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THE GRAND JURY REPORT AS AN INFRINGEMENT OF PRIVATE RIGHTS

"The law is good, if a man use it lawfully," Paul advised Timothy.1 This lofty epigram, of course, begs a very fundamental question—namely, what is lawful? A topic on which this basic inquiry has produced considerable debate is that of the grand jury2 report. Does the grand jury have the right to issue a report and if so when and about whom?

In Monroe v. Garrett,3 decided April 29, 1971, the court of appeal reiterated California's position granting wide and extensive powers to the grand jury to issue public reports. The case arose after the 1968 Los Angeles county grand jury investigated disturbances on several state college and high school campuses, with particular attention to the part played by the Educational Opportunities Program (EOP)4 in the disturbances. As a result of its investigation, the grand jury returned indictments against numerous individuals; many were subsequently convicted on various charges including conspiracy, false imprisonment, kidnapping, assault, disturbing the peace, malicious mischief, and trespassing.5

While a number of those indicted were awaiting trial,6 the grand jury issued a public report and a press release7 summarizing its findings and making several recommendations. Included was the recommendation that the EOP be closely examined to determine if persons, otherwise qualified for program financial aid, had been required to pledge themselves to engage in militant campus activities as a condition

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1. 1 Timothy 1:8 (King James).
2. A grand jury is a group of citizens sworn to investigate crime within their county. Cal. Pen. Code § 888 (West 1970). There is a required number of 23 in a county with a population exceeding four million persons (Los Angeles) and 19 in other counties. Id. § 888.2; see Cal. Const. art. I, § 8, which provides that "[a] grand jury shall be drawn and summoned at least once a year in each county."
6. Plaintiff's Petition for Hearing at 6, 8.
7. The press release was issued nearly two weeks before the grand jury's final report. Respondent's Brief at 1.
precedent to qualifying for aid under the program. The grand jury also recommended that faculty members or students indicted for a felony "based upon criminal activity occurring at or adjacent to an educational facility" be suspended until after the criminal charges had been resolved.

The propriety of a grand jury report is normally challenged by an action for libel or slander, or by a motion to have the report ex-

8. 17 Cal. App. 3d at 282, 94 Cal. Rptr. at 532.
9. Id. The court reprinted the following portion of the press release which had been objected to by the plaintiff in an appendix to the opinion:

"' Let there be no mistake about the fact that meaningful changes resulting in improved levels of social, educational and economic attainment for citizens of all social, ethnic and cultural backgrounds stands highest on any list of priorities, and the need for such progress has been of particular concern to the members of this Grand Jury. We realize, however, that there are individuals who engage in both overt and covert activity in the area of civil strife whose motives and purposes should be subject to careful evaluation and scrutiny. . . .

[W]e therefore: . . .

. . .

(3) recommend that the Educational Opportunities Program, which permits disadvantaged persons to receive a college education, be closely examined to determine if qualified persons are being required by any persons or organizations to commit themselves to engage in militant campus activities as a condition precedent to acceptance into such college program. We are inclined to believe that the recruitment and admission procedures currently utilized by various local colleges participating in the Educational Opportunities Program are in vital need of revision in order that the opportunities existing under such program be afforded those whose primary objective is obtaining a college education.

"The 1968 Grand Jury is of the opinion that it is inimical to the interest of an academic community to permit a person charged with a felony offense arising out of acts of civil disobedience which occurred at or adjacent to an educational institution, to continue as a faculty member or student while such charges are still pending.

"We, therefore, recommend that after a faculty or student member has either been bound over for trial in the Superior Court after a preliminary hearing, or is indicted for a felony offense based upon criminal activity occurring at or adjacent to an educational facility, such faculty member or student be immediately suspended by an appropriate administrative head of such facility until the criminal charges have been resolved either by trial, plea or dismissal.'" Id. at 285, 94 Cal. Rptr. at 534.

10. The only California case in which a grand jury report was challenged by a libel and slander action is Irwin v. Murphy, 129 Cal. App. 713, 19 P.2d 292 (1933). For decisions in other states see Annot., 48 A.L.R.2d 716, 718-21 (1956); Annot., 42 A.L.R.2d 825, 826-30 (1955). The RESTATEMENT OF TORTS § 589 (1938) provides: "A member of a grand or petit jury is absolutely privileged to publish false and defamatory matter of another in the performance of his function as a juror, if the defamatory matter has some relation to the proceedings in which he is acting as a juror." Comment c to that section provides: "[G]rand juries are generally authorized by law to . . . make charges by indictment. If the grand jury is authorized to conduct investigations [into crime] and to make reports thereof, the members are protected for any defamatory publication included as a part of such a report to the proper officer" (emphasis added.) See also Turpen v. Booth, 56 Cal. 65 (1880).
punged from the court's records. However, the plaintiff in *Monroe* was the executive director of the American Civil Liberties Union (ACLU) in southern California, and was not named or referred to in the report. He sued in a representative capacity and brought a class action on behalf of all taxpayers in Los Angeles County for reimbursement by the grand jury of the amounts spent in issuing the allegedly improper report and press release. A summary judgment was entered in favor of the plaintiff requiring the defendants, as members of the grand jury, to reimburse the county of Los Angeles a total of six cents.

Before the court of appeal, the primary issue presented was whether the making of the above recommendations in the report and the press release was within the jurisdiction and scope of authority of the grand jury. A unanimous court of appeal reversed the decision of the trial court and held that the grand jury had acted lawfully and within the scope of their powers in issuing the report and press release, and in making "peripheral recommendations aimed at preventing similar crimes.

This note will review certain of the policy arguments both for and against grand jury reports. The policy arguments favoring reports

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11. 17 Cal. App. 3d at 281-82, 94 Cal. Rptr. at 531-32. The plaintiff did not challenge the general authority of the grand jury to issue a report, but instead challenged the particular type of recommendations the Los Angeles grand jury had made. "Plaintiff does not question the right of the defendants to make inquiry into whether any crimes were committed within the county and to make report of such investigation. He does challenge the right of the defendants as a grand jury, to thrust itself into non-criminal matters clearly outside its jurisdiction. At stake here is the right of the defendants, as a grand jury, to expend public funds to advise educators who shall be students at their institutions and who should be the beneficiaries of a national educational program. . . . Such conduct by the grand jury has nothing to do with the prevention or reduction of crime and violence in the County." Respondent's Brief at 7-8. In particular, the plaintiff challenged the grand jury's right to make its recommendations in the form of a press release. *Id.* at 16-22. New York has established that a grand jury has no such right. *In re Jan. 1967 Reports of the Grand Jury, 52 Misc. 2d 895, 896, 277 N.Y.S.2d 105, 107 (Sup. Ct. 1967):* "There is no authority nor is it proper for the members of a grand jury to issue a press release or any other announcement expressing their personal views and recommendations on any subject. . . ." *Cf.* Elder v. Anderson, 205 Cal. App. 2d 326, 23 Cal. Rptr. 48 (1962) (trustees of a school district not permitted to announce to the general public that a student was involved in a "violation of manners, morals and discipline").

12. Six cents was the amount of damages requested by plaintiff; this was the amount "awarded Henry Ford in his libel action against the Chicago Tribune, another case involving a 'principle.'" Respondent's Brief at 4-5.

13. Also at issue was whether the grand jury was liable for the money spent to make recommendations in the report and press release. The court's determination that the recommendations in the report and press release were proper obviated consideration of this issue. 17 Cal. App. 3d at 285, 94 Cal. Rptr. at 534.

14. *Id.* at 284, 94 Cal. Rptr. at 533.

15. See text accompanying notes 53-67 *infra.*
—for example, the public’s right to know of noncriminal, antisocial conduct—are more persuasive where the individual affected is a public official rather than a private individual, yet the *Monroe* decision indicates a continuation of California’s broadly permissive policy of allowing grand jury reports regardless of the status of the individual affected. Adherence to this policy would seem to require legislation designed to clearly define the permissible limits of a grand jury report.

The note will also review recent state and federal legislation which has dealt with this problem, and will recommend that consideration be given to the approach taken in these statutes as a workable model for statutory safeguards needed in California. These statutes generally permit the grand jury to report on noncriminal official misconduct by public officials or employees while assuring such individuals procedural safeguards against many abuses of discretion by the grand jury. These statutory safeguards strike a balance between the public’s right to know and considerations of fairness to the individual about whom the grand jury issues its report. One of these safeguards—delayed publication of a report when the individual named in the report faces criminal charges—deserves special consideration because it is based not only on notions of fairness, but would appear to be required under the constitutional guarantees of a right to a fair trial. A grand jury report released while criminal charges are pending against the one named or implicated by such a report may influence jurors and thereby impair the right of the accused to a fair trial. Where even the possibility of prejudice exists, the veil of secrecy which hides grand jury proceedings from public view should not be lifted until completion of the criminal proceedings, or until after the danger of prejudice has passed.

**The Grand Jury Report**

A grand jury report should be carefully distinguished from either

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16. See text accompanying notes 68-79 infra.
17. See text accompanying notes 80-87 infra.
18. See U.S. Const. amend. VI: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .” See also id. art. III, § 3, amends. V, XIV.
19. The California Penal Code contains a number of sections pertaining to the secrecy of grand jury proceedings and deliberations including sections 911, 915, 924, 924.1, 924.2, 937, 938, 938.1, 939 and 939.1.

an indictment\textsuperscript{20} or a presentment\textsuperscript{21} because the report does not charge the commission of any crime. Rather, it is a publication by the grand jury in its official investigative capacity, disclosing its findings on matters purportedly of public concern. Some of the reports also include recommendations by the grand jury on how to alleviate the problems discussed in the report. In California, the grand jury is expressly authorized under the Penal Code to issue public reports which deal with county administrative matters.\textsuperscript{22} For example, the grand jury is authorized to examine and report on the accounts and records of county officers,\textsuperscript{23} to report annually to the board of supervisors on the need for an increase or decrease in the salaries of the district attorney and auditor,\textsuperscript{24} to report to the legislature as often as deemed necessary on the need for increases in salaries of supervisors,\textsuperscript{25} and to examine and report on the books, records and accounts of ex officio officers.\textsuperscript{26}

The focus of this note, however, is on reports which lack express statutory authority. Commonly, these reports take one of two forms. First, there is the general type of report which discusses undesirable conditions in the community without naming specific individuals. Sec-

\begin{itemize}
  \item \textsuperscript{20} "An indictment is an accusation in writing, presented by the grand jury to a competent court, charging a person with a public offense." \textsc{Cal. Pen. Code} § 889 (West 1970). The customary procedure is for the prosecutor, generally the district attorney, to submit to the grand jury a formal, written accusation or "bill of indictment." The grand jury must then determine from the evidence presented by the prosecutor whether the accusation, if proven, would be sufficient to secure conviction of the accused. \textit{Id.} § 939.8. If the required number of jurors find the bill to be a "true bill", it becomes an indictment and the accused stands indicted. If the required number of jurors find that the prosecutor has not submitted sufficient information to substantiate the bill of indictment, \textit{i.e.}, to make it a true bill, the grand jury is said to ignore it.
  \item The number of jurors required to return a true bill of indictment is 14 in a county having 23 grand jurors and 12 in a county having 19 grand jurors. \textit{Id.} § 940.
  \item The terms presentment and report are often used interchangeably but such usage is technically incorrect and adds little to a clear understanding of the function of the grand jury. A presentment is an accusation of crime made by a grand jury at its own instance and from its own knowledge after investigating and reviewing evidence supplied by one or more of its members or other witnesses. \textit{See, e.g.}, \textit{id.} § 918.
  \item Very often in response to the presentment the prosecutor draws up a bill of indictment and the grand jury then considers the bill as it would any other, endorsing it as a true bill or ignoring it. A point which deserves emphasis is that both the indictment and the presentment result in a written, formal accusation of crime designed to initiate criminal prosecution. The grand jury report, on the other hand, serves no such purpose.
\end{itemize}

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  \item \textsuperscript{21} \textit{id.} §§ 925, 927, 928, 929, 933.5; \textit{see also id.} § 930.
  \item \textsuperscript{22} \textit{id.} § 925.
  \item \textsuperscript{23} \textit{id.} § 927.
  \item \textsuperscript{24} \textit{id.} § 929.
  \item \textsuperscript{25} \textit{id.}.
  \item \textsuperscript{26} \textit{id.} § 929. \textit{See also id.} §§ 928, 930, 933.5; \textit{Board of Trustees v. Leach}, 258 Cal. App. 2d 281, 65 Cal. Rptr. 588 (1968); 46 Ops. \textsc{Cal. Att'y Gen.} 144 (1965).
ond, there is the specific report which publicly condemns specific individuals—frequently public officials—without necessarily returning criminal indictments.

There is disagreement as to whether common law grand juries had any power to issue informational reports, although there is some evidence that the practice was at least tolerated. Modern American courts vary as to recognition of the propriety of the grand jury's reporting function. Many courts permit the general type of report even in the absence of express statutory authority, although a few courts refuse to recognize any power of the grand jury to issue reports except when expressly granted by the legislature. The majority of American courts which have considered the problem refuse to allow grand jury reports which publicly criticize a specific individual without indicting him. When an individual's reputation is at stake, these courts refuse

27. There is general but not complete agreement that common law grand juries had the power to issue general reports. See, e.g., In re Camden County Grand Jury, 10 N.J. 23, 40-59, 89 A.2d 416, 426-39 (1952), in which Chief Justice Vanderbilt discussed various grand jury reports in early New Jersey dealing with the failure to repair a bridge, the failure to repair a road, the failure of a railroad to provide a flagman at a grade crossing, poor administration of a water department, the inadequacy and unhealthiness of a police station, morally infectious motion pictures, and numerous other matters. But see 7 MEDALIE, THE PANEL 5 (1929), cited in In re United Elec. Workers, 111 F. Supp. 858, 869 n.40 (S.D.N.Y. 1953).

There is more pronounced disagreement as to whether common law grand juries had the power to issue specific reports. For authority that such power existed see In re Report of Grand Jury, 152 Md. 616, 623, 137 A. 370, 372-73 (1927); Poston v. Washington, A. & Mt. V.R. Co., 36 App. D.C. 359, 367-69 (1911). Contra 1 S. WEBB & B. WEBB, ENGLISH LOCAL GOVERNMENT (1908); IV. W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 144-48 (1924); X. id. 146-50; GOEBEL & NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK 343-65 (1944); A. SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA 70-71 (1930) cited in In re United Elec. Workers, 111 F. Supp. 858, 863 n.12 (S.D.N.Y. 1953). See also Kuh, The Grand Jury "Presentment": Foul Blow or Fair Play?, 55 COLUM. L. REV. 1103, 1106-10 (1955) [hereinafter cited as Kuh].


29. See, e.g., In re United Elec. Workers, 111 F. Supp. 858, 869 (S.D.N.Y. 1953): "We are not here concerned with reports of a general nature touching on conditions in the community. They may serve a valuable function and may not be amenable to challenge."

30. This is basically the approach taken by the court in Hammond v. Brown, 323 F. Supp. 326 (N.D. Ohio 1971); cf. LA. CODE CRIM. PRO. ANN. art. 444 (West 1967), which provides in part: "The grand jury is an accusatory body and not a censor of public morals. It shall make no report or recommendation, other than to report its action as aforesaid."

31. See, e.g., Ex parte Robinson, 231 Ala. 503, 165 So. 582 (1936) (report ordered expunged); In re Gulf County Grand Jury, 224 So. 2d 764 (Fla. 1969) (expungement recognized as proper when report censures public official or other person without indictment); In re Report of Grand Jury, 152 Md. 616, 137 A. 370 (1927)
to overlook the lack of legislative authority for the specific report, and such reports are commonly expunged from the court records.\textsuperscript{32} As one court explained, this judicial stance is based on a policy that "a man should not be subject to a quasi-official accusation of misconduct which he cannot answer in an authoritative forum."\textsuperscript{33}

The following hypothetical will illustrate the various contexts in which a grand jury report may be issued with differing consequences. Suppose the grand jury of Blackacre County has made an investigation of alleged corruption in the police force.\textsuperscript{34} If the grand jury finds insufficient evidence to return criminal indictments, it may nevertheless issue a general report to draw public attention to the corruption within the police department.\textsuperscript{35} Since no named individual is singled out, there is little danger to individual reputations; the police force as a whole is placed under suspicion but this may be deemed justifiable because of the strong public interest in honest and efficient law enforcement. But suppose that the grand jury in this report accuses named policemen of misconduct, and instead of issuing a general report, the grand jury issues a specific report. If the accusations amount to charges of criminal conduct they are clearly improper since the individual has not been indicted.\textsuperscript{36} However, the specific report may attribute cer-
tain misconduct to the named individuals which is not criminal in nature. For example, the grand jury report may state that officers A and B, the chief of police's direct subordinates, are grossly inefficient and lax in their duties. Since A and B have not been indicted and hence are unable to refute these charges with evidence at trial, it is important that there be appropriate safeguards against either an improperly motivated or negligently considered grand jury report.

On the other hand, suppose that the grand jury indicts A and B for accepting bribes, and also issues a public report enlarging on the circumstances under which such indictments were returned. The report may refer to A and B by name (specific) or it may make no direct reference to A and B, but instead may concentrate on exposing the corruption in the police force without mentioning any specific individuals. In either case, the report may be issued prior to the indictment, at the time of indictment, after the indictment but prior to trial, or after trial. In all but the last instance, the grand jury report may expose A and B to pretrial prejudice. Arguably the indictment itself may subject A and B to prejudice, but the issuance of a special report in addition to the indictment would add to the possibility of prejudice.

In *Monroe v. Garrett* the grand jury report was issued while criminal charges against a number of the accused were pending. The timing of the issuance of the report, and the unmistakable reference to the defendants in the report, would certainly appear to have adversely affected the defendant's right to a fair trial. The *Monroe* decision, however, approved the issuance of the report and indicates a continuation of California's policy of allowing the grand jury great freedom in issuing reports and making recommendations. This decision emphasizes the need for legislation defining the permissible limits of grand jury reports, and at the very minimum, indicates the need for legislation designed to safeguard a criminal defendant's right to fair trial by forbidding pretrial release of a potentially harmful grand jury report.

The California View: From Irwin v. Murphy to Monroe v. Garrett

The appellate court in *Monroe* relied heavily on section 917 of the California Penal Code which provides that the “grand jury may inquire into all public offenses committed or triable within the county

37. This was the situation in *Monroe*. Plaintiff's Petition for Hearing at 6.
38. Although the report itself did not "name names", the press accounts which carried the grand jury's recommendations for suspending indicted students and faculty did carry the names of those under indictment. *Id.* at 4-6.
39. See text accompanying notes 65-79 *infra*.
40. See text accompanying notes 88-129 *infra*. 


and present them to the court by indictments.” This code section does not expressly authorize the issuance of a report either to the court or to the public. At issue, then, was whether the express power to investigate impliedly gave the grand jury in Monroe the right to issue a public report and disclose its findings by making a press release. In reaching the conclusion that the grand jury had acted properly in issuing the report and press release, the court stated:

The Grand Jury in the instant case was legitimately investigating crime on campuses, and, during the course of that investigation, it made peripheral recommendations aimed at preventing similar crimes. . . .

In our system of government, a Grand Jury is the only agency free from possible political or official bias that has an opportunity to see the picture of crime and the operation of government relating thereto on any broad basis. It performs a valuable public purpose in presenting its conclusions drawn from that overview. The public may, of course, ultimately conclude that the jury’s fears were exaggerated or that its proposed solutions are unwise. But the debate which reports, such as the one before us, would provoke could lead only to a better understanding of public governmental problems. They should be encouraged and not prohibited.

The Irwin Court

The court also relied quite heavily on a 1933 court of appeal case, Irwin v. Murphy, as precedential authority. Irwin indicates just how emphatically the California courts have endorsed grand jury reports.

41. CAL. PEN. CODE § 917 (West 1970). The court also cited as authority id. § 923 which provides: “Whenever the Attorney General considers the public interest requires, he may, with or without the concurrence of the district attorney, direct the grand jury to convene for the investigation and consideration of such matters of a criminal nature as he desires to submit to it. He may take full charge of the presentation of such matters to the grand jury, issue subpoenas, prepare indictments, and do all other things incident thereto to the same extent as the district attorney may do.”

42. 17 Cal. App. 3d at 284, 94 Cal. Rptr. at 533-34 citing The California Grand Jury, supra note 19, at 123. It is difficult to understand how the court decided that “similar crimes” would be prevented by the suspension of indicted students and faculty. This position might be logical if the persons the grand jury recommended be suspended, had been convicted of the type of crimes sought to be prevented. But, even though logical, such a position would still seem improper, since an “indictment is a mere accusation, and raises no presumption of guilt.” Coyne v. United States, 246 F. 120, 121 (1917).

Thus, by stating that the recommendation by the grand jury was aimed at preventing similar crimes, the court impliedly approved the notion that these particular defendants would be likely to commit “similar crimes”—an assumption based solely on the fact that they had been indicted for such similar crimes. Such an assumption is clearly illogical, and appears contrary to the presumption of innocence normally accorded the accused.

On September 26, 1930, the San Francisco grand jury published a report of its findings in connection with the death of a prize fighter in a local bout.\(^{44}\) No indictments were returned against any of the principles involved because of insufficient evidence. Nevertheless, the report received sensational front-page publicity,\(^{45}\) and recommended that the governor request the resignation of the state boxing commissioner.\(^{46}\) The report also recommended that the state athletic commission "permanently and perpetually" revoke the license of the referee who officiated the fight,\(^{47}\) and continued:

"The referee . . . by a preponderance of the evidence, is guilty in our eyes of carelessness and inefficiency, deliberate or otherwise, on the night in question, and his sworn testimony is at variance with all other sworn testimony heard.\(^{48}\)"

Unquestionably, the grand jury had both the right and the duty to make an investigation into the circumstances surrounding the death of the fighter—a possible criminal homicide—since grand jurors bind themselves by their oath to inquire into all "public offenses" committed or triable within their county.\(^{49}\) The plaintiff in \textit{Irwin}, however, challenged the right of the grand jury to issue the public report in the absence of any criminal indictments and sued for libel and slander, naming the jury foreman as principal defendant. The court held that the grand jurors were privileged in issuing the report and continued:

"Law and common sense combine to compel the conclusion that, if a grand jury is authorized and bounden [sic] to inquire of public offense, a necessary element of this power 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."\(^{50}\)"

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\(^{44}\) The bout took place between Max Baer and Frankie Campbell on August 25, 1930. The latter died the following day as a result of injuries sustained in the fight.

\(^{45}\) The newspaper accounts of this episode provide a lively and insightful background to the case. The grand jury's report was carried on the front page of the morning \textit{Chronicle} under an eight-column banner headline: "JURORS URGE TRAUNG, IRWIN OUSTERS". San Francisco Chronicle, Sept. 27, 1930, at 1. The subheadline read: "Ring Game Clean? No! Says Jury". \textit{Id.} at 1, col. 2.

\(^{46}\) \textit{Id.} at 2, col. 4.

\(^{47}\) \textit{Id.}

\(^{48}\) \textit{Id.} (emphasis added). It is interesting to note that the \textit{Irwin} court did not reproduce this language—which shows the grand jurors saw themselves somewhat as a guilt-finding body rather than as an investigative, accusatory body. Instead, the court paraphrased these "accusations." 129 Cal. App. at 714-15, 19 P.2d at 292-93.


\(^{50}\) 129 Cal. App. at 717-18, 19 P.2d at 293-94. The court cited as authority CAL. PEN. CODE § 915, now § 917 (West 1970) (see text accompanying note 41 \textit{supra}), and CAL. PEN. CODE § 920, now § 939.7 (West 1970). \textit{Contra}, In re United Elec. Workers, 111 F. Supp. 858 (S.D.N.Y. 1953). "It may be said that the Grand
The court in *Irwin* may have overstated its case somewhat—substituting hyperbole for a sober recognition of the genuine dispute over the propriety of such reports. However, the court in *Monroe* approved the holding in *Irwin* with only a slight qualification.

It must be pointed out that the wisdom of the [Los Angeles County Grand Jury] report and press release is not before this court. We are called on only to determine the legality of these documents.

... If it was not an excess of jurisdiction for the Grand Jury in *Irwin* to suggest the revocation of the license of a referee and to examine the rules and regulations of boxing contests and make recommendations, then we see no reason why it is an excess of jurisdiction to recommend the suspension of teachers or students and recommend changes in the educational opportunities program.

**The Distinction Between Monroe and Irwin**

The court in *Monroe*, by deliberately refraining from ruling on the "wisdom" of the report and press release, bypassed an opportunity to note the basic distinction between the two cases. In *Irwin*, even though there was doubt as to the propriety of certain accusations made in the report and the grand jury's right to make them, no criminal indictments were ever returned against those implicated in the report. In *Monroe*, however, when the grand jury issued its report, criminal charges were pending against certain individuals involved in activities directly criticized by the report. Such a distinction should be made and indeed deserves judicial consideration. In *Monroe* the recommendation of the grand jury that students and faculty facing criminal charges be suspended until resolution of such charges, might have adversely influenced the objectivity of a prospective juror in the subsequent criminal

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Jury's function is to determine whether there is enough evidence before it to support the charge of crime... If there is, the Grand Jury returns an indictment; if there is not, it remains silent. Once having determined that the evidence is insufficient, its function ends. It may not then issue a report based upon information derived during the course of its secret inquiry, directed to the executive and legislative branches, which touches upon matters within their exclusive authority." *Id.* at 864-65.

51. One immediate challenge to the grand jury's "shot-gun" criticism of local boxing was issued, appropriately enough, from the Chronicle's sports section. The report had accused "particular" sports writers of conspiring with boxing clubs "with the object of increasing box office receipts through the publicity so obtained." San Francisco Chronicle, Sept. 27, 1930, at 1, col. 2. Under a headline, "Grand Jury Must Give Facts When It Presents Serious Accusation", the Chronicle sports page delivered the following counter-punch: "The Grand Jury, if it wishes to be fair, must give the names of such newspapermen as are charged with having too friendly a connection with boxing clubs. It is unjust to all others who handle such sports that they should be placed under blanket suspicion." *Id.* Sept. 28, 1930, Sporting Green at 1, cols. 6-7.

52. 17 Cal. App. 3d at 283-84, 94 Cal. Rptr. at 532-33.
To be sure, a certain amount of publicity directed at prominent figures in campus disorders may be unavoidable, but this factor would appear to further militate against a grand jury issuing a report which directs more publicity at a defendant facing criminal charges.

**The Nature of the Controversy**

Before considering in more detail the possible conflict between a pretrial grand jury report and the right to fair trial, it may be helpful to note briefly some of the objections often raised regarding the types of grand jury reports under consideration. The conclusion "compelled" by the union of law and common sense is not invariably that reached by the court in *Irwin*. Among the criticisms often listed against the issuance of grand jury reports, five stand out.

*Extrajudicial punishment.* Perhaps the most serious objection to grand jury reports which censure individuals—by name or by imputation—without indicting them, is that they amount to extrajudicial punishment. Such reports cast a social stigma on the individual affected without affording him a judicial hearing in which he can offer evidence to refute the accusations. The greater the publicity, the greater the potentially adverse effect on the individual. Courts and legal writers have noted that the harm caused to the individual as the result of a vituperative grand jury report may be as socially detrimental as a criminal indictment. Therefore, if there has been antisocial activity which is not punishable under the penal law, the remedy should be through legislative change of the penal law rather than through the issuance of a grand jury report.

*Report accepted as reliable by public.* Closely aligned with the

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53. See text accompanying note 50 supra.


55. A person's reputation may be severely injured by an indictment based on insufficient evidence where no prosecution follows, yet "no one would suggest eliminating . . . the power of a grand jury to indict." *In re* Camden County Grand Jury, 10 N.J. 23, 63, 89 A.2d 416, 441 (1952).

56. *Comment, The California Grand Jury, supra* note 19, at 124. The legislative change referred to is that of making the antisocial conduct a crime. An alternative legislative change is that of specifically granting the grand jury power to report on noncriminal conduct of, for example, public officials. See text accompanying notes 65-87 infra.
social impact on a particular individual is the objection that the information in the report is generally considered to be very reliable by the general public. Since the average citizen may not clearly understand the general function of the grand jury, the tendency may be to regard the grand jury as an extension of the court.\textsuperscript{57} The inherent danger, of course, is that the report achieves an air of officiality in the eyes of the public which is not warranted, since the grand jury's members are merely laymen, selected at random rather than for their specific investigative abilities or knowledge of the law.\textsuperscript{58}

Secrecy. Grand jury proceedings are by statute clandestine.\textsuperscript{59} As a result, the accused in a grand jury report may often not know the real basis for the accusations.\textsuperscript{60} When the report is not issued in conjunction with an indictment, the accused in the report is denied the right to confront and cross-examine witnesses against him; and unless he is given the opportunity by the grand jury to appear and testify in his own behalf, he may be denied the right to include any rebutting evidence in the report itself. Thus, the grand jury's accusations are not subject to the safeguards of an adversary proceeding.\textsuperscript{61} Although the same criti-

\textsuperscript{57} In one sense the grand jury may properly be deemed an extension of the court in that the "grand jury is not an adjunct of the office of district attorney but is an independent body, members of which are officers of the court." \textit{In re Peart}, 5 Cal. App. 2d 469, 473, 43 P.2d 333, 336 (1935). But such an impression is clearly incorrect if it leads to the assumption that the grand jury findings are as well-founded or persuasive as those of the court itself.

\textsuperscript{58} \textit{See}, e.g., \textit{In re United Elec. Workers}, 111 F. Supp. 858, 861 (S.D.N.Y. 1953).

\textsuperscript{59} \textit{CAL. PEN. CODE} § 911 (West 1970) is typical of provisions in many states requiring grand jurors to take an oath of secrecy. The substance of the oath has changed remarkably little in nearly 300 years. In proceedings against the Earl of Shaftesbury in 1681, the following oath was administered to grand jurors:

"You shall diligently inquire and true presentments make of all such matters, articles and things, as shall come to your own knowledge, touching this present service; the king's counsel, your fellows' and your own, you shall keep secret; you shall present no person for hatred or malice; neither shall you leave any one unpresented, for fear, favor or affection, for lucre or for gain, or any hopes thereof; but in all things you shall present the truth, the whole truth, and nothing but the truth, to the best of your knowledge. So help you God." \textit{Thompson & Merriam}, JURIES 649-50 (1882). \textit{See CAL. PEN. CODE} § 924.1 (West 1970); \textit{see also} Kennedy & Briggs, supra note 34, at 251-55. Comment, \textit{Constitutional Law}, supra note 54, at 717-18.

\textsuperscript{60} \textit{CAL. PEN. CODE} § 939.6 (West 1970) sets forth guidelines as to what constitutes admissible evidence in grand jury proceedings. However, the secrecy of such proceedings may at times prevent effective monitoring to assure that these guidelines are followed.


\textsuperscript{61} One early nonlegal writer has suggested that secrecy poses certain dangers even where one is afforded the guarantees of an adversary proceeding: "The jury, passing on the prisoner's life, May in the sworn twelve have a thief or two Guiltier than him they try." Shakespeare, \textit{Measure For Measure}, act. II, sc. I, line 1.
cism may be made regarding excoriating grand jury reports issued in conjunction with criminal indictments, the accused does have a chance to clear his name at trial.

Unaccountability of grand jury. A fourth objection to grand jury reports is the inherent potential for the grand jury to abuse its powers because its members are selected rather than elected. As one writer has pointed out,

Legislative investigations conducted in a patently unfair manner are subject to correction through public dissatisfaction which can be expressed at the polls. Political chastisement of a grand jury which has acted unjustly is impossible.  

Imposition of jurors' personal "morality." An additional criticism of grand jury reports has been that when the grand jury report censures an individual without indicting him they are really imposing personal standards of right and wrong instead of applying the highly defined rules of the criminal law.  

The penal law offers objective guidelines for the grand jury to use in determining whether an individual has acted in a way society has determined shall be punishable. When the grand jury censures behavior which does not represent an indictable offense, those guidelines give way to the personal mores of the grand jury and the danger of oppression increases.  

If the behavior criticized by the grand jury report is generally felt to violate accepted norms, the remedy should be the legislative enactment of criminal laws proscribing such behavior rather than extrajudicial action by the grand jury.

Much of the dispute over grand jury reports could be obviated if a distinction is made between grand jury reports involving public officials and private individuals; and also by developing procedural safeguards designed to protect individuals referred to in such reports against possible abuses by the grand jury. The public has a right and a need to know about undesirable conditions in the community, and


64. "Basic to our theory of justice is the principle that there can be no punishment for harmful conduct unless it was so provided by some law in existence at the time. This has found expression in the doctrine: Nulla poena sine lege—no punishment without a law for it." Id. at 8.

65. CAL. PEN. CODE § 919(c) (West 1970) differentiates between public officials and private individuals. "The grand jury shall inquire into:

(c) The willful or corrupt misconduct in office of public officers of every description within the county." Logically this section should be interpreted to require grand jury investigations of noncriminal conduct by public officials, since section 917 authorizes grand jury investigations of all "public offenses" committed or triable within the county.
when these facts can be brought to light without singling out individuals for criticism, there would appear to be no real objection to grand jury reports. As indicated, most courts will tolerate general reports of this kind. But the disclosure of undesirable conditions by the grand jury will of necessity often entail naming or implicating a particular individual. When the individual affected is a public official, a report on his misconduct in office would be fully justifiable so long as he is afforded certain fundamental protections against the possibility of an improper grand jury report. Public servants, especially elected officials, occupy positions of public trust, and as trustees of the public welfare these officials assume a risk that they will be the subject of close scrutiny and public comment.

**The New York Legislative Approach to Grand Jury Reports**

Recent New York legislation incorporates a distinction between grand jury reports involving public officials and private individuals by expressly allowing grand jury reports of noncriminal conduct of public servants. The statute reverses the position previously held in a

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66. See text accompanying note 27 *supra*.

67. "It must be emphasized that one is concerned here with public office and nonfeasance and neglect in such office. Current events hardly suggest that a public officer is in dire need of protection from criticism. Indeed, the United States Supreme Court in *New York Times Co. v. Sullivan* ... and the cases in its wake, make quite clear that, except for defamation made with 'actual malice', a public offender will be denied a private tort remedy, however grievous the defamation. Surely the risk of a private defamation with impunity is far greater than official defamation which has always, in the public interest, been granted at least qualified privilege." *In re Second Report of the Nov., 1968 Grand Jury, 26 N.Y.2d 200, 216, 257 N.E.2d 859, 868, 309 N.Y.S.2d 297, 310 (1970) (Breitel, J., dissenting). Kuh, *supra* note 27, at 1122-24, advocates that all persons and business entities assuming public responsibilities be accountable to the public in grand jury reports.

68. N.Y. CRIM. PRO. LAW § 190.85 (McKinney 1971) provides:

1. The grand jury may submit to the court by which it was impaneled, a report:
   (a) Concerning misconduct, non-feasance or neglect in public office by a public servant as the basis for a recommendation of removal or disciplinary action; or
   (b) Stating that after investigation of a public servant it finds no misconduct, non-feasance or neglect in office by him provided that such public servant has requested the submission of such report; or
   (c) Proposing recommendations for legislative, executive or administrative action in the public interest based upon stated findings.

2. The court to which such report is submitted shall examine it and the minutes of the grand jury and, except as otherwise provided in subdivision four, shall make an order accepting and filing such report as a public record only if the court is satisfied that it complies with the provisions of subdivision one and that:
   (a) The report is based upon facts revealed in the course of an investigation authorized by section 190.55 and is supported by the preponderance of the credible and legally admissible evidence; and
considerable body of New York case law that grand juries had no power to report on noncriminal misconduct or neglect of public officials or other individuals. The New York cases had previously held that the statutory mandate for grand jurors to inquire into the willful and corrupt misconduct in office of public officers did not impliedly authorize the issuance of any report where no criminal conduct was involved. The recent statute eliminates the need for finding implied statutory authority to issue reports by specifically providing for grand

(b) When the report is submitted pursuant to paragraph (a) of subdivision one, that each person named therein was afforded an opportunity to testify before the grand jury prior to the filing of such report, and when the report is submitted pursuant to paragraph (b) or (c) of subdivision one, it is not critical of an identified or identifiable person.

3. The order accepting a report pursuant to paragraph (a) of subdivision one, and the report itself, must be sealed by the court and may not be filed as a public record, or be subject to subpoena or otherwise be made public until at least thirty-one days after a copy of the order and the report are served upon each public servant named therein, or if an appeal is taken pursuant to section 190.90, until the affirmance of the order accepting the report, or until reversal of the order sealing the report, or until dismissal of the appeal of the named public servant by the appellate division, whichever occurs later. Such public servant may file with the clerk of the court an answer to such report, not later than twenty days after service of the order and report upon him. Such an answer shall plainly and concisely state the facts and law constituting the defense of the public servant to the charges in said report, and, except for those parts of the answer which the court may determine to be scandalously or prejudicially and unnecessarily inserted therein, shall become an appendix to the report. Upon the expiration of the time set forth in this subdivision, the district attorney shall deliver a true copy of such report, and the appendix if any, for appropriate action, to each public servant or body having removal or disciplinary authority over each public servant named therein.

4. Upon the submission of a report pursuant to subdivision one, if the court finds that the filing of such report as a public record, may prejudice fair consideration of a pending criminal matter, it must order such report sealed and such report may not be subject to subpoena or public inspection during the pendency of such criminal matter, except upon order of the court.

5. Whenever the court to which a report is submitted pursuant to paragraph (a) of subdivision one is not satisfied that the report complies with the provisions of subdivision two, it may direct that additional testimony be taken before the same grand jury, or it must make an order sealing such report, and the report may not be filed as a public record, or be subject to subpoena or otherwise be made public."


70. Former N.Y. CODE CRIM. PROC. § 253(2) (McKinney 1958) was worded the same as CAL. PEN. CODE § 919(c) (West 1970), quoted at note 65 supra. This language is altered somewhat in the new codification. N.Y. CRIM. PROC. LAW §§ 190.05, 190.55 (McKinney 1971).

jury reports of official, noncriminal misconduct in office, subject, however, to certain carefully circumscribed limitations.

The statute provides that the report must concern a public servant, and be issued for the purpose of recommending his removal or disciplinary action. Further, the judge to whom the report is submitted must file it as a public record only if the report results from an investigation of crime or wilful and corrupt misconduct in office by the individual named in the report. In addition, the statute provides the one named in the report has the right to testify before the grand jury before it issues the report, and that the report shall not be made public until at least thirty-one days after the individual named has received a copy of the report. The public servant is also entitled to file an answer to the report rebutting the grand jury's accusations, and such answer then becomes an appendix to the report. Additionally, the court in its discretion may: (1) seal a report where it might prejudice fair consideration of a pending criminal matter; (2) order that additional testimony be taken by the grand jury; or (3) order the report permanently sealed if the grand jury fails to comply with any of the procedural requirements listed in the statute.

The New York statute thus appears to reconcile the public's right to know of socially harmful conditions with the rights of the individual to due process of law. The assumption can be made that as a general matter society has a crucial interest in learning of noncriminal misconduct in public office, and a properly supervised grand jury may serve to effectively ferret out such information.

72. N.Y. CRIM. PRO. LAW § 190.85(1)(a) (McKinney 1971).
73. Former N.Y. CODE CRIM. PRO. § 245 (McKinney 1958) was similar to CAL. PEN. CODE § 917 (West 1970) quoted in text accompanying note 41 supra. The new codification provides that the "grand jury may hear and examine evidence concerning the alleged commission of any offense prosecutable in the courts of the county, and concerning any misconduct, nonfeasance or neglect in public office by a public servant, whether criminal or otherwise." N.Y. CRIM. PRO. LAW § 190.55(1) (McKinney 1971) (emphasis added); accord, id. § 190.05.
74. N.Y. CRIM. PRO. LAW § 190.85(2)(a) (McKinney 1971).
75. Id. § 190.85(2)(b).
76. Id. § 190.85(3).
77. Id.
78. Id. § 190.85(4). See text accompanying notes 88-129 infra.
79. Id. § 190.85(5). Section 190.90 outlines procedures for appealing from orders concerning grand jury reports.
80. See, e.g., In re Second Report of Nov., 1968 Grand Jury, 26 N.Y.2d 200, 204, 257 N.E.2d 859, 861, 309 N.Y.S.2d 297, 300 (1970) holding the right of an individual to file an answer to a report under N.Y. CODE CRIM. PRO. § 253-a 3(b), now N.Y. CRIM. PRO. LAW § 190.85(3) (McKinney 1971), includes the right of the accused to examine the minutes of the grand jury proceedings in order to ascertain the identity of witnesses against him and the evidence on which the report was predicated.
81. "Thus grand jury presentments [reports] of public affairs serve a need that is
not subject to criminal penalties is nevertheless a legitimate matter of public concern; for example, inefficient or corrupt city government, improperly administered police or fire departments, and the like. A grand jury is particularly well suited to conduct these investigations since it is generally immune to the political pressures which prod legislative and executive investigatory committees and because grand jurors are not, as a rule, trying to further political careers by reaching "popular" conclusions. In addition, the secrecy of grand jury proceedings, though criticized by some as a potential instrument of oppression, may also serve a beneficial function by encouraging more complete disclosures by witnesses volunteering or subpoenaed to testify. Thus, this "secrecy" factor may more than compensate for the lack of special investigative ability on the part of the grand jury's members by providing a forum more conducive to full disclosure of the truth than a nonsecret, public forum. Objections to grand jury reports, such as the danger that the grand jury will impose extrajudicial punishment based on the jury's own notions of morality, can be effectively met by careful judicial supervision of the grand jury. When an individual is named in the report and is not criminally indicted or when the grand jury indicts an individual on insufficient evidence and no prosecution follows, his reputation is unquestionably harmed and he is denied an opportunity to clear his name in court; yet, the remedy to this problem would be more careful supervision of the grand jury's indictment and reporting functions.

As indicated by Monroe and Irwin, there is a need for California to re-evaluate its rather unrefined and permissive acceptance of grand jury reports. The need for restricting the issuance of reports to only those involving public officials is a critical one, as is the need to ensure such procedural safeguards as the right of the accused to testify, to file an answer, to examine the condemning evidence, and to know the wit-
nesses who testified against him. Such procedural safeguards may somewhat burden the grand jury's reporting function, but any such burden would be fully justifiable if we are to recognize basic fairness and the rights of the individual accused.\footnote{86} This re-evaluation of the proper reporting function of grand juries should not be left to the courts, but instead should be made by the legislature. The New York statute, which has been referred to, would serve as a useful model.\footnote{87}

**Report v. Fair Trial**

California may refuse to limit the scope of grand jury reports by enacting legislation similar to that in New York. Indeed, such a refusal would be consistent with the position taken in *Irwin*\footnote{88} and *Monroe*\footnote{89}—neither of which would seem to conform to the New York statute. In addition to the fact that in neither case were the individuals afforded the procedural protections required by the New York statute, the reports did not involve public servants. The fight referee in *Irwin* was perhaps in the public eye more than the average individual, but this by no means would have made him a public servant under the New York statute. Similarly, the students and faculty members referred to by the grand jury report in *Monroe* could not, even in a Pickwickian sense, have been considered public officials.

Should California fail to adopt legislation similar to that in New York and continue to permit grand juries a broad reporting power, some provision for suppressing a potentially prejudicial report when an individual named therein is on trial becomes of significant importance. The possibility of pretrial prejudice to a criminal defendant should be a sufficient ground for delaying publication of the report. In recent years the United States Supreme Court increasingly has attempted to

\footnote{86} In a concurring opinion in *In re Presentment by Camden County Grand Jury*, 34 N.J. 378, 405, 169 A.2d 469, 479 (1961), Chief Justice Weintraub stated that if such burdens could not be borne, the individual's reputation must take precedence. "[I]t may be said that, if there is no feasible solution, we should in such matters join the jurisdictions which hold that a grand jury should indict or be silent." *Id.*


\footnote{89} 17 Cal. App. 3d 280, 94 Cal. Rptr. 531 (1971).
protect a criminal defendant against harmful publicity, both before and
during the trial.\textsuperscript{90} Also, recent state and federal legislation dealing with
grand jury reports specifically provides for delay in publication where
fair consideration of a pending criminal matter would be prejudiced.\textsuperscript{91}
The California courts have already allowed the suppression of grand
jury transcripts during the pendency of criminal proceedings in order
to prevent possible adverse pretrial publicity,\textsuperscript{92} and similar considera-
tions would indicate the propriety of temporarily restraining publication
of grand jury reports. By temporarily restraining publication of poten-
tially prejudicial pretrial reports, the courts would help minimize the
number of motions for change of venue and appeals on the basis that a
fair and impartial trial could not be obtained because of prejudicial
pretrial publicity.\textsuperscript{93}

The United States Supreme Court signaled an increasing judicial
sensitivity to prejudicial publicity in Estes v. Texas\textsuperscript{94} and Sheppard v. Maxwells.\textsuperscript{95} In Estes a two-day preliminary hearing of Billie Sol Estes
on swindling charges had been continually disrupted by the presence of
personnel and equipment providing live television coverage of the pro-
ceedings. Although the Texas court did not permit live televising of
the trial itself, portions of the trial were filmed and later shown on videotape. The Supreme Court held that the television coverage allowed
by the state involved "such a probability that prejudice [would] result
that [it was] deemed inherently lacking in due process."\textsuperscript{96} Although the
Court's chief concern in Estes was the effect of extensixe television cov-
erage on the right to fair trial, the principle announced can clearly be
applied to other adverse pretrial publicity. In holding that certain pro-
cedures are "inherently" lacking in due process, the Court in Estes
eliminated the requirement, in such a case, of showing actual, identifi-
able prejudice.\textsuperscript{97}

\textsuperscript{90} See text accompanying notes 94-102 infra.
\textsuperscript{91} See text accompanying notes 103-06 infra.
\textsuperscript{92} Craemer v. Superior Ct., 265 Cal. App. 2d 216, 225-27, 71 Cal. Rptr. 193,
201-02 (1968); accord, 53 Ops. CAL. ATT'Y GEN. 200 (1970).
\textsuperscript{93} See Maine v. Superior Ct., 68 Cal. 2d 375, 383-84, 438 P.2d 372, 377-78,
\textsuperscript{94} 381 U.S. 532 (1965).
\textsuperscript{95} 384 U.S. 333 (1966).
\textsuperscript{96} 381 U.S. at 542-43.
\textsuperscript{97} In his concurring opinion Chief Justice Warren noted the need to guard
against possible prejudice from pretrial publicity "despite the observance of the formal
requisites of a legal trial." \textit{Id.} at 561. "No doubt each juror was sincere when he
said that he would be fair and impartial to petitioner, but the psychological impact
requiring such a declaration before one's fellows is often its father." \textit{Id., quoting}
Clark, J., in Irvin v. Dowd, 366 U.S. 717, 728 (1961); see United States v. Cimini,
427 F.2d 129, 130 (6th Cir. 1970).
In Sheppard v. Maxwell the Court reversed the 1954 murder conviction of Dr. Samuel Sheppard for the second-degree murder of his wife, holding that the voluminous and often partisan newspaper coverage before and during trial denied the defendant a fair trial. The majority opinion of Justice Clark makes clear the Court's position that it is the duty of the lower courts to carefully monitor potentially harmful publicity and, when necessary, to take steps to eliminate it.

Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to insure that the balance is never weighed against the accused. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function.

The publicity generated by the grand jury report and press release in a case such as Monroe v. Garrett may not be as offensive or extensive as that in Estes and Sheppard so as to conclusively presume a prejudicial effect on the defendant's right to a fair trial. However, the prejudicial effect may be said to be one of degree rather than kind, and the principles announced by the Court in Estes and Sheppard appear to encourage judicial intervention when mass publicity begins to tip the scales away from the accused's right to fair trial. In balancing these interests, the courts must determine, for example, the necessity for making the report public before the accused has been tried. Seldom, if ever, would the public interest served in the immediate disclosure of the findings of the report outweigh the possibility of prejudice to a criminal defendant. Further, the public interest might be served just as effectively by a general report which did not mention any particular individuals, as by a specific report which publicly rebukes identifiable individuals. The Supreme Court has indicated that the con-

99. Id. at 362-63.
100. The publicity that surrounded the Sheppard trial, for example, was as abusive as it was constant. A "Roman-holiday" atmosphere prevailed before and during trial. The mass media instinctively sensed that the case—a murder mystery replete with sex and suspense—was a "natural" for grabbing the public's interest. Editorials calling for action against Sheppard, cartoons and banner headlines filled the press for weeks. A typical editorial was captioned, "Why Don't Police Quiz Top Suspect?", and referring to Sheppard, included the following: "Now proved under oath to be a liar, still free to go about his business, shielded by his family, protected by a smart lawyer who has made monkeys out of the police and authorities, carrying a gun part of the time, left free to do whatever he pleases...." Id. at 341.
101. See N.Y. CRIM. PRO. LAW § 190.85(2)(b) (McKinney 1971), which pro-
flict between the public's right to know and the individual's right to fair trial is best resolved by the application of a rule of fairness; and the Court has left little doubt regarding the overriding importance of the right to fair trial by stating: "We have always held that the atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs." 102

Precedent at the State and Federal Levels

The New York statute previously discussed103 and other recent federal legislation104 allow the suppression of potentially prejudicial grand jury reports. The pertinent section of the New York statute, later adopted verbatim in the federal legislation, provides as follows:

Upon the submission of a report pursuant to subdivision one, if the court finds that the filing of such a report as a public record, may prejudice fair consideration of a pending criminal matter, it must order such report sealed and such report may not be subject to subpoena or public inspection during the pendency of such criminal matter, except upon order of the court.105

The clear purpose of this section is to give additional protection against prejudice to criminal defendants under those circumstances when grand jury reports are allowed to be published.106 The California legislature should adopt a similar provision since California grand juries have far greater autonomy in their reporting function than do the New York or federal grand juries. The broad language of the Irwin case, now nearly forty years old, is an unsatisfactory definition of the grand jury's reporting function, and the redefinition of that function is properly a subject for the legislature. Until appropriate legislation is drafted, the courts should carefully supervise the circumstances under which grand jury reports are issued, and when necessary to avoid prejudice to a criminal defendant, a court should suppress otherwise proper reports.

The standards set out by the Supreme Court in Estes107 and Maxwell108 were followed by the California court in Craemer v. Superior Court.109 The court of appeal affirmed the right of a trial judge to

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103. See text accompanying notes 65-87 supra.
105. N.Y. CRIM. PRO. LAW § 190.85(4) (McKinney 1971). The federal equivalent of this section is identical except that it spells "subpoena" as subpena. 18 U.S.C. § 3333(d) (1970).
suppress publication of grand jury transcripts after indictments had been returned. The trial judge, in receiving the indictments against sixteen named defendants, ordered the grand jury transcripts sealed, and also specifically ordered that newspapers not be furnished copies, in order to prevent pretrial publicity by the press. On appeal, while holding that any permanent denial of public access to the transcripts would be unreasonable, the court of appeal expressly acknowledged the right of a trial court to temporarily withhold from public scrutiny matters ordinarily of public record and stated:

In the light of Estes and Sheppard ... it is clear that a judge has the duty to protect a defendant from inherently prejudicial publicity. Accordingly, it follows that in the performance of that duty a judge may require the removal from public scrutiny of a public record containing data or material which, if publicized prior to trial, could result in publicity so inherently prejudicial as to endanger a fair trial. In the instant case it is clear that [the lower court's] order was not based upon evidence establishing a reasonable likelihood that inherently prejudicial publicity will saturate the community and thus endanger defendants' right to a fair trial, but that it is predicated upon an awareness of the probability that prejudice to defendants will result.

Though the decision in Craemer concerns a grand jury transcript rather than a report, the court's language would appear sufficiently broad to encompass a situation such as that suggested by the facts in Monroe v. Garrett. As stated by the Craemer court, "Judicial experience has shown that pretrial publication of grand jury proceedings has had a tendency, in some instances, to prejudice a defendant's right to a fair trial."

Estes, Sheppard, and Craemer should not be interpreted as limiting First Amendment rights, or as any attempt by the courts to regulate the mass media and others not within the jurisdiction of the court. Rather, the cases represent an increasing judicial awareness of a problem which has grown as quickly as the ability to propagate information and "news." While the "watchdog" role of the press and other mass media

110. Generally a transcript becomes a matter of public record after there has been an indictment returned and the accused is taken into custody. Cal. Pen. Code § 938.1 (West 1970). If the grand jury does not return an indictment, the testimony before it is not reduced to transcript form and grand jurors are bound by their oath of secrecy not to divulge any of the substance of the proceedings. Id. § 924.1 makes it a misdemeanor to willfully disclose any evidence adduced before the grand jury. See also 53 Ops. Cal. Atty Gen. 200 (1970).


112. Id. at 226, 71 Cal. Rptr. at 201. "Accordingly, we think that in keeping with a trial judge's duty to insure that a defendant will receive a fair trial the judge may, in order to prevent even the probability of unfairness, make such orders as are reasonably designed to avert improper prejudice to indicted defendants." Id.
has been properly acknowledged by the courts, there is a growing recognition by the courts of a duty to a defendant—to exercise discreet and limited control over persons and property under the court's jurisdiction as a means of insuring a fair trial.

There is yet another, fundamentally pragmatic, reason for suppressing grand jury reports while criminal proceedings are pending or in progress. By monitoring with greater thoroughness the issuance of pretrial reports, courts would also correspondingly reduce the necessity for appeals or motions for change of venue which might be based on an alleged denial of fair trial due to prejudicial pretrial publicity. Neither the right to appeal nor a motion for change of venue, however, would appear to be a proper substitute for careful judicial supervision of pretrial publicity. In the case of the grand jury report the court would have the power to control at least one source of potentially prejudicial publicity, and if the court fails to exercise this power, there is an increased possibility that the defendant will seek a change of venue before trial, or would subsequently have grounds for appeal from an adverse judgment. In either case, judicial action taken to obviate such a possibility, would promote more efficient administration of justice.

A Recent Review of the Problem

The possibility of pretrial prejudice resulting from a grand jury report was recently considered by a federal district court in Ohio in Hammond v. Brown. In Hammond a special state grand jury was called to investigate incidents at Kent State University during May 1-4, 1970, in which national guard troops killed four students and wounded nine others. The grand jury returned indictments against numerous individuals on a variety of charges, including arson and inciting to riot. In addition, the grand jury issued a report in which it charged that certain faculty members and the university administration

113. E.g., Ryon v. Shaw, 77 So. 2d 455, 457 (Fla. 1955), where Justice Terrell, speaking for the Florida Supreme Court, stated: "There is no greater deterrent to evil, incompetent and corrupt government than publicity."
114. See, e.g., 265 Cal. App. 2d at 224, 71 Cal. Rptr. at 200.
116. The right to appeal is not a sufficient guarantee of the right to fair trial since "the burden, expense and delay involved in a trial render an appeal from an eventual judgment an inadequate remedy." Brown v. Superior Ct., 34 Cal. 2d 559, 562, 212 P.2d 878, 880 (1949).
118. The proceedings of a special grand jury are "of the same force and effect" as a regular grand jury. OHIO REV. CODE ANN. § 2939.17 (Page Supp. 1970).
119. Thirty true bills covering 25 defendants and 43 offenses were returned by the grand jury. 323 F. Supp. at 336.
as a whole should share the responsibility for the "tragic consequences of May 4, 1970." The report went on to find that the disturbances during the four tumultuous days constituted a riot, and that the burning of the campus ROTC building constituted arson. The plaintiffs—primarily faculty and students who had been indicted or referred to in the report—moved to have the report expunged from the public record alleging that the report was beyond the grand jury’s scope of authority and that it had prejudiced the plaintiffs’ right to fair trial. The federal court, applying the state law of Ohio, condemned the grand jury for rendering moral and social judgments on policies, attitudes and conduct of university personnel, and held that the report was improper and ordered it expunged from the public record. The court then considered the plaintiffs’ allegations that the release of the report and the calling of a court-authorized press conference to discuss the grand jury findings, had increased pretrial publicity, thereby adversely affecting the right to fair trial of those persons indicted by the grand jury. The court refrained from applying the “Sheppard principle” that the “probability of prejudice of jurors may be conclusively presumed under certain circumstances and need not be proved.” However, the court noted that even though the report and press conference were not deemed prejudicial per se, this did not exclude the possibility that they could be shown to be prejudicial in fact. The court found it unnecessary to decide the case on this basis, however, and held that the report was beyond the scope of the grand jury’s express statutory powers and was

120. *Id.* at 347.
121. *Id.* at 340.
122. Federal subject matter jurisdiction was based on the plaintiffs' claim of denial of the constitutional right to fair trial. The court exercised pendent jurisdiction to hear the state claim that the Ohio special grand jury report was illegal and invalid. 323 F. Supp. at 343.
123. In judging the report improper, the court refused to find any implied statutory authority for the grand jury to issue a report. The court noted that there were only two provisions in the Ohio Code which authorized reports: § 2939.21 requiring an annual inspection by the grand jury of the county jail and a report to be made to the court of common pleas; and § 2939.23 requiring a report to the court when an indictment is not found by the grand jury against an accused who has been held to answer. 323 F. Supp. at 343-44. *Ohio Rev. Code Ann.* (Page 1954). *Cal. Pen. Code* § 919(a), (b) (West 1970) consolidates these provisions but does not expressly provide for a report of the grand jury’s findings.

The Hammond court did not discuss *Ohio Rev. Code Ann.* § 2939.08 (Page 1954), apparently satisfied that it did not apply. This provision is the equivalent to *Cal. Pen. Code* § 917 (West 1970) on which the California courts in *Irvin v. Murphy* and *Monroe v. Garrett* found the implicit authority for the grand jury reports involved in those cases.
124. 323 F. Supp. at 356. The court states that one hundred reporters attended the press conference.
125. *Id.* at 355.
therefore improper. The court also ordered the grand jury report expunged from the public record.

It is concluded and declared that the Report's continued existence in court files and in the court's journal irreparably injures the right of each of the accused indicted to a fair trial, protected by the Due Process Clause.\(^\text{126}\)

The court thus clearly recognized that the "continued official existence"\(^\text{127}\) of the report would infringe upon the right to fair trial, and ordered the defendant to have published in the local press for six consecutive days a copy of the court's order together with a certificate of the defendant's compliance with that order.\(^\text{128}\) It seems evident, therefore, that the court considered the report prejudicial, in spite of the finding of insufficient actual prejudice. Furthermore, the court was of the opinion that whatever prejudice had been caused by the report before its expungement might very well subside by the time of trial, and one step toward eliminating any accrued prejudice would be the expungement of the report itself.\(^\text{129}\)

Conclusion

Despite the absence of clear statutory authority, California courts seem willing to approve grand jury reports with little or no hesitation, even where a report publicly pillories a nonindicted, private individual. Because of this permissive policy it is incumbent upon the California courts to supervise more closely the circumstances under which such reports are issued. Ideally, legislation should be enacted redefining the permissible limits of grand jury reports, and such legislation would do well to follow the New York model\(^\text{130}\) which permits reports on non-criminal misconduct of public servants so long as certain procedural safeguards are maintained.

In the absence of such legislation, the California courts should at the very minimum provide for delayed publication of a report where

\(^{126}\) Id. at 343. The court also considered the effect of the press conference on the trial of the accused, and concluded that the press conference had not appreciably increased pretrial publicity. "Once Judges Jones and Caris determined to release the Report [to the press], one can be sure that alert newsmen would have given it full coverage and distribution, even if the Report had been released in some other way than a press conference." *Id.* at 356 (emphasis added). Thus, this ruling merely considered the *additional* effect of the press conference *after* the decision to release the report had been made. The ruling clearly did not indicate the courts condonation of the press conference, but was addressed only to the issue of whether the press conference had increased the total publicity given to the report.

\(^{127}\) Id. at 356.

\(^{128}\) Id. at 358.

\(^{129}\) Id. at 354.

\(^{130}\) See text accompanying note 68-79 *supra*. 
it might adversely affect the rights of a criminal defendant. When a report reflects upon an individual who has been indicted, a court receiving the report should not allow its immediate release if it might impinge upon that "most fundamental of all freedoms"—the right to fair trial. Similarly, the court should scrutinize very carefully any attempts by the grand jury to issue press releases or to call press conferences for purposes of discussing the grand jury's findings. In most cases a delay in publication would not adversely affect any public interest served by such a report. For example, in Monroe v. Garrett, the grand jury could easily have recommended to the court or district attorney that the local operation of the Economic Opportunities Program be investigated, without immediately making the same recommendation in a press release. Similarly, the public recommendation for suspension of indicted students and faculty would not appear to be proper while their trials were pending, if such a recommendation can be deemed proper at all.

In the final analysis, the same courts which sanction grand jury reports owe a duty to guard against their abuse. To ignore abridgments by a grand jury of fundamental considerations of fairness to the individual, is to ignore subversion of the very judicial processes the grand jury is designed to support.

Clement Glynn*

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131. See text accompanying note 102 supra.
133. As indicated above, this seems to be an improper recommendation for a grand jury to make, publicly or otherwise. See note 42 supra.
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