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American Grand Jury: Investigatory and Indictment Powers

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NOTES

American Grand Jury: Investigatory and Indictment Powers

ON JULY 23, 1970, THE AKRON BEACON JOURNAL MADE PUBLIC a United States Department of Justice summary of a 7,500 page report compiled by a Federal Bureau of Investigation probe into the shootings which had occurred at Kent State University on May 4, 1970.¹ The report severely criticized the Ohio National Guard² finding that the shootings "were not necessary and not in order."³ Finally, the Justice Department summary interpreted information gathered from interviews taken during the F.B.I. probe to indicate that there was:

[S]ome reason to believe that the claim . . . that their [the guardsmen's] lives were endangered by the students was fabricated subsequent to the event.⁴

Two months later, on September 26, 1970, the President's Commission on Campus Unrest, chaired by former Governor William W. Scranton of Pennsylvania, communicated its findings concerning the Kent State tragedy to President Nixon.⁵ In its report, the Commission also criticised the Ohio National Guard and concluded that:

Even if the Guard had the authority to prohibit a peaceful gathering — a question that is at least debatable — the decision to disperse the noon rally [of May 4] was a serious error

. . . [T]he Guard's decision to march through the crowd . . . was highly questionable

* * *

¹ Akron Beacon Journal, July 23, 1970, at 1 and 8.

² NEWSWEEK, Oct. 26, 1970, at 25.

³ NEWSWEEK, Aug. 3, 1970, at 14.

⁴ TIME, Nov. 9, 1970, at 16.

⁵ REPORT OF THE PRESIDENT'S COMMISSION ON CAMPUS UNREST iii (1970) [hereinafter cited as PRESIDENT'S COMMISSION].

. . . The indiscriminate firing of rifles into a crowd of students and the deaths that followed were unnecessary, unwarranted, and inexcusable.

* * *

Even if the guardsmen faced danger, it was not a danger that called for lethal force. The 61 shots fired by 28 guardsmen certainly cannot be justified . . . ⁶

The third and final report on the events which took place at Kent State University was issued on October 16, 1970, by a special Portage County, Ohio, grand jury.⁷ The grand jury was convened at the order of the then Ohio Governor, James A. Rhodes,⁸ who had authorized the dispatching of the National Guard to Kent in May.⁹ After twenty-seven days of deliberation, the grand jury released its findings and indicted twenty-five people for a total of forty-three offenses.¹⁰ The fact that indictments were returned did not shock the public who had watched the events for five months following the Kent State tragedy. The surprise was rather in the fact that the Portage County grand jury exonerated the Ohio Guard as being essentially blameless¹¹ although the members of the grand jury had available to them the reports compiled by both the F.B.I. and the President's Commission on Campus Unrest.¹² The twenty-five indictees included students and faculty members of Kent State University, civilians not associated with the Kent State academic community, but not one National Guardsman.¹³

In its eighteen page report, the grand jury found that:

The gathering on the commons on May 4 . . . degenerated into a riotous mob.

. . . Those who acted as participants and agitators are guilty of deliberate, criminal conduct . . .

* * *

⁶ *Id.* at 288-89.

⁷ Akron Beacon Journal, Oct. 16, 1970, at 1 and 2; U.S. NEWS AND WORLD REPORT, Nov. 2, 1970, at 33.

⁸ U.S. NEWS AND WORLD REPORT, Nov. 2, 1970, at 32.

⁹ PRESIDENT'S COMMISSION, *supra* note 5, at 247.

¹⁰ NEWSWEEK, *supra* note 2.

¹¹ NEWSWEEK, *supra* note 2; NEWSWEEK, Nov. 23, 1970, at 32.

¹² U.S. NEWS AND WORLD REPORT, *supra* note 7; TIME, *supra* note 4.

¹³ NEWSWEEK, *supra* note 2; NEWSWEEK, Nov. 23, 1970, at 32; U.S. NEWS AND WORLD REPORT, *supra* note 8; SATURDAY REVIEW, Dec. 19, 1970, at 58.

It should be made clear that we do not condone all of the activities of the National Guard on the Kent State University Campus on May 4. We find, however, that those members of the National Guard who were present on the hill adjacent to Taylor Hall on May 4 fired their weapons in the honest and sincere belief and under circumstances which would have logically caused them to believe that they would suffer serious bodily injury had they not done so.

They are not, therefore, subject to criminal prosecution for any death or injury resulting therefrom.

* * *

. . . [I]t is clear that from the time the Guard reached the practice football field, they were on the defensive and had every reason to be concerned for their own welfare.¹⁴

As a result of the obvious discrepancies and conflicts among the three reports concerning the Kent State incident, the U.S. Department of Justice was reported to have been considering whether the convening of a federal grand jury was necessary.¹⁵ Additionally, Robert I. White, President of Kent State University at the time of the tragedy,¹⁶ the Kent State faculty and student senates, and the Kent State graduate-student council¹⁷ expressed a need for and requested the empaneling of a federal grand jury. To date, none has been convened nor has there been any indication that one will be called in the future.

Regardless of one's personal views as to which of the three reports comes to the correct conclusions about the events which took place at Kent State University, the fact remains that the Ohio grand jury report contradicts the others. A federal grand jury might allay those contradictions, but one has not been convened. These considerations, then, raise a recurring issue which has been debated within the legal and political communities for years: whether or not the grand jury system in the United States is a viable institution within the framework of modern justice.

The History and Origin of the Grand Jury

A determination of the utility of the grand jury as it applies to contemporary justice cannot be accomplished without first con-

¹⁴ U.S. NEWS AND WORLD REPORT, *supra* note 8, at 34. The author was unable to obtain a certified copy of the Portage County, Ohio, grand jury report, but excerpts from the official text can be found in U.S. NEWS AND WORLD REPORT, *supra* note 8, at 33-35, and Akron Beacon Journal, *supra* note 7.

¹⁵ NEWSWEEK, Nov. 23, 1970, at 33; SATURDAY REVIEW, *supra* note 13.

¹⁶ NEWSWEEK, Nov. 23, 1970, at 32.

¹⁷ U.S. NEWS AND WORLD REPORT, *supra* note 7.

sidering the original purposes and needs for which the grand jury was established and whether or not those considerations still exist. Although some evidence exists to suggest that elements of the jury system, both petit and grand, may have come to England earlier, it was undoubtedly introduced by the Norman kings.¹⁸ During the period in which England was ruled by Henry II, 1154-1189, documentation indicates that the use of the jury system was extensive.¹⁹ Henry II also made use of bodies called "assizes,"²⁰ which were a type of court that performed the functions of a jury, except that verdicts issued therefrom were based upon investigation and personal knowledge of the jurors rather than adduced evidence.²¹ Holdsworth has stated that the use of the jury to present persons suspected of serious crime to officials of the king probably originated from the Assize of Clarendon, which took place in 1166.²² At that assize, it was provided that:

[F]or the preservation of the peace and the maintenance of justice enquiries be made throughout each county and hundred by twelve legal men of the hundred and four legal men from each township, under oath to tell the truth; if in their hundred or their township there be any man who is accused or generally suspected of being a robber or murderer or thief, or any man who is a receiver of robbers, murderers or thieves since our lord the king was king.²³

It has remained a popular notion to the present that the grand jury, as it originated from the Assize of Clarendon, was developed for the protection of individual rights. This tradition loses support, however, by the fact that:

[I]ts sole function was to increase the power of the Crown. An accusation by the Grand Assize [grand jury] raised a presumption of guilt and trial by compurgation or ordeal thereafter followed.²⁴

Eventually, as trial by ordeal or battle was abolished in the thirteenth century, the grand jury not only continued to act in its

¹⁸ 1 HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 313 (3d ed. 1922); 1 POLLOCK AND MAITLAND, *THE HISTORY OF ENGLISH LAW* 143 (1903), cited in, Morse, *A Survey of the Grand Jury System*, 10 ORE. L. REV. 106 (1931).

¹⁹ 1 HOLDSWORTH, *supra* note 18; 1 POLLOCK AND MAITLAND, *supra* note 18, at 144; Morse, *supra* note 18, at 107.

²⁰ 1 HOLDSWORTH, *supra* note 18, at 275; Morse, *supra* note 18, at 107-08.

²¹ BLACK'S LAW DICTIONARY 154 (Rev. 4th ed. 1968).

²² 1 HOLDSWORTH, *supra* note 18, at 321; Morse, *supra* note 18, at 110.

²³ 1 HOLDSWORTH, *supra* note 18, at 77; Morse, *supra* note 18, at 110.

²⁴ Calkins, *Abolition of the Grand Jury Indictment in Illinois*, 1966 U. ILL. L. F. 428-29 (1966), citing, BIGELOW, *HISTORY OF PROCEDURE IN ENGLAND* 324 (1880); 1 HOLDSWORTH, *supra* note 18, at 313.

indicting capacity, but also became the trier of guilt and innocence.²⁵ Thus, at that time, the grand jury also functioned in a capacity similar to the modern petit jury. In 1351-1352, however, statutory law was enacted in England which separated the roles of the grand and petit juries by prohibiting grand jurors from being veniremen on the trial jury.²⁶

The true origin of the respect which the grand jury has maintained through the centuries as an institution that protected English citizens from oppression and unfounded accusations of the Crown²⁷ can be traced back to the 1681 case of the *Earl of Shaftesbury Trial*.²⁸ In that case, charges of treason had been lodged by Charles II against the Earl of Shaftesbury.²⁹ The Crown insisted that the grand jury hear testimony in open court, whereupon the jury refused. Following the testimony of witnesses behind closed doors, the grand jury declined to indict — much to Charles' chagrin.³⁰ From this point on the grand jury ceased to exist as an exclusive tool of the Crown.

Finally, when the colonization of the North American continent took place during the Seventeenth and Eighteenth centuries, the English brought the grand jury system with them.³¹ It was their belief that the same conditions and considerations which made the grand jury a necessary institution in Britain also applied to the colonies in the New World.³²

The American Grand Jury

The grand jury system became firmly rooted in American criminal procedure when, on December 15, 1791, the several states of the United States of America completed ratification of the Bill of Rights.³³ The Fifth Amendment of the United States Constitution provides in part that:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentation or indict-

²⁵ Calkins, *supra* note 24, at 429, citing, BIGELOW, *supra* note 24, at 316-17, and, WALSH, A HISTORY OF ANGLO-AMERICAN LAW 300-02 (2d ed. 1932).

²⁶ 1 HOLDSWORTH, *supra* note 18, at 325; Morse, *supra* note 18, at 114; see, Calkins, *supra* note 24, at 429.

²⁷ State v. Iosue, 220 Minn. 283, 19 N.W.2d 735 (1945).

²⁸ YOUNGER, THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634-1941, at 2 (1963).

²⁹ *Id.*

³⁰ Calkins, *supra* note 24, at 429. Calkins also cites a second case at 429 n. 29, "for the meritorious action of the grand jury in withstanding the strongest possible pressure from the Crown." Trial of Stephen Colledge for High Treason, 8 Howell State Trials 550 (1816).

³¹ YOUNGER, *supra* note 28, at 2.

³² State v. Iosue, 220 Minn. 283, 19 N.W.2d 735 (1945).

³³ THE CONSTITUTION OF THE UNITED STATES OF AMERICA, H.R. DOC. NO. 92-157, 92d Cong., 2d Sess. 12 (1972).

ment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger. . . .³⁴

This provision remains part of the Constitution to date and no attempt at revision regarding it has been proposed. Similar articles have also been included in the constitutions of various states. The Ohio Constitution, for example, employs language identical to its federal counterpart, except that a grand jury indictment is also not specifically required in cases of impeachment, nor those involving "offenses for which the penalty provided is less than imprisonment in the penitentiary. . . ."³⁵

While our Founding Fathers undoubtedly believed that England was enlightened in devising the "Grand Inquest," such esteem for this decision has not weathered the centuries. England abolished the grand jury in 1933³⁶ and replaced it with a mandatory preliminary hearing.³⁷ With but a few exceptions, both the federal government and the individual states have not followed this example. As of 1966, twenty-one states required that felony prosecutions be initiated by grand jury indictment alone.³⁸

It was held by the United States Supreme Court in the case of *Hurtado v. California*,³⁹ that the Due Process Clause of the Fourteenth Amendment to the Constitution did not require the states to retain or employ the grand jury method of initiating criminal prosecutions. As a result, twenty-two states by 1966 permitted the initiation of felony prosecutions by either the grand jury indictment or the prosecuting attorney's information.⁴⁰ A small number of other states, at that time, also allowed the use of the information where prosecution by indictment was waived by the accused.⁴¹ Such is the present situation in Ohio.⁴² Waiver by the defendant has even been adopted in federal cases where the accused may be punished by imprisonment for a term exceeding one year or at hard labor.⁴³

³⁴ U.S. CONST. amend. V.

³⁵ OHIO CONST. art. I, § 10 (1851). See, ILL. CONST. art. I § 7 (1970); PA. CONST. art. I, § 10 (1968); KY. CONST. § 12 (1891).

³⁶ KARLEN, *ANGLO-AMERICAN CRIMINAL JUSTICE* 149 (1967); Calkins, *supra* note 24, at 428, *citing*, PLUNKETT, *A CONCISE HISTORY OF THE COMMON LAW* 112 n.1 (5th ed. 1956).

³⁷ KARLEN, *supra* note 36, at 143-46.

³⁸ Calkins, *supra* note 24, at 424 n.6.

³⁹ 110 U.S. 516 (1884).

⁴⁰ Calkins, *supra* note 24, at 424 n.6.

⁴¹ *Id.*

⁴² OHIO REV. CODE § 2941.021 (Page's Supp. 1971).

⁴³ 18 U.S.C. §§ 3361-62 (1970); FED. R. CRIM. P. 7 (a)-(b).

In addition to its responsibility of bringing to trial those individuals charged with a crime, the American grand jury has been charged with the duty to protect innocent citizens from unfounded accusations⁴⁴ as had its English counterpart prior to 1933. A third duty, however, has also been imputed to the American grand jury — the reporting to the citizenry of the county or district within which it has been impaneled, any information regarding the dereliction of public officials or figures of public interest, and unwholesome situations which exist within the community.⁴⁵ For example, Title 18, Section 3333 of the United States Code permits a special grand jury which has been impaneled by any district court to submit to that court a report:

[C]oncerning noncriminal misconduct, malfeasance, or misfeasance in office involving organized criminal activity by an appointed public officer or employee as the basis for a recommendation of removal or disciplinary action. . . .⁴⁶

Instances of similar responsibilities on the state level include California Penal Code Sections 914.1 and 925 which have been reported⁴⁷ to require country grand juries to investigate county government offices routinely, without any suspicion or knowledge of criminal conduct or irregularities.⁴⁸

A determination, then, as to whether or not the modern grand jury remains a viable institution must necessarily consider whether the functions and duties of making criminal presentments, protecting innocent citizens from unfounded accusations, and conducting investigations are being performed and met. Furthermore, even if such aims are being accomplished, are they being achieved efficiently, or could they be arrived at more effectively by an alternative institution or procedure?

⁴⁴ *Hoffman v. United States*, 341 U.S. 479 (1951); *Hale v. Henkel*, 201 U.S. 43 (1906); *Hurtado v. California*, 110 U.S. 516 (1884); *In Re Jones*, 101 App. Div. 55, 92 N.Y.S. 275 (2d Dept.), *appeal dismissed*, 181 N.Y. 389, 74 N.E. 226 (1905).

⁴⁵ *Ryon v. Shaw*, 77 So.2d 455 (Fla. 1955); *Application of Quinn*, 5 Misc.2d 466, 166 N.Y.S.2d 418 (Ct. Gen. Sess. 1957); *In re Presentment by Camden County Grand Jury*, 34 N.J. 378, 169 A.2d 465 (1961); *In re Presentment by Camden County Grand Jury*, 10 N.J. 23, 89 A.2d 416 (1952). *Cf.*, *In Re Morse*, 42 Misc. 664, 87 N.Y.S. 721 (Ct. Gen. Sess. 1904); *Petition of McNair*, 324 Pa. 48, 187 A. 498 (1936).

⁴⁶ 18 U.S.C. § 3333 (1970). It should be noted that the previous two code sections, 3331 and 3332, authorize the impaneling of special federal grand juries. *See*, 18 U.S.C. § 3057 (1970), which provides for grand jury investigations regarding illicit activities relating to bankruptcies, insolvent debtors, receiverships, and corporate reorganization plans.

⁴⁷ *Dummit, Investigatory Powers of California Grand Jury*, 46 (CALIF.) ST. B. J. 467, 472 (1971).

⁴⁸ Ohio also grants investigatory powers to its grand juries, but of a more specific nature. OHIO REV. CODE § 701.03 (Baldwin 1971) gives county grand juries authority to visit and inspect any of the benevolent or correctional institutions established by a municipal corporation, and to examine the books and accounts thereof. OHIO REV. CODE § 2921.15

(Continued on next page)

The Grand Jury Indictment Should be Abolished and Replaced by the Prosecutor's Information

As its lineage would indicate, the function of the grand jury to present criminal indictments to the court when the evidence merits such action, is inexorably tied to its role as the protector of individual civil rights and liberties. This conclusion logically follows since an accused cannot be protected from unfounded accusations and oppression unless he has first been accused of some criminal or undesirable behavior. These two responsibilities will be considered as a unified entity.

While it has been contended by some that abolition of the grand jury indictment and use of the prosecutor's information solely in its place would grant an excessive amount of power to the county prosecutor or the U.S. attorney,⁴⁹ retention of the indictment would still prove ineffective in protecting the rights of an alleged criminal, unless the grand jury actually acts independently of the prosecutor.⁵⁰ In 1931, U.S. Senator Wayne L. Morse, then Associate Professor of Law at the University of Oregon, conducted an extensive "Survey of the Grand Jury System."⁵¹ Statistical data from 7,414 cases reported by 162 prosecuting attorneys representing twenty-one states was gathered, collated, and analyzed.⁵² Of the total number of cases considered, 95.24% (7,061) were presented to the grand jury through the prosecutor's office; only 4.76% (353) of the cases were commenced on the initiative of the grand jury itself.⁵³ From this data, Professor Morse concluded that "grand juries do not tend to function independently [of the prosecutor]."⁵⁴

(Continued from preceding page)

(Page 1954) authorizes the convening of a special county grand jury to investigate any conspiracy to defraud the state. OHIO REV. CODE § 2939.21 (Page 1954) requires county grand juries to visit county jails once during each term for the purpose of examining their condition and inquiring into the discipline and treatment of the prisoners. Finally, OHIO REV. CODE § 2939.17 (Page's Supp. 1971) empowers the Governor or General Assembly to order the initiation of any investigation by means of a special county grand jury. Such was probably the statutory authority employed by Governor Rhodes to convene the special Portage County grand jury which inquired into the Kent State incident.

⁴⁹ Younger, *The Grand Jury Under Attack*, 46 J. CRIM. L.C. & P.S. 214 (1955).

⁵⁰ Note, *Should the Grand Jury Indictment Be Abolished in Illinois?*, 2 JOHN MARSHALL J. OF PRAC. AND PROC. 348 (1969); Calkins, *supra* note 24, at 431.

⁵¹ Morse, *supra* note 18, (pts. 1-3), 101, 217, 295.

⁵² *Id.* at 123.

⁵³ *Id.* at 134.

⁵⁴ *Id.* at 362.

It may be argued and even granted that Morse's data is forty-one years old and, therefore, invalid, but recent sources⁵⁵ can be found which support his conclusion. Canfield quotes an ex-prosecuting attorney as follows:

Almost without exception grand jurors know only the facts of the case that the state's attorney chooses to present, and almost invariably grand jurors follow the wishes of the prosecutor as to who shall be indicted and who shall not be indicted. In fact, it is now quite safe to say that the reliability of the grand jury runs just about parallel with the reliability of the state's attorney. This is not a criticism of either jurors or prosecutors and is not an attempt to indicate anything but a sincere effort on the part of either, but if the state's attorney is to so much govern the grand jury, why not let him exercise his discretion quickly by means of an information.⁵⁶

Other data from the Morse survey discredits the concept that the grand jury protects individuals from governmental oppression. Morse reported that the grand jury returned "no true bills," i.e., lack of probable cause, in 16.57% (1,170) of the prosecutor initiated cases.⁵⁷ However, an even greater percentage of the cases commenced by the grand jury itself, 20.40% (72), received "no true bills."⁵⁸ Thus, of the 7,414 total cases considered, the grand jury refused to indict in 16.75% (1,242) of them. Commenting on these statistics, Morse stated that:

[I]t can be inferred that prosecutors are not more likely to initiate investigations of cases which should be "no true billed" than are the grand juries themselves.⁵⁹

Again, since the Morse data can be criticized as being dated, the reader is asked to consider the figures set down in Tables I and II below. Table I lists the number and percentage of no bills returned by grand juries from five selected counties of New York State and from the entire state during the period from July 1,

⁵⁵ See e.g., Antell, *The Modern Grand Jury: Benighted Supergovernment*, 51 A.B.A. J. 154-55 (1965); Lombard, *The Criminal Justice Revolution and the Grand Jury*, 39 N.Y. ST. B.J. 397, 399 (1967). Cf., Gelber, *The Grand Jury Looks at Itself*, 45 FLA. B.J. 577 (1971). Former grand jurors from eleven Florida counties who served from 1964-66 and 1967-70 were asked if they believed that the state's attorney exercised too much influence over grand jury action. 43% of those jurors polled answered in the affirmative. While a majority of the jurors believed that they acted independently during their tenure, it is significant that close to one-half of them personally believed that they had not.

⁵⁶ Canfield, *Have We Outgrown the Grand Jury?*, 40 ILL. B.J. 209 (1951), cited in, Calkins, *supra* note 24, at 431.

⁵⁷ Morse, *supra* note 18, at 145.

⁵⁸ *Id.* at 140.

⁵⁹ *Id.* at 146.

1963 to June 30, 1964, inclusive.⁶⁰ Table II contains similar information from Cuyahoga County (Cleveland), Ohio, for the years 1970 and 1971.⁶¹

TABLE I: Percentage of No Bills Returned in New York State from July 1, 1963 to June 30, 1964.

<i>County</i>	<i>Total Defendants Considered</i>	<i>No Bills Returned</i>	<i>Percentage of No Bills Returned</i>
Bronx	2,116	176	8.32
New York	6,200	767	12.37
Kings	5,198	627	12.06
Queens	2,030	400	19.70
Richmond	427	76	17.80
New York (state)	27,436	3,476	12.67

TABLE II: Percentage of No Bills Returned in Cuyahoga County (Cleveland), Ohio, During 1970 and 1971.

<i>Year</i>	<i>Total Cases Filed With Grand Jury</i>	<i>No Bills Returned</i>	<i>Percentage of No Bills Returned</i>
1970	4,151	305	7.35
1971	4,380	238	5.39

While the figures contained in Tables I and II make no distinction between cases initiated through the prosecutor's office and those commenced by the unilateral action of the grand jury, numerous contemporary sources indicate that grand juries commence comparatively few cases on their own initiative.⁶²

The statistics contained in Table I generally show that in New York, during the year 1963-64, 12.67% no bills were returned throughout the state. Table II indicates that for the calendar years of 1970 and 1971, the Cuyahoga County, Ohio, grand jury refused to indict in an average of 6.37% of the cases which it took under consideration. These figures are clearly not in excess of the 16.75% total "no true bills" reported by Morse, and demonstrate that the trend observed in 1931 has continued to the present. If anything, the percentage of no bills has decreased, and one might conclude from this that the general quality of cases presented to the grand jury by the prosecutor has improved markedly from 1931 to 1972. Thus, as Morse pointed out:

⁶⁰ 10 N.Y. ADMIN. BD. OF THE JUD. CONF. ANN. REP., LEG. DOC. NO. 90, Table 31, 417 (1965), cited in, Note, *An Examination of the Grand Jury in New York*, 2 COLUM. J. OF L. & SOC. PROB. 99 (1966).

⁶¹ OFFICE OF THE CLERK OF THE COURT OF COMMON PLEAS, CUYAHOGA COUNTY, OHIO, 1970 and 1971 YEARLY REPORTS.

⁶² See e.g., MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 9-10 (1969), and, Goldstein, *The State and the Accused: Balance of the Advantages in Criminal Procedure*, 69 YALE L.J. 1166-72 (1960), cited in MILLER et al, CRIMINAL JUSTICE ADMINISTRATION AND RELATED PROCESSES 533-40 (1971).

The statistics . . . show that there is little difference between the opinions of the prosecutors and the grand juries as to what should be done with the cases. It would, therefore, seem to follow that they agree as to who are innocent persons. Thus, if the honesty and integrity of our prosecutors . . . can be relied upon, it would seem to follow from these statistics that innocent persons would be as well protected under the information method as under the indictment method.⁶³

It might be contended that one of the major difficulties which exists in Morse's evaluation of the data and the conclusions which he reaches therefrom lies in his reliance upon the continued honesty and integrity of the prosecutor's office. That is, if the indictment were abolished and replaced solely by the prosecutor's information, the danger might exist of improperly prepared cases and abuse of presentment power.⁶⁴

This argument can be challenged on two grounds. First, abolition of the indictment does not necessarily include dissolution of the grand jury itself. The grand jury could continue in its investigatory capacity, and in so doing, make the prosecutor's office subject to periodic inspection and review. As previously noted, grand jury review of county offices is already authorized in some states, and this power could be used to place the necessary checks and balances upon a prosecutor's office which would have sole responsibility for the presentment of persons accused of criminal conduct. Second, only an amount of evidence sufficient to establish a *prima facie* case against the accused is heard by the grand jury at an inquest.⁶⁵ It is, therefore, doubtful that cases are completely prepared by the time they are presented to the grand jury, and that without any additional preparation, the prosecutor could go directly from the jury's chambers into court and try the case.

The subject of a *prima facie* case and the evidence required to secure an indictment raises another criticism regarding the retention of the indictment—the absence of due process during jury proceedings.⁶⁶ The grand jury is merely an informing body rather than a judicial proceeding in the strict sense that the latter requires procedural due process.⁶⁷ As a result, inquiries made by the grand jury are conducted on an informal basis, and do not adhere to the

⁶³ Morse, *supra* note 18, at 154.

⁶⁴ Lombard, *supra* note 55, at 400.

⁶⁵ Calkins, *supra* note 24, at 432.

⁶⁶ It was held in the case of *Costello v. United States*, 350 U.S. 359 (1956), that the only due process required by the Fifth and Fourteenth Amendments to the Constitution regarding grand juries is that the jury be unbiased and constituted according to law.

⁶⁷ *In re Neff*, 206 F.2d 149 (3d Cir. 1953).

rules of evidence.⁶⁸ Furthermore, the accused, who is being investigated at a grand jury hearing, is not permitted to be represented by counsel,⁶⁹ does not have the right to present evidence favorable to his case,⁷⁰ and may not cross-examine witnesses who have been presented by the prosecutor as his incriminators.⁷¹

It is particularly notable that the rules of evidence are held in abeyance during grand jury proceedings; it is entirely possible to have an indictment based solely upon hearsay evidence.⁷² One witness before a grand jury was reportedly told, "The grand jury is entitled to your *speculation*."⁷³ (emphasis supplied).

Indeed, a grim picture of due process in the grand jury chambers is painted by Nitschke who states:

[T]he witness must walk into the grand jury room alone facing, in the secrecy of those chambers, the questions of the prosecutor and grand juror without the protection afforded by counsel or by the presence of the court. Without the help of his lawyer the witness may be led into the discussions of privileged communications or into admissions which he would not have made if he had been refreshed on the basis of all the facts. He cannot object to questions that are leading, double-edged or otherwise improper in form. Only parts of documents, or only one document of a series, may be shown to him. He cannot demand that he be allowed to explain or to controvert facts brought out before the grand jury. He may not be cross-examined to bring out full and complete facts.

* * *

In these circumstances, the average individual testifies under considerable mental stress. He may forget facts that under more favorable circumstances he would readily recall. Through suggestions of the prosecutor and grand jurors he "recalls" matters of which he actually has no knowledge. He gives incomplete answers. He may tend to tell the grand jurors what he believes they wish to hear. To relieve the

⁶⁸ See, Foster, *Grand Jury Practice in the 1970's*, 32 OHIO ST. L.J. 701 (1971).

⁶⁹ *United States v. Scully*, 225 F.2d 113, 116 (2d Cir. 1955), *cert. denied*, 350 U.S. 897 (1955).

⁷⁰ *Id.*

⁷¹ *United States v. Levinson*, 405 F.2d 971 (6th Cir. 1968), *cert. denied*, 395 U.S. 958 (1969), *rehearing denied*, 396 U.S. 869 (1969); *United States v. Scully*, 225 F.2d 113 (2d Cir. 1955), *cert. denied*, 350 U.S. 897 (1955).

⁷² White, *Is the Grand Jury Necessary?*, 45 VA. L. REV. 461, 488 (1959).

⁷³ Foster, *supra* note 68, at 703.

pressures upon himself he may make irrelevant accusations about the conduct of third persons⁷⁴

In summing up the injustices caused by the grand jury's nature of being devoid of due process, Foster states that:

Unfounded speculation can lead only to misunderstanding; it can never advance the pursuit of truth. Honest and meaningful testimony is most likely to emerge when a proper foundation is laid, when a witness is asked a comprehensible question, and when adversary counsel are present to object to improper implications, conclusions, and assumptions of fact not in evidence. The features which make the adversary trial a viable social institution are utterly and intolerably lacking from the grand jury process.⁷⁵

Those who desire to preserve the indictment and maintain that the grand jury protects both the accused and the witnesses who appear before it from unfounded accusations, defamation, and harassment point to the secrecy in which its proceedings are cloaked as further justification for the continuation of prosecution by indictment.⁷⁶ The reasons which justify such secrecy have been stated as (1) to prevent the escape of those who may be indicted, (2) to insure that the grand jurors are not harassed during their deliberations, (3) to encourage the voluntary disclosure of evidence, through testimony, by witnesses, (4) to prevent the defamation of an accused who might be subsequently found to be not culpable for any criminal activity, and (5) to prevent the possible tampering with witnesses.⁷⁷

All of these reasons which support the proposition that grand jury proceedings should be secret can be rebutted. The counter-arguments, however, require a working knowledge of the steps which precede the returning of an indictment by the grand jury. Thus, it is necessary to briefly outline these steps. In order to secure an indictment against an alleged criminal, five steps are generally followed: first, a complaint is filed before a magistrate; second, the magistrate determines whether there is probable cause to believe that a crime has been committed through some criminal agency, possibly the accused; third, if probable cause is found to be present, the accused is held in custody or granted bail pending action by the grand jury; fourth, the prosecutor prepares the case and presents

⁷⁴ Nitschke, *Reflections on Some Evils of Expanding Use of the Grand Jury Transcript*, 37 A.B.A. ANTI-TRUST L.J. 198, 203-05 (1968), cited in Foster, *supra* note 68, at 701.

⁷⁵ Foster, *supra* note 68 at 716-17.

⁷⁶ 18 U.S.C. § 1508 (1970) makes it unlawful for anyone, who is not a grand juror, to listen to or to observe the proceedings of a federal grand jury, or to attempt to do either, while the jury is deliberating or voting.

⁷⁷ *United States v. Badger Paper Mills, Inc.*, 243 F. Supp. 443 (E.D. Wis. 1965), cited in Note, *Examination of the Grand Jury*, *supra* note 60, at 103.

it to the grand jury, and fifth, if a *prima facie* case is made out during the inquest, the grand jury binds the defendant over for trial by returning a true bill or indictment.⁷⁸

The arguments that can be advanced in opposition to the secrecy of grand jury proceedings may be stated as follows: (1) Escape of accused — the escape of an alleged criminal who may be indicted will not necessarily be prevented by the secrecy of grand jury proceedings since, in most cases, he has already been arrested and has appeared at a preliminary hearing. He has either been released on bond or imprisoned before the grand jury's deliberations commence.⁷⁹ (2) Harassment of grand jurors — strict laws have been enacted to prevent the harassment of grand jurors.⁸⁰ (3) Voluntary disclosure of evidence — any reluctance that a prospective witness might have in testifying of his own volition before a grand jury should really not be dispelled by secret proceedings. The witness must realize that any testimony or evidence which he contributes to the case will eventually be made public at trial.⁸¹ (4) Defamation of accused — the good name of the accused will not, in the majority of cases, be protected by secret proceedings since, as was seen previously, most cases presented to the grand jury generally result in true bills. Thus, while the accused may have an excellent defense at trial and be subsequently acquitted, he must, nevertheless, bear the social stigma of having been indicted.⁸² (5) Tampering with witnesses — once a witness for the prosecution testifies at a preliminary hearing, the accused will know the substance of the *prima facie* case against him. Furthermore, since the defendant can obtain a pre-trial list of all the witnesses to be presented against him, it is, therefore, a simple matter to approach these witnesses. Secret grand jury proceedings will not prohibit tampering with the witnesses, if the defendant is adamant about doing so.⁸³

Calkins states that there is still another more compelling reason to oppose the secrecy of grand jury proceedings. He contends that the element of "surprise" is fostered by secrecy, and that such an element has no place in a criminal trial.⁸⁴

Secrecy places a premium on the element of surprise for in many instances the defense, because of very restrictive rules of pretrial discovery in criminal cases, will have

⁷⁸ Antell, *supra* note 55, at 154.

⁷⁹ Calkins, *supra* note 24, at 435.

⁸⁰ See e.g., 18 U.S.C. §§ 1503 and 1504 (1970).

⁸¹ Calkins, *supra* note 24, at 434.

⁸² *Id.* at 433.

⁸³ *Id.* at 434.

⁸⁴ *Id.*

little understanding of the State's case until it unfolds at trial⁸⁵

Thus, as Traynor concludes, "The truth is most likely to emerge [only] when each side seeks to take the other by reason rather than surprise."⁸⁶

Connected very closely with the cloak of secrecy that surrounds grand jury proceedings is the jury's authority to issue compulsory process. All state⁸⁷ and federal⁸⁸ grand juries have the power to subpoena witnesses who will not come forward willingly. If used, this power provides considerable assistance to the prosecutor in the collection of evidence.⁸⁹ Opponents view this power as a "clear evasion of the law,"⁹⁰ on the grounds that it has been misused. Tigar and Levy contend that some grand juries continue in session after indictments have been returned, solely for the purpose of granting government attorneys compulsory process in obtaining pre-trial discovery. Such discovery, they claim, is explicitly forbidden by rules 15 and 16 (c) of the Federal Rules of Criminal Procedure.⁹¹ Again, instead of protecting the rights of the innocent accused, the grand jury indictment perpetrates the exact opposite.

A final consideration to be examined regarding the merits of either retaining or abolishing the grand jury indictment is the time element involved in the administration of criminal justice. It is common knowledge that justice for the alleged criminal is served at a relatively slow pace in this, the age of computerized speed. Recalling to mind the five step procedure for bringing an accused to trial that was outlined above, it should be readily apparent that the abolition of the indictment would eliminate two of those steps entirely. Any alternative to the indictment which would facilitate the more timely disposition of cases, then, should be seriously considered, provided that the civil rights of the accused are not curtailed or limited. Other considerations presented in this work have endeavored to demonstrate that the rights of the accused would be equally as well protected, if not more so, under the prosecutor's information. Furthermore, if the prosecutor's information were to

⁸⁵ *Id.* at 434-35.

⁸⁶ Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U. L. REV. 228, 249 (1964), cited in, Calkins, *supra* note 24, at 435.

⁸⁷ *E.g.*, OHIO REV. CODE § 2939.12 (Page 1954).

⁸⁸ See, FED. R. CRIM. P. 17(a); Shillitani v. United States, 384 U.S. 364 (1966), citing United States v. Bryan, 339 U.S. 323 (1950), and, Levine v. United States, 362 U.S. 610 (1960).

⁸⁹ Lombard, *supra* note 55, at 401-02.

⁹⁰ Tigar and Levy, *The Grand Jury as the New Inquisition*, 50 MICH. ST. B.J. 693, 700 (1971).

⁹¹ *Id.* Rule 15 gives only defendants the right to take depositions to perpetuate testimony, and rule 16(c) severely limits the right of government attorneys to discovery.

replace the indictment and follow a mandatory preliminary hearing such as the one presently employed in England, the two steps of the charging process now occupied by the indictment would not only be eliminated, but no others would be needed to replace them. The prosecutor's information would merely exist as an ancillary procedure to the preliminary hearing.

It can be contended that the indictment procedure takes only a negligible amount of time. Even granting that, it is indisputable that a small amount of much needed time would be saved. In this manner, criminal procedure would operate more fully to safeguard the accused's constitutionally guaranteed right to a speedy and public trial.⁹²

The Investigatory Powers of the Grand Jury Should be Retained and Intensified

It has been shown⁹³ that the American grand jury possesses investigatory powers independent of its role as the accuser of alleged criminals. The consideration of whether these powers should be continued as they now exist, increased, or abolished altogether depends in a large sense upon the choice of alternative institutions which might be employed to replace the grand jury in its investigative capacity.

The just and efficient operation of our government relies upon the intricate system of checks and balances which exists among the legislative, executive, and judicial branches as outlined in the Constitution of the United States. As the grand jury is presently established, it functions as an appendage of, and has no existence apart from, the court which it attends. The grand jury does not become an independent body after being summoned, impaneled, and sworn-in.⁹⁴ This principle is important, because insofar as it participates in the system of checks and balances, the grand jury must be considered judicial in nature. Thus, from a theoretical standpoint, any institution which might be proposed as an alternative to the grand jury should also be judicial in nature.

From a purely pragmatic, rather than theoretical, point of view, one might query why a system of checks and balances is needed at the grass-roots, investigative level. The same question may also be restated in another manner. If the investigatory powers of the grand jury were eliminated, would it be essential that the alternative institution or procedure which replaces them be judicial in nature, or

⁹² U.S. CONST. amend VI.

⁹³ See text at notes 44-48 *supra*.

⁹⁴ *In re National Window Glass Workers*, 287 F. 219 (D.C. Ohio 1922), *cited in*, Gold, *Limitations on the Powers of Federal Grand Juries*, 23 PA. B.A. Q. 48, 50-51 (1951).

would replacement itself be essential? Investigations carried out by the executive and legislative branches of the government have completely different purposes and designs from those conducted by a quasi-judicial body such as the grand jury. Executive investigations such as the Federal Bureau of Investigation probe following the Kent State tragedy⁹⁵ are merely intended to determine whether a particular law has been violated. Legislative investigations such as Congressional or city council committee hearings are designed to gain input into the lawmaking process. Judicial inquiries as characterized by grand jury investigations are intended to serve two purposes, depending upon whether or not the power of indictment is retained. If the indictment has not been abolished, the grand jury investigation must consider the facts of a case presented to it and determine whether an established law, on its face, has been violated.⁹⁶ In the second instance where there exists no power to indict, the grand jury would essentially act as a public watchdog and informant to the community concerning matters of public concern such as the efficient operation of the government. In neither case is the grand jury designed to enforce laws in a vacuum nor acquire the information needed to write new ones as are executive departments and legislative bodies.

Another consideration delineates grand jury inquiries from executive and legislative investigations — bias and discrimination. Of their very nature, the executive and legislative arms of government are politically biased. It necessarily follows that investigations conducted by them are subject to some amount of political influence. The judiciary, on the other hand, is generally viewed as being apolitical in nature, and this same quality can be imputed to grand juries since they are appendages of the courts.⁹⁷ This consideration of having an unbiased grand jury has been seen as being so essential that many of the states⁹⁸ along with the federal government⁹⁹ have established guidelines to assure the impartial selection of jurors. The United States Supreme Court has also spoken on this theme by holding that the Constitution requires an affirmative duty on the

⁹⁵ See text at notes 1-4 *supra*.

⁹⁶ This function of the grand jury investigation is admittedly very close to the mere enforcement of the law as performed by the executive branch of government. It is for this reason that numerous arguments favoring abolition of the grand jury indictment were presented in the previous section of this work.

⁹⁷ Lumbard, *supra* note 55, at 400.

⁹⁸ E.g., OHIO REV. CODE § 2939.02 provides that only the grand jury foreman may be hand picked by judges of the common pleas court. All other jurors must be chosen randomly from a list of qualified electors whose names have been placed in a jury wheel or automated data processing device.

⁹⁹ 28 U.S.C. § 1863 (1970) requires each United States District Court to devise and make operational a written plan for random jury selection.

part of jury selectors to pursue a method of selection which operates devoid of any discrimination.¹⁰⁰

A final reason which supports the retention of the grand jury investigation is the possible abolition of the indictment. As pointed out previously,¹⁰¹ a method of maintaining the integrity of the prosecutor's office is required if the prosecutor's information becomes the sole procedure for initiating criminal presentments. Along with other investigative functions such as inquiring into the conditions and operation of penal institutions,¹⁰² the grand jury could routinely make similar inquiries into the prosecutor's office.

If one concludes that the grand jury should retain its investigatory powers, it logically follows that the extent of those powers must also be considered. In some states such as Ohio, it has been held that the grand jury may not act in an advisory capacity or review the conduct of public authorities, boards, officers, or commissioners.¹⁰³ Other states, New York¹⁰⁴ and Pennsylvania¹⁰⁵ for example, permit investigations into public matters, but only when it is probable that some criminal activity is involved. A third approach is taken by California, which permits routine investigation of public offices even where a hint of criminal conduct does not exist.¹⁰⁶

Indeed, the investigatory powers of the grand jury runs the full gamut of authority among the states. If the grand jury, however, is to serve the community in its fullest capacity and participate completely in the system of check and balances, the purview of its inquiry must ultimately be expanded.¹⁰⁷

Intensification of the jury's powers of investigation, however, presents additional difficulties. Grand jury inquiries cannot diligently examine the operations of governmental agencies and offices unless the knowledge and expertise of the jurors are equal to the task in these matters. As Antell implies, there can be no special merits:

In confiding these important responsibilities to a group of citizens who are completely untrained in the work they

¹⁰⁰ *Glasser v. United States*, 315 U.S. 60 (1942); *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946); cited in, Comment, *El Chicano Y the Constitution: The Legacy of Hernandez Grand Jury Discrimination*, 6 U. SAN FRAN. L. REV. 129, 139-40 (1971).

¹⁰¹ See text following note 64 *supra*.

¹⁰² See note 48 *supra*.

¹⁰³ *State v. Robinette*, 2 Ohio Op.2d 215, 75 Ohio L. Abs. 181, 143 N.E.2d 186 (C.P. Pike County 1957).

¹⁰⁴ *In re Morse*, 42 misc. 664, 87 N.Y.S. 721 (Ct. Gen. Sess. 1904).

¹⁰⁵ *Petition of McNair*, 324 Pa. 48, 187 A. 498 (1936).

¹⁰⁶ See text at notes 47 and 48 *supra*.

¹⁰⁷ *Cf.*, *Hale v. Henkel*, 201 U.S. 43 (1906); *United States v. Thompson*, 251 U.S. 407 (1920); *Frisbie v. United States*, 157 U.S. 160 (1895); cited in, *Dummit*, *supra* note 47, at 469.

have to do and whose only qualification for service is that they can see and hear and have resided for a prescribed time in the jurisdiction where they have been called for service.¹⁰⁸

Additionally, the fact that grand juries must ultimately depend upon the state's attorney and his staff to do the investigative field work seriously hinders the completeness and effectiveness of grand jury investigations.¹⁰⁹ This is especially true when one considers that the primary interest of the prosecutor lies in the area of criminal prosecutions.

A survey of grand jurors which was conducted in Florida provides viable solutions to these problems. A questionnaire was submitted to 210 former grand jurors from eleven Florida counties who served during the 1964-66 and 1967-70 terms. Among others questions, the following two were posed. "Would better caliber jurors be obtained if they were selected from a 'blue ribbon list,' and "Should the jury be able to employ its own investigators rather than be limited to the investigative staff provided by the police or the prosecutor?"¹¹⁰ On a statewide basis, 66% of the jurors voted affirmatively on both issues. The results of the Dade County (Miami) poll showed a significantly higher percentage of affirmative responses than those from other less populated counties. Regarding the first issue, Dade County jurors supported selection of jurors from a restricted rather than general panel of citizens by a margin of 89%. 84% of the Dade County jurors were also in favor of an independent investigative staff.¹¹¹ Thus, a truly effective grand jury investigation can be attained, at least in the eyes of grand jurors themselves, if individual juror qualifications are upgraded and an independent research staff is provided.

Conclusions and Recommendations

The historical origin of the grand jury dates to Twelfth Century England. As it developed there, the dual role of the grand jury as accuser of alleged criminals and protector of individual rights and liberties evolved. However, upon examination of the contemporary American grand jury, it can be seen that these historical roles have not been fulfilled in many instances. Furthermore, in those cases

¹⁰⁸ Antell, *supra* note 55, at 154.

¹⁰⁹ Elias *et al*, *The Grand Jury System in Massachusetts: A Survey*, 2 SUFFOLK U. L. REV. 201, 205 (1968), *citing*, Note, *The Grand Jury as an Investigatory Body of Public Officials*, 10 ST. JOHN'S L. REV. 219, 231 (1936).

¹¹⁰ Gelber, *supra* note 55, at 577.

¹¹¹ *Id.*

where the grand jury has functioned satisfactorily in its historical capacity, similar results could have been achieved in a more practicable manner by other means — most notably the prosecutor's information.

Specifically, this examination of the grand jury system demonstrates that: (1) grand juries do not act independently of the prosecutor; (2) prosecutors initiate cases of at least the same or better merit than those commenced by grand juries themselves; (3) the quality of cases presented by the prosecutor would not decrease if the indictment were abolished; (4) the facets of due process present in a purely judicial proceeding which guard and protect the rights of the accused are absent from grand jury proceedings, and (5) the speedy administration of criminal justice as guaranteed by the Constitution is delayed by prosecution via the indictment.

It is concluded and recommended, therefore, that the grand jury indictment be abolished in all cases, both federal and state, and replaced by a uniform preliminary hearing followed by the prosecutor's information. The author realizes that this proposal may require constitutional revision by the federal and many state governments, which, although being a formidable obstacle to abolition, should not be considered an insurmountable one or used as an additional justification for retention of the grand jury indictment.

While it is recommended that the indictment be abolished, it is not suggested that the grand jury itself be dissolved. It has been outlined that the American tri-partite form of government requires the existence of a quasi-judicial investigatory body. The grand jury serves this purpose. Additionally, should the indictment be abolished, the investigatory powers of the grand jury should be retained and expanded for two reasons. One, a device or procedure will be necessary to maintain the integrity of the prosecutor's office which would then have sole power to present alleged criminals to the courts. Two, no longer acting as indictor, the grand jury in many states would require extended power to inquire routinely into the operation of governmental offices and agencies. The authority to investigate special circumstances on an ad hoc basis, such as the Kent State tragedy, should also be retained and enlarged. In any investigation, however, the grand jury would only act as an inquisitory body whose findings would then be passed onto the state's attorney. In this fashion, then, the prosecutor would remain as the sole initiator of criminal prosecutions.

The Kent State incident is illustrative of the new role that should be played by the grand jury. Of the three investigations which were carried out, the one performed by the Portage County grand jury became the most important because twenty-five criminal

indictments were issued therefrom; *individual rights and liberties were involved*. The two federal investigations were, therefore, somewhat dwarfed in importance. This should not have been the case. Under the proposals outlined above, the county grand jury investigation would have been no more authoritative than the other two and would have served a similar function to the one conducted by the Federal Bureau of Investigation. In other words, both the Federal Bureau of Investigation and the Portage County grand jury would have reported back to their respective executive superiors, the United States Department of Justice and the Portage County Prosecutor. To the discretion of these executive authorities, then, any decision to prosecute would have been reserved. Thus, the decision to prosecute would have lain with the Portage County Prosecutor initially and not with the grand jury, instead of forcing him, as the news media reported, to prosecute a handful of the Kent State defendants and only later allowing him to drop the charges against the rest.

If the investigatory powers of the grand jury are to be retained and intensified, it is necessary that the grand jury be given adequate resources with which to employ its own investigative staff. The prosecutor's office, in its new role of sole accuser, would direct its staff in the realm of criminal investigation only, and would probably have neither the time nor manpower to provide investigators for the grand jury. Furthermore, if the grand jury is to routinely inquire into the operation of governmental offices, specifically the prosecutor's, a totally impartial investigation could not be expected if the staff employed by the grand jury were to come from the prosecutor's office itself.

Finally, it is recommended that laws be enacted or existing statutes be amended by both the Congress and state legislatures which would provide for a "blue ribbon" list of prospective grand jurors who possess the individual qualifications necessary to perform competent investigations. The use of such a list need not violate the Constitution as being discriminatory, if safeguards are included in the legislation which would assure that compilation of the list itself be both racially and politically unbiased. In addition, actual selection of jurors from the "blue ribbon" list could still be accomplished randomly and apportion representation among all groups in the community.

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