

Comments

THE CALIFORNIA GRAND JURY—TWO CURRENT PROBLEMS

The grand jury is potentially one of the most powerful civil institutions in California. An independent body whose members are often leading citizens of the county, the grand jury possesses broad investigative and accusatory powers. In its role as investigator of criminal activity it has subpoena power over all persons and all records, public and private, in the county. As an accusatory body, it can hold any citizen for trial on felony charges or cause any public official to stand trial for willful or corrupt misconduct in office.

Two aspects of the grand jury's activities have gained current prominence. This Comment will, after a survey of the composition, nature and duties of the grand jury, focus on its power to investigate and report on executive and legislative programs and policies. It will then examine the unique California statute that may result in the incompetency of "prospective defendants" to appear before the grand jury in its criminal investigations.¹

I

THE CALIFORNIA GRAND JURY—ITS NATURE, FUNCTIONS AND OPERATIONS

The California grand jury is a body of nineteen citizens,² chosen annually³ from each county's population. Jurors are usually outstanding members of the community who are selected in part on the basis of their civic activity and are often well known to the superior court judges who nominate them.⁴ After the jury

¹ The history and means of formation of the California grand jury are discussed elsewhere. History: See generally, *e.g.*, YOUNGER, *THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634-1941* (1963); Kennedy & Briggs, *Historical and Legal Aspects of the California Grand Jury System*, 43 CALIF. L. REV. 251 (1955); Younger, *The Grand Jury on the Trans-Mississippi*, 36 SW. SOC. SCI. Q. 159 (1955); Younger, *The Grand Jury Under Attack* (pts. 1-3), 46 J. CRIM. L., C. & P.S. 26, 37, 214 (1955). Formation: See CAL. CONST. art. I, § 8, art. XI, § 5, CAL. PEN. CODE §§ 888-914, 915-916.1. See generally, *e.g.*, *Some Aspects of the California Grand Jury System*, 8 STAN. L. REV. 631, 633-43 (1956).

² CAL. PEN. CODE § 908. A recent amendment has increased the size of the Los Angeles County grand jury to 23 members.

³ The exact statutory period of the grand jury is ambiguous. CAL. CONST. art. I, § 8, and CAL. PEN. CODE § 905 require that a grand jury panel be chosen only yearly; CAL. PEN. CODE § 901 states that grand jurors shall serve for one year and until other persons are selected and returned. Thus, a jury could serve up to one day short of two years, providing the flexibility of allowing one jury to hear and consider a protracted investigation as required by CAL. PEN. CODE § 939.9. See SPECIAL REPORT OF THE SACRAMENTO COUNTY GRAND JURY, 1962 (18 month investigation) [hereinafter cited as SPECIAL REPORT]. Moreover, a grand jury can remain impaneled indefinitely so long as it is considered to be acting under color of authority. It will be considered a *de facto* jury and its indictments and other official actions will have the same legal effect as those of a *de jure* jury. *Fitts v. Superior Court*, 4 Cal.2d 514, 51 P.2d 66 (1935).

⁴ Interview with Dieden, J., of the Superior Court of Alameda County, Nov. 19, 1963. See *People v. Hillery*, 60 A.C. 418, 432-34,P.2d, 34 Cal Rptr. 853, 862-63 (1963); *Some Aspects of the California Grand Jury System*, 8 STAN. L. REV. 631, 633-38, Table III, col. 2-3 following p. 651 (1956) [hereinafter cited as Comment]. Additionally, judges may ask the district attorney's office for comments on proposed jurors, although, of course, such comments are not in any way binding. Interview with Francis W. Mayer, Chief Deputy District Attorney, San Francisco County, Dec. 10, 1963 [hereinafter cited as Mayer], *Cf.* San Fran-

is impaneled, the jurors are instructed as to their duties by the presiding judge of the superior court.⁵ Although in some cases the jurors may be given nothing more than a copy of code sections outlining their duties, they are often provided with copies of prior jury reports, a suggested agenda for their first meeting, and, occasionally, a grand juror's handbook to inform them of their jury obligations.⁶ But the jurors' knowledge of their duties is initially small. To fill this void the district attorney of the county is authorized to give the jury information and advice. He is further authorized to interrogate witnesses before them.⁷ Very often the practical effect of his authority is to give him the potential power to direct the jury's activities.⁸

The grand jury has in the past been charged with being merely a rubber stamp of the district attorney.⁹ Yet, despite their practical power of direction and control over the jury, district attorneys in practice seemingly recognize its autonomy. Many of them attempt to win the jury's respect by working with it rather than directing it. If a district attorney fails to win the jury's respect, the jury may assume its independent powers and assert them in a head-strong manner. The resultant "run-away" jury is likely to work at cross-purposes with the prosecutor, thus impeding his efforts to control crime in the county.¹⁰

The grand jury may inquire into all crimes that are committed or triable in the county.¹¹ The primary means by which it does so is by considering cases submitted to it for indictment by the district attorney. The jury acts as a magistrate, deciding, from testimony it hears, whether there is reasonable and probable cause to believe that an accused individual committed a felony. If so, it returns an

cisco Chronicle, Jan. 8, 1964, p. 4, col. 1. The statutory scheme of selection is contained in CAL. PEN. CODE §§ 893-909.

⁵ CAL. PEN. CODE §§ 914, 914.1. See Comment at 639.

⁶ E.g., HALBERT, *A HAND BOOK FOR THE STANISLAUS COUNTY GRAND JURY*, 1953. See also Hartshorne, *Grand Jury Handbooks: A Boon to Court and Jurors*, 45 A.B.A.J. 799 (1959); Comment at 639-40.

⁷ CAL. PEN. CODE § 935.

⁸ Interviews with John M. Price, District Attorney, Sacramento County, Nov. 18, 1963 [hereinafter cited as Price]; Edwin Meese III, Deputy District Attorney, Alameda County, Nov. 4, 1963 [hereinafter cited as Meese]; Mayer. See, e.g., Garvey, *The Grand Jury: Use It or Lose It*, 34 CALIF. STATE B.J. 906 (1959). "What happens today in the typical grand jury room? For a few hours one evening a week the jury hears cases presented by the district attorney's office. It returns indictments, occasionally no indictment. It hears many routine cases which usually are conclusive, many of which could be tried on information. After a period of nodding assents, occasionally a dissent, to the findings of the district attorney, the jury is discharged. It has never investigated a case. It has never investigated a case not presented by the district attorney. It has never investigated a case on its own." *Id.* at 907-08. Cf. Scigliano, *The Grand Jury, The Information and the Judicial Inquiry*, 38 ORE. L. REV. 303 (1959). See also, Note, *The Grand Jury as an Investigatory Body*, 74 HARV. L. REV. 590, 596-97 (1961).

⁹ E.g., Coates, *The Grand Jury, the Prosecutor's Puppet: Wasteful Nonsense of Criminal Jurisprudence*, 33 PA. B.A.Q. 311 (1962); Kramitz, *The Grand Jury: Past—Present—No Future*, 24 MO. L. REV. 318 (1959).

But cf. Scigliano, *supra* note 8; Vukasin, *Useful or Useless? The Grand Jury*, 34 CALIF. STATE B.J. 436 (1959); White, *In the Defense of the Grand Jury*, 25 PA. B.A.Q. 260 (1954).

¹⁰ Mayer; Meese; Price. See Comment at 646-47.

¹¹ CAL. PEN. CODE §§ 889, 911, 917. The grand jury can proceed against corporations. CAL. PEN. CODE § 1395.

A grand jury is also authorized to return an accusation when it finds that a public official in the county should be tried on the charge of willful or corrupt misconduct in office. If found guilty of the charge he will be removed from office. CAL. PEN. CODE §§ 919(c), 921; CAL. GOV'T CODE § 3060. CAL. GOV'T CODE §§ 3061-73 set out the basic steps of proceedings based on an accusation. See also CAL. PEN. CODE §§ 7(1) (willful), 7(5) (corrupt).

indictment holding the accused to be tried on the charge.¹² The indictment is playing an increasing role in criminal prosecutions,¹³ for prosecutors are discovering that grand jury secrecy and efficiency can be advantageous in certain types of cases. For example, indictments are often sought: (1) when the accused has evaded apprehension and the statute of limitations would bar an information requiring the presence of the accused;¹⁴ (2) when the district attorney desires to avoid premature cross examination of emotional or reluctant witnesses;¹⁵ (3) when there is great public interest in the case and the district attorney, for political reasons, desires to share responsibility for prosecution with the grand jury;¹⁶ (4) when the investigative powers of the grand jury are useful, as in complex fraud cases or those involving corruption in public office;¹⁷ and (5) when the district attorney believes that employing the grand jury would be speedier than using preliminary examination procedures, as in cases involving multiple defendants or offenses.¹⁸

¹² CAL. PEN. CODE § 889; *Ex parte Sternes*, 82 Cal. 245, 247, 23 Pac. 38, 39 (1889).

While CAL. PEN. CODE § 917 states that although "all crimes committed or triable within the county" are subject to grand jury inquiry, indictments can be returned only for felonies. Indictments are returnable only to the superior court, which alone has jurisdiction of felony cases. *Ex parte Wallingford*, 60 Cal. 103 (1882).

¹³ The number and percentage of indictments (as compared with informations after preliminary hearings) presented to superior courts has shown a slow but steady increase in California over the last decade:

Year	Number of Indictments	% of Total Felonies Before Superior Court on Indictment
1952	277	2.0
1953	318	1.6
1954	597	3.0
1955	538	3.1
1956	712	3.5
1957	998	4.2
1958	840	3.1
1959	1,145	4.3
1960	1,221	4.0
1961	1,451	4.5
1962	1,433	4.5

CALIFORNIA BUREAU OF CRIMINAL STATISTICS, CRIME IN CALIFORNIA: 1952, table 9, p. 22; 1953, table 12, p. 28; 1954, table 16, p. 43; 1955, table 17, p. 38; 1956, table 17, p. 48; 1957, table 16, p. 48; 1962, table VI-1, p. 99 (1958-62).

¹⁴ Mayer; Sherry, *Grand Jury Minutes: The Unreasonable Rule of Secrecy*, 48 VA. L. REV. 668, 681 (1962).

¹⁵ E.g., cases involving sex offenses. Price; Meese; Comment at 644. Mayer commented that the indictment was especially useful in cases involving sex offenses or abortions, and that the testimony of a reluctant woman witness resulting in an indictment would often be enough to cause the defendant to plead guilty. Thus the witness would never have to be subjected to cross-examination.

¹⁶ Mayer; Meese; Sherry, *supra* note 14, at 681.

"Where the prosecutor is not personally involved in a wrongdoing, he cannot help but be sensitive to the delicacy of his position, dependent as he is upon the county for his budget and upon influential groups, themselves perhaps tainted by the wrongdoing, for his electoral support. The grand jury may permit a prosecutor to hide behind it, but, by the same token, the protection it provides may encourage him to act where otherwise he might not." Scigliano, *supra* note 8, at 309-10.

¹⁷ Mayer; Meese; Price; Sherry, *supra* note 14, at 681.

¹⁸ Mayer; Price; Comment at 644. In one case, Price reported that he sought and received 22 narcotics indictments in one night before the grand jury, whereas he calculated that it would take three weeks of preliminary examinations to achieve informations for the same offenses.

Other types of cases often presented to the grand jury are those where the district attorney wishes to test a weak case or where the witnesses are in state prison. *Ibid.*

While routine indictments make up the bulk of grand jury criminal duties, the jury also may initiate investigations of criminal or corrupt activity within the county.¹⁹ An investigation can be launched based on reliable information from the personal knowledge of the jurors²⁰ or from the district attorney,²¹ the judges of the superior court of the county,²² the attorney general of the state,²³ or ordinary citizens.²⁴ But an investigation cannot begin unless the grand jury has good cause to believe it possesses jurisdiction over the subject matter of the proposed inquiry;²⁵ "good cause" does not require that the jury have explicit knowledge of the actual commission of a crime.²⁶ Therefore, the jury is not authorized to launch "fishing expeditions" on the mere hope of turning up criminal or corrupt activity.²⁷

In perhaps its most important role,²⁸ the grand jury is considered the watchdog over county government by virtue of its extensive powers to inquire into the activities of county officers.²⁹ The most important of these duties are to inquire into the handling of county finances³⁰ and the needs of county officers to improve the performance of county functions.³¹ The jury is authorized to employ auditors only to aid in its examination of county financial records;³² it cannot employ

¹⁹ CAL. PEN. CODE § 919(c).

²⁰ CAL. PEN. CODE § 918. *People v. Lawrence*, 21 Cal. 368, 373 (1863). However, the statute that calls for the grand jury to investigate criminal matters presented to it by its own members is subject to the jury's own rules to pursue investigations. *Clinton v. Superior Court*, 23 Cal. App. 2d 342, 73 P.2d 252 (1937). See generally Note, *The Grand Jury—Its Investigatory Powers and Limitations*, 37 MINN. L. REV. 586, 593-94 (1953).

²¹ *People v. Lawrence*, 21 Cal. 368, 373 (1863).

²² *Samish v. Superior Court*, 28 Cal. App. 2d 685, 690, 83 P.2d 305, 307 (1938).

²³ CAL. PEN. CODE § 923. The section seems to provide a centralized check by the state attorney general over county district attorneys.

²⁴ *People v. Lawrence*, 21 Cal. 368, 373 (1863). A recent "garbage scandal" investigation in Sacramento County that resulted in indictments was initiated by a letter from a county resident to the foreman of the grand jury. SPECIAL REPORT, Exhibit A.

²⁵ *Samish v. Superior Court*, 28 Cal. App. 2d 685, 688, 83 P.2d 305, 306 (1938).

²⁶ *Ibid.* An investigation can result, for example, from state legislature reports, *id.* at 690, 83 P.2d at 307; the testimony of a witness or the accused before the grand jury in another matter, *People v. Craven-Fair*, 177 Cal. 222, 69 Pac. 1041 (1902); *People v. Northley*, 77 Cal. 618, 20 Pac. 129 (1888); or from an informed citizen.

"If it should develop after a thorough investigation by a grand jury that the alleged crime was really committed in another county that does not render the proceedings invalid or void, but merely precludes the presenting of an indictment therefor in that county." 28 Cal. App. 2d at 688, 83 P.2d at 306.

Furthermore, the grand jury can investigate criminal activity after the statute of limitations has run when it appears that the investigation may lead to the discovery of similar crimes that are not barred from prosecution. *People v. Curtis*, 36 Cal. App. 2d 306, 98 P.2d 228 (1939).

²⁷ *Samish v. Superior Court*, 28 Cal. App. 2d 685, 688, 83 P.2d 305, 306 (1938) (citing *Hale v. Henkel*, 201 U.S. 43 (1906); *Kennedy & Briggs*, *supra* note 1, at 264-65 (citing *Field, J.*, Charge to the Grand Jury, 30 Fed. Cas. 922 (No. 18,255), (C.C.D. Cal. 1872)).

²⁸ See *Sherry*, *supra* note 14, at 683.

²⁹ Grand jury county duties are found in CAL. PEN. CODE §§ 914.1, referring to CAL. GOV'T CODE §§ 23001-14, 24054, 26525 (duties of board of supervisors, propriety of certain county contract and financial procedures; 919 (county jails); 920 (lands escheating to state); 927 (salaries of county officers)).

³⁰ CAL. PEN. CODE §§ 925 (county officers and hospitals); 929 (county officers in their ex officio capacities); 933.5 (special purpose taxing and assessing districts). See also CAL. WELFARE & INST'NS CODE § 217.

³¹ CAL. PEN. CODE § 928.

³² *Ibid.*

investigators or experts for other purposes. In the case of *Allen v. Payne*³³ the California Supreme Court held that the jury has no inherent power, growing out of its common law history, that allows it to establish its own investigatory apparatus to detect crime. Both practice and statute have left this function to law enforcement officials.³⁴ Specific statutes designate when the jury can hire help, thus indicating legislative intent expressly to limit the extent of grand jury investigatory aid.³⁵ While *Allen* dealt with crime detection, subsequent cases have applied it to refuse the employment of expert assistance to aid the jury in carrying out its duty to report on the needs of county officers.³⁶ Hence, the jury, in fulfilling its duties with respect to both county government and county crime is restricted to its own often limited knowledge and whatever aid can be enlisted from the district attorney, the county sheriff,³⁷ or the attorney general.³⁸

This restriction is supportable on two main grounds. First, grand jury criminal investigators would perform the same functions that police, sheriff and district attorney personnel presently carry out, leading to the possible disruption of centralized effort.³⁹ Second, the jury's partial dependance on the district attorney's investigative machinery provides a check on jury activity, enabling him quickly to determine when a particular jury is transgressing its authorized scope of inquiry.⁴⁰

But applying the *Allen* doctrine in all cases may be questionable. In two situations the legislature should consider authorizing outside help for grand juries. When the district attorney has the task of directing the grand jury as well as of representing the county employees that it may be investigating, possible conflict of interest arises. For this reason, recent grand juries have asked that outside help be authorized.⁴¹ In these cases outside attorneys may be needed for impartial grand jury investigation. Secondly, with respect to the jury's duty of reporting on the needs of county officers, the complexity and sophistication of modern business and administrative methods may justify employing independent experts.⁴² It seems proper to assume that inasmuch as the legislature endowed the grand jury with extensive investigative responsibilities, it intended that the grand jury was to have the assistance necessary to carry out these responsibilities in an intelligent, complete and constructive manner.

Grand jury hearings and deliberations usually take place in secret. Under circumstances affecting the "general public welfare" or involving corruption or

³³ 1 Cal. 2d 607, 36 P.2d 614 (1934) (two dissents). Cf. *Woody v. Peairs*, 35 Cal. App. 553, 170 Pac. 660 (1917).

³⁴ 1 Cal. 2d at 608, 36 P.2d at 614.

³⁵ *Ibid.*

³⁶ *Uhler v. Superior Court*, 117 Cal. App. 2d 147, 255 P.2d 29 (1953); *County of Fresno v. Roberson, Martin & Co.*, 124 Cal. App. 2d Supp. 888, 269 P.2d 252 (App. Dep't Super. Ct. 1954).

³⁷ The sheriff or district attorney could hire investigators at the grand jury's request. Cf. *Niceley v. County of Madera*, 111 Cal. App. 731, 296 Pac. 306 (1931).

³⁸ CAL. PEN. CODE § 936. The duty of the attorney general to supply counsel is apparently discretionary. *McFarland v. Superior Court*, 88 Cal. App. 2d 153, 198 P.2d 318 (1948). The attorney general can provide investigators even if the district attorney is willing to do so as well. See SPECIAL REPORT (accountants). See also CAL. PEN. CODE §§ 934, 935.

³⁹ Meese.

⁴⁰ See text accompanying notes 7-10, 22 *supra*.

⁴¹ *San Francisco Chronicle*, Jan. 23, 1963, p. 46, col. 1 (report of 1963 San Mateo County grand jury).

⁴² CAL. PEN. CODE § 928 states that the grand jury is required to report "upon the needs of all county officers in the county, including the abolition or creation of offices and the equipment for, or the method or system of performing the duties of, the several offices"

misconduct of public officers the jury can meet in public.⁴³ Ordinarily, however, no one but the members of the jury, the district attorney or his assistant,⁴⁴ a court reporter,⁴⁵ an interpreter if necessary,⁴⁶ and the witness, without counsel, are present during the taking of testimony. The modern rationale for grand jury secrecy is based upon the protection it provides to society by providing jurors with an atmosphere free from reprisal that might result from adverse public pressure. Further it may be necessary to prevent information of a possible impending indictment from reaching a defendant in advance of arrest. Secrecy is said also to protect the accused, for an individual who has been investigated but not indicted will not be subjected to adverse publicity and possible damage to his reputation.⁴⁷

The accused is relieved of many of the apparent evils of jury secrecy by the requirement that, once arrested, he is entitled to a transcript of the testimony that led to his indictment.⁴⁸ The California practice of supplying a transcript, which is contrary to that followed in most jurisdictions, informs the accused, in part at least, of the case against him.⁴⁹ The practice, while apparently not impairing grand jury effectiveness, also serves as a check on both prosecutor and jurors.⁵⁰ The prosecutor is forced to present a case containing the requisite quantum of evidence to indict the accused. Where such evidence is lacking the transcript may serve the defendant as the basis for an attack of the indictment.⁵¹ Moreover, the disclosure of the contents of the transcript will make it more likely that fear of public censure will compel the jurors to conduct themselves properly at all times.

II

PROBLEMS OF GRAND JURY INVESTIGATIONS

In its investigations into all phases of county government, the grand jury is, of course, required to be alert to criminal or corrupt activity that could lead to

⁴³ The grand jury, through its foreman, and the attorney general or district attorney can request the superior court to allow the jury to hear the matter in public session. Deliberation and voting by the jury remains private. CAL. PEN. CODE § 939.1. *Samish v. Superior Court*, 28 Cal. App. 2d 685, 83 P.2d 305 (1938) (public investigation of misconduct on part of state legislators in Sacramento County). See Sherry, *supra* note 14, at 679.

⁴⁴ CAL. PEN. CODE §§ 935, 939. *People v. Magallones*, 15 Cal. 426 (1860) (assistant district attorneys can be present).

⁴⁵ CAL. PEN. CODE § 938. The reporter is required to transcribe all testimony after being sworn not to violate the secrecy of the grand jury proceedings.

⁴⁶ CAL. PEN. CODE § 937. The interpreter is also sworn to secrecy.

⁴⁷ See generally 8 WIGMORE, EVIDENCE §§ 2360-63 (McNaughton rev. 1961); Sherry, *supra* note 14, at 668; Vukasin, *supra* note 9; Note, 18 LA. L. REV. 186 (1957); Note, 33 ST. JOHN'S L. REV. 320 (1959).

A further reason for secrecy, obsolete in California, is that it prevents hesitancy which witnesses may feel if their testimony were made public. It also protects informers, encouraging complete statements from them. The requirement that a transcript of jury testimony be supplied to the accused negates these reasons in California.

⁴⁸ CAL. PEN. CODE § 938.1; *People v. Pipes*, 179 Cal. App. 2d 547, 3 Cal. Rptr. 814 (1960). Failure to deliver the transcript within the required 10 day period is not reversible error. *People v. Cowen*, 41 Cal. App. 2d 824, 107 P.2d 659 (1940); Stout, *Appellate Review of Criminal Convictions on Appeal*, 43 CALIF. L. REV. 381, 402 (1955). But the reporter will not be paid until he delivers the transcript. CAL. PEN. CODE § 938.2.

⁴⁹ *People v. Sola*, 200 Cal. App. 2d 593, 19 Cal. Rptr. 327 (1962); *People v. Carella*, 191 Cal. App. 2d 115, 12 Cal. Rptr. 446 (1961). See Sherry, *supra* note 14.

⁵⁰ Since the reasons for secrecy no longer apply after arrest, it has been said that the California practice of providing a transcript to the accused does not impair grand jury effectiveness. *Id.* at 682.

⁵¹ See CAL. PEN. CODE § 995.

further specific investigation and possible indictment or accusation. However, none of the jury's county duties give it license to crusade against some real or imagined legislative injustice. One trend of some recent California grand juries has been to inquire into and make recommendations about city, state, and even federal legislative acts or executive programs.⁵² The initiation of investigations of this nature without good cause to believe that criminal activity is involved seems to be an unwarranted extension of grand jury power.⁵³ This view was summarized by McGuinness, P. J., in his charge to the 1963 Alameda County Grand Jury:

You are not to initiate investigations not specifically enjoined on you without probable cause nor attempt to act as a supervising administrative agency controlling the discretionary activities of public officers.

No public officer is responsible to you for anything except for corrupt or willful misconduct. With all questions of discretion, or judgment, of ways and means and kindred matters you have nothing to do.⁵⁴

Even if the grand jury cannot initiate investigations into official discretion it can investigate and make recommendations if the investigation grows out of a legitimate inquiry into criminal or corrupt activity. The means by which the grand jury can communicate its recommendations is the report, and the power to report is one of the most potent—and most controversial—of the grand jury's powers.⁵⁵

In the important case of *Irwin v. Murphy*⁵⁶ a grand jury criticized in general the manner of staging prize fights and in particular the fitness of a certain individual to act as a referee. The investigation grew out of the death of a fighter in the ring. The jury report disclosed that boxing had become a racket and called for reforms and resignations to end abuses. The court held that since the jury was investigating a public offense—possible murder—it was acting within the scope of its powers. And since it was considered a judicial body, and the grand jurors officers of the court, a report on such an investigation is privileged if the

⁵² Meese; Price; Comment at 650 (reporting that in 1954 23 grand juries, in a joint meeting, urged amendments to state old age assistance and aid to needy children laws). The legislature's answer was Assembly Res. 246 (1955), stating that: "This body hereby expresses its desire and conviction that no grand jury shall make any recommendation on any matter except on the basis of independent investigation of the matter by such grand jury, and no grand jury shall adopt as its own the recommendation of another grand jury unless the grand jury adopting such recommendations does so after independent investigation of the matter as to which the recommendation is made" The same wording became CAL. PEN. CODE § 939.9, added in 1957.

Cf. 1961 GRAND JURY OF ALAMEDA COUNTY, FINAL REPORT, 27 (1962): "Our findings indicate that re-evaluation of State and Federal [welfare] legislation is timely but there also appears to be serious administration problems in the program and it is evident that many abuses could be resolved or alleviated by tightening up on the local level."

⁵³ Such an investigation would be in violation of the jurors' oaths, CAL. PEN. CODE § 911, and might be unwarranted in light of limited expertise and time. See Comment at 648 and Table III, cols. 9-10 following p. 651 (1955).

⁵⁴ McGuinness, P. J., Charge to Alameda County Grand Jury, at p. 11 (1963). See also, e.g., Kennedy & Briggs, *supra* note 1, at 256 (grand jury not to be a "supervisory agency" over county officers as far as their decisions are concerned); Kuh, *The Grand Jury "Presentment": Foul Blow or Fair Play*, 55 COLUM. L. REV. 1103, 1125 (1955) (citing *Moore v. Delany*, 180 Misc. 844, 45 N.Y.S.2d 95 (Sup. Ct. 1943)). See generally, Note, 37 MINN. L. REV. 586, 587-90 (1953).

⁵⁵ Compare Oliver, *The Grand Jury: An Effort to Get a Dragon Out of His Cave*, 1962 WASH. U.L.Q. 162 with Weinstein & Shaw, *Grand Jury Reports—A Safeguard of Democracy*, 1962 WASH. U.L.Q. 191, and Kuh, *supra* note 54.

⁵⁶ 129 Cal. App. 713, 19 P.2d 292 (1933).

allegedly libelous report is related to the matters under investigation.⁵⁷ The court stated:

Law and common sense combine to compel the conclusion that, if a grand jury is authorized and bounden to inquire of public offense, a necessary element must be the power and duty to disclose the result of the inquiry. . . . What an inane and lifeless body a grand jury would be if the limit of its power in case no indictment were returned were complete silence or a formal report of two words—"charge ignored."⁵⁸

The *Irwin* decision raises two questions: (1) the legitimacy of grand jury recommendations after inquiry into criminal activity aimed at preventing similar activity in the future, and (2) the scope and content of such reports if they are permitted.

In two recent instances the grand jury of Sacramento County has, by means of a report, recommended and criticized legislative and executive actions. In one instance the jury criticized the county board of supervisors' grant of a garbage franchise,⁵⁹ in the second the jury made numerous recommendations to tighten state savings and loan regulations.⁶⁰ In both cases the jury report either accompanied or followed indictments that grew out of its investigations into alleged criminal activity. The recommendations of the grand jury in both of these cases appear to be proper. Since they follow a legitimate inquiry into criminal activity, they represent an exception to the rule that the grand jury cannot inquire into or make recommendations about "questions of discretion" of public officers. In *Irwin v. Murphy*⁶¹ the court was of the opinion that the jury's authority to investigate carries with it the right to report the results of investigations. And in that case recommendations for cleaning up the fight game were made to the governor and the state athletic commission. The Sacramento County reports would therefore seem to be legally proper, inasmuch as the grand jury was authorized to investigate the matters in question⁶² and it fashioned its recommendations from its own investigations.⁶³

The question then arises as to what a legally authorized grand jury report should contain. When such a report contains only general recommendations the jury's lack of expertise on the subject under investigation could place the merits of its proposals in a questionable posture. The grand jury has no expert staff available to sift and weigh proposals. In effect, it is a group of laymen with little in the way of funds or staff attempting to do what legislative committees have learned requires, in many instances, great amounts of both. One answer, of course, would be, as suggested above, to provide administrative and investigative assistance to the grand jury.⁶⁴ As yet, in California this has been done only to a limited degree.

⁵⁷ See also CAL. PEN. CODE § 924.3.

⁵⁸ *Irwin v. Murphy*, 129 Cal. App. 713, 716, 718, 19 P.2d 292, 293, 294 (1933).

⁵⁹ SPECIAL REPORT at 1: "What the [grand jury] has undertaken is to determine whether the action by the responsible county officials has fallen within the limits of reasonable discretion and competence. If any such action has not fallen within those limits, if it has been arbitrarily performed without regard to the public interest and official duty, or if it has been corruptly influenced, the Grand Jury considers that it has both the power and duty to act. This is true as well where the action under review is the fixing of rates under a public franchise as in any other case."

⁶⁰ San Francisco Chronicle, Feb. 8, 1964, p. 1, col. 7-8.

⁶¹ 129 Cal. App. 713, 718, 19 P.2d 292, 293 (1933).

⁶² CAL. PEN. CODE § 919(c).

⁶³ CAL. PEN. CODE § 939.9.

⁶⁴ See text accompanying notes 29-43 *supra*.

Grand jury reports are privileged, thereby allowing a jury to publicly criticize and even libel an individual based on the secret testimony of witnesses not subject to cross-examination, possibly without warning to the attacked individual, who will not have an adequate opportunity to clear his name.⁶⁵ The primary justification for a report, when no indictment results, is that the good to the public that results from disclosed charges of wrongdoing justifies the harm done to an affected individual.⁶⁶ Against this justification an array of objections to reports have been suggested including: (1) that reports are given an aura of officiality by the public because they emanate from an arm of the court;⁶⁷ (2) possible political motivation or irresponsibility on the part of the grand jurors;⁶⁸ and (3) lack of any objective standards on which the jury can base its conclusions in the report as contrasted with the requirement that it adhere to the law in handing down indictments.⁶⁹

However, one objection to a grand jury report which names an individual stands out. If the report names and censures but fails to indict an individual, he will, in effect, be extra-judicially punished by adverse publicity without a chance to adequately answer the jury's allegations. The grand jury report would then become akin to a congressional investigation "in which the process of law-making and law-evaluating are submerged entirely in exposure of individual behavior—in adjudication, of a sort, through the exposure process . . ."⁷⁰ In essence, the named individual is punished for criminal activity for which he could not otherwise be called upon to answer unless there is reasonable or probable cause to believe that he has committed a public offense. If an individual has committed antisocial activity that is not a crime, the remedy to society should be legislative change rather than grand jury extra-judicial punishment. And the effectiveness of the report is not impaired, for the grand jury can adequately fulfill its role by recommending changes in the law without enmeshing otherwise innocent individuals in its proposals.⁷¹

⁶⁵ *Irwin v. Murphy*, 129 Cal. App. 713, 19 P.2d 292 (1933). *Cf.* CAL. PEN. CODE § 930 (comments in reports concerning county officials are not privileged unless the official is indicted). The wording of § 930 is misleading, referring to "the report above mentioned." CAL. PEN. CODE § 929 refers only to reports on books and records of county officers in their *ex officio* capacity as members of districts within the county, and would seem to be the report referred to in § 930. However, grand jury statutes were collected into the Penal Code in 1959 under one title for more logical arrangement of such sections. Calif. Stat. 1951, Ch. 501, § 20, provided that insofar as the new sections "are substantially the same as existing statutory provisions relating to the same subject matter they shall be construed as restatements and continuations and not as new enactments." Section 930 was derived from former § 928, applying there to all reports now required by §§ 925, 927-29. Hence, there is no privilege unless criticized officers in such reports are indicted or, as could be argued, accused.

⁶⁶ Kuh, *supra* note 54, at 1121. The majority view allows grand jury reports that criticize public officials (who may be said to assume the risk of such reports) or those who initiated the report (and thus bring any resultant criticism on themselves). Other reports are considered outside the jurisdiction of the grand jury. *Id.* at 1122-23; Note, 74 HARV. L. REV. 590, 595 (1961).

⁶⁷ Comment, *Constitutional Law—Judicial Powers—Legality of the Grand Jury Report*, 52 MICH. L. REV. 711, 717 (1954).

⁶⁸ Kuh, *supra* note 54, at 1125.

⁶⁹ Note, 74 HARV. L. REV. 590, 594 (1961).

⁷⁰ *Baranblatt v. United States*, 360 U.S. 109, 166 (1959) (Brennan, J., dissenting). See Oliver, *supra* note 55, at 177-82 for a comparison of grand jury reports and congressional investigations.

⁷¹ It has been suggested that an improper grand jury report would not be privileged. PROSSER, TORTS 608 n.10 (2d ed. 1955). Other methods to challenge a report include: suits

III

THE PROBLEM OF THE "POTENTIAL DEFENDANT" IN GRAND JURY INVESTIGATIONS

Typically, in either a criminal investigation or in a proceeding leading to an indictment before a grand jury, a witness will appear alone, answering questions asked by the district attorney and individual jurors. The witness is entitled to refuse to answer any question, as well as turn down demands to produce evidence, on the grounds of his privilege against self-incrimination.⁷² Furthermore, if a grand jury witness may become a defendant as a result of the investigation, he may be incompetent to testify at all in California. California Penal Code Section 1323.5 states:

In the trial of or examination upon all indictments, complaints, and other proceedings before any court, magistrate, grand jury, or other tribunal against persons accused or charged with the commission of crime or offenses, the person accused or charged shall, at his own request, but not otherwise, be deemed a competent witness.

At common law, defendants in criminal trials were not competent to testify on their own behalf.⁷³ As this rule was being eliminated by statute, it became recognized that the defendant, because of the privilege against self-incrimination, should be allowed to remain silent without prejudice.⁷⁴ Hence, in a criminal trial the defendant cannot now be called as a witness by the prosecution,⁷⁵ for a subsequent resort to the privilege in regard to specific incriminating questions asked by the prosecutor would make it impossible to prevent the trial jury from inferring guilt from the assertion of the privilege.⁷⁶

by a taxpayer to enjoin the issuing of a report; appeal from a contempt citation or perjury conviction resulting from the pre-report investigation; a petition to prohibit the enforcement of a court order to obey a subpoena; or an attack by an interested party on a report. Note, 37 MINN. L. REV. 586, 588 n.12 (1953). Apparently none of these devices have been employed in California.

⁷² CAL. CONST. art. I, § 13; CAL. PEN. CODE § 939.3. See generally 8 WIGMORE, EVIDENCE § 2252 (McNaughton rev. 1961).

Procedures differ as to informing all grand jury witnesses of their self-incrimination privilege. Compare Meese ("scrupulously" inform all witnesses) with "Suggested Procedure" for the Sacramento County Grand Jury, 12-13 (mimeograph, Office of District Attorney, Sacramento County) (no admonition to witness as to self-incrimination privilege mentioned). It would seem that when, as in a grand jury proceeding, no counsel can accompany a witness, the witness must be informed of his privilege against self-incrimination. Cf. Kilpatrick v. Superior Court, 153 Cal. App.2d 146, 314 P.2d 164 (1957). See also McBAINE, CALIFORNIA EVIDENCE MANUAL § 240 (2d ed. 1960).

The privilege of a witness includes a privilege to not answer questions that are degrading to the witness or are not "legal and pertinent to the matter in issue." CAL. CODE CIV. PROC. §§ 2065, 2066. See I.E.S. Corp. v. Superior Court, 44 Cal.2d 559, 283 P.2d 700 (1955) (pertinency). These privileges apparently apply to grand jury proceedings, Rogers v. Superior Court, 145 Cal. 88, 78 Pac. 344 (1904) (pertinency); *In re Rogers*, 129 Cal. 468, 62 Pac. 47 (1900) (pertinency); *In re McDonough*, 21 Cal. App.2d 287, 68 P.2d 1020 (1937) (degrading questions). For a criticism of allowing privilege on the grounds of pertinency, see 8 WIGMORE, EVIDENCE § 2210(1) (McNaughton rev. 1961).

See, generally, on the entire subject, Annot, *Privilege Against Self-Incrimination as to Testimony Before Grand Jury*, 38 A.L.R.2d 225 (1954).

⁷³ 2 WIGMORE, EVIDENCE § 575(3) (3d ed. 1940).

⁷⁴ United States v. Scully, 225 F.2d 113, 115-16 (2d Cir. 1955).

⁷⁵ 8 WIGMORE, EVIDENCE § 2268(2)(a)(iv) (McNaughton rev. 1961).

⁷⁶ Similarly, grand jury testimony of the accused in which he asserts his self-incrimination privilege cannot be received in evidence at trial. "The use of evidence of the assertion of the privilege against self-incrimination as an indication of guilt and as support for a verdict is directly contrary to the intent of the constitutional provisions" guaranteeing the right of privi-

Statutes similar to section 1323.5 are found in many states, but usually refer only to incompetency at trial.⁷⁷ California's statute refers to virtually all criminal proceedings.⁷⁸ The predecessor of section 1323.5 was enacted in 1866⁷⁹ and was amended to its present form in 1872.⁸⁰ Yet it was "lost" until the year before it was codified in the Penal Code in 1953.⁸¹ Before that date a witness before a grand jury, even if he might later be "accused or charged" with the offense being investigated, could not refuse to be sworn. Instead, he was forced to rely on the privilege against self-incrimination. For example, in the case of *In re Lemon*⁸² a witness refused to be sworn in a police bribery investigation on the ground that he might become a prospective defendant. The district court of appeal held that the inquiry into police corruption was not properly a criminal proceeding; it was characterized as an inquiry into whether to commence such a proceeding. The court stated that if Lemon could properly refuse to be sworn, then:

[E]very policeman in San Francisco and every person who might be suspected of giving a bribe to a police officer could designate himself as a "prospective defendant" and refuse to be sworn in said investigation. Such is not and should not be the law in this jurisdiction for it would carry the privilege far beyond the point to which it is necessary to protect the individual against self-incrimination.⁸³

However, in 1952, in the case of *People v. Talle*,⁸⁴ the predecessor of section 1323.5 was "rediscovered." In that case the prosecution called the defendant as a witness in the People's case at trial. The district court of appeal, per Peters, J., reversed Talle's conviction, holding that the prosecution's tactics resulted in impairment of the defendant's constitutional rights. More important here, the predecessor of section 1323.5 was held to bar the prosecution from calling the defendant unless he requested to testify. The court also concluded that the non-inclusion of the predecessor of section 1323.5 when the Penal Code was enacted did not repeal the statute by implication.

The effect of the newly rediscovered section 1323.5 turns on the definition of the terms "accused or charged." A defendant could be considered "accused or charged" when: (1) he is formally charged by having a criminal complaint filed against him;⁸⁵ (2) an investigation is launched into his activities; or (3) an investigation is aimed at a small group of individuals and a resulting indictment would be likely to charge one or more of the group with the commission of the

lege against self-incrimination. *People v. Calhoun*, 50 Cal.2d 137, 148, 323 P.2d 427, 434 (1958). See also *People v. Snyder*, 50 Cal.2d 190, 324 P.2d 1 (1958); *People v. O'Bryan*, 165 Cal. 55, 130 Pac. 1042 (1913).

⁷⁷ 3 WHEARTON, CRIMINAL EVIDENCE § 786, at 125 n.10 (12th ed. 1955).

⁷⁸ Cf. *People v. Finch*, 2 Cal. App.2d 752, 771-74, 29 Cal. Rptr. 420, 431-32 (1963) (witness not incompetent even though her testimony at a preliminary hearing led to a charge of murder against her. CAL. PEN. CODE § 1323.5 not mentioned).

⁷⁹ Cal. Stat. §§ 1865-66, p. 865, Ch. DCXLIV (1866).

⁸⁰ Cal. Stat. §§ 1871-72, p. 319, Ch. CCXLII (1872).

⁸¹ See CALIFORNIA CODE COMMISSION, PROPOSED ADDITIONS TO THE PENAL CODE 2 (1952). "It is believed that no substantive changes in the law have been made in this codification." CAL. PEN. CODE § 1323.5, labeled § 1324, is at p. 21.

⁸² 15 Cal. App.2d 82, 59 P.2d 213 (1936). See also *In re Hoertkorn*, 15 Cal. App.2d 93, 59 P.2d 218 (1936).

⁸³ *In re Lemon*, 15 Cal. App.2d 82, 91-92, 59 P.2d 213, 217 (1936).

⁸⁴ 111 Cal. App.2d 650, 245 P.2d 633 (1952).

⁸⁵ This is the approach used by the Alameda County district attorney, in effect reading the word "formally" in front of "accused or charged" in CAL. PEN. CODE § 1323.5. Meese.

crime under investigation. In the first two examples there is no question that the individual would be "accused or charged" as a result of the grand jury proceedings. In the last example all prospective defendants are known and the terms of section 1323.5 might be extended to render the members of the group incompetent to testify.⁸⁶

The ambiguity of the statute is squarely presented, however, in the *Lemon* situation in which there is reasonable cause to believe that a crime has been committed, but the identity of those implicated is unknown at the outset, and any person called before the jury could become a defendant in the case. In that situation, two alternative interpretations of section 1323.5 are presented.

The first alternative is to limit section 1323.5's application to persons formally accused or charged. All other witnesses would be required to rely upon their privilege against self-incrimination.⁸⁷ Under this approach, there would be no extension of the "prospective defendant's" incompetency to all grand jury proceedings. The reason for incompetency of the defendant at trial does not exist in a grand jury proceeding, for the grand jury does not pass on the individual's guilt or innocence. Grand jury proceedings are not analagous to trial proceedings. In the grand jury process the accused has none of the rights which prevail at trial, such as the right to counsel, to cross-examine witnesses, to present his side of the case, and to a public trial.⁸⁸ Furthermore, under current practice, the grand jury is not required to find a *prima facie* case of the defendant's guilt beyond a reasonable doubt before he can be indicted.⁸⁹ Thus under the first interpretation, the application of section 1323.5 should not be extended to instances where the witness is not, in some way, "accused or charged" with the offense being investigated.

The second alternative would be to deem incompetent all persons who could become "prospective defendants" in the case under investigation. This alterna-

⁸⁶ Cf. *State v. Browning*, 19 N.J. 424, 117 A.2d 505 (1955); *State v. Fary*, 19 N.J. 431, 117 A.2d 499 (1955).

⁸⁷ *In re Lemon*, 15 Cal. App. 2d 82, 91-92, 59 P.2d 213, 217 (1936). One standard procedure under CAL. PEN. CODE § 1323.5 is to tell any witness who "in the event it is likely or possible that [he] may become a defendant by reason of any charges being considered: 'You have a right to be sworn and make any statement on your own behalf that you may desire. You are informed, however, that if you are sworn and make any statement, such statement, together with any questions that may be asked of you by the members of the Grand Jury or the District Attorney will be taken down and become a matter of record, and in the event an indictment is filed against you on this charge, that record may be used either for or against you at the time of your trial. You are not obligated, however, to make any statement whatever, unless you desire to do so. Any statement that you make must be completely voluntary on your part, and with this admonition in mind. Now, after having been informed as to your rights in the premises, do you desire to be sworn and make any statement?'" Suggested Procedure for Sacramento County Grand Jury, 12-13 (mimeograph, Office of District Attorney, Sacramento County).

⁸⁸ *United States v. Scully*, 225 F.2d 113, 116 (2d Cir. 1955). Moreover, at trial California allows the prosecutor to comment on the failure of the defendant to testify on his own behalf, although such comments might allow the jury to infer guilt. CAL. CONST. art. I, § 13, CAL. PEN. CODE § 1323; *Adamson v. California*, 332 U.S. 46 (1947).

⁸⁹ CAL. PEN. CODE § 939.8 requires that the grand jury find an indictment "when all the evidence before it, taken together, if unexplained or uncontradicted, would, in its judgment, warrant a conviction by a trial jury." However, in practice an indictment will not be declared void unless there is no evidence whatsoever to support it. *Greenberg v. Superior Court*, 19 Cal. 2d 319, 121 P.2d 713 (1942); *People v. Brock*, 220 A.C.A. 610, 34 Cal. Rptr. 113 (1963). See Comment, *Grand Jury Indictment Based on Incompetent Evidence*, 43 CALIF. L. REV. 859 (1955).

tive, based on *Talle*, would result in the conclusion that if a witness is later charged with the crime about which he testified, his prior testimony becomes that of an incompetent witness. The indictment growing out of his testimony would then be void if the testimony related to the offense with which he was charged.⁹⁰ The fact that he is forced to go before the grand jury and district attorney alone becomes of primary importance for a broad interpretation of section 1323.5. If a prospective defendant refuses to be sworn he will not have to enter the jury room. He will then not be separated from continuing advice from his counsel. He will thus not be forced to rely on his own wits in front of the grand jury, where, despite his self-incrimination privilege, there is the danger that he might be indicted as a direct result of his own admissions.

The determination of which alternative should prevail in light of the ambiguity of section 1323.5 therefore requires a balancing of the rights of the individual against the utility of the grand jury investigation. In light of the current judicial philosophy of rigorously safeguarding the rights of the defendant from arrest⁹¹ to appeal,⁹² it seems that section 1323.5 will be broadly construed. Broad interpretation would require the prosecutor to know the direction of the grand jury investigation and those at whom it is aimed, thus reducing the possibility of "fishing expeditions" by both the prosecutor and the grand jury.⁹³ Furthermore, the argument that in some cases the "potential defendants" are unknown until midway into the investigation, could be countered by the provisions of Penal Code Section 1324, which allows forced production of evidence in exchange for immunity from prosecution as a means of obtaining otherwise privileged information.⁹⁴ The second interpretation of section 1323.5, if adopted, would, without significantly curtailing grand jury effectiveness, protect individuals called before the grand jury from unwarranted indictment, its attendant adverse publicity, and possible miscarriage of justice.

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⁹⁰ Cf., *In re McDonough*, 21 Cal. App.2d 287, 68 P.2d 1020 (1937). The possibility of a void indictment has led to the practice by the San Francisco County district attorney to not call anyone in a grand jury investigation who could possibly be a defendant. Section 1323.5 coupled with the practical aspects of refusing to go into an investigation without any information as to whom the eventual target of the inquiry might preclude the possibility of reversal if conviction later results. Mayer.

⁹¹ E.g., *Ker v. California*, 374 U.S. 23 (1963).

⁹² E.g., *Douglas v. California*, 372 U.S. 353 (1953); *People v. Henderson*, 60 A.C. 459, P.2d, 35 Cal. Rptr. 77 (1963).

⁹³ See Mayer. Apparently, there are no significant effects in San Francisco County where his conclusion is acquiesced in.

⁹⁴ CAL. PEN. CODE § 1324 provides that the district attorney can request the superior court of the county to order the witness to answer or produce undisclosed, previously privileged, testimony before the grand jury. "[U]nless it finds that to do so would be clearly contrary to the public interest, or could subject the witness to a criminal prosecution in another jurisdiction," the court will order production of the evidence. On answering, the witness is then immune from prosecution or penalty "on account of any fact or act concerning which . . . he was required to answer or produce evidence."

However, it seems clear that there is no constitutional requirement that the witness must be free from prosecution in other states or in federal courts as to the offense about which he must answer. *Mills v. Louisiana*, 360 U.S. 230 (1959) (claimed close co-operation between state and federal authorities) (3 dissents); *Knapp v. Schweitzer*, 357 U.S. 371 (1958) (3 dissents). The self-incrimination privilege does not protect witnesses against disclosing offenses that violate laws of another sovereign. *United States v. Murdock*, 284 U.S. 141, 149 (1931). *But cf.* 28 U.S.C. § 1785 (1958) (can refuse to answer questions on depositions if answer subjects deponent located in foreign country to prosecution in that country).