attorney general's motion in counties under 1,000,000 but not more than once every 18 months. Stat. Ann. §38-112-3 (a), (b). The grand jury consists of 23, 14 to constitute a quorum, with 12 members concurring to indict. Stat. Ann. §§78-9, 78-16, 78-17. The grand jury is sworn to secrecy. Stat. Ann. §38-112-6. Although it need not, the grand jury may hear defendant's evidence. §38-112-4. The state's attorney must attend the grand jury when summoned by it. Stat. Ann. §38-111-3.

Illinois provides for California-type preliminary hearings. Stat. Ann. §§38-109-1 et seq.

## INDIANA

Indiana's constitution is silent as to permissible modes of prosecutions. Const. Art. 1, §13. Statutes, however, permit felonies to be prosecuted either by indictment or by information. Stat. Ann. §9-904-2.

An Indiana grand jury has 6 members, of whom 5 must concur to indict. Stat. Ann. §§9-801, 9-901. The grand jury is summoned only in the court's discretion. Stat. Ann. §§9-802, 9-803. The grand jurors must take an oath of secrecy. Stat. Ann. §9-807. See also Stat. Ann. §9-816 (general secrecy). The prosecuting attorney may be present at all times except during the deliberations and vote. Stat. Ann. §9-826. The grand jury may inquire into corruption and misconduct in office and into the condition of the county "poorhouses" and prisons. Stat. Ann. §9-824 (1 to 5). No provision permits or forbids presentments or reports.

Indiana's information probable cause procedures resemble Rhode Island's in that there is provision for non-adversary proceedings. Stat. Ann. §9-903. However, there is also a California-type hearing possible, but defendant's initial appearance must occur within 48 hours of arrest. R. Crim. Pro. 9-701, 9-704, 9-704 a.

## IOWA

Iowa's constitution permits alteration of the grand jury system, including prosecution on information, and the legislature has so acted. Const. Art. 1, §11 as amended by Amend. No. 3; Informations are allowed. Code §769.1.

The Iowa local grand jury is to be called at the beginning of each calendar quarter. Code §770.1. The grand jury consists of 12, 7 of whom must concur to indict. Id. The grand jury must inquire into the condition and management of the county jails, the willful and corrupt misconduct of public officers, and obstruction of highways. Code §771.2. The prosecutor may be present at all times, except during the vote. Code §§771.5, 771.6. The grand jury may, but need not, hear defendant's evidence. Code §771.15.

Iowa's prosecutions by information closely follow the California model in almost all respects. Code §§757.2, 757.7, 758.1 to 761.18. However, judicial holdings that the filing of an information vitiates the probable cause hearing probably have been invalidated by Gerstein v. Pugh, supra. See State v. Collins, 152 N.W. 2d 612 (Sup. Ct. 1967).

## KANSAS

Kansas's constitution accords only the right to know the nature and cause of an accusation. Const. Art. 1, §10. Prosecution may proceed on either indictment or information. Stat. Ann. §22-3201

The grand jury is summoned by the district court "in the public interest" or on petition of 100 plus 2% of the voters in the last gubernatorial election. Stat. Ann. §322-3001 (1), (2). The grand jury has 15 members, 12 of whom constitute a quorum, and 12 of whom must concur to indict. Stat. Ann. §§22-2001 (3), 22-3011 (1). The grand jurors need not swear to secrecy. Stat. Ann. §§22-3003, 22-3012. The prosecuting attorney may be present at all times except during the deliberations and vote. Stat. Ann. §22-3010. Additionally, Kansas provides for a judicial "one-man grand jury" on petition of the attorney general, assistant attorney general, or a county attorney. Stat. Ann. §§22-3101 to 3105.

Kansas provides preliminary proceedings akin to those in California in information prosecutions. Stat. Ann. §§22-2901 et seq. The compiler's note indicates that the provisions are drawn from Montana Crim. Code 395-1202 and pre-existing Kansas law. However, examination reveals that both resemble California procedures. See Montana, infra.

KENTUCKY

Kentucky allows only prosecution by indictment except in cases involving "oppression or misdemeanor in office." Const., Bill of Rts., §12.

Kentucky grand juries are summoned at 3 regular terms of court, or, in courts of continuous sessions, each month. Rev.Stat.Ann. §29.205. The grand jury consists of 12, nine of whom must concur to indict. Rev. Stat. Ann. §29.005. The grand jury must swear to secrecy, R. Crim. Pro. §5.03. The grand jury may, but need not, hear defendant's evidence. R.Crim.Pro. §5.08. The prosecuting attorney may attend the grand jury, but may not be present during the vote. R.Crim.Pro. §5.14, 5.18. No provisions exist relating to presentments.

Kentucky provides preliminary hearings which resemble the federal model. R.Crim. Pro. §3.01 et seq.

## LOUISIANA

Louisiana permits prosecution by information except in capital cases, which must proceed only upon indictment. Const., art. 1, §9; Code Crim.Pro. art. 382.

The Louisiana grand jury consists of 12, of whom 11 constitute a quorum, and 9 an indicting majority. Code Crim.Pro. arts. 383, 413, 435. See State v. Jack, 255 So.2d 204 (Sup.Ct.1973). The grand jury is summoned at regular intervals but the sequences depend upon the particular parish. Code Crim.Pro., art. 414. The grand jurors must take an oath of secrecy. Code Crim.Pro. arts. 431, 434A. The district attorney or attorney general may be present at all sessions. Code Crim.Pro. art. 433. The grand jury may, but need not, hear defendant's evidence. Code Crim.Pro. art, 442. Presentments are disallowed. Code Crim.Pro. art. 444.

In prosecutions by information, Louisiana procedures follow California's. Code Crim.Pro. arts. 202 to 297.

MAINE

Maine prosecutions proceed upon indictment only.

Const., art. 1, §7.

The Maine grand jury is summoned at each county court term. See Rev.Stat.Ann., tit. 4, §110. The grand jury consists of from 16 to 23 members, with a 12 member majority requisite to indictments. R.Crim.Pro., 6(a),(f). The proceedings are to be kept secret, and the prosecutor may be present except during the vote. R.Crim.Pro., 6(d),(e). There is no provision relating to presentments.

Maine's preliminary hearing provisions are fashioned after the federal rules. R.Crim.Pro., 5.

## MARYLAND

Maryland permits prosecution either by indictment or by information. Const., Decl. of Rts., art. 21. See, e.g., Heath v. State, 85 A.2d 43 (Sup.Ct.1951).

The Maryland grand jury system is in a state of flux. Prior to 1973, a statutory grand jury sat in each judicial district. See Md. Code. Ann. tit.51, §1 et seq. However, in 1973 the legislature repealed all the grand jury provisions, and the system reverted to its purely common law origins.<sup>125</sup>

However, Maryland does have explicit provisions for probable cause hearings, which tend to follow the federal rules. See Maryland District Rules 709 [herein after cited as M.D.R.]. The rules grant defendants an absolute right to a probable cause hearing if their prosecution has been initiated by information. M.D.R. 741(a)(2). Probable cause hearings are discretionary where indictments have been returned. M.D.R. 741(a)(3). Additionally, though the defendant may cross-examine prosecution witnesses, the presentation of defense evidence is discretionary, unlike the comparable federal provision. M.D.R. 741(c). Finally, it should be noted that the court rules are more stringent and more solicitous of defendants' rights than the enabling legislation. See Md. Code art. 27, §512.

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<sup>125</sup> Telephone conversation, June 12, 1973, with Maryland State's Attorney for Baltimore City, Legal Assistant assigned to grand jury.

## MASSACHUSETTS

Massachusetts' constitution is silent as to the permissible mode of prosecution. Const., pt.1, art. 12. An early case, however, held that indictments are required. Jones v. Robbins, 74 Mass. (8 Gray) 329 (Sup. Jud. Ct.1857) This requirement is now embodied in statute. Ann.L. art, 263, §4.

Grand jurors are required to take an oath of secrecy. Ann.L. art, 277, §5. No other statutory provisions define or describe the grand jury or its duties. Comm. v. Geagan, 159 N.E.2d 870 (Sup.Jud.Ct.1959), cert. den. 361 U.S. 895 (1960); Comm. v. Ventura, 1 N.E. 24, 30 (Sup.Jud.Ct.1936). It is a creature purely of common law. Comm. v. Ventura, supra. However, the superior court clerk, on the request of the attorney general, accompanied by a certificate of public necessity, may empanel a special grand jury for such matters as the attorney general deems necessary. Ann.L. art, 277, §2A. Such special grand juries have the same powers as regular grand juries, but limited to the specific case or cases before them. Comm. v. Favulli, 224 N.E.2d 422 (Sup.Jud.Ct.1967).

Massachusetts provides for preliminary proceedings akin to the federal model. Ann.L. art. 276, §§21 to 42.

MICHIGAN

Michigan permits prosecution by either indictment or information, by statute, for the constitution is silent. Const., Art. 1, §20. Stat. Ann. §§28.441, 28.442.

The Michigan grand jury is summoned by the court every six months. Stat. Ann. §28.447. The grand jury consists of 13 to 17 members, 9 of whom must concur to indict. Stat. Ann. §§28.951, 28.963. The prosecuting attorney may be present only when required by the grand jurors, and may not be present during the deliberations or vote. Stat. Ann. §§28.960, 28.962. Michigan provided for the first "one-man grand jury" and retains its judicial investigation provisions. Stat. Ann. §§28.943 et seq.

In prosecutions by informations, Michigan maintains a procedural system which closely resembles that operative in California. Stat. Ann. §§28.860 to 28.933, 28.982.

MINNESOTA

Minnesota permits all non-capital offenses to be prosecuted without indictment. Const., art. 1, §6. R.Crim.P. 17.01.

Minnesota's local grand jury is summoned annually, if the "public interest" so requires, or, if the prosecutor requests a summoning. R.Crim.Pro. 18.01. The grand jury is composed of from 16 to 23 members, of whom 16 constitute a quorum and of whom 12 must concur to return a true bill. R.Crim.Pro. 18.01, 18.03, 18.07. Grand jurors must take an oath of secrecy. R.Crim.Pro. 18.08. Attorneys for the state may be present during the sessions, but not during the deliberations or vote. R.Crim.Pro. 18.04. The grand jury's duties are not explicitly set forth, other than to inquire into all public offenses in the district. R.Crim.Pro. 18.01. Presentments have been abolished. R.Crim.Pro. 18.06(3).

Minnesota's informations are prosecuted initially in the same manner as provided by the federal rules. R.Crim.Pro. 2.01 to 5.03. However, the preliminary examination, called an "omnibus hearing," resembles the model established in the model code of pre-arraignment procedure. R.Crim.Pro. 7.01 to 11.09. All pre-trial issues are to be determined at the hearing, including both probable cause and Fourth Amendment issues. R.Crim.Pro. 11.02, 11.03. Additionally, the prosecutor must give notice of his evidence on or before the date of the initial appearance. R.Crim.Pro. 7.01.

## MISSISSIPPI

Mississippi's Constitution requires indictments for all offenses. Const., art III, §27.

Mississippi's grand jury is summoned at court terms. Stat. Ann. §13-5-26. The grand jury consists of from 15 to 20 members, 17 of whom are necessary to indict. Stat. Ann. §§13-5-41, 99-7-11. The grand jurors are sworn to secrecy, the prosecutor may not be present during deliberations or vote. Stat. Ann. §13-5-61. The grand jury must inspect prisons, investigate county offices, and examine county books and accounts. Stat. Ann. §§13-5-55 to 59.

Mississippi appears not to have a preliminary examination procedure in its court rules or statutes.

## MISSOURI

Missouri permits all felonies to be prosecuted by indictment or information. Const. Art. I. §17.

The Missouri grand jury is composed of 12 members, 9 of whom must concur to return a true bill. Const. Art. 1, §16. Grand jurors must take an oath of secrecy. Stat. Ann. 540,080. Attorneys for the state may not be present during deliberations or votes of the panel. Stat. Ann. 540.140. There is a specific provision that the grand jury inquire into willful misconduct in office of public officials and report there upon. Const. Art., §16.

Missouri's prosecutions by information mandate initial appearances which proceed in the same manner as provided in the federal model. R. Crim. Pro. 23.02. The subsequent preliminary hearing must be R. Crim. Pro. 23.05. Thus the latter procedures are fashioned after the California model except that either the accused or the prosecution may obtain 10 day postponements for good cause. R. Crim. Pro. 23.06.

MONTANA

Montana permits prosecution by either indictment or information. Const. Art. III, §8.

The Montana grand jury is composed of 11 members, 8 of whom must concur to return a true bill. Code §95-1405. Grand jurors must take an oath of secrecy. Code §95-1404. Attorneys for the state may be present during the sessions but not during deliberations or vote. Code §95-1406. The grand jurors' duties are to investigate public offenses, prisons and the willful or corrupt misconduct in office of public officials. Code §95-1405. No specific provision, however, is made for presentments or reports.

Montana also provides for an adversary preliminary examination to determine if probable cause exists before the county attorney files an information. Code §95-1202. Alternatively, the county attorney may by-pass the preliminary examination by applying to the district court for leave to file an information. Code §95-1202. Thus the procedure resembles the Rhode Island model. Mont. Code 95-1301.

NEBRASKA

Nebraska requires that all felonies be prosecuted on presentment or indictment. However, a specific provision grants power to the legislature to permit informations and to, by law, regulate or abolish the grand jury. Const. Art. 1, §10.

The Nebraska grand jury has not been abolished but its role is not clear. Its common law composition has been retained. Rev. Stat. §29-1401.

The legislature has provided for prosecution by information, requiring however that such filing be preceded by a preliminary examination of the accused. Rev. Stat. §29-1607. See also Bird v. Sigler, 241 F. Supp. 1007 (1964). The statutes do not elaborate on the procedures to be followed at the hearing. But see State v. Sheldon, 138 N.W. 2d 428 (1965), where the proceedings were viewed as a procedural safeguard to prevent a person from being detained in custody without probable cause. Thus, the procedures cannot be classified according to the models.

NEW HAMPSHIRE

New Hampshire requires only that a full statement of charges be necessary to initiate a prosecution. Const. Pt.1,art. 15.

By statute, though, indictments are required in felony prosecutions. Rev. Stat. Ann. §601:1. The grand jury is apparently a pure common law body, with little constitutional or statutory bases. See, e.g., Powell v. Pappagianis, 238 A. 2d 733 (Sup. Ct. 1968); State v. Canatella, 72 A.2d 507 (Sup. Ct. 1950). All that is set forth by statute is the oath of secrecy and the method of empanelling the grand jury. Rev. Stat. Ann. §§600:3; 601:1 et. seq.

However, the State Supreme Court has held that, as at common law, the grand jury may present as well as indict. Powell v. Pappagianis, supra.

The statutes provide for preliminary hearings, which resemble the federal model. Rev. Stat. Ann. §§5-94:19-1; 596:A-1 et. seq.

NEW MEXICO

New Mexico permits felony prosecution by indictment or information. Const. Art II, §14.

The New Mexico grand jury is composed of 17 members, 12 of whom must concur to return a true bill. Const. Art. II, §14. The grand jury is empowered to investigate any public offense and the condition and management of the public jails. An indictment or a report may issue from such investigation. Stat. Ann. §41-5-11.

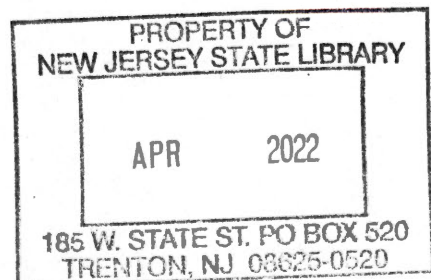
New Mexico requires that an adversary preliminary examination precede prosecution by information. Const. Art. II, §14; Stat. Ann. §41-23-20. The procedure follows that of the Model Code, Stat. Ann., §§41-23-1 et seq. but the New Mexico time limits are somewhat more stringent.

NEW YORK

New York requires that all felonies be prosecuted on indictment. Const. Art. I, §6.

The New York grand jury is composed of 16 members 12 of whom must concur to return a true bill. Crim. Pro. L. §190.05. Grand jurors must take an oath of secrecy. Attorneys for the state may be present during the sessions, but not during deliberations or vote. Crim. Pro. L. §190.25. The grand jury may, but it is not required, to hear defendant's evidence. Crim. Pro. L. §190.50. Further, the grand jury has broad powers to consider official misconduct, whether or not that misconduct rises to the level of criminality. Crim. Pro. L. §190.05. Corollary to this power of public official inquiry, any grand jury may file a report recommending disciplinary action or removal of a public official. Crim. Pro. L. §190.85.

Additionally, New York provides for an adversary preliminary hearing to determine "whether reasonable cause" exists to detain as pending grand jury action. Crim. Pro. L. §180.10 to 180.70. This resembles the federal model, except that a defendant must be released within 72 hours from the time of arrest unless a preliminary hearing has been held and "reasonable cause" found.



NEVADA

Nevada permits prosecution by presentment, indictment or information Const. Art. I, §8.

The Nevada grand jury is composed of 17 members, 12 of whom must concur to return a true bill. Rev. Stat. §6.120. Specific provisions are made for a grand jury to investigate state affairs. Rev. Stat. §6.135.

A district judge must empanel the state grand jury at the request of the legislature and the governor. A unique provision states that the panel may issue a presentment, which is a lesser finding than an indictment, and in that case an accused must be brought before a magistrate in the same manner if upon an arrest warrant. Rev. Stat. §12.285.

Nevada provides for an adversary preliminary hearing to determine if probable cause exists to hold an accused for trial. Rev. Stat. §173.035. This resembles the federal model except that the magistrate must hold the hearing within 15 days following arrest. Rev. Stat. §171-196. If after the preliminary examination the accused is discharged the prosecutor still may petition the court for leave to file an information. Such petition must contain affidavits of witnesses. Rev. Stat. §173.035.

NORTH CAROLINA

North Carolina requires that all felonies be prosecuted by indictment. Const., Art. 1, §§22.

The North Carolina grand jury is composed of 18 members, 12 of whom must concur to return a true bill. Gen. Stat. §15A-622. In addition to inquiring into felonies, the grand jury must inspect jails and may inspect other county officers and report to the court on their findings. Gen. Stat. §15A-628.

Additionally, North Carolina provides for an adversary preliminary hearing to determine if probable cause exists to hold accused for the grand jury proceedings. Gen. Stat. §15A-611. This hearing resembles the federal model except that it must be held within 96 hours following arrest. Gen. Stat. §15A-601.

NORTH DAKOTA

North Dakota requires that all felonies be prosecuted by indictment. However provision is made for the legislature to change, regulate or abolish the grand jury system. Const. Art. 1, §8. Prosecution by information is permitted by court rule. R. Crim. Pro. 7.

The North Dakota grand jury is composed of not less than 8 and not more than 11 members of whom 6 must concur to return a true bill. N.D.R. Crim. Pro., 29-10.11-01. The grand jury may be called by the judge of the District Court, a sue sponte or if the Board of County Commissioners requests him to do so or if 10% of the electors petition him to do so. R. Crim. Pro. 29-10.1-02. The grand jury must inquire into the willful and corrupt conduct of public officials and must also examine the condition of the county prisons.

The preliminary hearing is an adversarial one, fashioned after the Federal Model. R. Crim. Pro., R. 5.1.

OHIO

Ohio requires that all felonies be prosecuted on indictment. Const. Art. 1, §10.

The Ohio grand jury is composed of 9 members, 7 of whom must concur to present a true bill. R. Crim. Pro. 4. Jurors are sworn to secrecy. Rev. Code, §§2939.06.

The prosecuting attorney may not be present during deliberations or vote. Rev. Code, §2939.10. In addition to investigating public offenses, the grand jury must visit the county jail once during each term and report on the conditions there. Rev. Code, §§2939.21.

Ohio additionally specifies that persons accused of felonies be given preliminary hearings which follow the federal model, except as to time limits which follow the Model Code. R. Crim. Pro. 5.

OKLAHOMA

Oklahoma permits prosecution by indictment or information. Const., art. II, §17.

The Oklahoma grand jury is composed of 12 members, 9 of whom must concur to return a true bill. Const., Art. II, §18. The grand jurors are sworn to secrecy Stat. Ann. tit.22, §325. Attorneys for the state may be present during the sessions but not during the deliberations or votes. Stat. Ann. tit.22, §340. In addition to inquiring into crimes, the grand jury must inquire into the condition and management of the public prisons and into the willful and corrupt misconduct in office of public officers. Stat. Ann. tit.22, §338. If an indictment does not issue from an investigation, the grand jury may make a formal written report. Stat. Ann. tit.22, §346.

Oklahoma requires that all felony prosecutions by information must be preceded by a preliminary examination. Const., art. III, §17. Oklahoma's preliminary hearing is fashioned after the federal model. Stat. Ann. tit.22, §258.

## OREGON

Oregon's constitution only requires that the accused know the nature and cause of an accusation. Const., Art. 1, §§11. By statute, though, indictments are required in felony prosecutions. Ore. Rev. Stat. tit. 14, chap. 131.

Oregon's grand jury is composed of 7 members, 5 of whom must concur to return a true bill. The grand jurors are sworn to secrecy, the state's attorney may not be present during deliberations or votes. Ore. Rev. Stat. §132.010 to §132.360. In addition to inquiring into crimes, the grand jury must inquire into correctional facilities and juvenile training schools within its jurisdiction at least once a year. Ore. Rev. Stat., §132.440. No specific statutory authority either permits or forbids presentments.

Oregon also provides an adversary preliminary hearing for those accused of felony offenses. This hearing to determine probable cause functions solely to hold the accused for action of the grand jury, and the hearing must be held within 5 days following arrest. Ore. Rev. Stat. §135.070. The proceedings follow the federal model.

## PENNSYLVANIA

Pennsylvania permits prosecution of indictable offenses on information if the County Court of Common Pleas, with the approval of the Supreme Court, establishes such system by rule. Const., Art. 1, § 10.

Pennsylvania's grand jury is composed of from 15 to 23 members, 12 of whom must concur to return a true bill. R. Crim. Pro. 200. The grand jurors are sworn to secrecy. R. 206. The state's attorney may not be present during the deliberations and vote of the jury. R. Crim. Pro. 209.

Pennsylvania provides for an adversary preliminary hearing fashioned after the federal model. See R. Crim. Pro. 140, 141.

RHODE ISLAND

Rhode Island has been covered in depth in the body of this report.

However, its grand jury has not been abolished and retains its common law composition. Provision is made for a state-wide grand jury, in addition to a county-wide one, with the power to investigate and return indictments for crimes committed anywhere within the state. Gen. Laws Ann. §12-11.1, 12.11.1-1.

## SOUTH DAKOTA

South Dakota requires only that the accused have the right to demand the nature and cause of the accusation against him. Const., art. VI, §7. Prosecution by indictment or information is permitted by statute. Comp.L. 23-27, §5.

The South Dakota grand jury is composed of 6 to 8 members, 5 of whom must concur to return a true bill. Comp.L. §23-30-1 to 23-30-5. The duties of the grand jury are to inquire into public offenses, the conditions and management of prisons and the misconduct of public officials. Id. Additional provisions permit formation of a special grand jury for unspecified, typical cases. Comp.L. §23-29-16. Likewise, a special grand jury is to be empanelled to consider charges against the state's attorney. Comp.L. §23-30-8.

South Dakota information prosecutions provide for adversary preliminary hearings fashioned after the federal model. Comp.L. §23-27-4. In addition, there is a specific requirement that the hearing be held no later than 6 days after arrest unless by consent of the accused. Comp.L. §23-27-5. If the hearing results in a finding of probable cause, the state's attorney may file an information. Id.

SOUTH CAROLINA

South Carolina requires felony prosecution by indictment.  
Const. Art. 1, §11.

The South Carolina grand jury consists of 18 members, 12 of whom must concur to return a true bill. Const. Art. 5. The duties of South Carolina grand juries are apparently those as existed at common law.

South Carolina provides a preliminary examination, but the procedures to be followed at the hearing are not made explicit in the statutes or cases. Code §43-231. The burden is on the accused to make a timely demand for the hearing. Code §43-231. The validity of this provision is dubious after Gerstein v. Pugh, supra.

## TENNESSEE

Tennessee's constitution specifies only that the accused has the right to demand the nature and cause of the accusation against him. Const., Art. I, §9. However, it is required by statute that prosecutions be initiated by indictment. Code, §40-1605.

The Tennessee grand jury is composed of 12 members all 12 of whom must concur to return a true bill. Code §§40-1501 and 40-1707. In addition to inquisitional powers over indictable offenses, the grand jury has broad powers to investigate public prisons and other county institutions, the county treasury, the misconduct in office of county officers and obstruction of roads and highways. Code §40-1607. The jurors are sworn to secrecy. Code §40-1611. The district attorney may be present during deliberations or vote. Code §40-1610.

Tennessee has established a probable cause procedure similar to California's. Code §§ 40-1104, 40-1117.

## TEXAS

Texas requires only that the accused have the right to demand the nature and cause of the accusation against him. Const. Art. 1, §10. However, statutes require that all felony prosecutions be initiated by indictment. Code Crim. Pro. §1.05.

The Texas grand jury is composed of from 15 to 20 members, 9 of whom must concur to return a true bill. Code Crim. Pro. §19.06 and §20.09. The jurors are sworn to secrecy. Code Crim. Pro. §20.02. The state's attorney may not be present during deliberations and vote. Code Crim. Pro. §20.03.

Texas provides for an adversary preliminary hearing based on the federal model for all felony charges. Code Crim. Pro. §16.06, 16.07. In addition, Texas requires that the examining judge enters an order within 48 hours following the hearing or there shall be a finding of no probable cause. Code Crim. Pro. §16.7. Thus some aspects likewise resemble the Model Code.

## UTAH

Utah permits prosecution by indictment or information.  
Const., Art. I, §13.

The Utah grand jury is empanelled through unique proceedings. At least once every two years district courts hold public hearings, and in secret, hear any citizens who have reasons to believe that the law enforcement mechanisms have failed. Code 77-18-1.1. If the Court so finds, it must summon a grand jury. Id. Utah's grand jury is composed of 7 members, 5 of whom must concur to return a true bill. Code §77-20-1. The grand jury must investigate malfeasance in office. Code §17-19-1. However, the grand jury must indict, and may not present, any officials whose conduct is questionable; mere criticism is not permitted. Code §17-19-12. The grand jurors must swear to secrecy, and the state's attorney may not be present during deliberations or vote. Code §§77-19-9, 77-19-10.

Utah's prosecutions by information proceed in a manner akin to the Model Code. Code §§77-15-1 et seq.

VERMONT

Vermont's constitution requires only that the accused have the right to demand the cause and nature of his accusation. Const., Chap. 1, Art. 10., Prosecution by information is permitted by statute. R. Crim. Pro. 7.

Vermont's grand jury is composed of from 16 to 23 members 12 of whom must concur to indict. R. Crim. Pro. 6. The judge of the county court shall summon the grand jury on request of the State's attorney, the attorney general or the governor. Id. The grand jurors are sworn to secrecy. Id. The state's attorney may not be present during deliberations. Id.

Vermont provides for a probable cause preliminary hearing if the accused has been arrested without a warrant. R. Crim. Pro. 5. Thus before an information is filed, there has been an independent finding of probable cause either before or after arrest. R. Crim. Pro. 4. This procedure resembles none of the models and appears to have been promulgated in contemplation of Gerstein v. Pugh, supra.

## VIRGINIA

Virginia's constitution requires only that the accused has the right to demand the cause and nature of his accusation. Const. Art. I, §8. By statute, though, felony prosecutions must be initiated by indictment. Code 19.1-162.

Virginia's grand jury is composed of from 5 to 7 members, 5 of whom must concur to return a true bill. Code 19.1-150. Grand jurors are sworn to secrecy, and the state's attorney may not be present during deliberations. Code 19.1-150 to 19.1-160.

Additionally, if the accused is in custody on a felony charge, Virginia provides an adversary preliminary hearing to determine if probable cause exists. Code 19.1-163.1. This hearing appears to be fashioned after the federal model.

## WASHINGTON

Washington permits prosecution by either indictment or information. Const., art. I, §25.

The Washington local grand jury is composed of from 16 to 23 members, 12 of whom must concur to return an indictment. R.Crim.Pro. 10.28.150. The jurors are sworn to secrecy. R.Crim.Pro. 10.28.050. The prosecuting attorney may attend the sessions, and there is no provision prohibiting his presence at the deliberations or vote. R.Crim.Pro. 10.28.070. The grand jury is to inquire into the management of prisons and official misconduct. R.Crim.Pro. 10.28.110. The grand jury may issue a report concerning public affairs, and the report may be made public on court order. R.Crim.Pro. 10.27.160.

Washington's preliminary hearing system has probably been invalidated by Gerstein v. Pugh. Previously, an information could be filed, and the case tried, without such hearing. See State v. Jefferson, 485 P.2d 77 (Sup.Ct.1971).

## WEST VIRGINIA

West Virginia requires prosecution by indictment.

Const., Amend. V.

The West Virginia grand jury is composed of 16 members, 12 of whom must concur to return a three bill. Stat. §52-2-3, §52-2-8. The grand jurors are sworn to secrecy; the state's attorney may not be present during deliberations or votes. Stat. §52-2-3 to §52-2-7.

Even though West Virginia requires indictments, the State maintains preliminary examinations akin to the Model Code procedures. Code §62-1-1 et seq.

WISCONSIN

Wisconsin permits prosecution by indictment or information. Const. Art. I, §7.

The Wisconsin grand jury is composed of from 15 to 17 members, 12 of whom must concur to return a true bill. Stat. Ann. §225.10, §255.16. The grand jurors are sworn to secrecy. Stat. Ann. §244.11. The state's attorney may only be present to examine witnesses and give legal advice. Stat. Ann. §255.15. There is no provision concerning a state attorney's presence during deliberation or votes.

Wisconsin provides that no information may be filed without a preliminary hearing. Stat. Ann. §955.18. The hearing resembles that of the federal model. Id.

## WYOMING

Wyoming's constitution retains indictment but permits the legislature to alter the grand jury system. Const. Art. 1, §9. Prosecution by information is permitted by statute. R. Crim. Pro. 9.

Wyoming's grand jury is composed of 12 members, 9 of whom must concur to return a true bill. Stat. Ann. §7-93. The grand jurors are sworn to secrecy. The state's attorney may not be present during deliberations and votes. Stat. Ann. §7-104. Provision is made for empanelling a statewide special grand jury whenever the attorney general or governor deems it to be in the public interest to do so. Stat. Ann. 7-117.1.

Additionally, Wyoming provides for an adversary preliminary hearing similar to the federal model. R. Crim. Pro. 7. This hearing may precede the filing of an information. Provision is also made for the filing of an information on information and belief. R. Crim. Pro. 9. This procedure is suspect in light of Gerstein v. Pugh, supra.

APPENDIX B

The within appendix reduces the data contained in Appendix A to several basic essentials.

COLUMN	HEADING	KEY
1	State	abbreviation
2	Method of Prosecution (MOP)	I=Indictment only I/I= Informations allowed I/I= Indictments in capital cases
3	Presentments (P)	+ = allowed - = not allowed o = no provision
<p><u>N.B.:</u> 1) New Hampshire's case law permits presentments 2) Nevada's presentments are akin to arrest warrants.</p>		
4	Probable Cause Hearing Model (PCHM)	C=California F-Federal MC=Model Code RI=Rhode Island
5	Grand jury Size (GJS)	Grand Jurors /indicting majority

<u>STATE</u>	<u>MOP</u>	<u>P</u>	<u>PCHM</u>	<u>GJS</u>
ALA.	I	-	C	18/12
ALAS.	I	+	F	12-18/7-10
ARIZ.	I/I	0	MC	12-16/9
ARK.	I/I	0	C	16/12
CAL.	I/I	+	C	19/12,23/24
COLO.	I/I	0	F,MC	12/9
CONN.	I/I*	0	other	18/12
DEL.	I	0	F	15/9; 10/7
FLA.	I/I*	+	MC	15-18/12
GA.	I	-	F	18-23/12
HAW.	I	0	F	18-12/12
ID.	I/I	0	C	16/12
ILL.	I	0	C	23/12
IND.	I/I	0	C	6/5
IOWA	I/I	0	C	12/7
KAN.	I/I	0	C	15/12
KY.	I	0	F	12/9
LA.	I/I*	-	C	12/9
ME.	I	0	F	16-23/12
MA.	I/I	0	F	16-23/12
MASS.	I	0	F	16-23/12
MICH.	I/I	0	C	13-17/9
MINN.	I/I*	-	F,MC	16-23/12
MISS.	I/I	0	other	15-20/17
MO.	I/I	+	F,C	12/9
MONT.	I/I	0	RI	11/8
NEB.	I/I	0	other	16-23/12
N.H.	I	+	F	16-23/12
N.M.	I/I	+	MC	17/12
N.Y.	I	+	F	16/12
NEV.	I/I	+,other	F	17/12
N.C.	I	+	F	18/12
N.D.	I/I	0	F	8-11/6
OHIO	I	+	F,MC	9/7
OKLA.	I/I	+	F	12/9
ORE.	I	0	F	7/5
PA.	I/I	0	F	15-23/12
R.I.	I/I	0	RI	16-23/12
S.C.	I	0	other	18/12
S.D.	I/I	0	F	6-8/5
TENN.	I	0	C	12/12
TEX.	I	0	F,MC	15-20/9
UTAH	I/I	-	MC	7/5
VT.	I/I	0	other	16-23/12
BA.	I	0	F	5-7/5
WASH.	I/I	+	other	16-23/12
W. VA.	I	0	MC	16/12
WISC.	I/I	0	F	15-17/12
WY.	I/I	0	F	12/9

IV. ALTERING THE ROLE OF THE GRAND JURY: PROSECUTION  
BY INFORMATION AND THE GRAND JURY'S RESIDUAL FUNCTION

A. Prosecution by Information: A Constitutional Amendment to Permit the Practice.

As noted in our Introduction, this Report does not adopt a preference for prosecution by indictment or by information. Rather, we stress the need for elimination of duplicative procedures. We stress that adopting a preference for informations will require in-depth empirical studies as to finances, efficiency, and other important aspects of any elemental systematic alteration. In short, the feasibility of such a radical change must involve studies within the expertise of other disciplines. Those types of studies are beyond the scope of this Report. Consistent with the Report's goals, however, we will here assume that prosecution by information is desirable in New Jersey. Hence, we will examine generally those characteristics of a system of prosecution by information which we consider optimal. We will note inherent difficulties in the establishment of this type of system, and where possible, we will offer solutions with respect to those problems.

As an initial observation, it must be emphasized that establishment of a prosecution-by-information process for New Jersey requires an amendment to the State Constitution. State v. Rochester, 105 N.J. Super. 529, 556-57 (Law Div. 1967), aff'd 54 N.J. 85, 87 (1969). Our Constitution currently provides that "no persons shall be held to answer for a criminal offense, unless on the presentment or indictment of a Grand

Jury...." N.J. Const. Art. 1, par. 8. Consequently, all "crimes,"  
i.e., misdemeanors and high misdemeanors, may be prosecuted  
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only by indictment. Therefore, constitutional amendment is  
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necessary.

The form of a proposed amendment should be sufficiently  
broad to reflect basic value judgments as to the nature of the  
information procedures. Two questions which can only be  
resolved by such judgments are immediately evident from the  
preceding chapters of this Report. The first is whether all  
crimes are to be prosecuted on information. The second is  
whether a judicial determination as to sufficient cause to  
proceed to trial is to be made in lieu of grand jury indictment. 128

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E.g., Sawran v. Lennon, 19 N.J. 606 (1957); State v. Maier,  
13 N.J. 235 (1953).

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Constitutional amendment is, of course, a lengthy cumbersome  
process. Any amendment may be proposed only in the Senate or  
the General Assembly. N.J. Const. Art. IX, par. 1. If "three-  
fifths of all the members of each of the respective houses"  
agree to the amendment, it is then submitted to the people. Id.  
If a majority agrees to the amendment, but if a three-fifth  
majority is lacking, the amendment is to be reintroduced  
in the next legislative year. Id. When an amendment passes  
the Legislature, it is to be submitted to the people at the  
next general election, in the manner provided by statute.  
N.J. Const. Art. IX, par. 4. See N.J.S.A. 19:3-6. No rejected  
amendment may be resubmitted before the third general election  
thereafter. N.J. Const. Art. 9, par. 7.

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The Federal Constitution does not require that a judge rule  
on the propriety of an information. In Gerstein v. Pugh, 421  
U.S. 103 (1975), the Supreme Court stated that:

In holding that the prosecu-  
tor's assessment of probable cause

This chapter discusses the first issue, i.e., whether all crimes are to be prosecuted by information.

This first question presents several possible permutations. A system could be constructed in which the indicting grand jury is completely abolished. <sup>129</sup> Alternatively, a system could be instituted in which both indictments and informations are used. The latter alternative is utilized in the majority of states, and has definite advantages to an "information only" procedure. Although the advantages of retaining

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128 (cont'd)

is not sufficient alone to justify restraint on liberty pending trial, we do not imply that the accused is entitled to judicial oversight or review of the decision to prosecute. Instead, we adhere to the Court's prior holding that a judicial hearing is not prerequisite to prosecution by information. Beck v. Washington, 369 U.S. 541, 545 (1962); Lem Woon v. Oregon, 229 U.S. 586 (1913).

Consequently, the decision to require a magistrate's approval before an information may be prosecuted represents a judgment to grant defendants a greater degree of protection than that afforded by the Federal Constitution.

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Although no state has yet adopted such a system, it appears that Pennsylvania has moved in that direction. Any County Court of Common Pleas may provide for the institution of a prosecution by information system in its county if the Pennsylvania Supreme Court approves the proposed system. Pa. Const. Art. 1, §10 (as amended, November 6, 1973). By statute, no grand jury is to be impanelled for the purpose of considering indictment in any judicial district where prosecution may be commenced by information. 17 Pa. Stat. Ann. §275. See also Pa.R.Cri. P. 3(h) (informations replace indictment "in counties in which the indictment grand jury has been abolished"). However, grand juries may still be impanelled to investigate offenses "or for any other purpose as provided by law." Id. See generally Commonwealth v. Webster, 456 Pa. \_\_\_, 337 A.2d 914 (1975) (system consonant with requirements of equal protection).

indicting grand juries will be discussed later, it must be noted here that such benefits exist, thereby making dual systems preferable, should prosecution by information be found acceptable. Finally, as a last alternative, a few states require that "capital" offenses be prosecuted only on indictment. It should be noted that the New Jersey court rules forbid waiver of indictment in cases where the death penalty is involved. R. 3:7-2.

Although the precise reasons for requiring indictments in capital cases are not precisely discernible, a few basic historic justifications are self-evident. There may well have been public sentiment against imposing the death penalty in cases where the "community" had not brought the charges. Also, as our historical analysis has revealed, prosecution by information was frequently a political weapon used against opponents of the King. Since many common law felonies were punishable by death, prosecution by information was a devastating royal weapon. Residual distrust for the mechanism is an historical fact. The royal prosecutor's role in notorious cases initiated by information undoubtedly led to a similar distrust in relation to his American counterpart's role in commencing capital cases. It is therefore hardly surprising that a few jurisdictions even today prefer capital cases to be commenced by "community consensus," albeit pro forma. It would appear, however, that the historical rationale has lost its validity. There is currently no death penalty

in New Jersey. Should one be reestablished it is unlikely that improper motivations would lead the prosecutor to initiate <sup>131</sup> by information significant capital cases. To the contrary, it is probable that an indictment would be sought in sensitive cases. However, as the number of murders resulting from "street crime" increases, there will be less reason to submit this variety of cases to a grand jury. The prosecution would not be notorious or complicated, and should therefore be processed in a routine manner. That is, they would be prosecuted by information except, as noted, in sensitive cases. The availability of the grand jury should thus make unnecessary a constitutional directive for indictment in even capital cases.

In proposing an amendment to permit prosecution by information, we would suggest maximum flexibility with respect to its provisions. Thus, it would permit prosecution by information in all cases. This would in no way permanently establish an absolutely dual system. Statutes or court rules

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State v. Funicello, 60 N.J. 60 (1972).

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While there is no way of definitely supporting our hypothesis, we would emphasize that this appears to be the case at least in California. Virtually all California prosecutions are initiated by information. See Judicial Council of California, 1974 Report to the Governor and the Legislature, at p. 43. However, when Sirhan Sirhan was prosecuted for the murder of Senator Robert Kennedy, the Los Angeles County District Attorney sought an indictment rather than an information. See People v. Sirhan, Cal. 3d \_\_\_, 102 Cal. Rptr. 385, 472 P.2d 1121 (1972). Even so, California statistics for 1972 showed that only 15.9% of all willful homicide cases supra were prosecuted by indictment. Judicial Counsel Report, supra at p. 45.

could remove certain classes of cases from either the indictment  
or the information procedure. <sup>132</sup> At a later point, we will  
further discuss the probable need for some guidelines in deter-  
mining the use of either process. Those guidelines are premised  
on the nature of the prosecution rather than on the potential  
punishment as indicative of the procedure to be employed in  
commencing any given criminal case.

In concluding this section, it must be remembered  
the the information is not a vehicle for untrammelled prosecu-  
torial discretion. It is a charging device which can safeguard  
the rights of the citizen as well as, and perhaps even better  
than, the indictment. Consequently, the terms of the New  
Jersey amendment should recognize that function. Subtle  
semantic changes often connote great mutations in meaning.  
Rather than an amendment which provides that "all crimes  
may be prosecuted by indictment or information," we believe  
that the terms of the present provision should be retained,  
adding only that information constitutes a permissible means  
of initiating prosecutions. The provision would emphasize  
the right to prosecution by information and would state

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As noted, R. 3:7-2 forbids the use of accusations in cases  
where the death penalty may be imposed. A defendant facing  
a possible death penalty therefore may not waive indictment.  
In a dual system of prosecution, accusations might be permitted  
where a defendant waives either indictment or information.  
Hence, the court rule would to be amended to reflect the  
permissibility of informations but not accusation in capital  
cases. Also, the present rule is representative of the type  
of limitation which could be placed on the use of informations  
if any such limitations are deemed necessary.

that "no person shall be held to answer for a criminal offense, unless on the presentment or indictment of a grand jury or on information filed in the matter prescribed by law." Such an amendment would, as suggested, emphasize the information as an important guarantee. It would also allude to other positive prescriptions concerning the manner in which informations are to be filed.

B. Prosecution By Information: A Constitutional Guarantee For a Screening Procedure.

The grand jury's most important theoretical function  
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has been to protect the innocent from unfair accusation.

Any system which establishes prosecution by information should offer a substitute protection. The most commonly accepted substitute is the establishment of a preliminary hearing procedure in which a magistrate determines whether or not a case  
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is to proceed to trial. The nature of the magistrate's  
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decision should roughly parallel the task of the grand jury.

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See Chapter 2, supra.

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According to two law professors, "... the preliminary hearing may well be the most important procedure mechanism in the administration of criminal justice in this Country...." Graham and Letwin, "The Preliminary Hearing in Los Angeles: Some Field Findings and Legal Policy Observations," (Par 2), 18 U.C.L.A. L. Rev. 916, 953 (1971) (herein after cited as Graham and Letwin).

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E.g., National Advisory Commission Criminal Justice Standards and Goals, Courts, (1973) Standard 4.4, commentary at p. 75. See, e.g., Jaffe v. Stone, 18 Cal. 2d 146, 150, 114 P.2d 335, 338 (1941); Thies v. State, 178 Wis. 98, 103, 189 N.W. 539, 541 (1922). See generally note, "The Preliminary Hearing- An Interesting Analysis," 51 Iowa L. Rev. 164 (1965).

Consequently, it follows that the magistrate should decide whether or not sufficient cause exists to prosecute the complaint. While various specific aspects of the preliminary hearing will be discussed in greater detail in subsequent sections of this chapter, general observations must be noted for purposes of possible constitutional recognition.

There does not appear to be any federal constitutional requirement that a state must provide a preliminary hearing as part of a prosecution-by-information system. All that the Constitution requires is that no person be deprived of liberty or be subjected to any significant restraints without a judicial determination of probable cause. Gerstein v. Pugh, *supra*, 420 U.S. at 120. This determination is akin to issuance<sup>136</sup> of an arrest warrant by a judicial officer. It need not occur in an adversarial or even a formal ex parte hearing setting. Id. Moreover, Gerstein v. Pugh applies only to cases where no arrest warrant has been issued by a judge and where the accused is in pretrial custody. Quite obviously, the probable cause determination may be made in a setting vastly different from<sup>137</sup> those models explored in Chapter III of this Report. Thus, it appears that a state may proceed against an individual on a prosecutor's information, without judicial approval, and

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In New Jersey, a clerk or deputy clerk may issue a warrant. R. 3:3-1(a). We question whether such a procedure satisfies the requirements of Gerstein v. Pugh, *supra*.

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Gerstein v. Pugh, *supra*, 421 U.S. at 122, expressly recognizes that the probable cause determination may be made on an ex parte application, without hearing, on submission of documents, even when a suspect is in custody.

without any hearing whatsoever if the individual has been arrested pursuant to a warrant issued by a judge, or if the individual has not been placed in custody, or if a summary probable cause determination has been made.

Yet, removal of the grand jury's traditional aegis should not leave a void in the criminal process. If the grand jury is not to determine the existence of sufficient cause to prosecute, it seems clearly desirable that some other institution make that determination. It would therefore appear that such a decision should be made by a judge rather than by the prosecutor alone. A judicial finding would obviate the potential for abuse which led to initial American resentment against prosecution by information. Under these circumstances, it seems reasonable to include a check on prosecutorial discretion in the constitutional amendment we have suggested. Additionally, it should be noted that the State Constitution's civil liberty guarantees might mandate a magisterial screening procedure despite the lesser strictures of the

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Even so, there has been criticism of the preliminary hearing on the ground that courts agree with prosecutors as frequently as grand juries. For example, one court lamented that "[i]n most California criminal prosecutions the preliminary examination is conducted as a rather perfunctory uncontested proceeding with only one likely denouncement-- an order holding the defendant for trial...." People v. Gibbs, 255 Cal.App.2d 739, 743, 63 Cal. Rptr. 471, 475 (3d Dist. 1967). See Davis, Discretionary Justice (1969) at 27, 144, 188 et seq. (1969); Dession, "From Indictment to Information--Implication of the Shift," 42 Yale L. J. 163, 192 (1932).

Federal Constitution. Any such problem could be avoided by inclusion of a guarantee in the proposed amendment to N.J. Const. Art. I, Par. 10.

Finally, as a pragmatic matter, it would seem safe to assume that the public would more readily accept a prosecution-by-information system if its enactment included a substitute for the grand jury. Therefore, we recommend that any amendment establishing prosecution by information contain a provision guaranteeing that no case be prosecuted without the express approval of a judge upon a finding of "sufficient cause to proceed."<sup>140</sup>

As we have emphasized, there is no definite, constitutionally prescribed, manner in which the decision to permit further proceedings need be made. Although we recommend that an adversarial preliminary hearing structure be established,

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While it is not yet entirely clear whether the State constitutional guarantees are stricter than their federal counterparts, recent cases tend to indicate a trend in that direction. See, e.g., State v. Krol, 68 N.J. 236 (1975); State v. Johnson, 68 N.J. 349 (1975).

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At the present time, we do not feel that it would be useful to engage in any substantive analysis of the standard's meaning. We suggest that while the standard could roughly approximate that applied by grand juries to indict, it should not be called "probable cause." Use of the latter term might engender comparison with arrests and searches. The magistrate's role at the preliminary hearing differs greatly from his role in issuing a warrant. Even if "sufficient cause" were tantamount to "probable cause," the evidence before the hearing magistrate would so differ from an application for warrant or bail hearing that the finding at the preliminary would be different in a pragmatic sense. See generally, Graham & Letwin, part I, at 685-727.

we are loath to suggest that it be included in the constitutional amendment. At this time, an adversarial preliminary hearing seems to be the best vehicle for the protection of the rights of the citizen, as well as providing the best results for the State. However, the establishment of an adversarial preliminary hearing procedure does not involve the transcendent importance of a magistrate's finding of sufficient cause. Indeed, it is possible to posit circumstances where the preliminary hearing may not serve some of the goals it should be designed to achieve. 141

We believe that the decision to establish an adversarial preliminary hearing structure should be made in a non-constitutional setting. It seems that this is a matter within the unique expertise of both the Legislature, which reflects changing social attitudes, and of the judiciary, which knows its own capabilities in terms of resources. Continuing input from the Bar, as well as the general public, will demonstrate the need or lack of need for adversarial preliminary hearings at any given time. Again, we stress the current apparent necessity for adversarial preliminary hearings, but we also recognize that changing times may alter that view. 142

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For example, a defendant might make a tactical error by testifying and demonstrate such low credibility that a magistrate finds sufficient cause even though the State's case is marginal.

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In this respect, we recognize that the time may someday arrive when a system such as Rhode Island's becomes attractive. See Chapter II, B4, supra R.I. Gen. Laws Ann. §312-12-1.1 et seq.

History has proven the need for judicial intervention in systems where prosecution by information is permitted. This need appears to have remained unchanged since the earliest uses of informations. The preliminary hearing, on the other hand, engenders doubt as to its essential value. Therefore, we suggest that the constitutional amendment include a guarantee that no case be prosecuted except upon a court's determination of sufficient cause to proceed, but the provision should remain silent as to the need for adversarial preliminary hearings.<sup>143</sup> In conclusion, the amendment might provide that "no person shall be held to answer for a criminal offense unless on the presentment or indictment of a grand jury or on an information filed in the manner prescribed by law and for which a judge finds a basis supported by sufficient cause."

C. The Form and Contents of a New Jersey Information.

This section concerns a far more technical aspect of prosecution-by-information than the two preceding parts. We will discuss here the actual suggested contents of an information. This may seem to be a rather minor concern, but it must be realized that an information is not an indictment. Conceivably, an information could differ in form and content

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Compare Calif. Const. Art. I, §14.

from an information. Since it is, nevertheless, a substitute for an indictment, its function will be basically identical, and we recommend no basic changes at this time.

In New Jersey, the primary purpose of an indictment is to inform the defendant of the nature of the charges against him so that he may adequately prepare his defense. Its secondary function is to protect the defendant from being the subject of another indictment for the same offense. An indictment must allege all the essential elements of the offense charged and sufficient facts to support a conviction. It must also include the statute allegedly violated, and conclude with the allegation that the offense was committed "against the laws of the State of New Jersey and contrary to the peace and dignity of the same."

Clearly, an information must serve the same functions as the indictment. Likewise, the minimum legal requisites should be identical. In this regard, there appears to be no reason

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We would note, however, that if a system similar to Rhode Island's is adopted, it might be necessary to further detail specifics of the offense.

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E.g., State v. Rios, 17 N.J. 572 (1955); State on Complaint of Brumel v. Brumel, 14 N.J. 53 (1954); State v. LeFante, 12 N.J. 505 (1953); State v. Winne, 12 N.J. 152 (1953).

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Id.

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Id.

to suggest that the information's contents differ from those of the indictment. The only change required is the deletion of the initial wording which states that the "grand jurors of the State of New Jersey for the County of \_\_\_\_\_ do present that ...." This would require a change to reflect the fact that the prosecutor is informing the defendant and the court that he has reason to believe that the defendant committed the offense at a specified place, on a certain date, in violation of a criminal statute. We will not recommend any specific formulations, but again suggest that the indictment format could be adapted to the information.

D. Filing the Information.

An information is usually a final charging document as is the indictment. A complaint is usually the initial charging document. The pretrial procedural system typically transforms the contents of the complaint into the information. An issue which arises from the alteration is the point at which this transformation is to occur. There are two possibilities as to the time when an information may be filed i.e., either before <sup>148</sup> or after <sup>149</sup> the preliminary hearing.

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E.g., Fla.R.Crim. P. 3.131; Iowa Code Ann. §§754.1, 769; La. Code Crim. Proc. Art. 384; Mich. Stat. Ann. §§28.941, 28.942. See Minn.R.Crim. P. 2.01; 4.01 (called a complaint).

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E.g., Ariz.R.Crim.P. 5.4(a); Ark.Rev.Stat. Ann. §43-86a; Calif. Penal Code §738; Colo.Rev.Stat. Ann. §16-5-201(b), §16-5-205; Ind.Rev.Stat. §2-704a; Kan.Stat. Ann. §§22-2901(1); 22-2902(1); Md. Code, Art. 27, §592(a).

In states where the information is filed before the preliminary hearing, it supersedes or even replaces the complaint.<sup>150</sup> In states where the information is filed after the preliminary hearing, the hearing's outcome determines the contents of the information, including a final statement of the offense charged.<sup>151</sup> In either case, the prosecutor retains broad discretion in conforming the eventually filed information to the evidence adduced at the preliminary hearing.<sup>152</sup> Likewise, in both cases the court obviously retains final authority to determine the nature of the charges. In New Jersey, criminal charges are filed either by complaint or indictment.<sup>153</sup> We see no reason to change that procedure. Since the complaint is often prepared by a police officer, the statute designated may not be correctly set forth in the complaint. A prosecutor would waste needless time by attempting to mold the complaint into an information which is unsupported by the evidence actually adduced at the examination. For example, a situation might arise in which an officer files a complaint

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Iowa Code Ann. §754.1 et seq.

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E.g., Ariz. R. Crim. p. 5.4(b).

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See, e.g., Idaho Code Ann. §19-1420.

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R. 3:2 (complaint contents); R.3:4-1 (issuance of complaint). See R. 3:6-8 (indictment can be kept secret except for purposes of obtaining a warrant).

for assault with an offensive weapon. (N.J.S.A. 2A:90-3). The prosecutor might examine the police reports and file an information which alleges assault with intent to kill (N.J.S.A. 2A:90-2) because he is unsure of the strength of the State's evidence as to a weapon. Conceivably, the preliminary hearing might adduce evidence negating the existence of either offense, but support a charge of threatening to take a life. N.J.S.A. 2A:113-8. The prosecutor's restructuring of the complaint would be an unnecessary stage in the procedure. Consequently, we recommend that no information be filed formally until  
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after the preliminary hearing.

E. The Preliminary Hearing: A Functional Analysis.

As we have emphasized, the preliminary hearing seems to represent a reasonable alternative to the grand jury's deliberation and indictment functions. In fact, as our historical and national surveys reveal, the preliminary

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This recommendation is in accord with the National Advisory Commission on Criminal Justice Standards and Goals, Courts (1973) Standard 4.8 at p. 87: "The initial charging document, as amended at the preliminary hearing, should serve as the formal charging document for trial."

hearing may well be superior to the indictment process.

A grand jury must determine whether sufficient cause exists to hold a defendant to answer for an offense. It performs this task by hearing evidence. Even a putative defendant may not cross-examine witnesses before the grand jury. Nor may his attorney be present if he himself is subpoenaed.

These characteristics have often been cited as creating the potential for vast abuses. <sup>155</sup> The grand jury is frequently characterized as the prosecutor's "rubber stamp." It is also sometimes compared to the Star Chamber. Our historical survey tends to show that many of these fears are justified, although contrary indications surely are evident. The secrecy requirement often protects the innocent individual who is investigated and subsequently found to be innocent by the grand jury. Also, as a general rule, grand juries have remained true to their mission and have protected the innocent.

Any proposed preliminary hearing should be geared to incorporate the best attributes of grand jury deliberations and to avoid the worst. We hope that at least some of these results are accomplished by the nature of the preliminary hearing we recommend.

In our view, a preliminary hearing ought to be an adversarial proceeding. <sup>156</sup> It should be held in open court

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See generally Chapter 2, supra.

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We tentatively reject Rhode Island's procedure as granting too little to defendants in return for the loss of indictments. Further, study, however, should not be foreclosed by this judgment.

the record. We recommend that any preliminary hearing procedure adopted in New Jersey should include several basic requirements. The preliminary hearing should be a public proceeding. Strictly drawn exceptions may be made to the public nature of these proceedings. For example, the prosecution may wish to close the courtroom when a sex offense is being heard to protect a witness of tender years. So too, the accused may wish to envelop the hearing in secrecy to avoid prejudicial publicity. Similarly, the court, in the exercise of its inherent discretion, might decide that the proceedings should be closed to the public for a variety of reasons. We contemplate, however, that the typical preliminary hearing will be public. Thus, objections to grand jury secrecy are met while the salutary elements in nondisclosure may be available when necessary. Since the ultimate decision of whether the

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The making of stenographic record is within the discretion of the hearing magistrate. E.g., Calif. Penal Code §869. We believe that the record should be guaranteed. See, e.g., Ariz. R.Crim. P. 5.3(a).

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Our current Municipal Court rules provide a paradigm for a procedure excluding the public at preliminary hearings:

The court, in its discretion and with the defendant's consent, may exclude from the courtroom during the trial or hearing of any matter involving domestic relations, bastardly cases, sex offenses, attempted suicide, school truancy and parental neglect any person not directly interested in the matter being heard or tried. R. 7 :4-4.

case should be tried lies with the court, objections of undue prosecutorial influence and prosecutorial abuses for improper motive are immaterial objections. Furthermore, the defendant will be present and may take an active role in his defense at a relatively early stage. Cross-examination of prosecution witnesses and the opportunity to present defense witnesses are two further guarantees which would tend to effectuate the goal of filtering out frivolous cases.

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To this point, we have concentrated on demonstrating the suitability of the adversarial preliminary hearing to achieving the basic goal of grand jury proceedings, i.e., protecting the innocent. Other functions are also served by the hearing, which do not apply to the grand jury. Most obvious are the discovery aspects of a hearing. From the defense viewpoint, at least some prosecution witnesses will testify as they might be expected to at trial. Actual examination and cross-examination is clearly superior to documentary discovery. Both parties have an opportunity to "dry run" their respective cases.

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See Graham and Letwin, supra, 18 U.C.L.A. L. Rev. at 661-68.

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Id. at 916-31.

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See id. at 931-39.

Other, more general, functions are performed by preliminary hearings. Although we stress the need for empirical study, the preliminary hearing has the potential to speed the time involved in prosecuting a criminal case. In Los Angeles County, it is estimated that the average preliminary hearing consumes approximately 30 minutes.<sup>162</sup> A case may undoubtedly be presented to a grand jury in a shorter time. However, a preliminary hearing produces a transcript which may be submitted to a County or Superior Court judge in lieu of trial.<sup>163</sup> Likewise, a strong prosecutorial presentation at the preliminary hearing stage may well lead to a plea bargain while the mere return of an indictment would not.<sup>164</sup> Again, further studies are necessary but it is suggested that the results contemplated above are quite possible.

Arguments surely might be made against adoption of the preliminary hearing. It could be contended that it merely shifts the consumption of time to an earlier stage. This possibility even more strongly indicates the need for further research. Even so, we submit that the adversarial preliminary hearing is a viable alternative to the indicting grand jury. Its benefits appear to outweigh its burdens. Finally, the preliminary hearing appears to offer more by way of ultimate

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Id. at 659.

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Id. at 931-39. This practice may be on the decline.

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Id. at 948-53.

protection to both the citizen and the State than does the grand jury.

F. The Preliminary Hearing: Which Court?

An important question in any proposal to establish a system of prosecution by information in a preliminary hearing context must concern the court in which such proceedings are to be conducted. Several alternatives are presented, e.g., Municipal Court, County District Court, County Court, or Superior Court. The considerations, as with the filing of informations, are basically logistical and financial. As with many of this Report's suggestions, further empirical analysis is required.

We are compelled to acknowledge at this juncture that regardless of which court conducts preliminary hearings, the cost to the taxpayer will probably exceed that attendant to a grand jury system. The court system will need to be expanded to cope with the increased workload engendered by preliminary hearings. This entails expenditures for the salaries of judges, court personnel, reporters, prosecutors, and public defenders. Finally, ancillary costs, such as physical plant, and supplies will also be increased. Partially mitigating these expenditures will be the absence of "lost earnings" to individual grand jurors. All these factors must be considered in empirical form before any conclusion as to financial feasibility is made. We note the problem

only to draw attention to its existence. Consequently, we will now return to the question of which court is best suited for holding probable cause hearings.

Municipal courts are unsuited for such hearings. Municipal judges are generally part-time. They have neither the time nor the resources to preside over preliminary hearings. Even if municipal courts are consolidated into the County District Court system,<sup>165</sup> and should the judges be given full time status, other potential problems preclude utilization of the municipal court as the preliminary hearing forum. Basically, the Municipal courts cannot serve the purpose since they are too geographically decentralized. Transportation of prisoners, as well as travel of prosecutors and public defenders, militate against the possibility in terms of finances and time consumption. A centrally located court surely would be more effective.

Our preference for centralization leads us to conclude that County District Courts are best suited for conducting preliminary hearings. No doubt, more County District Court judgeships would need to be created. We must once more emphasize the need for further study. A cost benefit analysis is necessary to make a proper decision.

G. The Preliminary Hearing: Format and Governing Law

We have recommended that New Jersey informations be filed only after a preliminary hearing. This hearing would

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A proposal to consolidate the Municipal Courts into the County District Court System is currently being studied by another another sub-committee.

be formal, in open court, on the record, and of an adversarial nature. These basic characteristics should guarantee a viable alternative to grand jury indictment. We will now describe more fully general procedures and governing rules which might be adopted. Further study of currently existing systems, however, is necessary.

New Jersey has adopted a procedure akin to the preliminary hearing. The New Jersey analogue is called a "probable cause hearing" and is governed by R. 3:4-3. That rule provides:

If the defendant does not waive indictment and trial by jury but does waive a hearing as to probable cause, or if the defendant does waive indictment and trial by jury but the judge is not an attorney, the court shall forthwith bind him over to await final determination of the cause. If the defendant does not waive a hearing as to probable cause and if before the hearing an indictment has not been returned against the defendant with respect to the offense charged, the court shall hear the evidence offered by the State within a reasonable time and the defendant may cross-examine witnesses against him. If, from the evidence, it appears to the court that there is probable cause to believe that an offense has been committed and the defendant has committed it, the court shall forthwith bind him over to await final determination of the cause, otherwise, the court shall discharge him; provided however, that if the offense charged is indictable, a court shall not discharge the defendant without first giving the county prosecutor notice and an opportunity to be heard. Such notice may be oral, or may be in writing, and shall state when the county prosecutor may appear

on the docket as to when and how such notice was given. After concluding the proceeding the court shall transmit, forthwith, to the county prosecutor all papers in the cause in the event the defendant is not discharged; provided, however, that when the county prosecutor so requests the court shall forward the papers to him even though the defendant is discharged. The court shall admit the defendant to bail as provided in R. 3:26, and any bail taken by him shall be transmitted to the county clerk.

The rule provides probable cause hearings only where no indictment has yet been returned. The State may vitiate a defendant's right to a hearing by procuring an indictment.<sup>166</sup> The only time limitation with respect to conducting a probable cause hearing is a "reasonable" one. Confrontation and cross-examination of the State's witnesses are guaranteed rights. Although the rule does not specifically so state, its terms contemplate that probable cause proceedings are to be heard in inferior courts.<sup>167</sup> The provision as to a judge who

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Accord State v. Cox, 114 N.J. Super. 556 (App.Div. 1971); State v. Boykin, 113 N.J. Super. 594 (Law Div. 1971).

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An arresting officer is to take the defendant before the court named in the warrant or, if the arrest has been made without a warrant, "before the nearest available committing judge." R. 3:4-1. "An arrest warrant may be issued by a judge of a court having jurisdiction in the municipality in which the offense is alleged to have been committed or in which the defendant may be found...." R. 3:3-1. The rules thus contemplate Municipal and County District court judges as the probable cause hearing judges. We note that this rule creates the potential for the logistical problems we mentioned earlier.

is not an attorney implies a municipal judge. Hence, the current New Jersey procedure possesses the basic, general characteristics we have emphasized: adversarial in nature, in open court, and on the record. However, if the preliminary hearing procedure is adopted, we would recommend elimination of the probable cause hearing as a duplicative procedure.

If the New Jersey preliminary hearing is to substitute for the grand jury proceeding, we must posit more specific procedures. Since we have suggested that the information be filed only after the preliminary hearing, the provision which vitiates the right after indictment will not apply. <sup>168</sup> Every individual who is the subject of a criminal complaint would have <sup>169</sup> the right to a preliminary hearing.

The next consideration is establishing a time frame for the preliminary hearing. This time frame must conform to federal constitutional speedy trial guarantees. Since a complaint will have been filed before the preliminary hearing, the dictates of Barker v. Wingo, 407 U.S. 514 (1972) clearly apply. United States v. Dillingham, \_\_\_ U.S. \_\_\_ (Dec. 1, 1975). Moreover, our Supreme Court in the future might well adopt a rule which would mandate trial within a definite time

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Theoretically, that result could be accomplished under Gerstein v. Pugh. See generally R. 3:4-1 et seq. (first appearance); R. 3:26-1 et seq. (bail); R. 7:5-1 et seq. (Municipal Court bail).

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Accord, e.g., Ariz. Const., Art. 2, §20; Ark. Rev. Stat. Ann. §§43-601 et seq. Calif. Const., Art. I; §14; Penal Code §682 Md. Dist. R. 741(c).

after complaint or indictment. Thus, the preliminary hearing should be held as soon as possible after the arrest is made. Our current court rules provide for initial appearance shortly after arrest at which time the defendant is informed of the charges and advised of his rights. It is at this appearance that counsel is appointed or the defendant allowed time to retain counsel. In our suggested procedure, the preliminary hearing would be the next stage, thereby requiring a time interval between the initial appearance and preliminary hearing. Aside from the fact that defendant has either been jailed or freed on bail, among the controlling factors should be the time needed to obtain counsel. Additionally, time is necessary to permit counsel to adequately defend.

If a defendant appears with counsel at the initial appearance, or if the public defender immediately accepts the case, a shorter time will be necessary for preparation and for the hearing than if defendant appears without counsel. Likewise, a distinction should be made to give "jail" cases

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R. 3:4-1 ("without unnecessary delay"). Several states have established definite time limitations for that period between arrest and first appearance. E.g., Ariz.R.Cri. P. 4.1(c) (24 hours); Fla.R.Cri. P. 3.130 (24 hours); Ga. Code Ann. §27-210 (72 hours where arrest pursuant to warrant), §27-212 (48 hours where warrantless arrest); Ind.R.Cri. P. 9-701 (48 hours); La. Code Crim.Proc. Art. 230.1A (144 hours); Md. Dist. R. 709(a)(1) (24 hours) or 709(a)(2) (first session of court after arrest on warrant or "charging" in warrantless arrest); Minn.R.Crim. P. 401(5)(1) (38 hours); N.Y.Crim.Pro.L. §§180.10 et seq. (72 hours). Ohio R.Crim. P. 5 (24 hours) Ore. Rev. Stat. §135.070 (5 days). As ancillary to abolishing the current probable cause hearing, it might be necessary to increase the importance of the "first appearance." One of the charges might be adoption of a time limit here.

priority over "bail" situations. Cf. Gerstein v. Pugh, supra. This, however, creates an inherent contradiction, for a defendant who is free on bail will probably be able to obtain counsel more readily than a jailed defendant. We believe that this problem should be resolved in favor of the jailed defendant, and that the time sequence mandate faster preliminary hearings for those in jail. Although further study is necessary to determine more precise time limits, some general observations and suggestions may be made.

We believe that a date certain for the preliminary hearing should be set at the initial appearance. The setting of this date should guarantee efficient processing of cases. Delaying tactics are inevitable on both sides, but they can be reduced to a minimum by strict time requirements.

In California, a defendant is given two to five days to procure counsel. Then, counsel is afforded at least two days to prepare for the hearing. Calif. Penal Code §§859b, 860. The Model Code, however, mandates that a defendant be given a preliminary hearing within 10 days of the initial appearance if the accused is in jail and within 30 days if he is not. Model Code §310.5(3). However, the Model Code's "initial appearance" is a lengthy, complex procedure with adjournments available for a number of reasons, including the procurement of counsel. M.C. §§310.1(8), 310.2(1). We prefer California's system, but would establish definite time limits as suggested in the Model Code.

The initial appearance should not resemble the preliminary hearing. The purpose of the initial appearance should be to inform the defendant of the charges against him and advise him of his rights, including the appointment of counsel. We believe that the preliminary hearing should be held within 14 calendar days of the initial appearance if the defendant is in jail,<sup>171</sup> and within 30 calendar days if he is not.<sup>172</sup>

We now examine the actual hearing. In so doing, it must be recalled that the primary function of the hearing is to serve as an effective substitute for the grand jury. The preliminary hearing, also offers other potential benefits. These include early resolution of evidentiary and constitutional issues which may make conviction at trial impossible. Conceivably, this might result in fewer trials. These obvious benefits to defendants are balanced by those to the State. As we have noted, defendants may plea bargain more readily after a finding of sufficient cause. Further, defendants may submit on the transcript, thus avoiding full scale jury trials.

Consequently, we believe that the Rules of Evidence should apply at preliminary hearings.<sup>173</sup> Application of the evi-

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Accord, National Advisory Commission, Standard 4:8 at p. 87.

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Accord, e.g., Model Code §310.5(3).

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E.g., compare Ariz.R.Crim.P. 5.4(c) (-3) (expert reports; documentary evidence without foundation if substantial basis to believe foundations will be laid at trial admissible, hearsay where cumulative or where declarant will be available at trial, all admissible). with Conn.Gen.Stat. Ann. §54-76a (rules of evidence).

dence rules will better reflect the strengths and weaknesses in the State's case. In such a manner the screening function would be enhanced, resulting in fewer trials. Thus, marginal cases based on evidence of dubious admissibility would not proceed further. While we recommend application of the Rules of Evidence to preliminary hearings, we recognize that there might be some limited circumstances in which such rules could be relaxed. For example, laboratory reports might be admitted without calling the expert.<sup>174</sup> Alternatively, stipulations of this sort might be encouraged by a provision that no stipulation at a preliminary hearing be considered a waiver at trial.

One other area should be discussed. We offer for consideration the possibility that evidentiary objections on constitutional grounds be allowed at the preliminary hearing. That is, a defendant could move to exclude evidence based upon allegedly unlawful searches and seizures, Miranda problems<sup>175</sup> and suggestive and unreliable identifications. We do not suggest that the denial of a defendant's evidentiary objections at the preliminary hearing should bind the trial judge. If a defendant's objection is denied, he might then either submit on the transcript or demand a full evidentiary hearing as of right.

We recommend that the defendant should be permitted to testify and to produce witnesses in his own behalf. Likewise

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We would hesitate to posit any other relaxations at this time. If any leeway is to be permitted, we would recommend further study of the Arizona rule noted above. See note 49, supra.

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See Minn.B.Crim. P. 11.02, 11.03 (omnibus hearing).

we believe that the State should be given the express right to appeal an adverse decision. Since the defendant would not yet have been placed in jeopardy, there is no legal reason to refuse to permit such an appeal. Concomitant with the State's right to appeal should be an express provision prohibiting the prosecution from either seeking an indictment where a judge has refused to issue an information and from attempting to seek another information on the same evidence. Additionally, we suggest that, as with California's system, the hearing be completed at one session.<sup>176</sup> Also, as in California, the prosecutor should be given 15 days from the finding of sufficient cause to file an information or a dismissal will be automatic.<sup>177</sup>

In sum, we have concluded that the New Jersey preliminary hearing should be a speedy, efficient, protective procedure which closely resembles the trial. We believe that the procedures we have recommended will result in a more efficient administration of criminal justice. These suggestions raise many questions. We recommend that our proposal be the subject of further study.

H. The New Jersey Grand Jury in a Dual Prosecution System.

We do not suggest abolition of the grand jury. Its unique role in the criminal process must be preserved. Several

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<sup>176</sup>  
Calif. Penal Code §861.

<sup>177</sup>  
Calif. Penal Code 739.

compelling reasons exist for the retention of the grand jury. The grand jury's investigative powers, the need for secrecy in some cases, its ability to process multi-defendant cases, and a potential unwillingness of prosecutors to seek informations in sensitive cases all militate against abolishing the institution.

Aside from the functional reasons noted above, the grand jury also serves as a vehicle for citizen participation. It is consistent with the nature and goals of our democratic society to retain this mechanism. The grand jury is essential in affirming public confidence in government. We therefore recommend that any system of prosecution by information include a role for the grand jury. Indeed, if the majority of routine cases is prosecuted by information, the grand jury would be able to focus on complex investigations, on combatting official misconduct, and on reflecting community consensus in sensitive cases.

#### I. Guidelines for Prosecutors: Indictment and Information

A prosecutor faced with a decision to seek an indictment or information should be guided by some informal guidelines. Several classes of cases seem uniquely suited to prosecution by indictment: 1) cases involving complex investigations; 2) cases in which the statute of limitations is about to run; 3) cases of official corruption; 4) cases where informants' or undercover operatives' identities must be kept secret; and 5) cases involving sex crimes, especially child abuse cases.

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See California Judicial Council, 1974 Report to the Governor and Legislature at p. 45 citing Los Angeles District Attorney, Departmental Organization Manual at p. 45.

V. THE GRAND JURY: PROPOSALS FOR REFORM

A. Prosecutorial Discretion

The existing grand jury system is frequently characterized as inefficient and cumbersome. Prosecutors have often claimed that the volume of matters required for grand jury presentation precludes careful consideration of each case. Many prosecutors are of the view that once a complaint is filed, the matter must be presented to a grand jury. Often, prosecutors feel compelled to indulge in a charade by presenting a frivolous matter to a grand jury and recommending that a "no bill" be returned. In short, the sheer weight of statistics with respect to the matters presented often denies the grand jury the opportunity to carefully review each case.

We suggest that the grand jury system can be strengthened by enabling prosecutors to administratively terminate prosecutions prior to the grand jury stage. It has been recommended that prosecutorial screening of cases ought to occur when there is a reasonable likelihood that the admissible evidence would be insufficient to either obtain a conviction or to sustain it on appeal. A more difficult problem is presented by technical violations of the law. Many have adopted the position that a prosecutor "may refuse to present a matter to a grand jury even when there exists probable cause to believe that a criminal offense has been committed."<sup>179</sup> The American Bar Association

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<sup>179</sup> Note, "Prosecutorial Discretion," 1 Crim. Justice Q. 154, 157 (1973).

has noted that "a prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances, and for good cause consistent with the public interest, decline to prosecute notwithstanding that evidence may exist which would support a conviction."<sup>180</sup> In a similar vein, the National Advisory Commission on Criminal Justice Standards has taken the view that "an accused should be screened out of the criminal justice system when the benefits to be derived from prosecution or diversion would be outweighed by the costs of such actions."<sup>181</sup>

It is apparent that the overwhelming demands which are being made on the criminal justice system by the increasing volume of cases mandate the exercise of prosecutorial discretion. Of course, discretion must be exercised at various stages of criminal proceedings. Recently, it has been proposed that every exhaustive effort be made to eliminate the filing of criminal complaints in frivolous cases. R. 3:2 provides that "the complaint shall be a written statement of the essential facts constituting the offense charged made upon oath before a judge or other person empowered by law." The Rule is silent with respect to whether a prosecutor may prevent the filing of frivolous criminal complaints. Nevertheless, our survey reveals that prosecutors believe that they lack the power to preclude a citizen or a police officer from filing a complaint.

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<sup>180</sup> A.B.A. Standards, §3.9 (1971).

<sup>181</sup> National Advisory Commission on Criminal Justice Standards, Standard 1.1.

The filing of a criminal complaint often has an adverse effect upon the accused and his family. Thus, a cogent argument can be made that prosecutors ought to be authorized to screen criminal complaints. Another subcommittee is presently reviewing such a proposal. <sup>182</sup> We note it here simply to suggest that prosecutorial screening at the earliest stage of a criminal

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The following rule was recently proposed by the Essex County Prosecutor:

In any county where the Assignment Judge and County Prosecutor have determined that filing of complaints charging indictable offenses shall be pursuant to the provisions of this rule in the county or a subdivision thereof, the Assignment Judge by order shall direct each municipal court judge and each clerk of said court to require compliance with the provisions of this rule as a condition precedent to filing any complaint charging an indictable offense.

(a) No complaint charging an indictable offense shall be filed in any municipal court, unless the County Prosecutor shall consent to said filing in writing, or orally if circumstances do not permit written consent prior to filing; in the event of an oral consent, the County Prosecutor shall file written consent as soon as practicable thereafter.

(b) Any private citizen aggrieved by the refusal of the County Prosecutor to consent to the filing of a complaint charging an indictable offense may apply to the municipal court for a hearing, on notice to the County Prosecutor, at which hearing the County Prosecutor may attend and participate. The municipal judge may take testimony from said citizen and any other witnesses produced by said citizen. The hearing may be held with or without notice to the prospective defendant, as the court, in the interest of justice, may deem fit. In the event the hearing is on notice to the prospective defendant, the prospective defendant may cross-examine the witness produced. If at the conclusion of the hearing the court determines that the citizen should be permitted to file a complaint, then such complaint shall be accepted for filing by the clerk of the court.

proceeding would, in all likelihood, strengthen the grand jury by decreasing the number of matters presented to it.

Many have advocated the exercise of prosecutorial discretion after criminal complaints have been filed both prior to and following probable cause hearings. A recent amendment to R. 3:25-1 provides that "a complaint may be dismissed prior to trial only by order" of the assignment judge or the judge to whom it has been assigned for disposition. Although the amendment appears to require judicial approval as a prerequisite to dismissing a complaint, the Commentary which accompanied its submission to the Supreme Court by the Criminal Practice Committee noted that it was not intended to preclude the exercise of prosecutorial discretion. Simply stated, the amendment, standing alone, was not intended to prohibit a prosecutor from administratively dismissing a criminal prosecution.

Perhaps a more difficult obstacle is presented by N.J.S.A. 2A:158-5 which provides that "each prosecutor ... shall use all reasonable and lawful diligence for the detection, arrest, indictment and conviction of offenders against the laws." Despite the seemingly mandatory nature of the statute, our courts have explicitly recognized that prosecution of criminal cases is not a ministerial function and that a "county prosecutor within the orbit of his discretion inevitably has various choices of action and even of inaction." State v. Winne, 12 N.J. 152, 174 (1953). It is thus incumbent upon prosecutorial authorities to exercise discretion based upon their "judgment and conscience

... in accordance with established principles of law." State v. LaVien, 44 N.J. 323, 237 (1965).<sup>183</sup>

Despite the almost universal acceptance of the settled principle that prosecutors possess broad discretionary powers, the boundaries of such authority are vague and remain largely undefined. No one currently disputes the fact that the exercise of discretion implies "conscientious judgment, not arbitrary action" and that a prosecutor's range of choices, not unlike those within the judicial domain, depends upon the "particular circumstances of the case." State v. Shiren, 9 N.J. 445, 452 (1952). See also Abrams, "Internal Policy: Guiding the Exercise of Prosecutorial Discretion," 19 U.S.L.A.L.Rev. 1 (1971); Killer, Prosecution: The Decision to Charge a Suspect with a Crime, Chap. 20 (1970). A prosecutor is protected from civil and criminal liability to the extent that discretionary decisions are made in good faith. State v. Winne, supra at 162-163. Cf. In re Investigation Regarding Ringwood Fact Finding Comm., 65 N.J. 512 (1974); State v. Laws, 51 N.J. 494, 510 (1968), cert. denied 393 U.S. 971 (1968). Further, although a prosecutor has broad discretion in selecting matters for prosecution, it is not unregulated or absolute and it may, in appropriate circumstances, be reviewed for arbitrariness or abuse. In re Investigation Regarding Ringwood Fact Finding Comm., supra at 516.<sup>184</sup>

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In other jurisdictions see United States v. Cox, 342 F.2d 167 (5 Cir. 1965); Moses v. Kennedy, 219 F.Supp. 762 (D.D.C. 1963); Pugach v. Klein, 193 F.Supp. 630 (D.D.C. 1961); Williams v. Cave, 138 Kan. 586, 27 P.2d 272 (S.Ct. 1933); State ex rel. McKittrick v. Wallach, 353 Mo. 312, 182 N.W.2d 313 (S.Ct. 1944).

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See also State v. Conyers, 58 N.J. 123, 146-147 (1971); State v. Ashby, 43 N.J. 273, 276 (1964).

As we have noted previously, many prosecutors question whether they are empowered to administratively terminate prosecutions without grand jury action. No doubt the problem is more acute once a municipal court judge finds that probable cause exists. R. 3:4-3 provides that "[i]f, from the evidence, it appears ... that there is probable cause to believe that an offense has been committed and the defendant has committed it, the court shall forthwith bind him over to await final determination of the cause...." Perhaps it is significant that the rule does not state that the defendant is bound over for grand jury action. It has thus been argued that "[t]he determination of probable cause by the municipal court judge ... does not require any specific course of action by the prosecutor in order to terminate criminal proceedings, for there is no applicable court rule or statute governing such a disposition." 185

In our view, the power of a prosecutor to terminate a prosecution, both before and after a probable cause hearing, ought to be clarified. We urge study of a proposal which would make explicit the prosecutor's legal obligation. The following amendment to N.J.S.A. 2A:158-5 ought to be considered:

N.J.S.A. 2A:158-5A Discretion In The Charging Decision:  
De Minimis Infractions

- 1 - Notwithstanding the provisions of N.J.S.A. 2A:158-5 a prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute notwithstanding that evidence may exist which would support a conviction. A prosecutor may decline to prosecute an offense if, having regard to the nature of the conduct charged and the attendant circumstances he finds that the defendant's

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185 Note, "Prosecutorial Discretion," supra at 162.

conduct:

- a. Was within a customary license or tolerance, neither expressly negated by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offense;
  - b. Did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or
  - c. Presents such other extenuations that it cannot reasonably be regarded as envisaged by the Legislature in forbidding the offense.
- 2 - Among the factors which a prosecutor may properly consider in exercising his discretion are:
- a. The prosecutor's reasonable doubt that the accused is in fact guilty;
  - b. The extent of harm caused by the offense;
  - c. The disproportion of the authorized punishment in relation to the particular offense or the offender;
  - d. Possible improper motives of a complainant;
  - e. Cooperation of the accused in the apprehension or conviction of others;
  - f. Availability and likelihood of prosecution by another jurisdiction.

The proposed statute would amend N.J.S.A. 2A:158-5 and clarify a prosecutor's role in charging criminal offenses. The proposed bill employs the language of Section 2C:2-11 of the proposed New Jersey Penal Code. That provision permits assignment judges to dismiss de minimis infractions. Also contained in the bill are the standards approved by the American Bar Association. <sup>186</sup>

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<sup>186</sup> A.B.A. Standards, §3.9 (1971).

B. Selection of Grand Jury Members.

Prior to 1969, grand jurors in New Jersey were selected by a process referred to as the "key man" system. Grand jury commissioners were invested with broad discretion in devising methods to select the grand jury venire. In general, the system required the jury commissioners to solicit names of prospective jurors from various civil organizations, churches and labor unions. Although the "key man" method of grand jury selection was in extensive use in many jurisdictions and withstood constitutional attack in numerous cases,<sup>187</sup> it was the subject of a great deal of criticism. Thus, in 1969, our Supreme Court directed that as a matter of policy, future grand juries were to be selected on a random basis.<sup>188</sup> This policy was articulated in State v. Rochester, 54 N.J. 85 (1969),<sup>189</sup> where the Court directed that voter registration lists be employed. Id. at 92. The new policy was instituted in the hope that "it would achieve its high democratic goals while retaining, and perhaps even strengthening the just and effective aspects of our historic grand jury system." Id.

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<sup>187</sup> See Scales v. United States, 367 U.S. 203 (1961); United States v. Butera, 420 F.2d 564, 573 (1 Cir. 1970); Sanders v. United States, 415 F.2d 621, 623-24 (5 Cir. 1969); Mobley v. United States, 379 F.2d 768, 773 (5 Cir. 1967); Pope v. United States, 372 F.2d 710, 721-24 (8 Cir. 1967); United States v. Hoffa, 349 F.2d 20, 29 (6 Cir. 1965); Padgett v. Buxton-Smith Mercantile Co., 283 F.2d 597, 599 (9 Cir. 1960), cert. denied 365 U.S. 828 (1961).

<sup>188</sup> See State v. Rochester, 54 N.J. 85 (1969).

<sup>189</sup> See also State v. Smith, 55 N.J. 476 (1970); State v.  
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It is a well established principle of our jurisprudence that juries as instruments of public justice must be truly representative of the community.<sup>190</sup> This does not mean that every jury must contain representatives of all the economic, social, religious, racial, political and geographic groups of the community.<sup>191</sup> In an unbroken line of cases, the courts have uniformly rejected the contention that approximately proportional representation of the various identifiable groups within the community is required.<sup>192</sup> Nevertheless, it is incumbent upon

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Forer, 104 N.J.Super. 481 (Law Div. 1969); State v. Hughes, 128 N.J.Super. 363 (App.Div. 1974), certif. denied 66 N.J. 307 (1974); State v. Robinson, 128 N.J.Super. 525 (Law Div. 1974).

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See, e.g., Hill v. Texas, 316 U.S. 400 (1942); Smith v. Texas, 311 U.S. 128 (1940); Strauder v. West Virginia, 101 U.S. 303 (1880).

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See Dow v. Carnegie-Illinois Steel Corp., 224 F.2d 414, 424 (3 Cir. 1955).

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See Brown v. Allen, 344 U.S. 428, 497-98 (1953); United States v. DiTommaso, 405 F.2d 385, 390 (4 Cir. 1968), cert. denied 394 U.S. 934 (1969); Carmical v. Craven, 314 F.Supp. 580, 583-84 (N.D. Calif. 1970); United States v. Cohen, 275 F.Supp. 724, 723 (D.Md. 1967), aff'd 405 F.2d 385 (4 Cir. 1967), cert. denied 394 U.S. 934 (1968); United States v. American Oil Co., 249 F.Supp. 130, 138 (D.N.J. 1965), motion for rehearing denied, 286 F.Supp. 742, 744-55 (D.N.J. 1968); State v. Rochester, 54 N.J. 85, 88 (1969); State v. Forer, supra. As stated by the Supreme Court of the United States in Swain v. Alabama, 380 U.S. 202 (1965):

[T]he defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venire of jury roll from which petit jurors are drawn. (Citations omitted). Neither the jury roll nor the venire need be a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable (cont'd)

jury commissioners to select grand jury venires which closely mirror the demographic characteristics of the community.<sup>193</sup> The guarantee establishes a protective mechanism against dishonest or excessively zealous prosecutors and an incompetent or unduly passive judiciary. Further, the diffusion of citizen responsibility for the determination of the culpability of any member of society is a value deserving of constitutional protection.<sup>194</sup>

Inauguration of the random selection system was designed to serve these historic purposes. Its implementation has tempered, but has not wholly abated criticism of present grand jury selection procedures on grounds of racial and socio-economic exclusion. At present, our statutes (N.J.S.A. 2A:68-1, et seq.) do not set forth the procedures to be employed by jury commissioners

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group. 'Obviously the number of races and nationalities appearing in the ancestry of our citizens would make it impossible to meet a requirement of proportional representation. Similarly, since there can be no exclusion of Negroes as a race and no discrimination because of color proportional limitation is not permissible.' (citation omitted). We cannot say that purposeful discrimination based on race alone is satisfactorily proved by showing that an identifiable group in a community is under-represented by as much as ten per cent. (380 U.S. at 208, 85 S.Ct. at 829). (emphasis added)

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See Thiel v. Southern Pacific, 328 U.S. 217, 220 (1946). See also Hernandez v. Texas, 347 U.S. 475 (1954); Cassell v. Texas, 339 U.S. 282 (1950).

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See Williams v. Florida, 399 U.S. 78, 96 (1970); Heller, The Sixth Amendment to the Constitution of the United States (1965).

in selecting prospective grand jurors. We suggest that a study be conducted to determine whether the present method of grand jury selection is achieving the objective of obtaining a venire which fairly reflects a cross-section of the community. We note that voter registration lists might not, under rare circumstances, accomplish this end. Other possible sources, such as city directories, may be used to supplement voter lists.<sup>195</sup> In any event, empirical analyses of our system should be made in order to determine whether currently utilized selection procedures effectively insure representative grand juries.

We also recommend increasing the amount of compensation provided to grand jurors. N.J.S.A. 22A:1-1 provides that petit and grand jurors shall receive a per diem allowance of \$5. In addition, travel expenses to the extent of two cents per mile are permitted. This statute, which was enacted in 1953, ought to be amended. Amendatory legislation increasing juror fees would enable poor and working class persons to serve on grand juries with less financial sacrifice. Further, increasing grand juror fees would have an impact on their willingness to serve.

C. Number of Grand Jurors.

We recommend that the Supreme Court consider reducing the number of grand jurors on each panel. At present, N.J.S.A. 2A:73-1 provides that a grand jury shall not "exceed" twenty-three individuals. In like manner, R. 3:6-1 provides that the

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<sup>195</sup> See 28 U.S.C. §1863.

"assignment judge of each county shall order ... one or more grand juries ... not exceeding twenty-three members." An indictment or a presentment may be returned "only upon the concurrence" of twelve or more jurors. See R. 3:6-8 and R. 3:6-9 respectively. Our courts have noted that a grand jury may consist of less than 23 members. See State v. Zeller, 77 N.J.L. 619 (E. & A. 1909); State v. Robinson, 82 N.J.L. 76 (S.Ct. 1911). Obviously, twenty-three is not a "magic number". Considerable resources could be saved if the panel was reduced to a lesser number. The Rule requiring the concurrence of a majority of jurors would be retained. The resulting monetary saving could be utilized to increase juror fees which, as noted above, would greatly contribute to insuring that the grand jury reflects a cross-section of the community.

D. Training and Supervision of Grand Jury.

A common complaint with respect to grand juries is that they tend to "over-charge." Although no empirical studies exist supporting this belief, the experience of many prosecutors has been that grand juries often return indictments in marginal cases where the likelihood of ultimate conviction is minimal. This is true despite the routine instruction to the grand jury, which recites the standard of proof required for the return of an indictment, i.e., "evidence, which if unexplained or uncontradicted, would carry the case to a jury and justify the conviction of the accused."<sup>196</sup> Many have argued that the proclivity of grand

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<sup>196</sup> Trap Rock Industries, Inc. v. Kohl, 59 N.J. 471, 487 (1971).

juries to indict is caused by their lack of understanding with respect to other phases of the criminal justice system. A recent study of a grand jury in Harris County, Texas, disclosed that the typical grand juror does not understand his basic function until the third full working session.<sup>197</sup> The author concluded that approximately 116 cases are presented to a grand jury before its members fully comprehend their primary responsibility.

We suggest that grand jurors should be given a mandatory training period to acquaint them with the criminal justice system. The assignment judge should be required to instruct the grand jury more thoroughly with regard to its rights and obligations. We further recommend that the Administrative Office of the Courts prepare a printed manual to be distributed to grand jurors fully advising them of their responsibilities. The availability of the court for instructions independent of the prosecutor should be emphasized. The assignment judges should be specifically authorized to instruct the jury with respect to the particular offense charged in the complaint. See, e.g., State v. Ellenstein, 121 N.J.L. 304 (S.Ct. 1938). Further, R. 3:6-6(a) should be amended to permit the assignment judge to be present for the purpose of delivering such instructions when the grand jury is "in session" except when it is receiving evidence or deliberating. At present, that Rule provides as follows:

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<sup>197</sup>Carp, "Harris County Grand Jury: A Case Study," 12 Houston L. Rev. 90 (1974).

(a) Attendance at Session. The prosecuting attorney, the clerk of the grand jury, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors, the clerk and the prosecuting attorney may be present while the grand jury is deliberating. The grand jury, however, may request either the prosecuting attorney or the clerk to leave the jury room during its deliberations.

It may be argued that the Rule does not prohibit the assignment judge from being present when the grand jury is not receiving evidence or deliberating. However, we submit that R. 3:6-6(a) is ambiguous and that it should be clarified to permit the assignment judge to instruct the grand jury at its request or that of the prosecutor.

Although prosecutors disagree, it is a common complaint that grand juries have become a "rubber stamp" and do not exercise sufficient independent judgement in deciding whether to return an indictment. It seems an entirely salutary practice for the assignment judge to charge the grand jury after it has heard all the evidence, so that it can reach its decision with an impartial view of the law fresh in its members' minds, free from any prosecutorial "pressures" which may be exerted.

Another issue deserving of study is whether a separate office of counsel to the grand jury should be created for presenting matters to that body and assisting it in performing its function. It bears repeating that the grand jury is an arm of the court and is a judicial body.<sup>198</sup> It is an integral

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<sup>198</sup> In re Jeck, 26 N.J. Super. 514 (App.Div. 1953).

part of our court system and it performs quasi-judicial functions.<sup>19</sup>  
Not until 1812 were prosecutors appointed to present matters to  
the grand jury.<sup>200</sup> We suggest that a "grand jury advisor" might be  
a viable means of insuring the independence of that body. In any  
event, we recommend that the concept be studied.<sup>201</sup>

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State v. Smith, 102 N.J. Super. 325 (App. Div. 1968),  
aff'd 55 N.J. 476 (1970).

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L. 1812, p. 23.

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We note in this context that the following bills are being  
considered by the Legislature:

Senate Bill No. 423:

Be it enacted by the Senate and General Assembly of  
The State of New Jersey:

1. The Chief Justice of the Supreme Court shall,  
from a list of attorneys selected by the  
Administrative Office of the Court, appoint on  
an experimental basis and as hereinafter provided,  
attorneys for grand juries empaneled under the  
laws of this State to advise and assist such  
grand juries as hereinafter provided. Every  
attorney so selected shall be qualified by sub-  
stantial experience in the field of criminal law,  
and shall not be associated with the office of  
the Attorney General or of the prosecutor of the  
relevant county. Said attorney shall be responsible  
solely to the Chief Justice.

2. The Chief Justice shall appoint such attorneys  
pursuant to section 1. of this act to advise and  
assist grand juries in one county of the first  
class and one county of the second class to be  
determined by the Chief Justice.

3. The Chief Justice shall assign an attorney  
to each grand jury sitting in cases involving  
crimes punishable as high misdemeanors (cont'd)

E. Evidence Before the Grand Jury.

It is beyond cavil that reception before a grand jury of inadmissible or even illegally obtained evidence procured in violation of an individual's constitutional rights does not serve

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201 (cont'd)

in the counties selected pursuant to section 2 of this act. In all other cases in the counties so selected, the provisions of this statute shall be read to the grand jury, and an attorney assigned if it so requests. Subject to such rules as may from time to time be prescribed by the Chief Justice, the attorney for the grand jury to which he is assigned to provide legal advice and assistance of counsel to the grand jury in the performance of its functions and duties, and to answer any and all questions put to him by the grand jurors. He shall have access to all evidence and files of the prosecutor in each case presented to the grand jury and shall advise the grand jury upon any matter which he deems material and which is found therein, or upon any matter of fact or law which he deems material to the proposed indictment, including suggestions concerning further investigations. The attorney shall not be an advocate for any defendant, nor for the State, and shall not have any direct role in the deliberations of the grand jury except to answer questions put to him by grand jurors and as hereinbefore provided. Upon the impaneling of every grand jury in the counties selected pursuant to section 2 of this act, the members thereof shall be notified that the attorney is available to answer any questions which a member of the grand jury may desire to propound, including, but not limited to, questions seeking explanation of proposed indictments, concerning the evidence or legal implications thereof, or the degree or the weight of evidence concerning a proposed indictment.

4. There shall be appropriated such sums as may be necessary for the implementation of this act.  
(cont'd)

to vitiate the resulting indictment. In most jurisdictions, including New Jersey, the grand jury is not limited to

201 (cont'd)

5. This act shall take effect immediately and shall terminate and be of no further force and effect on December 1, 1978, unless extended by the Legislature.

Senate Bill No. 1082:

1. The Governor, with the advice and consent of the Senate, shall appoint for a term of 3 years, attorneys for grand juries impaneled under the laws of this State, to advise and assist such grand juries as hereafter provided. The number of such attorneys to be appointed shall be determined with the advice of the assignment judges of the Superior Court of each county. Every attorney so appointed shall be qualified by substantial experience in the field of criminal law, or be a teacher of the law in such field; provided, however, that such attorney shall not engage in the private practice of law during his appointment nor be associated with the office of the Attorney General or of the prosecutor of the relevant county. Said attorney shall be responsible solely to the assignment judge, and shall be compensated at a rate to be fixed by the Legislature. He may employ such assistants and staff as may be deemed necessary by the assignment judge and within the limits of appropriations available therefor. (cont'd)

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See, e.g., United States v. Calandra, 414 U.S. 343 (1974); United States v. Blue, 384 U.S. 251 (1966); Lawn v. United States, 355 U.S. 339 (1958); Costello v. United States, 350 U.S. 359 (1966); Holt v. United States, 218 U.S. 24 (1910). One line of cases, however, has indicated that where a target of an investigation is compelled to give incriminating evidence before a grand jury, that same grand jury cannot permissibly indict for the offenses to which he has confessed. See e.g., Goldberg v. United States, 472 F.2d 513, 516 (2 Cir. 1973); Jones v. United States, 342 F.2d 863 (D.C.Cir. 1964); United States v. Tane, 329 F.2d 848 (2 Cir. 1964); United States v. Lawn, 115 F.Supp. 674 (S.D.N.Y. 1953), appeal dismissed sub nom; United States v. Roth, 208 F. 2d 467 (2 Cir. 1953). For example, the court in (cont'd)

receiving evidence admissible at trial.<sup>203</sup> As a general rule, the competency of evidence presented to the grand jury may not

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201 (cont'd)

2. The attorney for the grand jury shall be present at all sessions of each sitting grand jury to which he is assigned to provide legal advice and assistance of counsel to the grand jury in the performance of its functions and duties, and to answer any and all questions put to him by the grand jurors. He shall have access to all evidence and files of the prosecutor in each case presented to the grand jury and shall advise the grand jury upon any matter found therein, or upon any matter of fact or law which he deems material to the proposed indictment, including suggestions concerning further investigations. The attorney shall not be an advocate for any defendant, nor for the State, and shall not have any direct role in the deliberations of the grand jury except to answer questions put to him by grand jurors. Upon the impaneling of every grand jury, the members thereof shall be notified that the attorney is available to answer any and all questions which any member of the grand jury may desire to propound, including but not limited to, questions seeking explanation of proposed indictments, concerning the evidence or legal implications thereof, or the degree or the weight of evidence concerning a proposed indictment. (cont'd)

202 (cont'd)

Goldberg v. United States, supra, observed that an indictment might be invalid if returned by the same grand jury before whom a defendant was compelled to testify against himself under a grant of immunity, and who actually testified as to incriminating matters. The court applied the rationale of Bruton v. United States, 391 U.S. 123 (1968), to the grand jury setting in finding that under such circumstances "it would be well nigh impossible for the grand jurors to put [defendant's] answers out of their minds." Thus, the very testimony which was compelled by the grant of immunity might be used against him by the grand jury. Goldberg v. United States, supra at 516.

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See, e.g., State v. Chandler, 98 N.J. Super. 241 (Cty. Ct. 1967); See also State v. Ferrante, 111 N.J. Super. 99 (App. Div. 1970); State v. Garrison, 130 N.J.L. 350 (S. Ct. 1943); State v. Donovan, 129 N.J.L. 478 (S. Ct. 1943); State v. Ellenstein, 121 N.J.L. 304 (Sup. Ct. 1938); State v. Dayton, 23 N.J.L. 49 (S. Ct. 1850).

be the subject of judicial inquiry.<sup>204</sup>

The reason for the rule is obvious. Traditionally, the grand jury "has been accorded wide latitude to inquire into violations of [the] criminal law."<sup>205</sup> "It is a grand inquest, a body with powers of investigation, the scope of whose inquiries is not to be limited... by doubts whether any particular individual will be found properly subject to an accusation of crime."<sup>206</sup> It has been recognized that "the

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201 (cont'd)

3. The costs of the legal services provided pursuant to the provisions of this act shall be paid by the State out of funds appropriated for this purpose to the Department of Law and Public Safety, Division of Criminal Justice.

4. This act shall take effect 90 days following its enactment.

#### STATEMENT

This bill would strengthen the grand jury system by providing competent legal assistance to every grand jury convened in this State. Whereas detractors have suggested that the grand jury be abolished, this bill would assure that the grand jury would operate as originally intended, that is, as a protection against malicious indictment. By providing the grand jury with an independent attorney employed by the court and unconnected with the prosecutor's office, this bill would restore the grand jury as a more meaningful investigative body and protector of individual liberty.

<sup>204</sup> State v. Chandler, supra.

<sup>205</sup> United States v. Calandra, supra at 341.

<sup>206</sup> Blair v. United States, 250 U.S. 273, 282 (1919).

grand jury's investigative power must be broad if its public responsibility is adequately to be discharged."<sup>207</sup> Significantly, the grand jury is not an "officious meddler,"<sup>208</sup> for its investigatory function "is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed!"<sup>209</sup> "Such an investigation may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors."<sup>210</sup>

One caveat is plainly in order. The policy prohibiting dismissal of an indictment by virtue of the introduction of inadmissible evidence does not apply to what has been characterized as "grand jury misconduct." Our courts have held that "in order to promote the purity of the administration of justice and for greater security of the citizen,"<sup>211</sup> an indictment may be quashed by virtue of misconduct by the grand jury. Misconduct occurs when the grand jury "indifferently and openly without having some evidence,"<sup>212</sup> brings charges against an individual by

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<sup>207</sup> Branzberg v. Hayes, 408 U.S. 665, 700 (1972).

<sup>208</sup> In re Addonizio, 53 N.J. 107, 124 (1968).

<sup>209</sup> United States v. Stone, 429 F.2d 138, 140 (2 Cir. 1970).

<sup>210</sup> Branzberg v. Hayes, supra at 701.

<sup>211</sup> State v. Dayton, supra at 88.

<sup>212</sup> State v. Donovan, supra at 479.

returning an indictment. However, an indictment will not be dismissed as long as some legal evidence was presented which supports the charges.<sup>213</sup>

Although the great weight of authority supports the rule in New Jersey, many have argued that it ought to be modified. It has been suggested that the failure to apply any evidentiary controls results in unnecessary trials and permits improper rummaging into the personal lives of witnesses.<sup>214</sup> In this context, it is to be observed that Congress is presently considering two bills which, if enacted, would require that an indictment be based upon legally sufficient evidence.<sup>215</sup> So too, several states have, by statute, limited the power of the grand jury to receive inadmissible evidence.<sup>216</sup> We suggest that this issue should be studied to determine whether our present rule is to be retained.

F. Gathering of Evidence.

Although no New Jersey case has expressly dealt with the subject, it would appear that the subpoena power is not inherent

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<sup>213</sup> State v. Smith, supra at 343.

<sup>214</sup> See Clark, The Grand Jury: The Use and Abuse of Political Power, p. 145 (1975). See also Goldstein, "The State and the Accused: Balance of Advantage in Criminal Procedure," 69 Yale L.J. 1149, 1171 (1960); Comment, 58 Mich. L. Rev. 1218 (1960); Note, 72 Yale L. J. 18 (1973).

<sup>215</sup> H.R. 2986 and H.R. 6006.

<sup>216</sup> See, e.g., Cal. Penal Code §936.6 (1970); Nev. Rev. Stat. §172.135 (1967); N.Y. Crim. P. Law §190.30 (1971).

in the general authority of prosecutors to detect and investigate criminal activity. Neither N.J.S.A. 2A:158-5 nor R. 1:9-1 and 2, expressly authorize prosecutors to subpoena witnesses or materials.<sup>217</sup> Further, the comment which accompanies R. 1:9-1 states that the subpoena authority "is applicable only to court proceedings."<sup>218</sup> It thus appears that, in the absence of a specific grant of authority,<sup>219</sup> prosecutors lack the power to summon witnesses and demand documentary evidence for strictly investigative purposes. Our courts have noted in this regard that "[i]f the prosecutor has before him any evidence "of criminal activity," his course should be to "present the facts to the grand jury, and if in its opinion an investigation should be made, subpoenas can be issued in the regular way...."<sup>220</sup>

Despite this admonition, the subpoena, while technically a directive by the court to appear, has traditionally been employed by prosecutors as a distinct investigative tool. Often witnesses are summoned for private interviews with the prosecutor and do not thereafter appear and testify before the grand jury. It has been suggested that the grand jury subpoena

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<sup>217</sup> Compare R. 7:3-3 which permits law enforcement officers to issue subpoenas with respect to non-indictable offenses.

<sup>218</sup> It is to be noted that subpoenas for taking depositions are governed by R. 4:14-7. Subpoenas requiring appearances before the ethics committee, the unauthorized practice committee and the committee on character and fitness are governed by R. 1:20-6, R. 1:22-6 and R. 1:25, respectively.

<sup>219</sup> In some states, statutes have expressly conferred subpoena powers on the prosecutor. See, e.g., Pollard v. Roberts, 283 F.Supp. 248 (E.D. Ark. 1968), aff'd 393 U.S. 14 (1968).

<sup>220</sup> Brier v. Smith, 104 N.J. Eq. 386, 391 (Ch. 1929). See also State v. Eisenstein, 16 N.J. Super. 8 (App.Div. 1951), aff'd o.b. 9 N.J. 347 (1952).

has been abused in this manner. In a somewhat similar context, the American Bar Association has criticized "the practice of some prosecution offices of summoning persons for interviews by means of documents which in format and language resemble official judicial subpoenas or similar judicial process, although the prosecutor lacks subpoena power."<sup>221</sup> Noting that "[s]uch practices are improper"<sup>222</sup> and that "they amount to a subversion and usurpation of judicial power,"<sup>223</sup> the American Bar Association has characterized such activity as "unprofessional conduct."<sup>224</sup> Absent specific statutory subpoena power, "a prosecutor's communication requesting a person to appear for an interview should be couched in terms of a request."<sup>225</sup>

It would appear that if the grand jury is to be employed as an investigative body, it should have authority with respect to the parameters of its inquiry. It has been proposed that the issuance of subpoenas could be voted upon by some portion of the grand jury.<sup>226</sup> A cogent argument can be made that the

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<sup>221</sup> Commentary, A.B.A. Standards §76 (1970). See also United States v. Thomas, 320 F.Supp. 527 (D.C. Cir. 1970).

<sup>222</sup> Commentary, A.B.A. Standards §76 (1970).

<sup>223</sup> Id.

<sup>224</sup> A.B.A. Standards §76 (1970).

<sup>225</sup> Commentary, A.B.A. Standards §76 (1970).

<sup>226</sup> Both H.R. 2986 and H.R. 6006 require that a subpoena issue only upon the affirmative vote of twelve or more grand jurors. See also Clark, The Grand Jury, p. 141 (1975).

function of the grand jury can be meaningful only "if it is active over and beyond voting solely on whether to indict."<sup>227</sup>

By requiring an affirmative vote of the grand jury as a prerequisite to the issuance of a subpoena, the dominance of the prosecutor and the consequent passivity of the jurors would be reduced. We thus recommend study of procedures by which the grand jury would be given greater control over the subpoena process.

We also urge that consideration be given to conferring upon the prosecutor the power to issue subpoenas. This has been accomplished by legislation in several states.<sup>228</sup> The prosecutor would be granted the power to subpoena witnesses outside the presence of the grand jury, so that he alone would conduct the initial exploratory investigation to determine whether the matter ought to be presented.<sup>229</sup> Only when he had developed sufficient information would the case be presented for the grand jury's consideration. As noted by one author, "[t]his suggestion would absolve the grand jurors of the difficult task of being investigators and then having to shift to evaluating the evidence."<sup>230</sup> To strengthen the independence of the grand jury, full authority to initiate investigations could be given to the prosecutor with the corresponding power

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<sup>227</sup>  
Id.

<sup>228</sup>  
Pollard v. Roberts, supra.

<sup>229</sup>  
Clark, The Grand Jury, supra, 142.

<sup>230</sup>  
Id. at 143. Cf. Antell, "Modern Grand Jury: Benighted Supergovernment," 51 A.B.A.J. 183 (1965).

commensurate with his responsibility. This would not detract from the investigatory function of the grand jury. Rather, it would grant to the prosecutor effective powers to screen possible subjects for grand jury inquiry. On the other hand, once the matter is presented to the grand jury, that body would have greater control over the metes and bounds of its investigation.

Similar questions have been raised with respect to the granting of immunity. N.J.S.A. 2A:81-17.3 provides that "[i]n any criminal proceeding before ... a grand jury, if a person refuses to answer a question ... on the ground that he may be incriminated thereby and if the Attorney General, in writing, requests the court to order that person to answer the question, the court shall so order and that person shall comply with the order." In return, the witness is to be granted "use plus fruits" immunity. See also N.J.S.A. 2A:81-17.29 et seq., as amended, regarding public employees. Several commentators have suggested that the grand jury be permitted to vote upon the question of granting immunity to a witness.<sup>231</sup> We question the viability of this proposal. Nevertheless, prosecutors have been criticized with respect to their discretionary authority.<sup>232</sup> Suffice it to say, the question has evoked strong emotions on both sides of the issue. Thus, we recommend further consideration of proposals modifying present procedures to permit the grand jury to vote upon questions relating

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<sup>231</sup>Id. at 142.

<sup>232</sup>Id.

to the grant of immunity.

G. Presenting Exculpatory Evidence.

As we have noted previously, the original function of the grand jury in England was to consolidate the royal power and to present matters for criminal prosecution. Nevertheless, perhaps the most significant function of the grand jury in modern times is not only to examine the commission of crimes, but also "to stand between the prosecutor and the accused, and to determine whether the charge [is] founded upon credible evidence or [is] dictated by malice or personal ill will."<sup>233</sup> Succinctly stated, our Constitution, which requires indictment for criminal offenses, presupposes a grand jury "acting independently of either prosecuting attorney or judge,"<sup>234</sup> whose mission is to clear the innocent, no less than to bring to trial those who may be guilty. It has been suggested that the grand jury's ability to fulfill its public responsibilities is compromised to the extent that the prosecutor is not currently required to present all exculpatory evidence to it for its consideration. It is highly unlikely that the grand jury will learn of exculpatory evidence unless the prosecutor brings it to its attention. Yet, under our present system, the grand jury is not required to hear evidence which might be

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<sup>233</sup> Hale v. Henkel, 201 U.S. 43, 59 (1906).

<sup>234</sup> United States v. Dionisio, 410 U.S. 1, 16-17 (1973).

favorable to the defendant. Hence, the tenable possibility exists that an individual may be compelled to undergo the trauma of a felony trial based upon an ex parte proceeding from which he and all his evidence are excluded.

In other jurisdictions, it has been held that "if the district attorney seeking an indictment is aware of evidence reasonably tending to negate guilt, he is obliged to inform the grand jury of its nature and existence."<sup>235</sup> This rule appears to be consistent with the prosecutor's principal responsibility.<sup>236</sup> "The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done."<sup>237</sup> So too, such a rule would insure the grand jury's role as a protective bulwark standing solidly between the ordinary citizen and an over-zealous prosecutor. Nevertheless, a requirement that all known exculpatory evidence must be presented to the grand jury might well be unworkable. Under such a rule, a prosecutor might be compelled to present all eye-witnesses to a crime, thereby unduly lengthening grand jury proceedings. We suggest, however, that this issue be given further consideration.

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<sup>235</sup> See Johnson v. Superior Court, 15 C.3d 248, \_\_\_ Cal.Rptr. \_\_\_, \_\_\_ P.2d \_\_\_ (1975).

<sup>236</sup> See Disciplinary Rule 7-103.

<sup>237</sup> Canons of Professional Ethics, Canon 5. See also State v. Farrell, 61 N.J. 93, 104 (1972).

#### H. Right of Target Witnesses to Appear.

In New Jersey, it is unnecessary to advise a witness of his Fifth Amendment privilege against self-incrimination if he is called before a grand jury conducting a general investigation. "Where the inquiry is in fact a general investigation not aimed at the witness and the witness fails to claim the privilege, his testimony can be used against him and can even be the basis of an indictment."<sup>238</sup> In contrast, the broad latitude afforded the questioning of a "non-target" witness does not apply to one who is the focus of a grand jury investigation. Rather, in New Jersey, a target witness must be warned of that fact.<sup>239</sup> A witness becomes a target of an investigation when he is called in order to obtain evidence to fix a criminal charge.<sup>240</sup> It is not necessary for a witness to have had formal charges filed against him in order for him to be considered such a target. It is only necessary that an intent to indict him at the time of questioning is present. In State v. Sarcone, 96 N.J. Super. 501 (Law Div. 1967), a trial court held that the appearance of a target witness or a putative defendant before a grand jury, absent the warnings and a subsequent waiver, mandates a

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<sup>238</sup>  
State v. Fary, 19 N.J. 431 (1955).

<sup>239</sup>  
State v. Sarcone, 46 N.J. Super. 501 (Law Div. 1967).

<sup>240</sup>  
Id.

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dismissal of a resulting indictment. This question is presently pending before our Supreme Court. See State v. Vinegra, \_\_\_ N.J. \_\_\_ (1975) (granting certification).

It has been suggested that a putative defendant be permitted to appear at his request before the grand jury. Several states allow the accused the right to testify prior to indictment although no duty exists on the part of the prosecutor to so inform the individual.<sup>242</sup> Other jurisdictions require that public officers accused of official misconduct must be informed of the charge and be permitted to appear and testify before the grand jury.<sup>243</sup> Still other states afford the accused the opportunity to be present and to question other witnesses, but not the right to introduce evidence in his behalf.<sup>244</sup> We suggest that this area be the subject of further inquiry. It is to be noted in this regard that several bills permitting a target witness an opportunity to appear before the grand jury on his own initiative are presently pending before Congress.<sup>245</sup>

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Contra: United States v. Corallo, 413 F.2d 1306, 1328-1330 (2 Cir. 1969); Blackwell v. United States, 405 F.2d 625 (5 Cir. 1969), cert. denied 395 U.S. 962 (1969); United States v. Capaldo, 402 F.2d 821, 823-824 (2 Cir. 1968), cert. denied 394 U.S. 989 (1969); United States v. Levenson, 405 F.2d 971, 979 (6 Cir. 1968), cert. denied 395 U.S. 958 (1969).

<sup>242</sup>  
See e.g., N.Y. Crim. P. Law, §190.50 (1971); Okla. Stat. Ann. tit. 22, §335 (1969).

<sup>243</sup>  
Ga. Code Ann. §40.1617 (1957), §89-9908 (1971).

<sup>244</sup>  
State v. Menillo, 159 Conn. 264 (1970).

<sup>245</sup>  
H.R. 2986; H.R. 6006.

I. Right of Witnesses to Have Counsel Present.

At present, a witness appearing before the grand jury has no right to be accompanied by counsel.<sup>246</sup> As noted previously, R. 3:6-6(a) closely restricts those permitted to be present during the grand jury's inquiry.<sup>247</sup> Legal commentators, however, have suggested that grand jury investigations constitute a "critical stage" of criminal proceedings and, thus, witnesses ought to be permitted to be accompanied by counsel.<sup>248</sup> Analogizing the grand jury's function with that of a preliminary hearing (see Coleman v. Alabama, 399 U.S. 1 (1969), but see Gerstein v. Pugh, \_\_\_ U.S. \_\_\_ (1975)), it has been contended that "[i]f the accused is in need of a lawyer to argue the probable cause issue before a judicial

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<sup>246</sup> State v. Cattaneo, 123 N.J. Super. 167, 172 (App. Div. 1973). See also Kirby v. Illinois, 406 U.S. 682 (1972); In re Groban, 352 U.S. 330 (1957); United States v. Morado, 454 F.2d 167 (5 Cir. 1972); United States v. DiMichele, 375 U.S. 959 (3 Cir. 1967), cert. denied 389 U.S. 838 (1967).

<sup>247</sup> R. 3:6-6(a) provides as follows:

(a) Attendance at Session. The prosecuting attorney, the clerk of the grand jury, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors, the clerk and the prosecuting attorney may be present while the grand jury is deliberating. The grand jury, however, may request either the prosecuting attorney or the clerk to leave the jury room during its deliberations.

<sup>248</sup> See Clark, The Grand Jury, supra, 126; Dash, "The Indicting Grand Jury: A Critical Stage," 10 Amer. Crim. L. Rev. 807 (1972).

officer, the presence of counsel is even more indispensable when a body of laymen is called upon to apply this legal standard."<sup>249</sup> The attorney's role would be limited "to advising the witness with respect to questions put to him...."<sup>250</sup> Any further participation would be barred "so that critics of this reform [could not] claim that the grand jury would be unable to function swiftly...."<sup>251</sup> It is to be observed that several states have enacted statutes authorizing the presence of counsel during the grand jury's investigation.<sup>252</sup>

Those opposing such legislation argue that grand jury proceedings are not criminal prosecutions. Further, the presence of counsel might well impair the independence of grand jury members. Enactment of such a proposal might cause intolerable delays and transform the grand jury proceeding to a mini-trial.

In any event, we recommend that the suggested reform be the subject of further study. Perhaps, the right to have counsel present should be adopted only with respect to putative defendants or target witnesses. The fact that legislation exists in other jurisdictions affording the right to an attorney suggests that the question warrants impartial inquiry.

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<sup>249</sup> Dash, "The Indicting Grand Jury: A Critical Stage," supra, 815.

<sup>250</sup> Clark, The Grand Jury, supra, 126.

<sup>251</sup> Id.

<sup>252</sup> See, e.g., Kan Stat. Ann §22-3009 (1970); S.D. Comp. Laws §23-30-7 (1972); Utah Code Ann. §77-19-3 (1973); Wash. Rev. Code. Ann. §10.27.120 (1972).

J. Oath of Secrecy.

The ancient doctrine of grand jury secrecy "has its origins in the early history of the common law,"<sup>253</sup> and is "older than our nation itself."<sup>254</sup> Our courts have strictly adhered to the traditional policy of secrecy and have deviated from that course only in rare instances when justice plainly demanded it.<sup>255</sup> The doctrine is thus deeply rooted in our jurisprudence<sup>256</sup> and is reflected in our existing court rules. R. 3:6-7 specifically states that "the requirement as to secrecy of the grand jury shall remain as heretofore" and "all persons other than witnesses ... shall be required to take an oath of secrecy before their admission thereto." Further, R. 3:13-3 and R. 3:17, the only specified exceptions to the rule of secrecy, refer only to pretrial discovery of grand jury minutes by a criminal defendant.

The reasons supporting the traditional policy of secrecy "are manifold ... and are compelling when viewed in

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<sup>253</sup>  
State v. Farmer, 45 N.J. 520, 522 (1965).

<sup>254</sup>  
The requirement of secrecy in ancient common law was so strict that if a grand juror disclosed to an indicted person the evidence presented against him, he was held to be accessory to the crime if the crime was a felony and a principal if it was treason. 4 Blackstone Commentaries, 126. Grand jury secrecy was firmly established in the Earl of Shaftesbury Trial, 1681.

<sup>255</sup>  
State v. Farmer, *supra*; State v. DiModica, 40 N.J. 4040 (1963); State v. Clement, 40 N.J. 139 (1963); State v. Moffa, 36 N.J. 219 (1961); In re Presentment by Camden Cty. Grand Jury, 34 N.J. 378 (1961).

<sup>256</sup>  
Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 399 (1959); United States v. Proctor & Gamble Co., 350 U.S. 677, 683 (1968); 4 Blackstone Commentaries 301, *et seq.*; 1 Pollack & Maitland, History of English Law 130 (1895). See generally, 8 Wigmore, Evidence §2360 (McNaughton rev. 1961).

the light of the history and modus operandi of the grand jury."<sup>257</sup> They have been aptly summarized in the oft-quoted language of the Court of Appeals for the Third Circuit in United States v. Rose, 215 F.2d 617, 628-29 (3 Cir. 1954). Succinctly stated, the secrecy doctrine is designed to (1) prevent the escape of those whose indictment may be contemplated, (2) insure the utmost freedom to the grand jury during its deliberations, and to prevent persons subject to indictment or their friends from importuning grand jurors, (3) prevent subornation of perjury, (4) encourage free and untrammelled disclosure by persons who have information with respect to the commission of crimes, and (5) protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation.<sup>258</sup>

As we have noted, our rules generally adhere to the doctrine of secrecy. However, R. 3:6-7 specifically exempts witnesses from the oath requirement. It has been suggested that the values to be protected by the secrecy doctrine, as noted above, are subverted to the extent that witnesses are permitted to discuss what transpired during the grand jury's investigation. There is no case law in New Jersey containing an historical exposition of witness secrecy in grand jury proceedings. Dictum in several decisions supports the view that a witness who has been examined before a grand jury is under no legal obligation to refrain from recounting

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Pittsburgh Plate Glass Co. v. United States, supra at 399.

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See also United States v. Amazon Industrial Chemical Corp., 55 F.R.D. 254, 261 (D.C. Md. 1931).

what was said to and by him while there. Nevertheless, it might well be argued that R. 3:6-7 does not preclude the assignment judge from requiring that the secrecy oath be administered with respect to witnesses. R. 3:6-7 requires that persons mentioned in R. 3:6-6(a) must be sworn to secrecy, but witnesses need not be so bound (emphasis ours).

We suggest that this question be studied. It is to be noted that this Committee recently considered the issue of whether witnesses should be required to take an oath of secrecy. The Committee agreed with the policy against prohibiting witnesses from divulging what transpired during the grand jury's investigation.<sup>260</sup> However, the question is a difficult one and thus we should review whether the assignment judge ought to be authorized to require that witnesses take the oath of secrecy in specific cases.

K. The Role of the Prosecutor.

It has been said that "[t]he integrity of the criminal justice system cannot be sustained unless it is complemented by an independent grand jury process which shields both the accused and the investigators from any questioning of their

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State v. Borg, 8 N.J. Misc. 349 (S.Ct. 1930); State v. Fish, 90 N.J.L. 17 (S.Ct. 1917), rev'd on other grounds 91 N.J.L. 228 (E. & A. 1917).

<sup>260</sup> "Report of the Supreme Court's Committee on Criminal Practice," 98 N.J.L.J. 321 (1975).

impartiality." Much of the criticism of the grand jury system has focused upon the ability of the prosecutor to dominate its investigations and mold the results of its

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inquiries. Prosecutors respond by noting that grand juries do, in fact, act independently. In point of fact, prosecutorial impropriety with respect to the grand jury function is rare in this State. We emphasize that the primary problem confronting the grand jury at present is the great volume of matters which must be presented to it. Simply stated, prosecutors, often overwhelmed by statistics, rarely have the motivation to "control" the grand jury.

Nevertheless, public confidence in our grand jury system can best be maintained by eradicating the potential for abuse. We suggest that the following proposals be considered. First, the prosecutor should not be permitted to circumvent the accused's right to a probable cause hearing by making an immediate presentation to the grand jury. R. 3:4-3 requires a hearing as to probable cause within a "reasonable time" following the filing of a complaint if "an indictment has [not yet] been returned against the defendant." A probable cause hearing is not constitutionally guaranteed except where the accused is detained. Further,

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Boylan, "On Restructuring the Grand Jury System," 88 N.J.L.J. (1975).

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See Puff and Harreden, "Grand Jury in Illinois: To Slaughter a Sacred Cow," 1973 U.Ill.L.F. 635 (1973). See also Wickersham, "The Grand Jury - Weapon Against Crime and Corruption," 51 A.B.A.J. 1157 (1965).

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See Gerstein v. Pugh, supra.

such a hearing is not an essential part of the prosecution and, as noted, can be superseded by the grand jury's prior return of an indictment.<sup>264</sup> Nevertheless, probable cause hearings assist the prosecutor in evaluating and in screening cases. So too, they are beneficial to the accused by virtue of the discovery advantages they afford. Moreover, such hearings may be employed as vehicles for plea bargaining since both the prosecutor and the accused can better evaluate the merits of their respective positions following presentation of evidence. In any event, our rules provide for such hearings and, thus, prosecutors should not be permitted to unilaterally compromise the defendant's right as set forth in R. 3:4-3. We recommend further study of means to discourage prosecutors from circumventing the accused's right to a probable cause hearing.

Second, we suggest limiting the number of times that a prosecutor may resubmit a matter to another grand jury. At present, the return of a "no bill" by one grand jury does not preclude the prosecutor from presenting the case to another, perhaps more cooperative, one. The "potential for nullifying one grand jury's action by reinstating the matter, without new evidence, before a different ... grand jury recurs throughout the history of

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<sup>264</sup> See State v. Cox, 114 N.J. Super. 556 (App. Div. 1971); State v. Boykin, 113 N.J. Super. 594 (Law Div. 1971). The Supreme Court's Special Committee on Calendar Control has recommended the elimination of probable cause hearings (Report, 94 N.J.L.J. 185, 198 (1971)). Wholly apart from the merits of this proposal (see Editorial, 94 N.J.L.J. 212 (1971)) (criticizing the Committee's recommendation and advocating retention of the probable cause proceeding), Gerstein v. Pugh, *supra* compels at least some abbreviated hearing to determine probable cause when the accused is in custody.

this institution, and the theme has its modern equivalent."<sup>265</sup>  
It would appear that, at the very least, the prosecutor should be required to advise the grand jury that a matter has been previously presented and that a "no bill" has been returned. Another alternative might be to require the prosecutor to apply to the assignment judge and to indicate that "new" evidence has been discovered which warrants resubmission of the matter to a different grand jury. We urge further consideration of this problem.

Third, we suggest consideration of a rule which would require that all comments of the prosecutor appear on the record. Presently, a defendant is not entitled to discovery of the "off the record" remarks of a prosecutor.<sup>266</sup> It bears repeating in this context that a prosecutor's duty before the grand jury is to present the evidence and to explain the law. A prosecutor should not, by his words or conduct, invade the province of the grand jury.<sup>267</sup> That is not to say that a prosecutor may not "summarize for the benefit of the grand jury the evidence

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Clark, The Grand Jury, supra, 11-12. Cf. Johnson v. Superior Court, supra.

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State v. Fisher, 112 N.J. Super. 319 (Law Div. 1970).

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State v. Joao, 491 P.2d 1089 (Haw. 1971). Commonwealth v. Favulli, 352 Mass. 95, 224 N.E. 2d 422, 430 (1967). Cf. State v. Manney, 24 N.J. 571, 581 (1957) where it is stated: "The presence of the prosecutor in the grand jury room during deliberations or voting [is] not considered a proper basis for quashing an indictment in the absence of any participation or effort to influence on his part." (emphasis ours)

that has been heard."<sup>268</sup> In at least one jurisdiction, it has been stated that a prosecutor's "request for an indictment ... amount[s] to nothing more than a formal indication of the government's position" and, hence, is not objectionable.<sup>269</sup> Other states have disagreed and have expressed the view that it is improper for a prosecutor to inform the grand jury of his personal opinion as to guilt or innocence.<sup>270</sup> The question has not been authoritatively resolved in New Jersey although it has been held that "[m]isconduct bears only on the question of probable cause or lack of it and for that one must look to the testimony that was heard."<sup>271</sup> In any event, the question whether prosecutorial comments to a grand jury ought to be on the record should be reviewed.<sup>272</sup>

Finally, New Jersey's practice of permitting the prosecutor to be present in the grand jury room while

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<sup>268</sup> United States v. United States District Court, 238 F.2d 713, 721 (4 Cir. 1956), cert. denied sub nom. Valley Bell Dairy Co. v. United States, 352 U.S. 981 (1957).

<sup>269</sup> United States v. Rintelen, 235 F. 787 (S.D.N.Y. 1961).

<sup>270</sup>

United States v. Bruzgo, 373 F.2d 383 (3 Cir. 1967); State v. Bojorguez, 111 Ariz. 549, 535 P.2d 6 (1975); State v. Good, 10 Ariz. App. 556, 460 P.2d 662 (Ct. of App. 1969); State v. Crowder, 193 N.C. 130, 136 S.E. 337 (1927); Hammers v. State, 337 P.2d 1097 (Okla. Crim. App. 1959).

<sup>271</sup> State v. Fisher, supra, at 324. See also New Jersey Rules of Evidence, Rule 41.

<sup>272</sup> It is to be noted that a rule could be adopted requiring the stenographer to record all prosecutorial comments, but compelling, as a prerequisite to discovery, a showing of good cause by the accused.

deliberations are taking place <sup>273</sup> should be reconsidered. <sup>274</sup>

In many jurisdictions, the prosecutor is barred from the grand jury room while the jurors are deliberating. <sup>275</sup> Although the prosecutor should be available to respond to questions at all times, his presence during the grand jury's deliberations is of doubtful value. We suggest study of a proposal which would bar the prosecutor from the grand jury room during deliberations.

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<sup>273</sup> See R. 3:6-6(a). See also State v. Manney, *supra* at 581; State v. McFeeley, 136 N.J.L. 102 (S.Ct. 1947); State v. Ellenstein, 121 N.J.L. 304 (S.Ct. 1938).

<sup>274</sup> See Boylan, "On Restructuring the Grand Jury System," *supra*.

<sup>275</sup> See, e.g., Ark. Stat. Ann. § 43-919 (1964); Ohio Rev. Code Ann. §2929.10 (1971); Tenn. Code Ann. §40-1610 (1955).

## VI. CONCLUSION.

The most obvious conclusion to be drawn from this Report is the need for further study. As we have emphasized, we have no empirical foundation upon which to construct either a reformed or a new system for initiating prosecutions. Our research has necessarily been limited to secondary sources and to existing empirical data compiled in other jurisdictions. Any changes of the magnitude we contemplate must be preceded by careful and extensive economic, demographic, and social analyses. In short, a complete feasibility study is indicated.

We offer several hypotheses for further consideration. Our models have been drawn from those now in operation in other jurisdictions and from those created by legal commentators. We have been able to ascertain those systemic characteristics which seem paradigmatic. A paradigm, though, is useful only until its efficacy has been tested.<sup>276</sup> We therefore conclude that no basic changes should be effected until more detailed studies are made.

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See generally Kuhn, The Structure of Scientific Revolutions (1967), chapter 2.