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THE GRAND JURY UNDER ATTACK

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Part One

RICHARD D. YOUNGER

The author is Assistant Professor of History in the University of Houston, Texas. He was formerly Instructor in the Milwaukee Extension Division of the University of Wisconsin. His interest in the Grand Jury began when he was a student in law in the University. What intrigued him particularly was the question why about one half of our states have abandoned it. The article following is an abbreviation of Dr. Younger's doctor's thesis entitled *A History of the Grand Jury in the United States* which he presented to the University of Wisconsin in partial fulfillment of the requirements for the degree of Doctor of Philosophy.

Part three under this title, the final portion of Professor Younger's contribution, will be published in our next number.—EDITOR. E.

As Justice James Wilson took his place at the front of the hall of the Philadelphia Academy, he was clearly pleased to see that so many cabinet officers, members of Congress, and leaders of Philadelphia society had braved the winter weather to attend his weekly law lecture. This was the Justice's second winter of lecturing as Professor of Law in the newly established College of Philadelphia. His course had been a tremendous social success. The first series opened auspiciously December 15, 1790 before a distinguished audience which included President and Mrs. Washington. Among his fellow lawyers, however, Wilson's discourses had been received with reserved acclaim. Many resented his severe criticism of Blackstone, while others felt disturbed by his ultra-Federalist views.

Justice Wilson's topic for discussion this evening was the jury, and he began with an analysis of the role of the grand jury in American law. He rejected summarily the views of those persons who would restrict the grand jury to the consideration of matters laid before them by the public prosecutor or given them in charge by the court. He stated that such a concept presented "a very imperfect view of the duty required of grand jurors." Their oath assigned no limit to their area of inquiry save their own diligence. Wilson stated that he saw in the grand jury more than a body set up merely to seek out law violators. He viewed it as an important instrument of democratic government, "a great channel of communication between those who make and administer the laws and those for whom the laws are made and administered." Elaborating upon his statement, the Justice pointed out that all the operations of government and all its officers came within the view of grand juries, giving them an unrivaled ability to suggest public improvements and expose corruption in government.¹

Justice Wilson was not the first American jurist to express such views regarding the grand jury. Almost ten years earlier Judge Francis Hopkinson of Philadelphia

¹ BIRD WILSON (ed.), *THE WORKS OF JAMES WILSON* (Philadelphia, 1804), II, 365-367; CHARLES WARREN, *THE HISTORY OF THE AMERICAN BAR* (Boston, 1911), 347; *THE DICTIONARY OF AMERICAN BIOGRAPHY* (20 vols., New York, 1928-1936), XX, 330.

had denounced judicial encroachment upon juries. He too stated that from the terms of their oath, there was "no bound or limit set to any number or sort of persons of whom they are bound to inquire." However, Hopkinson denied that judges could impose directions upon grand jurors.² Early in 1793 Secretary of the Treasury Alexander Hamilton had instructed customs officials to report to him all infractions of the neutrality laws. Thomas Jefferson protested vigorously against this unwarranted invasion of the province of grand juries. He objected to giving government officials authority to act as criminal informers and pointed out that the advantage of inquests was that "a grand juror cannot carry on a systematic persecution against a neighbor whom he hates because he is not permanent in the office."³ If the grand jury were to serve as an instrument of the people it was necessary that any private citizen have the right to go before a grand inquest. In 1794 Attorney General of the United States William Bradford announced that it was not necessary for persons to approach a grand jury through a committing magistrate.⁴

In spite of these pronouncements, however, not all jurists were certain that independent grand juries were a good thing. Judge Alexander Addison of Pennsylvania feared that danger lay in giving jurors too free a hand in their investigations. In a charge delivered in 1792 he went on record as favoring restrictions upon grand juries. Judge Addison cautioned the jurors that they could act only when a matter came within the actual knowledge of one of them, or when the judge or district attorney submitted an indictment for their consideration. They could investigate matters of public importance only if the judge charged them to do so. Such a restricted view of jury powers prohibited them from summoning witnesses on their own initiative and indicting persons on the basis of testimony received. It had the effect of placing these juries almost entirely under the control of the court.⁵

Restrictions imposed by courts were not the only means by which the juries were deprived of their powers of investigation. In Connecticut, through long practice, it had almost ceased to exist as an investigating body. Each town in the state still elected two persons each year to serve as jurors, but they no longer met as a body unless summoned by a court. Indictment by a full jury was mandatory only in case of crimes punishable by death or life imprisonment. In all other cases it became the practice for individual jurors or the district attorney to sign a complaint when they received information of a crime. Grand jurors in Connecticut tended to become informing officers with an annual term of office, possessed of the authority to make complaints individually, a power which they did not have at common law. As a result of such a system, they met infrequently as a body and through disuse lost most of their broad powers of initiating investigations.⁶

² THE MISCELLANEOUS ESSAYS AND OCCASIONAL WRITINGS OF FRANCIS HOPKINSON (Philadelphia, 1792), I, 207-208.

³ Letter from Thomas Jefferson to Edmund Randolph, May 8, 1793, PAUL L. FORD (ed.), THE WORKS OF THOMAS JEFFERSON (New York, 1904), VII, 316-318.

⁴ Letter from Attorney General Bradford to the Secretary of State, February 20, 1794, OPINIONS OF THE ATTORNEY GENERAL OF THE UNITED STATES, I, 22.

⁵ ALEXANDER ADDISON, REPORTS OF CASES IN THE COUNTY COURTS OF THE FIFTH CIRCUIT (Washington, 1800), Part II, 37-46.

⁶ STATUTES OF CONNECTICUT (1784), 94, (1808), 371-372; DWIGHT LOOMIS and J. GILBERT CALHOUN (eds.), THE JUDICIAL AND CIVIL HISTORY OF CONNECTICUT (Boston, 1895), 172-173.

OPPOSITION OF REFORMERS

The grand jury also became the target of those who denounced the institution in the name of reform. In England, Jeremy Bentham, the great codifier and legal reformer, struck out at the grand inquest as "an engine of corruption" which was "systematically packed" on behalf of the upper classes. He charged that juries in Britain had become assemblies composed almost exclusively of gentlemen, "to the exclusion of the Yeomen." In addition to its misuse, Bentham opposed it on grounds of efficiency. As a utilitarian, he had little patience with a body composed of "a miscellaneous company of men" untrained in the law. He believed that a professionally trained prosecutor could perform the functions of a grand jury with far greater efficiency and with less expense to the people and less bother to the courts.⁷

Bentham's reform proposals received wide circulation in the United States and led American legal scholars to reassess the value of the grand jury. Some came to the conclusion that public indifference and apathy seriously impaired its usefulness. They blamed juries themselves for criticism because they frequently neglected to conduct investigations into the conditions of prisons, roads, bridges and nuisances within the community.⁸ Edward Livingston, prominent Jeffersonian, became a disciple of Bentham in the United States and an ardent advocate of codification. In 1821 the state of Louisiana commissioned him to revise and codify its criminal laws. The procedural provisions of the completed Livingston Code confined grand juries to passing upon indictments submitted to them. They could only determine whether persons had violated penal laws of the state, but would have no power to initiate presentments or express their opinions on other matters. Livingston would limit judges to a mere statement of the law when addressing the jury, ruling out all remarks of a political nature.⁹ These restrictions incorporated in the proposed Louisiana Code met the whole-hearted approval of Chancellor James Kent of New York, in spite of the fact that he disapproved of codification. The New York jurist and law professor congratulated Livingston on the section of his code which severely limited grand jury activity, stating, "I am exceedingly pleased with the provision confining grand juries to the business of the penal law and not admitting any expression of opinion on other subjects."¹⁰

While a few American legal scholars were hoping to curb the inquisitorial powers of the jury, a western court spoke out forcefully in favor of very broad powers for grand inquests. In 1829 a grand jury in St. Louis, Missouri embarked upon an investigation of gambling in the community. They summoned a great many witnesses, questioned them on a wide variety of subjects, and indicted various persons on the basis of this testimony. Several of those indicated asked the court to quash the

⁷ JEREMY BENTHAM, *THE ELEMENTS OF THE ART OF PACKING, AS APPLIED TO SPECIAL JURIES* (London, 1821), 14-28; JOHN BOWRING (ed.), *THE WORKS OF JEREMY BENTHAM* (Edinburgh, 1843), II, 139-140, 171.

⁸ *Cottu On English Law*, *NORTH AMERICAN REVIEW* (October, 1821), XIII, 347.

⁹ *THE COMPLETE WORKS OF EDWARD LIVINGSTON ON CRIMINAL JURISPRUDENCE* (New York, 1873), I, 372, II, 249-250.

¹⁰ Letter from James Kent to Edward Livingston, February 17, 1826, *Two Letters of Chancellor Kent*, *AMERICAN LAW REVIEW* (April 1878), XII, 485; JOHN T. HORTON, *JAMES KENT, A STUDY IN CONSERVATISM* (New York, 1939), 171.

indictments on the grounds that the jurors had exceeded their authority by engaging in a "fishing expedition" with no particular offense in mind. The Supreme Court of Missouri, however, upheld the jurors and declared that to hold otherwise "would strip them of their greatest utility and convert them into a mere engine to be acted upon by circuit attorneys or those who might choose to use them."¹¹ Chief Justice Lemuel Shaw of Massachusetts echoed the sentiments of the Missouri court concerning the need for independent grand jury action. He told members of a Massachusetts inquest that they alone, because of the method of their selection and the temporary nature of their authority, were "beyond the reach of fear or favor, or of being overawed by power or seduced by persuasion."¹² Justice Joseph Story of the United States Supreme Court took a different position, however. In an article written in 1831 for Francis Lieber's *Encyclopaedia Americana*, he described a grand jury as acting only "at the instigation of the government." Story made no mention of jurors acting independently of the court or initiating investigations on their own.¹³

In England, criticism of the jury begun by Bentham continued to attract support and gradually bore fruit in the form of proposals to abolish the system entirely. Robert Peel was one of the first to suggest that a responsible public prosecutor should be appointed in its place.¹⁴ Suggestions that Parliament do away with the institution in England led both defenders and attackers to present their cases to the public. A citizen writing to the London *Times* under the name, "an admirer of grand juries," praised them as protectors of liberty and warned that it would take a bold man to bring a bill into Parliament to abolish them. An answering letter, signed "a Middlesex Magistrate" advocated a Parliamentary inquiry into the exorbitant expenses of grand juries. The writer expressed satisfaction that the proposals for abolition were gaining ground.¹⁵ In 1834 and again in 1836 Parliamentary resolutions to curtail their use aroused interest in English legal circles, but they were not successful.¹⁶

Agitation for abolition of the grand jury in the United States did not gain ground as rapidly as in England, but in at least one state prosecution on an information rather than on an indictment received encouragement. In Vermont, the state constitution did not specifically guarantee the right to indictment by a grand jury in all criminal cases. As a result, many lesser crimes came to trial at the instance of the public prosecutor. In 1836 the defendant in a criminal trial challenged this procedure and claimed that the state had violated the fifth amendment of the United States Constitution by prosecuting him on an information. The Supreme Court of Vermont held that the restrictions imposed by the fifth amendment applied only to the federal government and not to the states, and that the states were free to abolish the juries entirely insofar as the federal constitution was concerned.¹⁷

¹¹ *Ward vs the State*, 2 *Missouri* 120 (1829).

¹² *Chief Justice Shaw's Charge to the Grand Jury*, *THE AMERICAN JURIST* (July 1832), VIII, 216.

¹³ FRANCIS LIEBER (ed.), *ENCYCLOPAEDIA AMERICANA* (Philadelphia, 1831), VIII, 284; FRANK FRIEDEL, *Francis Lieber*, *NINETEENTH-CENTURY IDEALIST* (Baton Rouge, 1947), 69.

¹⁴ *Grand Juries*, *JURIST* (London) (June 1827), I, 190-202; PETER LAURIE, *THE USE AND ABUSE OF GRAND JURIES* (London, 1832), 5.

¹⁵ Letters to the Editor, London *TIMES*, December 23, 30, 31, 1833; September 2, 1834.

¹⁶ *Proposed Abolition of the Grand Jury*, *THE LEGAL OBSERVER* (London), (December 13, 1834), IX, 129; (April 30, 1836), XI, 492.

¹⁷ FRANCIS N. THORPE (ed.), *THE FEDERAL AND STATE CONSTITUTIONS* (Washington, 1909), VI, 3740; *State vs Keyes*, 8 *Vermont* 57 (1836).

RESTRICTING GRAND JURY POWERS

In 1837 the grand jury of Sullivan County, Tennessee initiated a sweeping investigation into illegal gambling in their community and in the course of the probe summoned a large number of persons to testify. A state law empowered the jurors to summon witnesses to investigate "illegal gaming." Among the indictments returned by the grand jury, based upon testimony of witnesses, was one for betting on an election. The Supreme Court of Tennessee quashed the indictment and warned future juries that they did not possess "general inquisitorial powers" and could call witnesses only where specifically authorized by law. The Court held that betting on elections could not be construed as "illegal gaming."¹⁸ Several years later, jurors of Maury County, Tennessee indicted a master for permitting his slave to sell liquor. The inquest learned of the incident from a witness they had summoned to testify on another matter. Again the Tennessee Supreme Court restricted the power of the jury to act independently and held that indictments had to be based upon the actual knowledge of one of the panel members.¹⁹

In Cincinnati the newly appointed federal judge, Timothy Walker, expressed the same restricted view. In 1842 he told a jury, "Your sole function is to pass upon indictments. The term presentment confers no separate authority. . . . Yet in some states advantage has been taken of a similar expression to convert a grand jury into a body of political supervisors." Walker was not a newcomer to western legal circles. He studied under Joseph Story at Harvard and went to Cincinnati in 1830. There he organized a law school, founded the *Western Law Journal* and became an ardent advocate of legal reform.²⁰

Two years after Timothy Walker read his restrictive charge in Cincinnati, the question of powers came up in Pennsylvania. In May, 1844 the convention of the Native American Association in Philadelphia ended in a series of destructive riots when Irish groups attempted to break up their meeting. The Governor called out the state militia after mobs had burned several buildings. At this point, Charles J. Jack, a member of the Native American group, addressed a letter to the grand jury then in session, protesting that the call for troops was an attempt to crush the Native Americans by military force. When he learned of the letter, Judge Anson V. Parsons of the Philadelphia Court of Quarter Sessions cited Jack for contempt and declared that it was an "indictable offense" for a private individual to communicate with a grand jury. Furthermore, Parsons announced that jurors were officers of the court under its legal direction and that only the court could convey information and instructions to them.²¹

The following year a Philadelphia grand jury informed the court that one of its members had charged Richard L. Lloyd and Benjamin E. Carpenter, members of the city Board of Health, with stealing public funds. The jurors asked the court to call witnesses and order the Board of Health to produce its books. Judge Edward

¹⁸ State vs Smith, 19 Tennessee 99 (1838).

¹⁹ State vs Love, 23 Tennessee 255 (1843).

²⁰ Charge Delivered by T. Walker, WESTERN LAW JOURNAL (May 1844), I, 337-338; Obituary of Timothy Walker, THE LAW REPORTER (April, 1856), XVIII, 708.

²¹ Commonwealth ex rel Jack vs Crans, 3 PENNA LAW JOURNAL 443 (1844).

King refused the request, stating that grand jurors could not proceed to investigate a matter unless the judge gave it to them in charge or the district attorney brought it to their attention. He told the jurors that they were free to initiate presentments only where all of the facts of the offense were known to one of their number. The policy announced by Pennsylvania courts, of severely limiting inquisitorial activities, was entirely foreign to the traditional concept of jury powers. Under the common law, juries had the authority to inquire into all violations of the law in their county and to summon before them all persons who could give them information.²²

Sentiment in favor of limiting the juries gained favor. In 1846 Congress made the summoning of federal grand juries discretionary with the presiding judge. Previously such a jury had attended every session of the federal district and circuit courts. Under the new law the federal marshal would not summon a panel unless the judge ordered him to do so.²³

Judicial rulings restricting the independence of grand juries found ready acceptance among several American legal scholars. Francis Wharton, recognized authority in the field of criminal law, noted with approval the decisions of the Tennessee and Pennsylvania courts making grand inquests mere adjuncts of the court. Wharton stated that the value of grand juries depended upon the political tendencies of the age. While they may have been important at one time as a barrier to "frivolous prosecutions" by the state, in the United States they were more useful as restraints upon "the violence of popular excitement and the malice of private prosecutors." If they were necessary at all, Wharton thought it was to serve as a means of protecting established institutions from the actions of the people. He did not see in the grand jury a means of increasing popular participation in government such as James Wilson had envisioned.²⁴

Edward Ingersoll, prominent reforming member of the Pennsylvania Bar, published an essay on grand juries in 1849 in which he condemned the institution as incompatible with the American constitutional guarantee of freedom. Ingersoll approved limitations placed upon their investigating activities because he believed that their secrecy and power to indict upon the knowledge of their own members, without additional evidence or witnesses, was "at variance with all modern English theory of judicial proceeding." He declared that inquests, if retained at all, should be limited to passing upon cases where the defendant had already had a preliminary hearing before a committing magistrate.²⁵

The same year in which Edward Ingersoll denounced the grand jury system as

²² *In the matter of the Communication of the grand jury in the case of Lloyd and Carpenter*, 5 PENNA LAW JOURNAL 55 (1845); GEORGE H. DESSON AND ISADORE H. COHEN, *The Inquisitorial Functions of Grand Juries*, YALE LAW JOURNAL (March 1932), 695.

²³ STATUTES AT LARGE OF THE UNITED STATES (1846), IX, 72; JOURNAL OF THE UNITED STATES SENATE (1845-1846), 495-496; JOURNAL OF THE HOUSE OF REPRESENTATIVES (1845-1846) 1241-1242.

²⁴ FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES (Philadelphia 1857), 227-234.

²⁵ EDWARD INGERSOLL, THE HISTORY AND LAW OF THE WRIT OF HABEAS CORPUS WITH AN ESSAY ON THE LAW OF GRAND JURIES (Philadelphia, 1849), 47; THE DICTIONARY OF AMERICAN BIOGRAPHY, IX, 467.

dangerous to freedom, the Code Commissioners of New York presented to the legislature of that state their draft of a proposed code of criminal procedure. Headed by David Dudley Field, long a proponent of legal reform and codification, the Commissioners left no doubt as to their position on the question of the grand jury. They referred to jury service as a burdensome duty and stated flatly that they would have recommended complete abolition of the institution in New York, had it not been for guarantees contained in the state constitution. The Commissioners did the next best thing, however, and advised the legislators that "limits must be placed to the extent of its powers and restraint must be placed upon their exercise." The New York legislature did not adopt the proposed criminal code, nor did it heed the advice of the commissioners to curtail their power.²⁶

EFFORTS TO ABOLISH THE GRAND JURY

While sentiment in favor of restricting the grand jury gained strength in American legal circles, in England a strong movement developed to abolish the institution entirely. By the mid-nineteenth century a large number of Englishmen shared Jeremy Bentham's views. In February, 1848 the Mayor and Aldermen of Southampton petitioned the House of Commons to do away with all grand juries. Later in the same year, jurors attending the Central Criminal Court in London recommended abolition of the institution and sent a copy of their resolution to the Secretary of State for the Home Department. In 1849 grand juries of both the Central Criminal Court and the Middlesex sessions announced their opposition to the system. Such recommendations were not altogether surprising. Many English judges were in the habit of calling attention to the uselessness of the system in their jury addresses.²⁷

W. C. Humphreys, a prominent English law reformer, stated that it was a potential menace to the country because it assisted rather than suppressed crime. In a pamphlet entitled, "Inutility of Grand Juries," Humphreys joined the crusade for their abolition.²⁸ Other members of the English bar followed suit. The committing magistrate of Old Bailey prison declared that the grand jury was the "first hope" of the criminal because it afforded "a safe medium for buying off a prosecution and is often resorted to for that purpose." Writing to the *London Times* under the name "Billa Vera," another lawyer claimed that intelligent and respectable jurors were "ashamed and disgusted" with their functions. He also revealed that the Corporation of the City of London had appointed a committee to investigate grand juries and it had uncovered evidence "decidedly hostile to the system."²⁹ Following this barrage of criticism, Lord J. Jervis, Attorney General of England, introduced a bill in Parliament to nullify the power of grand juries sitting in the metropolitan

²⁶ New York Constitution of 1846, Article VI, sec 24; *FOURTH REPORT OF THE COMMISSIONERS ON PRACTICE AND PLEADING, CODE OF CRIMINAL PROCEDURE* (1949), 37, 128.

²⁷ *JOURNAL OF THE BRITISH HOUSE OF COMMONS* (1847-1848), CIII, 265; *ACCOUNTS AND PAPERS OF THE HOUSE OF COMMONS* (1847-1848), LI, 211; (1849), XLIV, 1; *HANSARD'S DEBATES*, 3d Series, CXXXXV, 1426.

²⁸ W. C. HUMPHREYS, *Inutility of Grand Juries*, reviewed in *THE SOLICITOR'S JOURNAL AND REPORTER* (London) (April 1857), I, 326.

²⁹ *LONDON TIMES*, January 9, 1849.

police districts. Under the Attorney General's proposal, a jury could not indict a person until he had had a preliminary hearing before a police court magistrate. But despite support from English jurists and lawyers, the measure failed to pass Parliament.³⁰

Concentrated efforts in England to do away with the institution were not lost upon leaders in American legal circles. In February, 1850 the *United States Monthly Law Magazine* reported the progress of the movement in England, and commented editorially that it hoped American judges would follow the example of those in Britain and take an active stand against the institution. The editorial asked American newspapers "to keep the matter before the public until a similar bill shall be before our legislative bodies, and passed."³¹

Opposition to the grand jury moved from the courts and the pages of the law journals and textbooks to the floors of the state constitutional conventions for the first time in 1850. In that year conventions met in three states to revise existing constitutions and in each of them abolition of the grand jury became an important issue. In Michigan the Committee on the Bill of Rights reported to the convention at Lansing that it had struck out the provision guaranteeing the right to indictment by a grand jury in all criminal cases. When delegate Samuel Clark moved to restore the provision, the line of battle was drawn and a sharp debate ensued. Clark admitted that abuses may have crept into the system but he contended that these could easily be corrected. He warned that complete reliance upon public prosecutors would be "a dangerous innovation." James Sullivan, an attorney, answered Clark and maintained that no district attorney could possibly be more arbitrary or dangerous than a secret *ex parte* body which held its sessions "like the inquisition of the star chamber." He dwelt long on the average juror's complete ignorance of the law and pointed to the great expense of maintaining such a useless institution. The convention voted to strike out the grand jury guarantee, but abolitionist forces pressed for a constitutional provision specifically doing away with it. A majority of the delegates were unwilling to go to that extent, however, and left the question for the legislature to decide.³²

At Indianapolis the Indiana constitutional convention also became the scene of a struggle regarding the future of the grand jury. As in the Michigan convention, delegates were sharply divided. Some hailed it as an essential bulwark of liberty, while others denounced it as a "remnant of the barbaric past." Anti-jury forces worked for a constitutional provision doing away with the system, but the best they could get in the face of determined opposition was a clause authorizing the legislature "to continue, modify, or abolish" it at any time. Indiana became the first state to include such a provision in its constitution.³³

Opponents of the grand inquest were less successful in the Ohio constitutional convention than they had been in Michigan and Indiana. B. P. Smith, an attorney

³⁰ LONDON TIMES, April 14, 1859; HANSARD'S DEBATES, 3d Series, CXXXXV, 1426.

³¹ UNITED STATES MONTHLY LAW MAGAZINE (February 1850), I, 200.

³² REPORT OF THE PROCEEDINGS AND DEBATES IN THE CONVENTION TO REVISE THE CONSTITUTION OF THE STATE OF MICHIGAN (Lansing, 1850), 27, 54, 84-85, 202-219.

³³ JOURNAL OF THE CONVENTION OF THE STATE OF INDIANA TO AMEND THE CONSTITUTION (Indianapolis, 1851), 28, 60, 116, 964.

from Wyandot County, proposed substituting the information for the indictment, but only a handful of anti-jury men supported him. They pointed to the arbitrary nature of grand jury powers and pictured them as an unnecessary tax burden, but all to no avail. A majority of those present favored retaining the institution, and the revised Ohio Constitution made indictment by a grand jury mandatory in all criminal prosecutions.³⁴

In Tennessee, where judicial decisions had successfully restricted inquisitorial powers, the Supreme Court in 1851 reaffirmed its policy. But not all courts saw fit to restrict grand juries. New York followed the broad rule adhered to in Missouri and allowed the juries freer rein in their inquiries. In the federal courts, however, they tended to become more and more an arm of the court. In 1856 as part of an economy measure, Congress empowered federal judges to discharge jurors when in their opinion such action would best serve the public interest.³⁵

In the following year, delegates met at Salem, Oregon to draft a constitution for statehood. David Logan, a member of the territorial bar, tossed the question of the grand jury into the lap of the convention with a resolution to replace the institution with professional prosecutors. Logan reviewed in detail the origin and history of the grand inquest and argued that conditions which had once made the institution necessary no longer existed. He urged Oregon to take the lead in getting rid of the system and predicted that it would be only a matter of time before most other states followed suit. George H. Williams, Territorial Chief Justice, came to its defense, emphasizing its peculiar suitability in a frontier area such as Oregon. He admitted that, like most newly opened areas, Oregon had more than its share of lawlessness. Many "desperadoes" had come to the territory from the gold fields of California. In view of such conditions, the Chief Justice favored a secret method of entering complaints as a means of protecting citizens from possible reprisals. He explained to the convention that many persons refused to make complaints before justices because it might cost them their property or even their lives. Former Territorial Chief Justice Matthew P. Deady also joined the fight to save the grand jury. Logan accused those judges and lawyers who defended it of holding on to outmoded legal machinery merely because they were familiar with the system, and placed them in the same class with those persons who stood against popular election of judges. Anti-jury forces failed to secure the outright abolition of the grand inquest, but they did get a constitutional provision empowering the legislature to nullify the system at any time.³⁶

White its opponents in America worked through state constitutional conventions, anti-jury forces in England kept up their pressure to get Parliament to strip inquests of all power. Attorney General Sir Frederic Thesiger introduced such a bill in 1852,

³⁴ REPORT OF THE DEBATES AND PROCEEDINGS OF THE OHIO CONSTITUTIONAL CONVENTION, 1850-1851 (Columbus, 1851), II, 328-329.

³⁵ Glenn vs the State, 31 *Tennessee* 19 (1851); *The People vs Hyler*, 2 PARKER CRIMINAL REPORTS (New York) 566 (1855); STATUTES AT LARGE OF THE UNITED STATES (1856), XI, 50; THE CONGRESSIONAL GLOBE 34 Congress, 1st and 2d session, (1856), 1671-1675, 2161, 2181.

³⁶ CHARLES H. CARY (ed.), THE OREGON CONSTITUTION AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1857 (Salem, Oregon, 1926), 197, 212-215.

1854, and again in 1857. Each time he sought to convince his colleagues that the grand jury was useless in large cities in view of improved methods of police investigation. Sir Frederic pointed out that many of the jurors themselves look upon their job as a fruitless one. After the proper judicial urgings, juries in the metropolitan district of London had presented themselves year after year as "an impediment to the administration of justice." In spite of all efforts, the Attorney General could not work up sufficient enthusiasm among members of Parliament to persuade them to curtail use of the institution.³⁷ However, the question continued to provoke heated discussion in English legal circles. On December 20, 1858 T. Chambers, a solicitor, read a paper before the Juridical Society of London on the future of the grand jury. He opposed tampering with the institution and expressed a fear that, like many other modern reforms, the effect would be to "withdraw the people from the tribunals and replace them by officials." He also warned that justice should not be made to "rush through professional and official conduits," but should be passed upon by the people themselves. In the discussion following Chambers' paper, several members took vigorous exception to his position and insisted that increased efficiency would follow if "a professional inquiry" replaced the grand jury. The debate did not end that evening. As late as April, 1859 a letter to the *London Times* answered Chambers with the complaint that inquests too often encroached upon the duties of the trial jury and performed unnecessary work. Although they were unable to secure complete abolition, English opponents attained some measure of success when Parliament enacted the Vexatious Indictments Law in July, 1859. Thereafter, private citizens had to present certain cases to a police magistrate who would then determine whether the person could go before a grand jury.³⁸

In the United States anti-jury forces made their first attempt to abolish the system by legislative action in Michigan in 1859. The state constitution no longer guaranteed the right to a grand jury indictment, leaving the legislature free to act in the matter. The judiciary committee of the Michigan Assembly heartily endorsed a plan to end the use of inquests and issued a scathing report, characterizing the grand jury as "a crumbling survivor of fallen institutions . . . more akin to the star chamber." Led by Alexander W. Buell, a Detroit attorney, the committee called upon the state to discard an institution dangerous to individual liberty. They bemoaned the lack of learning of most jurors and the inability of the courts to control the direction of their investigations. The committee referred to the "wholesome" curbs which Pennsylvania courts had placed upon grand juries, but they feared that such decisions would be difficult to enforce and would not prove a satisfactory solution to the problem of lay interference. The committee's vigorous report proved effective in rallying legislative support for a bill abolishing the grand jury in Michigan. In February, 1859 the legislature provided that all crimes be prosecuted upon the information of a

³⁷ HANSARD'S DEBATES, 3d Series, (1852), CXX, 806; (1852), CXXII, 1115; (1857), CXXXV, 1425-1426; LONDON TIMES, July 12, 1854.

³⁸ T. CHAMBERS, *On the Institution of the Grand Jury*, JURIDICAL SOCIETY PAPERS (1858), II, 120, 126-127; SOLICITOR'S JOURNAL AND REPORTER (December 25, 1858), III, 135; LONDON TIMES, April 15, 1859; HANSARD'S DEBATES, 3d Series, (1859), CLII, 1046.

district attorney. Only a judge could summon a grand jury for purposes of an investigation.³⁹

Anti-jury forces in neighboring states watched with interest the success of their brethren in Michigan. In Wisconsin they drew encouragement and sought to use the example of Michigan as an opening wedge in a campaign to rid their own state of the hated institution. The *Milwaukee Sentinel* published with approval the Michigan legislative report and attacked grand juries editorially as cumbersome and expensive "instruments of private malice." Legislative action alone would not be sufficient to abolish the grand inquest in Wisconsin. The people would have to be educated to oppose the system, because they would have to approve any constitutional amendment.⁴⁰

While its opponents in Wisconsin awaited the next session of the legislature to propose a constitutional amendment, the fourth constitutional convention for the Territory of Kansas met at Wyandotte in the summer of 1859. Three previous constitutions drawn up at Topeka, Lecompton and Leavenworth had each included a provision guaranteeing the right to indictment by a grand jury in all "capital or otherwise infamous crimes." The Wyandotte convention adopted the Ohio constitution as its model, but the Committee on the Bill of Rights omitted the article referring to the grand jury and gave no reason for its action. In a territory deeply engrossed in the slavery controversy, this blow at popular government went unchallenged. Five years later it was comparatively easy to put a bill through the Kansas legislature providing that grand juries were not to be called unless specially summoned by a judge.⁴¹

When the Wisconsin legislature convened in 1860, Senator Robert Hotchkiss proposed and the Senate adopted a resolution asking the Judiciary Committee to investigate the expediency of abolishing the system. Madison and Milwaukee newspapers hailed this as "a good omen of reform." The Madison *Evening Patriot* urged immediate abolition and sounded the rallying cry, "Down with the old rotten fabric." The Senate Committee reported favorably on a constitutional amendment. When the resolution reached the floor for debate several senators questioned the power of states to tamper with the grand jury in view of the fifth amendment to the United States Constitution. Only a series of anonymous letters appearing in the *Milwaukee Sentinel* came to the defense. The writer, who signed himself "Invariable," predicted that "gross injustice and oppression on the one hand and bribery on the other" would inevitably follow if prosecution was left at the mercy of one man. The Wisconsin Senate passed the resolution calling for a constitutional amendment, but its action went for nothing when the Assembly buried the resolution in committee.⁴²

³⁹ *Report of the Judiciary Committee of the House of Representatives on recommending the passage of the bill to provide for the trial of offenses upon information, Michigan House Document No. 4 (1859); MICHIGAN HOUSE JOURNAL (1859), 237; Michigan Senate Journal (1859), 567; LAWS OF MICHIGAN (1859), No. 138, sec. 1, 7.*

⁴⁰ *MILWAUKEE SENTINEL*, February 1, 12, 1859.

⁴¹ *ARIEL E. DRAPIER, PROCEEDINGS AND DEBATES OF THE KANSAS CONSTITUTIONAL CONVENTION (Wyandot, Kansas, 1859), 68, 288, 676-678; LAWS OF KANSAS (1864), Ch. 64, sec. 1, 7.*

⁴² *MADISON (Wisconsin) EVENING PATRIOT*, January 17, 1860; *MILWAUKEE SENTINEL*, February 1, 12, 1859; November 30, 1859; January 19, 30, February 17, 1860; *MONROE, WISCONSIN STATES*

In Canada, the Upper Canada Law Journal, representing the sentiments of the Toronto Bar, took notice of the movement in England and the United States. The Canadian *Journal* reprinted English attacks upon the grand jury and went on record for abolition of an institution "which affords great facilities for gratifying private malice." This opinion received legislative approval in 1860 when the Canadian Legislative Council passed a bill to end the use of inquests in the Recorders' Courts of Upper Canada.⁴³

In July, 1864 foes of the inquest made a concerted effort to end its use in Nevada. The convention framing a constitution for statehood became the scene of a bitter dispute, but jury protagonists finally convinced the delegates that a popular tribunal was better fitted than a public prosecutor to handle the problems of law enforcement on the frontier. Nevada came into the Union in 1864 under a constitution which guaranteed the right to indictment by a grand jury.⁴⁴

In 1864 while Americans were engaged in a cruel Civil War, John N. Pomeroy, Professor of Law at New York University, applauded the fact that the grand jury remained in the United States as "an insuperable barrier against official oppression." Its value had become more apparent in the light of arbitrary arrests and military government of wartime. Pomeroy stated with satisfaction that "the innovating hand of reform has not as yet touched the long-established proceedings in criminal actions . . . the grand jury (is) carefully preserved by our national and state constitutions."⁴⁵ However, the professor's conclusions were more hopeful than realistic. Agitation had already begun in some states to follow the lead of Michigan and abandon use of the institution, while in Illinois, Indiana, Oregon and Kansas the legislatures were free of all constitutional restrictions in the matter. In Pennsylvania and Tennessee judicial decisions had seriously curtailed the initiative of grand juries. American legal scholars had long ago joined the crusade, many of them insistent that they had survived all possible usefulness. Abroad in England and Canada, the two other principal common law countries, they were under heavy attack.

Part Two

1865-1917

In the decade following the Civil War, efforts to abolish use of the grand jury in the United States assumed almost epidemic proportions. The rash of post-war conventions to frame and revise state constitutions gave opponents of the institution an opportunity to be heard. Legal and governmental theorists, speaking in the name of progress, had long inveighed against the grand jury as a relic of the barbaric past; too inefficient and time-consuming for an enlightened age. They conceded that inquests may at one time have been necessary safeguards against royal despotism,⁴⁶

RIGHTS, April 20, 1859; WISCONSIN SENATE JOURNAL (1860), 43, 71, 277; WISCONSIN HOUSE JOURNAL (1860), 407; MADISON, WISCONSIN STATE JOURNAL, January 16, February 15, 17, 18, 1860.

⁴³ UPPER CANADA LAW JOURNAL (March 1859), V, 21-52; (December 1860), VI, 274-275; JOURNALS OF THE LEGISLATIVE ASSEMBLY OF CANADA (1860), 77, 82, 415.

⁴⁴ OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE CONSTITUTIONAL CONVENTION OF NEVADA 1864 (San Francisco, 1866), 24, 60, 196-198.

⁴⁵ JOHN N. POMEROY, AN INTRODUCTION TO CRIMINAL LAW (New York, 1864), 126.

⁴⁶ ELLIOT ANTHONY, *Origins of Grand Juries*, CHICAGO LEGAL NEWS (October 17, 1868), I, 20-21.

but the need for such protection no longer existed in the United States. A few individuals cautioned that a free government might require even more checks than a despotism, but progress seemed to be the enemy of the grand inquest and many states abandoned the system in its name.

In Wisconsin opponents resumed their pre-war campaign to abolish the institution. They pointed to the speed and ease with which prosecutors accused offenders in Michigan where the grand inquest was dead. In contrast they pictured Wisconsin juries as "secret conclaves of criminal accusers, repugnant to the American system."⁴⁷ Assemblyman A. J. Turner introduced a resolution in January, 1869 to amend the state constitution to rid the state of grand juries. Although a majority of the Judiciary Committee favored delay in the matter, a minority group issued a vigorous report denouncing the system and brushed aside all opposition. In the Senate as in the Assembly, anti-jury forces painted a black picture of the institution and took advantage of their superior unity of purpose to gain the support of doubtful senators. Defenders advised caution but the spirit of advancement and reform swept away their objections. Governor Lucius Fairchild approved the joint resolution when it passed both houses of the legislature in 1869⁴⁸ and again in 1870.⁴⁹ The question then became one for the people of Wisconsin to decide. Apathy and indifference marked the campaign which followed as interest in state and local candidates overshadowed the proposed amendment. A few Democratic newspapers conducted editorial campaigns against abolition of the grand jury, charging that it was a Republican measure, but they made little headway. The *Grant County Herald* announced that a Republican scheme to get control of criminal prosecutions lay behind the amendment. The *Milwaukee News* warned that killing the grand jury was "another step onward in the concentration of power," a process which the recent war had hastened. It cautioned against destroying a popular institution which might be necessary to oppose tyranny of the federal government.⁵⁰ In answer to such attacks, proponents of the amendment assumed the pose of reformers, struggling to rid the state of "an expensive, unjust system."⁵¹ In the referendum on November 7, 1870 the people of Wisconsin voted overwhelmingly for reform and the grand jury ceased to exist in the state except when specially summoned by a judge.⁵²

While opponents of the grand jury in Wisconsin were struggling to rid their state

⁴⁷ MILWAUKEE SENTINEL, May 3, 1867; January 23, February 17, 1868; WISCONSIN STATE JOURNAL, January 22, 1868; JANESVILLE (Wisconsin) GAZETTE, February 19, 1868.

⁴⁸ WISCONSIN ASSEMBLY JOURNAL (1869), 39, 400-440, 565, 944; WISCONSIN SENATE JOURNAL (1869), 526, 600; WISCONSIN STATE JOURNAL, February 19, 25, March 5, 1869; MILWAUKEE SENTINEL, March 1, 1869; GENERAL LAWS OF WISCONSIN (1869), Joint resolution no. 7, p. 270; Letter from E. Steele to Governor Lucius Fairchild, November 28, 1868, FAIRCHILD MSS, Wisconsin State Historical Society.

⁴⁹ WISCONSIN ASSEMBLY JOURNAL (1870), 535; WISCONSIN SENATE JOURNAL (1870), 67; GENERAL LAWS OF WISCONSIN (1870), Ch. 118.

⁵⁰ LANCASTER, Wisconsin GRANT COUNTY HERALD, October 25, 1870; MILWAUKEE NEWS, October 30, 1870; November 5, 1870; MILWAUKEE SENTINEL, November 17, 1870.

⁵¹ WISCONSIN STATE JOURNAL, October 17, 1870; OSHKOSH (Wisconsin) CITY TIMES, November 2, 1870.

⁵² MILWAUKEE SENTINEL, January 9, 1871; *Wisconsin Constitution of 1849, Article I, sec. 8, as amended.*

of the hated institution, their compatriots in Illinois won a partial triumph. They succeeded in getting the constitutional convention in Springfield in 1870 to give the legislature the power to abolish the system. Such a procedure avoided any direct referendum on the matter.⁵³ Shortly after adoption of the new constitution, a special legislative committee urged the legislators to exercise their new authority and eliminate "so thoroughly despotic and subversive" an institution. Petitions approved the committee's advice, but the legislature failed to act on the proposal.⁵⁴

In England the year 1872 saw partial success crown the thirty year struggle to eliminate the grand jury. Parliament provided that grand juries would no longer be used in the London metropolitan district except when summoned by a magistrate.⁵⁵

There followed in the United States a series of constitutional conventions in which the question of retaining the grand jury system became an important issue. Delegates assembled at Charleston, West Virginia in 1872 refused to be swayed by talk of progress and voted down proposals to turn all criminal prosecution over to public officials.⁵⁶ Advocates of reform were more successful in the Ohio constitutional convention, where they deleted the guarantee of a grand jury indictment in all criminal cases. Ohio retained the institution, however, when the people refused to approve the new constitution.⁵⁷ In Missouri, in contrast to most states, grand juries actually strengthened their authority, with a direct constitutional mandate to investigate all officials having charge of public funds at least once a year.⁵⁸ Anti-jury forces fared better in the western conventions. The Nebraska constitution of 1857 allowed the legislature to "abolish, limit, change or amend" the grand jury system. Ten years later the legislators exercised this power and inquests became extinct in another state.⁵⁹ In 1876 Colorado followed the lead of Nebraska and put the matter up to the legislature which abolished grand juries shortly after.⁶⁰ The California constitution of 1879 allowed prosecution of criminal offenses upon the information of a prosecutor, but it also stipulated that grand juries be called in each county at least once a year.⁶¹ Western areas were more receptive to proposals to streamline their judicial machinery. In the South, the Radicals made no attempt to eliminate grand juries in the

⁵³ DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF ILLINOIS, 1869-1870 (Springfield, 1870), 176, 202, 1569-1573; Illinois Constitution of 1870, Article II, sec. 8.

⁵⁴ *Reports of the Special Committee on the Grand Jury System, Reports to the General Assembly of Illinois* (1873), IV; JOURNAL OF THE SENATE OF ILLINOIS (1873), 300.

⁵⁵ 35 & 36 VICTORIA c. 52 (August 6, 1872).

⁵⁶ JOURNAL OF THE CONSTITUTIONAL CONVENTION ASSEMBLED AT CHARLESTON, WEST VIRGINIA (Charleston, 1872), 37, 58.

⁵⁷ PROCEEDINGS AND DEBATES OF THE THIRD CONSTITUTIONAL CONVENTION OF OHIO (Cleveland, 1873-1874), I, 113, 191; II, 1737.

⁵⁸ DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1875 (Columbia, 1930-1945), I, 264-265; MISSOURI CONSTITUTION OF 1875, Article II, sec. 12; Article XIV, sec. 10.

⁵⁹ FRANCIS N. THORPE (ed.), *The Federal and State Constitutions* (Washington, 1909); IV, 2362, Nebraska Constitution of 1875, Article I, sec. 10; LAWS OF NEBRASKA (1885), Ch. 108, sec. 1.

⁶⁰ PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION FOR THE STATE OF COLORADO (Denver, 1907), 115, 198-200; Colorado Constitution of 1876, Article II, sec. 8, 23; LAWS OF COLORADO (1883), 160-161.

⁶¹ *Debates and Proceedings of the Constitutional Convention of the State of California* (Sacramento, 1880), 81, 150-151, 308-315; STATUTES OF CALIFORNIA (1881), sec. 9, p. 71.

constitutions which they drafted. When the Southern Bourbons came to write new constitutions they did not even consider eliminating an institution which had proved so useful in the Reconstruction period in opposing an unfriendly central government.

JUDICIAL RESTRICTIONS

Paced by the twin slogans of economy and efficiency, enemies of the grand jury had successfully ended its use in many states and curtailed it in others. However, the constitutional convention and the legislature were not the only means used to attack the system. Some judges were able to make serious inroads on grand jury powers to initiate and conduct investigations independently of the court. In Tennessee the supreme court reinforced its position that inquests could summon witnesses only where specifically authorized by a specific law. Pennsylvania courts reaffirmed the very restrictive rule which limited juries to an investigation of matters known to one of its members or suggested to them by the judge or the prosecutor. Individual citizens were not free to go before a grand jury nor could jurors summon witnesses whom they believed could assist them in their inquiries. Any attempt by a private individual to circumvent this ruling could be punished as contempt of court.⁶²

In the federal courts, as in most states, grand juries had always been free to subpoena any and all witnesses upon their own initiative. Chief Justice Salmon P. Chase urged jurors, convening in West Virginia in August, 1868, to call before them and examine fully government officials or any other persons who possessed information useful to them. He warned them, "You must not be satisfied with acting upon such cases as may be brought before you by the district attorney or by members of your body."⁶³ In view of Chief Justice Chase's statement of the broad rule prevailing in the federal courts, it was indeed a strange doctrine which Justice Stephen Field announced in August, 1872. Justice Field was the brother of the well-known legal reformer and codifier, David Dudley Field, who had tried his best to eliminate use of the grand jury in New York. Justice Field told a federal jury at San Francisco, California that it should limit its investigations to such matters as fell within their personal knowledge or were called to their attention by the court or the prosecuting attorney. He warned them in particular against delving into political matters unless instructed to do so. If neither the judge nor the prosecutor placed a matter before them, Justice Field observed, "it may be safely inferred that public justice will not suffer if the matter is not considered by you." He reminded the jurors that the type of government which existed in the United States did not require the existence of a grand jury as a protection against oppressive action by the government. The restrictive charge of Justice Field excluded private persons from the grand jury room and curtailed the freedom of action of jurors. It represented an effort to subordinate the grand jury to the wishes of the judge and prosecutor. As such, it contradicted accepted practice in the federal and English courts, as well as a great majority of the state courts.⁶⁴

⁶² *Harrison vs State*, 44, *Tennessee* 195 (1867); E. H. STOWE, *Charge to the Grand Jury*, PITTSBURGH REPORTS, III, 174 (1869); *McCullough vs Commonwealth*, 67 PENNA STATE REPORTS 30.

⁶³ Grand jury charge delivered by Chief Justice Chase, 30 FED CAS 980 (1868).

⁶⁴ Grand jury charge delivered by Justice Field, 30 FED CAS 993 (1872); SEYMOUR D. THOMPSON and EDWIN G. MERRIAM, *A TREATISE ON THE ORGANIZATION, CUSTODY AND CONDUCT OF JURIES, INCLUDING GRAND JURIES* (St. Louis, 1872), 668-672.

Not all American jurists desired to narrow the scope of grand jury activity, however. In Silver City, Idaho Territory, Judge H. E. Prickett solicited jurors to investigate all official misconduct and neglect of duty. He told members of the jury that they possessed full authority to call and examine all governmental officials or any other person in the community.⁶⁵ Federal District Judge Walter Q. Gresham told jurors at Indianapolis in 1878 that attempts to protect persons for political reasons should not prevent them from making a full investigation of a matter, but instead should inspire them with additional determination to bring the person to justice.⁶⁶ Although Field's voice was only one among many, the doctrines which he enunciated found favor with legal scholars and members of the bar who had long advocated placing the grand jury more completely under the control of the court. Francis Wharton, authority on criminal law, who had often advocated such a course, magnified the importance of Field's statements and attached great weight to them. In spite of the fact that Field stood completely alone in his statement of the "new" federal rule, Wharton wrote in 1889, "This is the view which may now be considered as accepted in the United States courts and in most of the several states." As proof of the latter, he cited Pennsylvania and Tennessee decisions, the only states having such a rule. In drawing his conclusion, Wharton accepted as the majority viewpoint a position which coincided closely with his desire to reduce the grand jury to a position of subservience.⁶⁷

In 1881 New York state finally adopted the Code of Criminal Procedure prepared by David Dudley Field in 1849. However, to the great disappointment of those who had assisted in its preparation, the legislature dropped the requirement that a preliminary hearing before a judge was necessary before a grand jury could return an indictment. Not only did the New York legislators see fit to leave the grand jury unfettered, but they included a provision requiring all inquests to make particular inquiry into official corruption and misconduct.⁶⁸

In the West, however, anti-jury forces continued to win victories. In a special referendum held in Iowa in November, 1884 the people voted to amend the state constitution to give the legislature authority to abolish grand juries completely.⁶⁹ For many years, persons advocating that states abandon the indictment in criminal proceedings had felt plagued by those who pointed to the fifth amendment of the United States Constitution as standing in the way. Although state and federal courts had frequently stated that the guarantee of the right to an indictment in the fifth amendment applied only to the federal government, the matter invariably came up for debate at constitutional conventions. With the adoption of the fourteenth amendment, there were those who insisted that the phrase "due process of law" included the right to indictment by a grand jury. As early as 1872 the Wisconsin Supreme Court decided that the fourteenth amendment did not prevent states from ceasing to use the indictment, but the question remained a point of controversy

⁶⁵ SILVER CITY AVALANCHE (Idaho Territory), May 12, 1877.

⁶⁶ *In re Miller*, 17 *Fed Cas* 295 (1878).

⁶⁷ FRANCIS WHARTON, CRIMINAL PRACTICE AND PLEADING (Philadelphia, 1889), 227-235.

⁶⁸ FOURTH REPORT OF THE COMMISSIONERS ON PRACTICE AND PLEADING (1849), xxxiv; NEW YORK CODE OF CRIMINAL PROCEDURE (1881), Ch. 2, sec. 260-261.

⁶⁹ THORPE, FEDERAL AND STATE CONSTITUTIONS, II, 1157, Amendment to Article I, sec. 11, Iowa constitution.

until the United States Supreme Court settled it in 1884. The test case arose in California when Joseph A. Hurtado challenged his murder conviction on the ground that he had come to trial on an information rather than a grand jury indictment. The high court gave the judicial green light to states which desired to get rid of the grand inquest. Citing the Wisconsin decision with approval, the justices announced that "due process of law" included any system of prosecution which preserved liberty and justice and was not limited to indictment by a grand jury. Justice John M. Harlan's vigorous dissent stated the case for those who believed that indictment by a jury of his neighbors was the right of every American citizen.⁷⁰

CRITICISM OF THE GRAND JURY SYSTEM

Criticism of the grand jury in legal circles continued to grow in the United States in the 1880's. Seymour D. Thompson and Edwin G. Merriam in their *Treatise on the Organization, Custody and Conduct of Juries* came out against the system and stated that the praise deserved by a few juries had been "quite undeservedly accorded to the institution itself."⁷¹ In 1886 Eugene Stevenson, a New Jersey public prosecutor, condemned the grand jury as an arbitrary, irresponsible, and dangerous part of government which long ago should have come "within the range of official responsibility." He much preferred the efficiency and decisiveness of a public prosecutor, observing, "It is difficult to see why a town meeting of laymen, utterly ignorant both of law and the rules of evidence should be an appropriate tribunal. The summoning of a new body of jurors at each term insures an unfailing supply of ignorance." As a parting blow, Stevenson declared that no sane statesman or legislator "would every dream of creating such a tribunal" if it did not already exist.⁷²

Later in the same year members of the American Bar Association heard David Dudley Field reiterate the demand for the efficiency of the expert in judicial proceedings. Field pointed out that the best civilization was the result of division of labor, where each person became an expert in his own specialty. The jury system, Field observed, ignored the benefits to be derived from specialization, largely because of "superstitious veneration."⁷³ Demands that an expert replace a tribunal composed of representative citizens may have had some basis on the ground of efficiency, but it also reflected a fear of democracy on the part of many who advocated the change. Most authors hid their distrust of the people behind charges of "star chamber" and "secret inquisition" leveled at grand juries. Professor Francis Wharton, however, made little effort to hide his apprehension regarding grand juries. Writing in 1889, he observed that their value shifted with the political tendencies of the age. At a time when excessive authority threatened, "then a grand jury, irresponsible as it is, and springing from the people, is an important safeguard of liberty." However, Wharton emphasized that when "public order and the settled

⁷⁰ *Rowan vs State*, 30 Wisconsin 129 (1872); *Hurtado vs California*, 110 U.S. 516 (1884).

⁷¹ THOMPSON AND MERRIAM, 569.

⁷² EUGENE STEVENSON, *Our Grand Jury System*, THE CRIM LAW MAGAZINE (December 1886), 713-714, 719; EDWARD Q. KEASBEY, *THE COURTS AND LAWYERS OF NEW JERSEY* (New York, 1912), III, 95.

⁷³ TITUS M. COON (ed.), *SPEECHES, ARGUMENTS AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD* (New York, 1890), III, 208-211.

institutions of the land are in danger from momentary popular excitement, then a grand jury, irresponsible and secret, partaking without check of the popular impulse, may through its inquisitorial powers become an engine of great mischief to liberty as well as to order."⁷⁴ But not all legal scholars and jurists saw inquests as a potential threat to the ruling group in government and society. Justice Samuel F. Miller, sitting on the United States Supreme Court, challenged the argument that inquests were of value only when there was danger of oppression at the hands of a despotic monarch. He emphasized their importance in protecting citizens from charges brought by irresponsible and arbitrary prosecutors.⁷⁵

ABOLISHING GRAND JURIES IN WESTERN STATES

The year 1889 witnessed the admission of the six "Omnibus" states into the Union. Opponents of the grand jury emerged completely victorious from the constitutional conventions which prepared them for statehood. Idaho, Montana and Washington abolished the grand inquest completely except for special occasions, while North Dakota, South Dakota and Wyoming left the question up to their legislatures. In the Idaho convention the expense of the juries, particularly in thinly settled areas, provided a potent argument in winning delegates to the cause of abolition. Anti-jury leaders claimed that the average indictment cost the people \$600 to \$1,000 and they predicted savings amounting to thousands of dollars each year if inquests ceased to exist. There was no lack of defenders, however, who warned against handling politicians the power of accusation and stressed the need of a people's body to investigate local officials. In spite of their efforts, the proponents of efficiency and economy prevailed in Idaho.⁷⁶ Delegates attending the Montana convention at Helena in the heat of July, 1889 faced the same decision. Rallying around the slogan, "Let Montana cut the thread that binds us to the barbarous past," advocates of abolition posed as reformers and attacked the grand inquest as an outmoded and even dangerous institution. They cited Wisconsin as a model to pattern after. Defenders of the jury opposed hasty action as a step in the direction of centralization, by removing one of the important barriers "which serves to protect the rights of the citizen against the government." Despite such protests, a majority of the Montana delegates favored eliminating the grand jury in their state.⁷⁷ It met the same fate on the floor of the Washington constitutional convention. In the three other new states, the stories were similar. Promises of economy and lower taxes prevailed against warnings not to kill a democratic institution. Legislatures in North Dakota, South Dakota and Wyoming did not hesitate to exercise their prerogative, and grand juries ceased to exist within their borders.⁷⁸

⁷⁴ WHARTON, 227.

⁷⁵ *Ex Parte Bain*, 121 U.S. 1 (1886).

⁷⁶ PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF IDAHO (Caldwell, Idaho, 1912), 260-270, 2050.

⁷⁷ PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF MONTANA (Helena, Montana, 1921), 100-105, 112-114, 251.

⁷⁸ THORPE, VII, 3975, Washington Constitution of 1889, Article I, sec. 25, 26; PROCEEDINGS AND DEBATES OF THE FIRST CONSTITUTIONAL CONVENTION OF NORTH DAKOTA (Bismarck, 1889), 364-365; SOUTH DAKOTA CONSTITUTIONAL DEBATES (Huron, South Dakota, 1907), II, 11, 131; JOURNAL

It became increasingly clear to Americans who wished to curb or eliminate the grand jury that getting rid of the institution by law or constitutional amendment offered the best chance of success. In spite of Wharton's efforts, state and federal courts were reluctant to adopt Stephen Field's new restrictive doctrine. In March, 1891 the Supreme Court of Maryland ruled that grand juries could initiate any type of prosecution, regardless of how the case came to their attention. To deny it such powers, the Maryland court insisted, would make juries useless and mere tools of the court and prosecutor. Justice David Brewer spoke the mind of the United States Supreme Court when he announced that accepted practice in America allowed grand juries to investigate any alleged crimes "no matter how or by whom suggested to them."⁷⁹

ATTACKS UPON THE GRAND JURY

Concentrating their efforts on eliminating the grand jury entirely, members of the bar emphasized the danger of lay interference in judicial matters and called for efficiency in administering justice.⁸⁰ Speaking before the annual convention of the Ohio State Bar Association in July, 1892 Justice Henry B. Brown of the United States Supreme Court proposed eliminating the grand inquest as a means of simplifying criminal procedure. He saw in public prosecutors a far more efficient means of bringing offenders to trial.⁸¹ O'Brien J. Atkinson, Michigan attorney, told members of the Michigan State Bar Association that he could not conceive of any condition where a grand jury would be desirable "or where its secret methods would not be productive of evil." He warned those states which had not followed Michigan's lead in abolishing the institution, that an accusing body with power to pry into public and private affairs in a secret manner could become a grave threat to liberty in America.⁸²

In January, 1896 the Territorial Bar Association of Utah met in convention at Salt Lake City. Territorial leaders were preparing themselves for another try at statehood and the forthcoming constitutional convention was uppermost in their minds. In his presidential address, J. G. Sutherland recommended that grand juries be eliminated after statehood, to be replaced by special prosecutors. Sutherland denounced inquests as useless, oppressive, and expensive and proclaimed that social and political changes in the United States had made them "undesirable as well as unnecessary."⁸³ The President of the Utah Bar Association got his wish a month

AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF WYOMING (Cheyenne, 1893), 716, 726; LAWS OF NORTH DAKOTA (1890), Ch. 71, sec. 1, 9; LAWS OF WYOMING (1890), Ch. 59, Sec. 1, 14; LAWS OF SOUTH DAKOTA (1895), Ch. 64, sec. 1, 9.

⁷⁹ *Blaney vs State*, 74 *Maryland* 153 (1891); *Frisbie vs United States*, 157 *U.S.* 160 (1894).

⁸⁰ *Grand Juries*, *THE LAW TIMES* (July 18, 1891), LXXXI, 205.

⁸¹ *Address by Justice Brown*, PROCEEDINGS OF THE OHIO STATE BAR ASSOCIATION (July 1892), XIII, 42-43.

⁸² *Address of O'Brien J. Atkinson to the Michigan State Bar Association*, *MICH. L. JOUR.* (September 1894), III, 259, 260, 266.

⁸³ REPORT OF THE SECOND ANNUAL MEETING OF THE TERRITORIAL BAR ASSOCIATION OF UTAH (1895), 12-14.

later when the Utah constitutional convention adopted his proposal and abolished all grand juries except when summoned by a judge.⁸⁴

Opponents of the grand jury in all sections of the United States maintained their pressure to turn criminal prosecution over to experts. In 1897 C. E. Chipperfield told members of the State's Attorneys Association of Illinois that the average grand juror possessed few of the qualifications essential to their duties. Lack of legal training, he contended, led jurors to "wander through time and eternity in a curious way," often allowing hard luck stories to influence their deliberations. Chipperfield called for an end to the institution, and he implored, "In the name of progress which is inevitable, I invoke . . . the abolition of that relic of antiquity, the twin sister of the inquisition, the grand jury in Illinois."⁸⁵ Charles P. Hogan used the same line of attack when he took the opportunity of his presidential address to urge members of the Vermont Bar Association to oppose the grand inquest. Characterizing it as "a cumbersome and expensive piece of legal machinery," he announced that there was no reason why it should continue to exist "in this enlightened and progressive age." Hogan suggested discarding the grand jury as the English had discarded the ordeal and trial by fire.⁸⁶

Vigorous and frequently vituperative attacks launched by legal leaders in the name of progress and reform helped discredit the grand jury in the eyes of the American people. Constant comparison with the inquisition and the star chamber aimed to pave the way for abandoning the institution. Reformers had their way in Oregon where in 1899 the legislature exercised the privilege given it in the state constitution and substituted the information for the indictment in criminal proceedings.⁸⁷ The following year citizens of Missouri approved overwhelmingly⁸⁸ amendments relinquishing grand jury duties to district attorneys. In California, however, where grand juries in San Francisco had gained a reputation as enemies of municipal corruption, in November, 1902 the people rejected a proposed constitutional amendment to end use of grand inquests entirely.⁸⁹ In November, 1904 residents of Minnesota approved abolishing the system in their state. The referendum on the constitutional change evoked very little discussion and went almost completely unnoticed in the excitement of a presidential election year.⁹⁰

At a time when public confidence in the grand jury was wavering under the barrage of abuse and the cries for reform, there were few persons who saw the institution as a potent instrument of the people. Judge Harman Yerkes of Pennsylvania,

⁸⁴ PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION FOR THE STATE OF UTAH (Salt Lake City, 1898), 313.

⁸⁵ C. E. CHIPPERFIELD, *The Abolition of the Grand Jury*, THE AMER. LAWYER (October 1897), V, 488-490.

⁸⁶ CHARLES P. HOGAN, *The Grand Jury System*, Reports of the Vermont Bar Association (1898), V, 85-99.

⁸⁷ LAWS OF OREGON (1889), sec. 1, 100, p. 99-100.

⁸⁸ WALTER F. DODD, THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS (Baltimore, 1910), 322, Amendment to the Missouri Constitution.

⁸⁹ DODD, 297, AMENDMENT TO THE CALIFORNIA CONSTITUTION.

⁹⁰ DODD, 320, *Amendment to the Minnesota Constitution*; MINN. JOUR., October 28, 1904.

however, retained the belief that grand juries could provide a means of extending democratic control of government. In September, 1901 he told jurors of Bucks County that bodies such as theirs, representing the people of the community, were not outmoded or useless. In times of great public peril or in the event of deep-seated abuses, Judge Yerkes observed, "the divided yet powerful and also combined responsibility of the secret session of the grand jury . . . has worked out great problems of reform and correction." He pointed out that abolition of the grand inquest would leave the accused citizen completely at the mercy of "an unjust or unwise judge or district attorney," or subject to contrivances of an unscrupulous prosecutor. Judge Yerkes dispelled the often repeated idea that because the United States was not ruled by a tyrannical king, grand juries had ceased to be necessary as guardians of individual liberty. He explained that tyrants even more irresponsible than the despots of old sought to dominate local, state and national governments. Giant business monopolies restless of legal restraints and party bosses who did not hesitate to break judges and create courts took the place of tyrannical monarchs as a danger to freedom in the United States. Against such ruthless forces Judge Yerkes saw grand juries as powerful agencies of the people, challenging business or boss domination of government. At a time when many legal scholars advised abandoning the grand inquest as an archaic relic of the past, the Pennsylvania judge saw what they had failed to see, that there were enemies of freedom in America which demanded the watchful eye of the grand jury if the American people were to control their government.⁹¹

In 1904 a Philadelphia grand jury challenged the sixty year old Pennsylvania rule that it could not initiate investigations unless the judge or the district attorney had given their approval. Members of the jury told Judge William W. Wiltbank they had evidence that certain constables in Philadelphia were using their official position to extort money from newly arrived immigrants. To obtain additional information they asked the judge to summon witnesses in the matter. He not only upheld the Pennsylvania rule and denied their request, but in doing so stated that victims of the extortion racket could not even go before the grand jury and tell their stories unless the court or the prosecutor saw fit to ask for an investigation.⁹² Pennsylvania remained in the minority on the question, however, as federal and most state courts continued to follow the common law rule which endowed grand juries with broad powers to begin investigations.⁹³

Annual meetings of bar associations in the various states continued to serve as excellent platforms from which to enlist support against the grand jury system. In July, 1905 the Committee on Law Reform of the Iowa Bar Association recommended and the association adopted a resolution calling for prosecution upon information. Judge M. J. Wade of Iowa City sought to ridicule members who did not fall into line when he stated tartly, "There are some persons in this world who are wedded to antiquity, revel in cobwebs, and they simply worship whiskers." Judge Wade tempted his colleagues, saying, "Let us do away with a few things and maintain the

⁹¹ *Charge to the Grand Jury of Bucks County, Pennsylvania*, PENNSYLVANIA COUNTY REPORTS (1901), XXIV, 164-165.

⁹² *In re alleged Extortion Cases*, 13 DISTRICT REPORTS OF PENNA 180 (1904).

⁹³ *People ex rel Livingston vs Wyatt*, 186 *New York* 383 (1906), *Hale vs Henkel*, 201 *U.S.* 43 (1905).

law for the benefit of the lawyers who are to convict guilty men."⁹⁴ Justice Brown of the United States Supreme Court reiterated his dissatisfaction with the grand jury system in an address to the American Bar Association in 1905. In January, 1906 George Lawyer, Albany attorney, challenged members of the New York State Bar Association to rid their state of grand juries. To continue to countenance such an institution, he warned, was to concede that under a republican form of government the liberties of the individual were in danger just as they had been under a despotism of the dark ages. Lawyer denounced the "arbitrary power" which inquests exercised to inquire into and criticize the acts of public officials. He insisted that under the American form of government the people "require no shield to protect them from the state's aggressions."⁹⁵

Opponents of the grand jury system did not have their way entirely. They suffered occasional reverses in their effort to drive the institution from the American legal system. Delegates who met at Guthrie, Oklahoma in 1906 to frame a constitution for statehood agreed to abolish regular sessions of the grand inquest, but they did not wish to leave the question of summoning a jury entirely up to the local judges. The Oklahomans did what no other Americans had ever done. They provided that the people could call a grand jury when they thought it was necessary. The signatures of one hundred resident taxpayers in a county were sufficient to launch an investigation.⁹⁶ In January, 1908 William S. U'Ren, Charles H. Cary, and other Progressive leaders advocated a return to the grand jury system in Oregon as a part of their program to increase popular control of the government. They made use of the initiative petition to bring the question of a constitutional amendment before the people of Oregon. The referendum evoked little debate. Opponents of the amendment accused grand juries of being responsible for long delays in justice, while Progressive leaders replied with the charge that the information system enabled district attorneys to use criminal prosecutions for political purposes. On June 1, 1908 after nine years without them, residents of Oregon voted two to one to restore the grand jury in their state.⁹⁷ In New Mexico as well as in Oregon, the people expressed themselves in favor of retaining control over criminal prosecutions. At public hearings conducted by the Committee on the Bill of Rights of the Constitutional Convention in 1910, popular opinion overwhelmingly favored keeping the grand jury. As a result, New Mexico became one of the few western states to summon inquests regularly to attend its courts.⁹⁸ In Arizona a different story unfolded. Even as a territory it had abandoned the grand jury. The Constitutional Convention did not consult the wishes of the people, but voted to continue the practice of substituting an expert prosecutor for a body of representative citizens.⁹⁹

⁹⁴ PROCEEDINGS OF THE IOWA STATE BAR ASSOCIATION (1905), XI, 58, 141.

⁹⁵ GEORGE LAWYER, *Should the Grand Jury System be Abolished?* REPORT OF THE NEW YORK STATE BAR ASSOCIATION (January 1906), XXIX, 29-43.

⁹⁶ THORPE, VII, 4274, *Oklahoma Constitution*, Article II, sec. 17.

⁹⁷ PORTLAND OREGONIAN, May 26, 1908; CHARLES H. CARY (ed.), *The Oregon Constitution and Debates of the Constitutional Convention* (Salem, Oregon, 1926), 444; ALLEN H. EATON, *The Oregon System* (Chicago, 1912), 70, 166.

⁹⁸ PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF NEW MEXICO (Albuquerque, 1910), 82-85, 197.

⁹⁹ MINUTES OF THE CONSTITUTIONAL CONVENTION OF ARIZONA (Phoenix, 1911), Article II, sec. 20; Article VI, sec. 6.

Gradually, critics of popular participation in judicial proceedings shifted the basis of their public opposition. They ceased to state boldly that the people should not interfere in matters for which they had no training. Such statements had an unpleasant, undemocratic ring and actually might rally support for the hated institution. Instead they began to stress the waste of time and money which grand juries entailed. H. N. Atkinson, Houston lawyer, told members of the Texas Bar Association that "a useless and unnecessary piece of legal machinery" cost Texas counties between \$100,000 and \$200,000 each year, in addition to taking men away from their homes and businesses to do work "which one man can do just as well."¹⁰⁰ Aaron Hahn of Cleveland repeated this argument in urging the 1912 Ohio Constitutional Convention to eliminate the grand jury from that state.¹⁰¹ In England a Parliamentary Commission composed of judges and legal experts studied the causes of delay in English courts. In 1913 they reported that the grand jury system "uselessly puts the country to considerable expense and numerous persons to great inconvenience." The Commissioners regarded the grand inquest as "little more than an historically interesting survival" which had "outlived the circumstances from which it sprung and developed." They recommended that Parliament take action to eliminate it from the English court system. Not all British jurists agreed that grand juries no longer served a useful purpose, however. Judge L. A. Atherly-Jones of the London City Court warned those who sought reform at the expense of popular government that "the bold hand of the innovator" should not touch those institutions which guard personal liberty.¹⁰² Americans who opposed grand juries commented approvingly on the English report. The *New Jersey Law Journal* predicted that it would be only a question of time before they would cease to exist in every state in the Union.¹⁰³

In June, 1915 William Howard Taft appeared before the Judiciary Committee of the New York Constitutional Convention and took the occasion to press home an attack upon the grand jury system. Drawing upon his experience as a judge, the ex-President criticized it as a "bulky and costly" institution which served only to relieve district attorneys of responsibility for prosecutions. He heartily endorsed the movement to substitute a legal expert for an unwieldy body of laymen. The New York convention considered several proposed amendments limiting the use of grand juries but they did not adopt them.¹⁰⁴ However, not all persons familiar with the work of grand juries believed they were too costly and cumbersome. Edward Lindsey, of the American Institute of Criminal Law, hailed their broad inquisitorial powers as an essential part of judicial machinery which was in constant use to secure in-

¹⁰⁰ H. N. ATKINSON, *The Useless Grand Jury*, LAW NOTES (September 1911), XV, 109-110.

¹⁰¹ JOURNAL OF THE CONSTITUTIONAL CONVENTION OF OHIO (Columbus, 1912), 55.

¹⁰² *Second Report of the Royal Commission on Delay in the King's Bench Division, Reports of Commissioners to the House of Commons* (London, 1914), XXXVII, 22; LONDON TIMES, January 6, 8, 10, 1914; BOSTON EVENING TRANSCRIPT, January 17, 1914.

¹⁰³ *Editorial Notes*, NEW JERSEY LAW JOUR. (April 1914), XXXVII, 97-98; *Evile of the Grand Jury System*, LAW NOTES (February 1914), XVII, 218.

¹⁰⁴ NEW YORK TIMES, June 12, 1915; *Judge Taft and the New York Constitutional Convention*, VIRGINIA LAW REGISTER (July 1915), I (N.S.), 226; *Revised Record of the Constitutional Convention of New York* (Albany, 1915), I, 221-22.

formation otherwise unobtainable. Lindsey pointed out that prosecutors and police departments were at best feeble substitutes for the powerful grand inquest.¹⁰⁵

Although Lindsey defended the grand jury against those who would have destroyed it, in doing so he adopted the criteria used by its critics. He sought to justify the institution on the grounds of efficiency. On this point the grand jury was particularly vulnerable. Few persons familiar with its operations would have denied that a prosecuting officer could move more rapidly and with greater singleness of purpose. It remained for a layman well experienced in the work of the grand jury to defend it as a valuable and democratic agency of the people. Publisher George Haven Putnam recognized that inquests could be slow and unwieldy bodies which frequently tried the patience of judges and prosecutors, but he did not believe it was fair to judge the institution solely on that basis. Democracy did not necessarily mean efficiency. It meant a careful concern for the rights of persons who had been arrested as well as the ability of citizens to initiate investigations of abuses in government and make officials responsible to them. After serving on grand juries in New York City over a period of thirty-five years, Putnam became convinced that no other institution provided such a degree of popular participation in government. He openly challenged the advice of ex-President Taft, announcing, "There is no other way citizens can bring criticism directly to bear upon public officials." Putnam saw grand juries as more than mere law enforcement agencies. He recognized that during their term of office the jurors acted as the representatives of the people of the county and in that capacity could call before them all public officials, high or low. When such bodies ceased to sit, the cause of popular government had suffered a severe blow. In 1915 Putnam and other laymen who were convinced of the necessity of preserving the institution in America organized the Grand Jury Association of New York County, made up of persons who had served on grand juries. They sought to publicize the importance of the grand inquest to democratic government and to blunt the attack long waged against lay interference in judicial matters.¹⁰⁶

The period from the Civil War to the First World War witnessed many attempts in the United States to abolish the grand jury. Armed with the persuasive arguments of efficiency and economy, advocates of reform achieved their most spectacular successes in western United States.¹⁰⁷

¹⁰⁵ EDWARD LINDSEY, *Functions of the Grand Jury*, JOUR. OF THE AMER. INST. OF CRIM. LAW AND CRIMINOL. (June 1913), IV, 169-171.

¹⁰⁶ GEORGE H. PUTNAM, MEMORIES OF A PUBLISHER (New York, 1915), 310-313; GEORGE H. PUTNAM, *Grand Jury of the County of New York*, ANNALS (March 1914), LII, 37-55; NEW YORK TIMES, February 28, 1930.

¹⁰⁷ Only Texas, California, Oregon and New Mexico summoned grand juries regularly.