The Grand Jury: True Tribunal of the People or Administrative Agency of the Prosecutor?

James P. Shannon

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THE GRAND JURY: TRUE TRIBUNAL OF THE PEOPLE
or
ADMINISTRATIVE AGENCY OF THE PROSECUTOR?

JAMES P. SHANNON†

In a petition to the General Assembly of the Commonwealth of Virginia, Thomas Jefferson once termed the Anglo-Saxon tradition of trial by grand and petit jury "The true tribunal of the people." Both before and after Jefferson's time the citizens of Virginia and of the nation have had abundant reason to cherish the constitutional requirement that criminal charges cannot be brought against any person in this country except by the indictment of a grand jury.

More recently, however, as numerous weaknesses in the modern operation of the grand jury system have come to light, several voices have been raised to question the continuation of this instrumentality of criminal justice. In a feature article for the New York Times, Leon Friedman, a staff attorney for the Association of the Bar of New York City, recently wrote: "The actions of grand juries in recent cases—such as The Pentagon Papers affair—... have led to charges that the juries have lost their way." 2

In his report Friedman lists specific reasons for the current loss of public confidence in grand juries:

Recent critics of the grand jury have questioned whether it does exercise an independent function or is merely a rubber stamp for the prosecutor; ... [whether] minority groups are underrepresented on grand jury panels; ... [and whether] it has been used to harass dissident groups and unfriendly witnesses who [appear] before it.

By custom and statute the grand jury is now regarded as a jury of inquiry, convened to hear the evidence adduced by the state, and to determine whether on its face that evidence warrants bringing a suspect person to trial.3 Once that decision is reached in a given instance the grand jury has, or should have, no further interest in

†B.A., College of St. Thomas; M.A., U. of Minnesota; Ph.D., Yale University; ordained Roman Catholic Priest; Auxiliary Bishop of St. Paul-Minneapolis; past President, College of St. Thomas, St. Paul, Minnesota; past Vice-President, St. John's College, Santa Fe, New Mexico; presently student, University of New Mexico School of Law.

1. The Complete Jefferson 128 (S. Padover ed. 1943) [hereinafter cited as Padover].
that particular allegedly criminal cause. It is also settled law that the
grand jury is neither supposed to be an agency of the prosecuting
attorney nor of the police officers preferring charges against an
accused.4

In contrast to this official and statutory description of the grand
jury, it is the central thesis of this paper that the grand jury, as an
instrument of criminal justice, has become in effect an administrative
arm of the office of attorney general or district attorney, that it no
longer enjoys public confidence, is frequently a device for the misca-
rrriage of justice, that its merits no longer balance its documented
deficiencies and that criminal indictment by a grand jury should be
replaced by the simpler more expeditious and equitable method of
criminal information filed by a public prosecutor.5

If this sweeping proposition surprises the reader it is hoped that
the following historical synopsis and contemporary analysis of what
the grand jury has become in the hands of modern prosecutors will at
least lessen that surprise if not convert the reader to the point of
view that the grand jury, as a regular instrument of returning criminal
indictments, has outlived its usefulness.

The grand jury has an honorable history in Anglo-Saxon common
law. Its precise origin is not known with certitude.

Trial by jury . . . is not the creature of an act of Parliament . . . . It
arose silently and gradually, out of the usages of a state of society
which has forever passed away . . . . Few subjects have exercised the
ingenuity and baffled the research of the historian more than the
origin of the jury.6

Some historians see the beginnings of the jury in the Inquisitio of
the Frankish courts of Carolingian kings.7 Some say the jury came to
England with William the Conqueror (1066).8 Whenever it began it

4. 38 C.J.S. Grand Juries § 1 (1943).
5. It is not here recommended that the grand jury be abolished entirely but that it be no
longer used as the usual instrumentality for bringing suspected persons to trial by means of
indictment (as distinguished from the filing of a criminal information by the prosecutor).
The extensive survey of judges and attorneys, apropos grand juries, conducted in 1930 by
Wayne Morse (later U.S. Senator) of Oregon, specifically concluded that the true and
enduring value of the grand jury would lie in its usefulness as an instrumentality for in-
vestigating charges of corruption among holders of public office. This conclusion of the
Morse study, cited below at note 6, is probably even more valid today than when it was
published four decades ago.
6. Forsyth, Trial By Jury 1-2 (1875), quoted in Morse, A Survey of the Grand Jury
System, 10 Ore. L. Rev. 102 n. 2 (1931) [hereinafter cited as Morse].
7. W. Holdsworth, History Of English Law 312 (1922), quoted in Morse, supra note 6, at
104 n. 11.
8. F. Pollock & F. Maitland, The History Of English Law 143 (2d ed. 1898), quoted in
Morse, supra note 6, at 106 n. 25.
had been firmly established as an essential element in English law by
the end of the reign of Henry II (1189).9

By the middle of the fourteenth century certain procedural dif-
ficulties began to appear when accusing juries (le graunde inquest)
presented a suspect for trial, tried his case to a jury made up of some
members from the original accusing jury, and then found him not
guilty. By statute in 1352 an indictor was forbidden to sit on the
trial jury of a person accused of felony or trespass if the accused
challenged the juror. This statute is generally accepted as marking the
first clear cut distinction between the jury of presentment (grand
jury) and the trial jury (petit jury).10

By royal decree in 1368 Edward III formalized the procedure of
the grand jury in criminal actions by fixing the number of jurors at
twenty-three and by declaring a majority vote of that number neces-
sary to prefer an indictment.11

Apropos the focus of the present paper it is worth noting that the
grand jury began, not as an adjunct of a court of justice, but as an
administrative agency of the king. The Domesday Book compiled in
the reign of William the Conqueror was in effect the work-product of
a primitive form of the grand jury. The task of that body at that date
was to determine the name and location of every person in the
kingdom and to ascertain the extent of his real and personal property
for purposes of levying royal taxes.12

As the grand jury came to be used more widely in criminal cases,
English citizens came to regard it less and less as an agency of the
Crown and to rely on it as a shield protecting them from arbitrary
prosecution by the Crown or false charges by their neighbors. In
1682 in the reign of Charles II, Sir Anthony Ashley Cooper, the first
Earl of Shaftesbury, was charged with high treason and brought be-
fore a grand jury. When that body reviewed the evidence and refused
to indict, Sir John Somers, then Lord Chancellor of England, said,
"Grand juries are our only security, inasmuch as our lives cannot be
drawn into jeopardy by all the malicious crafts of the devil, unless
such a number of our honest countrymen shall be satisfied in the
truth of the accusations."13

In this passage Lord Somers reflects the traditional view still held
by most Americans of the grand jury as a shield to protect accused

9. Morse, supra note 6, at 107.
10. Id. at 114.
11. Reeves, 3 History Of The English Law 133 ( ), cited in Morse, supra note 6, at
116 n. 71.
12. T. Plucknett, A Concise History Of The Common Law 112 (5th ed. 1956) [herein-
after cited as Plucknett].
13. Friedman, supra note 2, at col. 1.
persons from the zeal of over-eager prosecutors and to protect
the public interest from criminal injuries of every kind. It is precisely this
popular and trusting view which the present paper seeks to question.

By the time of the American Revolution the grand jury was an
accepted part of English criminal procedure and was readily incor-
porated into the American Bill of Rights. In fact, the earnest convic-
tion of the founding fathers about the basic importance of the grand
jury as a guarantee of personal rights poses a constitutional dilemma
today for those who would propose an alternative method of
bringing criminal charges.\textsuperscript{14}

In his endorsement of a Bill of Rights, Thomas Jefferson called the
right of trial by jury and the requirement of indictment by grand
jury the "sacred palladium of liberty."\textsuperscript{15} After passage of the first
ten amendments to the Constitution, Jefferson knew that the Fifth
Amendment and Article 3, Section 2, Part 3, of the original Constitu-
tion were only minimal statements of the right of trial by jury. He
continued to worry and to write about how this historic guarantee of
liberty could be protected and further refined. With deeper insight
than most of his peers he realized that the quality of justice in any
court using a jury could only be protected if the persons called to
duty were persons of integrity, prudence and independent
judgment.

In the General Assembly of the State of Virginia, 1798, Jefferson
proposed a plan to insure the selection of competent jurors for duty
on grand and petit juries. After listing a catalog of all the ills which
might result from ignorant, venal, avaricious, or prejudiced jurors, he
urged that the selection of jurors be left neither to chance nor to the
choice of members of the executive or judiciary bodies. Expressing
the hope that his fellow legislators might apprehend the danger of
the "gangrenous" infection of incompetent or misguided jurors
deciding important civil and criminal questions, Jefferson urged them
to arrest this malady before it could "reach the vitals of our political
existence."\textsuperscript{16}

His positive suggestion for guarding the integrity of both kinds of
juries was that persons be elected to this position.

\[\text{[It is proposed]}\] that the inhabitants of every precinct ... elect from
among themselves someone to be a juror, that from among those so
chosen in every county someone may be designated by lot, who shall
\begin{footnotes}
14. U.S. Const. amend. V: "No person shall be held to answer for a capital, or otherwise
infamous crime, unless on a presentment or an indictment of a Grand Jury. ..."
15. Padover, supra note 1, at 121.
16. Id. at 127.
\end{footnotes}
attend the ensuing session of the federal court within the state to act as grand and petty jurors, one of those from every senatorial district being designated by lot for a grand juror, and the residue attending to serve as petty jurors to be in like manner designated by lot in every particular case. . . . An institution of this outline, . . . so modified as to guard it against the intrigues of parties, the influence of power, or the irregularities of conduct, and further matured from time to time as experience shall develop its imperfections, may long preserve the trial by jury, in its pure and original spirit, as the true tribunal of the people, for a mitigation in the execution of hard laws when the power of preventing their passage is lost, and may afford some protection to persecuted man, whether alien or citizen, which the aspect of the times warns we may want.17 (Emphasis added.)

The focus of Jefferson's concern in each of these passages is on the protection assured to personal liberty by the grand and petit juries. Another perspicacious observer, visiting this country in its youth, who had been reared under the Civil Code of France, saw the American jury as more than merely an instrument of justice in a given trial at law. Alexis de Tocqueville perceived in the democratic American jury system, as contrasted with what he considered the generally aristocratic aura of the English jury, an enormously powerful political tool for the education of the American citizenry in its rights and duties.18

The modern historian can only puzzle over what reaction that remarkable Frenchman would have today if he could compare the reality of the operation of our grand juries with the sanguine predictions he made for them in 1831:

The jury contributes most powerfully to form the judgment and to increase the natural intelligence of a people, and this is, in my opinion, its greatest advantage. It may be regarded as a gratuitous public school ever open, in which every juror learns to exercise his rights, enters into daily communication with the most learned and enlightened members of the upper classes, and becomes practically acquainted with the laws of his country, which are brought within the reach of his capacity by the efforts of the bar, the advice of the judge, and even the passions of the parties . . . . I do not know whether the jury is useful to those who are in litigation; but I am certain it is highly beneficial to those who decide the litigation; . . . it [is] one of the most efficacious means for the education of the people which society can employ. . . . Thus the jury, which is

17. Id. at 128.
the most energetic means of making the people rule, is also the most efficacious means of teaching it to rule well.\textsuperscript{19} (Emphasis added.)

The present writer respectfully submits that in this euphoric prediction de Tocqueville's fond hopes have simply not been realized by the actual development of the grand jury. Even the most convinced exponent of indictment by grand jury could not today seriously endorse de Tocqueville's opinion that the grand jury does in fact "make the people rule" or that it does in fact teach them "to rule well." Quite the contrary, the grand jury, in modern practice has become a most unreliable instrument for assuring the independent power and the education of the people.

In the passages cited above from Somers, Jefferson, de Tocqueville, and the United States Constitution, several unspoken but important premises are that grand jurors:

1. will be selected by impartial means;
2. will be broadly representative of their community;
3. will be persons largely free of antecedent bias or prejudice on the questions before them;
4. will not be under the influence or direction of the public prosecutor;
5. will somehow be able to provide leadership of their own, sufficient to insure the independence of their action and the freedom of their judgment.

It is not possible to say categorically that all five of these necessary qualifications are regularly missing among most grand jury members today; but it is easily possible to defend the proposition that most of these requisites are absent in grand juries so often and so consistently today as to warrant the opinion that the grand jury has become in effect an administrative arm of the office of the public prosecutor and that by this transition from its original lofty and admirable purposes it often injures both the civil rights of the accused and, conversely, violates the common good of society by its selective and arbitrary enforcement of the law.

In reaching these conclusions the present writer makes no allegation or even veiled implication that the misuse of grand juries by prosecutors today results from any malicious effort by these public officers to pervert the system of criminal justice in our courts. If there is a villain in this story it is the American public which continues to adhere to a myth of grand jury integrity at the same time that it encourages prosecutors to act on the premise that ends justify means and that civil liberties can be abused by the courts in the

\textsuperscript{19} Id. at 181-182.
interest of some greater good apprehended by the vision of the prosecutor and by that portion of the citizenry for whom he considers himself guardian and spokesman. In support of this position five case histories from recent grand jury deliberations, one in Illinois, one in Ohio, and three in New Mexico, are summarized below.

THE KILLING OF FRED HAMPTON AND MARK CLARK

On December 4, 1969, at 4:45 A.M. fourteen Chicago police officers in plain clothes, under the direction of State’s Attorney Edward V. Hanrahan, staged a surprise raid on an apartment at 2337 West Monroe Avenue, the Chicago headquarters of the Black Panther Party. The officers had a search warrant authorizing them to look for illegal weapons.

In a sudden fusillade of gunfire two occupants of the apartment, Fred Hampton, Chairman of the Illinois Black Panther Party, and Mark Clark, a Panther Party leader from Peoria, were killed. Hampton was killed lying in bed. Clark was killed sitting in a chair facing the front door of the apartment. State’s Attorney Hanrahan later alleged that it was “conclusively proved that Panthers opened the battle by firing a shotgun blast through the apartment door.”

Leaders of the Black Panther Party then charged that the deaths of Hampton and Clark constituted murder, demanded an investigation of their deaths, and invited the public to examine their blood-stained and bullet-splattered apartment. Hundreds of citizens accepted the invitation to tour the apartment.

Responding to widespread public criticism of the police raid, State’s Attorney Hanrahan issued a statement, commending the members of the police raiding party for “their bravery, remarkable self-restraint, and their discipline in the face of this vicious Panther attack.”

In response to mounting public questioning of exactly what happened in the raid, the U.S. Department of Justice, acting through the

22. Interview with Patrick Whalen, Assistant Attorney General, State of New Mexico, in Santa Fe, New Mexico, November 26, 1971. Mr. Whalen was one of those allowed to inspect the Chicago apartment the day after the killings.
U.S. District Attorney in Illinois, convened a special federal grand jury on December 19, 1969, to investigate the killings.\(^2\)\(^4\)

On January 18, 1970, the Chicago coroner's jury made public its decision that the deaths of Hampton and Clark by police officers constituted justifiable homicide.\(^2\)\(^5\)

On January 30, 1970, the Cook County Grand Jury indicted the seven surviving Black Panther members who were in the party headquarters the night of the raid, charging them with various crimes, including that of attempt to commit murder.\(^2\)\(^6\)

On May 8, 1970, acting for the State of Illinois, Hanrahan suddenly dropped all these charges against the indicted Panthers.\(^2\)\(^7\)

On May 16, 1970, the federal grand jury issued a 243 page report of its findings, severely criticizing the Chicago Police Department for the conduct of the raid and the Chicago coroner for his report on the deaths of Hampton and Clark. A crucial portion of the federal grand jury's report, based on analyses by the crime laboratory of the F.B.I. found that 99 shots had been fired in the raid, that 82 of these were proved to have been fired by the police and that only 1 could be proved to have been fired by any of the nine occupants of the apartment.\(^2\)\(^8\)

Earlier testimony by Chicago police officers and by Hanrahan had firmly maintained that the police fired their weapons only after Panthers had first opened fire with a shotgun. The federal grand jury report stated, *apropos* these allegations:

> [U]nder questioning a Chicago police firearms examiner told the jury that the state's attorney's office pressured him into signing the [erroneous] report before he could examine all the evidence. He said he was told he would be fired if he refused to sign.\(^2\)\(^5\)

In a summary of the federal grand jury's conclusions, a writer for the *Wall Street Journal* said:

> The report was highly critical of the way the state's attorney's police handled physical evidence after the raid, noting that they preserved no fingerprints and failed to record or systematically identify the seized weapons. The post-raid performance of the Chicago Police Internal Inspection Division, which is supposed to investigate police performance, "was so seriously deficient that it suggested purposeful

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\(^{24}\) Id.

\(^{25}\) Id.

\(^{26}\) Id. at col. 2.

\(^{27}\) Id.


\(^{29}\) Id.
malfeasance. The raid was ill-conceived... not professionally planned [nor] properly executed.\textsuperscript{30}

The \textit{Wall Street Journal} in the same article concluded that the state's attorney's office in effect admitted that the indictments against the surviving Panthers were based on erroneous evidence by dismissing them.

Public response to the findings of the federal grand jury and to the decision by Hanrahan to drop all charges against the previously indicted Panthers amounted to an uproar. Petitions from 87 civic and legal associations promptly demanded further investigation of the killings.\textsuperscript{31}

On June 27, 1970, Chief Judge of the Chicago Criminal Court, Joseph A. Power, ordered the convening of a special Cook County Grand Jury and named a prominent and highly respected Chicago attorney, Barnabas F. Sears, to be the special prosecutor for the investigation.\textsuperscript{32} This grand jury was sworn in on December 7th and convened for the first time on December 7, 1970.\textsuperscript{33}

As special prosecutor, Barnabas Sears was assisted by four Chicago attorneys appointed by the court. Each of these attorneys was then and is now in private practice in Chicago. After almost five months of quiet and extensive investigation the special Cook County Grand Jury voted on April 21, 1971, to indict State's Attorney Edward V. Hanrahan and twelve members of the Chicago Police Department for criminal conspiracy in the deaths of Hampton and Clark.\textsuperscript{34}

On April 22nd, the day following the vote, and before that vote was made public, Judge Power summoned Barnabas Sears, his staff, and all 23 members of the grand jury into a closed door conference. Judge Power then ordered the Grand Jury to hear further testimony by Hanrahan and certain other witnesses who had testified earlier to the federal grand jury.\textsuperscript{35}

At this conference, Judge Power also directed the grand jury not to deliberate on any further indictment until after all the witnesses proposed by him had been heard. Sears refused to comply with the directives of the judge, stating that Power was "exceeding his authority."\textsuperscript{36} The privacy of this exchange was broken on April 26th when defense attorneys (representing several police officers) charged in

\textsuperscript{30} Id.
\textsuperscript{31} Thompson, supra note 20, at 1, col. 1.
\textsuperscript{32} Klein, supra note 28, at col. 6: "Sears... is a former president of the American Trial Lawyers' Association."
\textsuperscript{33} Chicago Sun-Times, Nov. 6, 1971, at 5, col. 4.
\textsuperscript{34} Id. at col. 1.
\textsuperscript{35} Hough, supra note 21, at 11, col. 2.
\textsuperscript{36} Thompson, supra note 20, at 1, col. 6.
open court that Sears had improperly pressured grand jury members to vote for indictment and called for dismissal of the grand jury on grounds that its deliberations had been "tainted." 3 7

In open court on April 26th Judge Power repeated his order to Sears to call Hanrahan and other specified witnesses before the grand jury. Sears again refused, saying, "No judge may interfere with or frustrate the proceedings or deliberations of the grand jury." 3 8

Angry, red-faced and frequently pounding the table, Judge Power excoriated Sears in open court for not calling the additional witnesses before the grand jury. "I now order you to subpoena all witnesses," he said. "I don't care who they are. I want them all to appear. Are you going to do that?"

Sears replied ... "I cannot submit to your direction. . . . You honestly believe you have the power you are seeking to exercise. You have absolutely no such power at all. It would impeach the integrity of the grand jury...." 3 9 I would be in violation of my oath (as special prosecutor) if I were to submit to the order and domination of your honor, and I therefore refuse." 4 0

Before the hearing of April 26th ended, Judge Power ordered Sears to pay a fine of $100 for his "contemptuous attitude" and ordered a continuing fine of $50 an hour against Sears, to run 24 hours a day, for as long as Sears refused to call the witnesses Judge Power wanted the grand jury to hear. 4 1

On May 4th Sears appealed to the Illinois Supreme Court asking it to set aside the fines levied against him by Judge Power and to set guidelines "to guide the future conduct of the special grand jury that is investigating a matter of grave public concern." 4 2 Without waiting for directions from the Supreme Court Judge Power ruled that he did have the authority to decide whether Sears had improperly influenced the decision of the Grand Jury. Power then summoned the foreman of the jury to his chambers for a private conference and later did the same with two other grand jurors. 4 3

On June 23rd the Supreme Court ruled that Sears was not in contempt of court by his refusal to call additional witnesses as ordered by Judge Power. The court also set aside the fines ordered

37. Id; Hough, supra note 21, at 11, col. 2-3.
39. Thompson, supra note 20, at 1, col. 6.
40. Chicago Sun-Times, Apr. 26, 1971, at 1, col. 1; Hough, supra note 21, at 11, col. 3:
"Sears agreed to hear grand jury testimony by Hanrahan, but refused to subpoena the federal witnesses as ordered by Judge Power."
41. Thompson, supra note 20, at 1, col. 6.
42. Id. at 6, col. 1.
43. Id.
by Power, and told him that he had no authority to meet privately with members of the Grand Jury and could only meet with them as a group and only if they requested such a meeting. 44

During May and early June the Grand Jury did hear extended testimony (25 hours in ten sessions) from Hanrahan, and then voted a second time (on June 24th) to return a true bill indicting him and the twelve Chicago police officers. 45 On June 25th the formal indictment, contained in a sealed envelope, was delivered by special prosecutor Sears to Judge Power. 46 Power accepted delivery, but did not open the envelope, and told Sears he did not intend to make public the findings of the grand jury and that he was appointing a special investigator to look into charges of improper procedures filed against Sears by the police officers named in the indictment. 47

On August 13, 1971, Sears asked the Supreme Court of Illinois to order Judge Power to make public the suppressed indictment, to revoke the appointment of the special investigator, and to drop the charges of misconduct filed against Sears. 48 On August 14th, the Chief Justice of the Illinois Supreme Court personally ordered the charges against Sears to be postponed indefinitely; and on August 24th, the Court ordered Judge Power to make public the indictments and to rescind his appointment of the special investigator. 49 Power complied with both directives at once, thus making formal and public charges of criminal conspiracy against State's Attorney Edward V. Hanrahan and twelve members of the Chicago Police Department. 50

No date has yet been set for the trial of these charges. However, 100 civic and legal associations, including the Chicago Bar Association, the Chicago Crime Commission, and the Chicago Council of Lawyers, have petitioned Hanrahan and the police officers indicted with him to take a leave of absence from their official posts until the criminal charges pending against them are resolved. 51 In similar situations in the past the Chicago Police Department has suspended its officers but had not done so in this instance. Neither Hanrahan nor any of the twelve officers has offered to take leave voluntarily. 52

As these indictments await trial, it is germane to the present dis-

44. Id. at col. 2.
45. Chicago Sun-Times, Nov. 6, 1971, at 1, col. 1.
46. Thompson, supra note 20, at 6, col. 2.
47. Hough, supra note 21, at 11, col. 3.
48. Id.
49. Id.
50. Thompson, supra note 20, at 6, col. 6.
52. Id. at 1, col. 2.
discussion to note that the Illinois statute governing the use of deadly force by a police officer effecting arrest carefully defines the precise limits of his exercise of this unusual authority. Whenever final judgment is made of the actions of the Chicago police officers who took the lives of Fred Hampton and Mark Clark, such judgment must find its validity in the specific terms of this particular statute.

THE KILLING OF ALLISON KRAUSE, JEFFREY MILLER, SANDRA SCHEUER, AND WILLIAM SCHROEDER

Kent, Ohio, is a small college town (population 31,500). Its biggest industry is Kent State University (22,000 students), often called the largest unknown university in the country. Students there tend to be first-generation collegians, from comfortable working class families. It has never been known for radicalism or activist students, even though it has seen five sizeable student rallies between 1968 and 1970.

These rallies, against the war in Vietnam, were orderly and peaceful. Four of them ended in a march to the Campus Commons which students and faculty have come to regard as a kind of Hyde Park where dissent can be safely expressed.

All college campuses are, or should be, alert for the annual “May Madness” which afflicts students near the end of the school year. Once upon a time this annual malady produced nothing more serious than panty-raids and contests among eaters of live goldfish.

Since Vietnam the “May Madness” has been the occasion for increasingly serious protests by students against the war. May 1, 1970 (a Friday), was an unusually warm day in Ohio. Students at Kent gathered that evening in the two drug stores and six bars which are the center of local social life. About 11 P.M. a group began shouting antiwar slogans in a street along the “strip.”

- Peace Officer's Use of Force in Making Arrest (A) a peace officer ... is justified in the use of any force which he reasonably believes to be necessary to effect the arrest and of any force which he reasonably believes to be necessary to defend himself or another from bodily harm while making the arrest. However, he is justified in using force likely to cause death or great bodily harm only when he reasonably believes that such force is necessary to prevent death or great bodily harm to himself or such other person, or when he reasonably believes both that:
  1. Such force is necessary to prevent the arrest from being defeated by resistance or escape; and
  2. The person to be arrested has committed or attempted a forcible felony or is attempting to escape by use of a deadly weapon, or otherwise indicates that he will endanger human life or inflict great bodily harm unless arrested without delay. Ill. Ann. Stat. ch. 38, § 7-5 (Smith-Hurd 1964). (Emphasis added.)

Curious patrons from the crowded bars moved to the street to hear the chanting. When the police arrived their first action was to close the bars. This move sent about 500 more persons into the streets. Displaced and angry bar patrons then began to toss rocks through store windows. Using tear gas the police pushed the crowd back to the campus. By 2 A.M. all was calm in Kent. Only 50 store windows had been broken. No one had been injured.

The next morning (Saturday) student leaders, faculty members and townspeople were apprehensive that the aftermath of the night before might provoke trouble. By evening a crowd of 500 students was milling about the Campus Commons. The old R.O.T.C. building, a converted W.W.II barracks, was a natural target. Its windows were soon shattered. Someone soaked a rag in gasoline drained from a parked motorcycle, ignited it, and tossed it through a broken window. When firemen tried to stop the fire their hoses were cut. The building was destroyed.

At 9:30 P.M. (Saturday) the Ohio National Guard, called out by Governor James Rhodes, moved onto the campus. The commanding officer decreed that they were there in order “to protect lives and property” on the campus. Sunday morning Governor Rhodes himself arrived and promptly changed the orders of the Guard, directing them “to break up any assembly on campus whether peaceful or violent.” Before leaving the campus the Governor revealed his intention to ask the legislature to make rock-throwing a felony in Ohio.

By Monday morning, after a night in which one student had been bayoneted, “the students were angry, the Guardsmen were weary, the town merchants short-tempered, and the university officials powerless.” Just before noon on Monday a crowd of students began to gather on the Campus Commons. One professor who was present said later there were about 600 in the crowd.

Shortly after noon (Monday), the Guard ordered the crowd to disperse and even though the students did begin to disperse, the Guard fired tear gas cannisters into the crowd. Before any rifle shots were fired the crowd had split into three groups, each heading for a different part of the campus.

At this point a portion of the Guardsmen turned sharply and marched up a hill, away from the students. Then, suddenly, some Guardsmen turned back and fired on the students with live ammunition. The Scranton Committee, appointed by President Nixon, later reported that at this time 29 Guardsmen fired 61 rounds in 13 seconds. Nine students were injured by rifle fire and four were killed. The dead were: Allison Krause, Jeffrey Miller, Sandra Scheuer,

55. Id. at 3, col. 3.
and William Schroeder. These four deaths occurred on May 4, 1970. On June 13th President Nixon named William Scranton, former Governor of Pennsylvania, Chairman of a national Commission on Campus Unrest and ordered the commission to investigate what happened at Kent State.

Ronald Kane, County Prosecutor for Portage County, in which Kent is located, stated publicly that he would convene a county grand jury to investigate the Kent State killings. On August 3rd Governor Rhodes ordered the Attorney General of Ohio to convene a special state grand jury to investigate the killings, thus blocking County Prosecutor Kane who had announced he would subpoena Governor Rhodes to testify before the county grand jury.56

On September 26th the Scranton Committee completed its report to President Nixon, concluding that “The indiscriminate firing of rifles into the crowd of students and the deaths that followed were unnecessary, unwarranted and inexcusable.”57

On October 16th the Ohio State Special Grand Jury returned its verdicts, exonerating the National Guard and its members from any responsibility for the deaths of four students and the injuries to nine others. The Ohio Special Grand Jury also at this time indicted one professor and 24 students for alleged offenses ranging from arson to first degree riot.58

On October 24th Governor Rhodes named three attorneys as special counsel to prosecute the persons indicted by the Ohio State Special Grand Jury. One of these attorneys, Seabury Ford, then told newsmen, “The National Guardsmen should have shot all the troublemakers [at Kent State].”59

On October 31st the New York Times made public a report by the F.B.I. which said there was “reason to believe that the claim by the National Guard that their lives were endangered by the students was fabricated subsequent to the event.”60 On the same day a suit was brought in Federal Court in Cleveland to have the report and the indictments of the Special Grand Jury dismissed.61

On November 9th Robert I. White, then President of Kent State, labeled the report of the grand jury “inaccurate” and said that it “disregarded clear evidence” opposed to its findings.62

57. Id.
58. Id.
59. Id.
60. Id.
61. Id.
62. Id.
3rd U.S. Senator Stephen Young of Ohio charged that the Ohio Grand Jury was "conceived in fraud and fakery . . . to clear Governor Rhodes of the blame for his abominable blunder." On January 28, 1971, U.S. District Judge William K. Thomas ordered the Special Grand Jury report expunged from the records in Ohio but allowed the grand jury's indictment of 25 persons to stand.

On July 21, 1971, U.S. Senator George McGovern, addressing the U.S. Senate, called the report of the Ohio Grand Jury "a whitewash of the agents of government involved in the events that led to the [Kent State] killings." McGovern then called for "a Federal Grand Jury to investigate the killings."

On July 22nd, Congressman William Moorhead (D.Pa.) entered in the Congressional Record his opinion that "murder has been committed at Kent State." Citing a report by Dr. Peter Davies on the Kent State killings, Moorhead said, "I hope that the work of Dr. Davies and the thousands of hours put into this investigation by friends and relatives of the four slain students is not wasted." The detailed and painstaking Davies report charged that 8 or 10 National Guardsmen had privately conspired to use live ammunition to quiet student unrest at Kent State and that, on a pre-arranged signal, from a commanding hilltop position, they had all wheeled and fired in unison, just as they had agreed in advance.

On August 13th, John Mitchell, U.S. Attorney General, expressed his personal sorrow and that of the Department of Justice to the parents of the four students killed at Kent State and then announced that, despite the conclusions of the Scranton Committee, there would be no further investigation of the Kent State killings, and that the files of the Justice Department on this case were being closed at once.

On September 30th Ohio's 8th District Court of Appeals, upheld the suit of Arthur Krause against the State of Ohio in a $2 million wrongful death action on behalf of his daughter, Allison, who had been killed. Rejecting the state's argument of sovereign immunity, the Court of Appeals ruled that the trial court had erred in dismissing the Krause suit and ordered it back to trial a second time, saying, "The State of Ohio is responsible . . . for the tortious acts of its

63. Id.
64. Id.
65. Id. at 2, col. 2.
66. Id.
authorized agents." 69 Thus far no second trial has been convened to hear this civil suit.

On October 20th, Dr. Glenn Olds, newly appointed President of Kent State, went to Washington to present to President Nixon a petition signed by a majority of the Kent State faculty and student body asking the President to convene a Federal Grand Jury to resolve "in the dignity of our federal court system" the conflicting reports about the killings at Kent State. 70 To date no further action has been taken by the President or the Department of Justice on this request.

The most penetrating analysis of what happened at Kent State is a 227 page report by Dr. Peter Davies, a New York insurance broker. Davies' report, entitled "An Appeal For Justice," is a devastating attack, alleging the miscarriage of justice in Ohio and a damning indictment of the Ohio State Special Grand Jury. 71

The conduct of National Guardsmen on active duty in Ohio is governed by the Ohio Code of Military Affairs. This code has a stern statute governing the act of killing by military personnel. 72 The key

69. Id. at 2, col. 3.
70. Id.
71. Davies, supra note 67, at 19-S, col. 1-2. The conclusion of the report merits quoting:
   To deny the existence of an element in our society whose hatred for student protesters is such they not only approve of the killings, but genuinely wish more had been shot, is to deny a reality. To assume that a uniform whether of the police or the National Guard, cleanses the wearer of his prejudices is to assume they are not human beings. ...
   [B]y what law do we deny the parents of those killed and wounded the right to know exactly what the F.B.I. investigation found concerning their children that day, especially those who were shot to death. . . . This is not a police state where people are shot down by militia and the nation compelled to accept without question the reasons given by those responsible for the shooting. . . .
   Four human lives . . . may very well have been deliberately taken by a number of men using their uniform, anonymity, and subsequent lies to satisfy their personal animosity toward a "class of persons" they had decided were long overdue for punishment. It was, as one Guardsman said, "Time they got it like that." That this might be possible is deeply disturbing . . . because it raises the . . . spectre of another My Lai. . . . We would much prefer to let the dead rest in peace and the reasons why they are dead at ages 19 and 20 remain buried with them.
   Unfortunately, however, we must also reconcile their deaths with our Constitution and our laws. We would rather forget about Kent State than face up to this challenge. Why?
72. Any person subject to this code who, without justification or excuse, unlawfully kills a human being, when he:
   (A) Has a premeditated design to kill;
   (B) Intends to kill or inflict great bodily harm;
   (C) Is engaged in an act which is inherently dangerous to others and evinces a wanton disregard of human life; or
   (D) Is engaged in the perpetration of [a felony] ;
words in this statute, *apropos* the Kent State killings are "without justification or excuse" and "unlawfully kills." The crimes and penalties specified in this statute do not apply if the killing in question was done "lawfully" or "with justification."

The fact that the National Guard in Ohio has chosen not to invoke this statute against any Guardsman indicates that the state commander of the National Guard and his legal advisors are satisfied that the deaths of the four students at Kent State were, in some sense, "justified." The Ohio Grand Jury obviously concurs in this opinion. This judgment, however, on its face, is directly contrary to the Anglo-American common law tradition of respect for human life as an ultimate value. It is still an open question whether the judgment of the Ohio Grand Jury and National Guard is as offensive to the American citizenry at large as it is to students of the law.

### THE KILLING OF PAUL GREEN

Sometime between January and April of 1971 Nancy Crowe and Paul Green decided that they were in love and would soon be married. Nancy, recently divorced, had an infant son in her custody. Paul was unmarried. Nancy's mother, Mrs. Ethel Tappan, was bitterly opposed to the forthcoming marriage and made it her business to inform the police in Ruidoso, New Mexico, that Nancy and Paul were living together as man and wife although they were not yet formally married.

On April 23rd, in mid-afternoon, Ruidoso Police Chief O. S. Montes and another officer went to the Sierra Blanca Cabins where Paul and Nancy and the baby lived and where Paul worked as a handyman. Chief Montes did not produce a warrant. Alleging that he had a formal complaint, Chief Montes arrested Nancy Crowe and Paul Green on a charge of lewd cohabitation. To this date no signed complaint and no warrant for the arrests have been made public by the Ruidoso police.

The criminal charge of unlawful cohabitation is classified by statute in New Mexico as warranting, for a first conviction, a warning by the judge not to continue such conduct; and only if the parties

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73. Beaumont, *Three Police Killings*, The New Mexico Review, Aug.-Sept. 1971, at 6-8. Unless otherwise noted this detailed and analytical article is the source of the factual material in this section of this paper [hereinafter cited as Beaumont].
persist in this practice after such a warning are they considered guilty of a petty misdemeanor.\textsuperscript{74}

Appearing in Ruidoso Municipal Court on the afternoon of their arrest Paul and Nancy admitted that they were living together, thus pleading guilty under the statute. Municipal Judge Austin H. Pritchett found them both guilty, suspended Nancy's sentence, and sentenced Paul to 30 days in jail and a fine of $100. Before being sentenced neither Paul nor Nancy had been represented by counsel. After being released Nancy went to their home. Paul asked permission to telephone an attorney. While being allowed to make this call he spotted an open door leading to the outside, and though hampered by a recent and severe axe-wound in the instep of his right foot, he decided to make a break and bolted for the open door.

What happened next is not precisely clear from the record. Police officer Victor Brooks who was guarding Green later testified that he called out to Green, "Stop, or I'll shoot" and that Green responded, "Go ahead."\textsuperscript{75} This exchange of words, as reported, is disputed.

What is not disputed is that Officer Brooks, at a distance of 200 feet, fired two shots from his .38 calibre service revolver. One shot struck Paul Green in the back of his head at the base of the skull and killed him instantly.

Officer Brooks was then arrested on a warrant signed by the Assistant District Attorney for Lincoln County. The charge was voluntary manslaughter. It has since been alleged that Brooks was reassured by the District Attorney that he should not worry about the charge, because "the grand jury would take care of it."\textsuperscript{76}

By a decree of George P. White, Mayor of Ruidoso, May 18th was

\textsuperscript{74} The New Mexico statute governing this crime reads, in its entirety, as follows:

Unlawful cohabitation consists of persons who are not married to each other cohabiting together as man and wife.

Whoever commits unlawful cohabitation upon the first conviction shall be warned by the judge to cease and desist such unlawful cohabitation.

Whoever persists in committing the crime of unlawful cohabitation after being warned is guilty of a petty misdemeanor. N.M. Stat. Ann. § 40A-10-2 (Repl. 1964) (Emphasis added.)

\textsuperscript{75} Beaumont, supra note 73, at 7, col. 3.

\textsuperscript{76} Id. at 8, col. 1. This allegation is repeated in The New Mexico Review, Dec. 1971, at 4, col. 3: "An informed source within the state legal system confided to The Review that following Brooks' arrest, the D.A. told him not to worry because 'the grand jury would take care of it.'" This issue of the New Mexico Review also carries an important postscript to the story of Paul Green. James Rowen, in The Politics of Murder, at 4, col. 3, quotes a letter dated May 13, 1971, written by E. H. Williams, Jr., District Attorney for Lincoln County, New Mexico, to R. E. Thompson, counsel for Thomas Green, the brother of Paul Green. The letter reads: "While we i.e. the office of the D.A. do not attempt to impose our will or wishes on a grand jury, since this is not our purpose, nor permitted by law. I think it is accepted that in presenting evidence and working with the Grand Jury, the prosecution is in a good position to make its views known." (Emphasis added.)
declared to be "Victor Brooks Fund Day." Fourteen service stations in Ruidoso agreed to donate to the defense fund for Victor Brooks one cent from the sale of every gallon of gasoline sold at their pumps on that day. A special account was opened in the Security Bank to receive donations for the Brooks Defense Fund. Mayor White and Alfred Gonzales, a building contractor, urged their fellow citizens to be generous to the fund.

In the end the fund was not needed and Victor Brooks Day was never held because on May 12th the Grand Jury of Lincoln County, after examining all the facts in the killing of Paul Green, declared that the actions of Officer Brooks on April 23rd constituted justifiable homicide under the laws of New Mexico and that Brooks was free of all criminal charges. 77

Three of the four sections of the New Mexico statute governing justifiable homicide by a police officer do not apply to the facts in the Green case. Section A refers to a death sentence ordered by a court. Green's death was not ordered by the court. Sections C and D refer only to fleeing felons. Green was not a felon. Hence section B is the only part of the statute which could possibly make the killing of Green justifiable by law in New Mexico, and then only if it could be said by a competent court or jury that his death was necessary to "execute some legal process or to the discharge of any other legal duty." Clearly Officer Brooks had a duty under the law to keep Green in custody. In order to fulfill this duty, was it necessary that Officer Brooks kill Green? The Grand Jury of Lincoln County said "yes" and closed the case.

77. In the light of this verdict it is pertinent to cite the precise terminology of that portion of the Criminal Code of New Mexico which defines justifiable homicide committed by a police officer:

Homicide is justifiable when committed by a public officer . . . .
A. in obedience to any judgment of a competent court;
B. when necessarily committed in overcoming actual resistance to the execution of some legal process or to the discharge of any other legal duty;
C. when necessarily committed in retaking felons who have been rescued or who have escaped, or when necessarily committed in arresting felons fleeing from justice; or
D. when necessarily committed in order to prevent the escape of a felon from any place of lawful custody or confinement. N.M. Stat. Ann. § 40A-2-7 (Repl. 1964). (Emphasis added.)

In New Mexico escape from jail by one "lawfully committed to . . . jail" is a fourth degree felony. N.M. Stat. Ann. § 40A-22-8 (Repl. 1964). By invoking this statute one could argue that Paul Green, though convicted only of a misdemeanor, was, in attempting to escape from jail, a fleeing felon and therefore vulnerable to the use of deadly force by his jailers. However, the invocation of this statute raises the correlative and more difficult question of whether Paul Green's conviction and sentencing constituted lawful commitment under New Mexico Statute 40A-10-2, supra note 74, defining unlawful cohabitation as a petty misdemeanor and fixing a warning, not a jail term, as the statutory penalty for a second offense.
Paul Green now lies buried in Gate of Heaven Cemetery, in Aspen Hills, Maryland. According to the verdict of a grand jury of his fellow citizens in Ruidoso, his death was "necessary" for the common good of the citizens of New Mexico.

THE KILLING OF ROY GALLEGOS

Before dawn on the morning of June 22, 1971, a tourist who had parked his mobile home for the night near the Capitol in Santa Fe, New Mexico, reported to the State Police that a burglary was in progress at the Free Fraser Pharmacy on College Street. Within a block of this pharmacy that night more than a dozen State Police officers and National Guardsmen were on active patrol, guarding state buildings as a precaution following rumors of possible civil disorders in Santa Fe. In the wake of widespread riots a week earlier in Albuquerque, Santa Fe was alert and apprehensive.

State Police arrived at the pharmacy in minutes and promptly arrested three male suspects. Before Santa Fe City Police arrived all three youths were securely in the custody of the State Police. One of those arrested, Roy Gallegos, age 19, was at the time of his arrest allegedly very much under the influence of some drug or narcotic.

After being turned over to City Police Officer Vance Mabry, young Gallegos made a break for freedom. It is uncontested that there were at least ten eyewitnesses to what happened next. It is also uncontested that Officer Mabry then drew his .38 calibre service revolver, fired one shot at the fleeing suspect, from a distance of 100 feet. The one bullet entered the back of Gallegos' head. He was pronounced dead on arrival at St. Vincent's Hospital, Santa Fe.

In subsequent efforts to explain exactly what happened the night Roy Gallegos was killed, two sharply different accounts were given to the public. One of these came from Santa Fe Police Chief Felix Lujan, the other from Father Miguel Baca, a Franciscan Friar, assistant pastor of St. Anne's Catholic Church in Santa Fe, who is also a confidant of two youth groups in Santa Fe, La Gente and La Juventud del Barrio de Cristo Rey.

The account of Chief Lujan contains the following statements:
1. When Officer Mabry arrived on the scene of the alleged burglary, all three suspects were safely in the custody of State Police officers;
2. When Gallegos broke away, Officer Mabry shouted several warnings to him;

78. Roy Gallegos, The New Mexico Review, Aug.-Sept. 1971, at 11-12 [hereinafter cited as Gallegos]. Unless otherwise noted all the factual material in this story of Roy Gallegos' death is taken from this article, written by the staff of The New Mexico Review.
3. Gallegos refused to halt;
4. Mabry then fired one and only one shot at Gallegos;
5. Gallegos fell to the pavement, was rushed to the hospital, and was pronounced dead on arrival;
6. At least 10 eyewitnesses were present at the killing.

In sharp contrast to these allegations, Father Baca’s report on the incident alleges that:
1. Gallegos had both hands handcuffed behind his back when he was shot;
2. A state police officer was running after Gallegos and was but a few steps away from him at the moment he was killed;
3. Gallegos was running directly toward a large number of state police and national guardsmen who could easily have apprehended him without violence;
4. Other officers shouted to Officer Mabry, “Don’t shoot”;
5. The locked handcuffs were removed, at least partially, from Gallegos after he was shot;
6. Gallegos was under the influence of drugs at the time he was shot;
7. Gallegos resided in Santa Fe, was well known to the Santa Fe Police, and, had he escaped, could have been easily located and arrested later.

It should be noted that neither Chief Lujan nor Father Baca was present at the scene of the killing. However, it is “known that the State Police report . . . contains the same accounts of the killing which Father Baca released [to the press].”

Roy Gallegos was killed on June 22nd. Father Baca made his account public nine days later on July 1st. The next day, Santa Fe County District Attorney James Thompson announced that the grand jury of that county would convene on July 19th to determine whether any criminal charges should be filed against Officer Mabry. In his announcement Thompson contradicted the earlier testimony of Chief Lujan and alleged that the shot which killed Gallegos was not aimed at him but was intended as a warning shot. Thompson did not file any criminal charge against Officer Mabry.

On July 19th the grand jury assembled in Santa Fe, heard the evidence, and declared the death of Roy Gallegos justifiable homicide. In reaching this conclusion the grand jury cleared Officer Mabry of any criminal charge and declared that the shot which killed Roy Gallegos was a warning shot.

It is reasonable to suppose that Mr. Thompson’s instructions to the grand jury shared with them the decision handed down by the

79. Id. at 12, col. 1.
Supreme Court of New Mexico in 1937 in the case of *State v. Vargas.* This case turned on the definition of when deadly force is necessary to prevent the escape of a prisoner. In that decision the Supreme Court upheld the conviction (for voluntary manslaughter) of a Taos County Deputy Sheriff who had shot and killed a runaway prisoner who had pelted the officer with rocks.

In addition to the New Mexico statute on justifiable homicide and the official interpretation of that statute by the Supreme Court, other standards are available to the citizenry of New Mexico for judging the "necessity" of the death of Roy Gallegos.

Chapter 4, Article 1, Section 21 of the Rules and Regulations of the New Mexico State Police authorizes an arresting officer who is being "feloniously attacked . . . to use deadly force when all other means of accomplishing the arrest . . . fails." The same passage, however, warns the arresting officer that "The risk of possible liability for the use of excessive force far outweighs the necessity of preventing the escape of such a person."

When asked for an explication of this passage in the State Police Regulations, Wirt Jones, a veteran agent of the F.B.I. and now Director of the New Mexico State Law Enforcement Academy, said, "In our courses we follow the longstanding policy of the F.B.I.: You do not shoot a fleeing man." Douglas Davis, a police instructor at the New Mexico Academy, when queried about the instruction given on this point in his classes to novice police officers, replied, "It is definitely stressed that [the police officers] will only fire when their life is in danger or [when] they are in danger of bodily harm."

The Santa Fe Police Department has its own course of police instruction. One of the instructors in this program is State Police Sergeant Melvin West. When asked the content of his instruction on this question, West said that all members of the Santa Fe Police Department are formally instructed that "[t]he use of deadly force is not justified for crimes against property, such as a burglary when there is no one else in the building."

It is impossible for the average citizen, reading the records available to the public, to reconcile Officer Mabry's deliberate use of deadly force against an unarmed, drug-intoxicated, fleeing teenager with these several explicit standards laid down by the Rules and Regulations of the State Police, by the pedagogical norms of the New Mexico Law Enforcement Academy, and by the training program of the Santa Fe Police Department.

80. 42 N.M. 1, 74 P.2d 62 (1937).
81. Gallegos, *supra* note 84, at 12, col. 3.
82. *Id.*
83. *Id.*
Citizens not members of the grand jury in Santa Fe and not privy to the instructions given to the grand jury by District Attorney Thompson can only speculate on how the killing of Roy Gallegos could possibly be classified as justifiable homicide under the statutory definition of this defense in New Mexico. As in the case of Paul Green, this defense turns on the definition of what is "necessary" killing.

Roy Gallegos now lies buried in Rosario Cemetery in Santa Fe. And, according to the verdict of his fellow citizens in Santa Fe, his death was "necessary" for the common good of the citizens of New Mexico.

THE KILLING OF BETTY GRIFFITHS

On the afternoon of August 10, 1971, in Albuquerque's South Valley, Betty Griffiths, age 16, was riding in a car with some friends. They parked in front of Boy's Market, a grocery store, and Betty entered the store alone. The clerk on duty was Robert Lee Goodwin, age 33, whose father is the owner of this store. The girl presented a signed check for $33 to the clerk.

Sensing that the check might be either stolen or forged, the clerk went to a telephone to verify the signature. At this point Betty quickly left the store, without making any purchase, without waiting for any change, and without taking the check. Goodwin, armed with a .38 calibre revolver, took off in pursuit of the girl. She did not re-enter the car but fled down the street on foot. Goodwin caught up with her after a chase of two blocks. In the struggle which followed, Goodwin wrestled the girl to the ground. At this point Goodwin fired one shot from the .38. The bullet entered the girl's skull at her chin and passed out the top of her head. She died two days later.

No charges were filed against Goodwin but on August 18th the facts of the case were presented by the District Attorney of Bernalillo County to the grand jury. On the same afternoon the grand jury declared that the death of Betty Griffiths was an act of justifiable homicide.


85. The statute in New Mexico governing justifiable homicide by a citizen is similar to but slightly different from that governing justifiable homicide by a police officer. It reads as follows:

Homicide is justifiable when committed by any person in any of the following cases:

A. When committed in the necessary defense of his life, his family or his
The facts surrounding the killing of Betty Griffiths do not fit any one of the three grounds for justifiable homicide by a citizen in New Mexico. At the time of her death she was unarmed. She was at no time an aggressor and posed no threat to the person or the property of the storekeeper. She was in full flight from the man who killed her. She had never actually cashed the check she originally presented. She had obtained no merchandise from the grocery store.

Citizens reading the news account of the death of this sixteen year old girl might well ask, especially if they have any knowledge of the statutory requirements for the defense of justifiable homicide in New Mexico, how a grand jury could possibly decide that her death was in any way commensurable with any injury she allegedly intended to inflict on the storekeeper or his property. However, according to the verdict of a grand jury of her fellow citizens in Bernalillo County, her death was somehow “necessary” for the common good of the citizens of New Mexico.

ANALYSES OF FIVE “NO BILLS”

Taken together these five case histories lend current support to the conclusion of attorney Leon Friedman that “grand juries . . . have lost their way.”86 The fact that a U.S. Senator would call for a federal grand jury to investigate the findings of a state grand jury,87 that a special grand jury, called in response to a public outcry, could return thirteen indictments against the same law enforcement officers who had just been exonerated by a grand jury in the same county,88 that a blue-ribbon presidential commission and a state grand jury investigating precisely the same facts could reach diametrically opposed conclusions,89 would seem to justify the conclusion that grand juries no longer enjoy or deserve the public confidence they once had.

The case histories cited above also lend credence to the growing need for a more sober, rational, and credible system of public justice throughout the State of New Mexico. The times of the McCarthy era, and the perpetuation of an atmosphere in which a grand jury's verdict is somehow “necessary” for the common good, are long past. A grand jury's responsibility is not to serve as the public's mouthpiece, but to weigh the evidence and determine with objectivity and fairness whether the defendant is guilty or innocent. The administrative complexities associated with a federal grand jury investigation should not be permitted to insulate a grand jury from the public's scrutiny. In the case histories cited above, it appears that the jury's verdicts were made in an atmosphere of political expediency rather than in the interest of justice. The need for a grand jury system which is independent of political pressures is great.

ANALYSES OF FIVE “NO BILLS”

The need for a grand jury system which is independent of political pressures is great.

property, or in necessarily defending against any unlawful action directed against himself, his wife or family;

B. When committed in the lawful defense of himself or of another and when there is a reasonable ground to believe a design exists to commit a felony or to do some great personal injury against such person or another, and there is imminent danger that the design will be accomplished; or

C. When necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed in his presence, or in lawfully suppressing any riot, or in necessarily and lawfully keeping and preserving the peace. N.M. Stat. Ann. § 40A-2-8 (Repl. 1964). (Emphasis added.)

86. Friedman, supra note 2, at E8, col. 1.
88. See text accompanying note 50, supra.
89. See text accompanying notes 57 and 58, supra.
public opinion that the grand jury is no longer the best instrument for assuring justice in the indictment of persons suspected of crime. Many knowledgeable persons are increasingly puzzled if not angered at the evident discrepancy between the statutes defining justifiable homicide and the decisions of grand juries applying these statutes to specific homicides. Such persons, many of them lawyers and jurists, find it increasingly difficult to make the act of faith our system has traditionally asked all citizens to make in the grand jury system.\(^9\)

On the record of these five cases, reasonable and temperate citizens could argue that Governor Rhodes and his special prosecutors crassly manipulated the state grand jury in Ohio; that Illinois State's Attorney Hanrahan controlled the deliberations of the Cook County Grand Jury and directed its verdict; that Judge Power's crude attempts to bulldoze the Special Grand Jury in Cook County would almost certainly have succeeded, had it not been for the courage and integrity of Barnabas Sears; and that the conclusions of justifiable homicide reached by grand juries in Lincoln, Santa Fe, and Bernalillo Counties, investigating the deaths of Paul Green, Roy Gallegos, and Betty Griffiths are on their face contrary both to the statutory and the decisional law of the State of New Mexico.\(^9\)

The specific, radical purpose of grand jury investigations is to decide whether there is an actionable criminal charge against a person suspected of some form of criminality. A true bill returned by a grand jury proves neither guilt nor innocence. It merely states that the jury panel concurs in the opinion that there seems to be enough evidence for or against a person to bring on his case for trial or to dismiss it.

In each of the cases just cited the grand juries decided that the evidence did not warrant a trial. And yet, four of those five cases are back in court today, and the fifth will probably be there soon. The reason these several causes are back in court, on either criminal or civil charges (of wrongful death), is that competent and courageous attorneys have persuaded the courts that there is an arguable case at the root of each of these fact-situations.

Apropos the Kent State killings, a civil action for the wrongful death of Allison Krause, filed by her father, has already survived an appeal in the U.S. Court of Appeals for the Eighth District.\(^9\)

In Illinois, contrary to the findings of the county grand jury and

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90. Friedman, supra note 2. See also Tigar, An Eight-Point Indictment of the Grand Jury System, Center Report, Dec. 1971, at 13-14. This article, a paper recently presented by Michael Tigar at the Center For The Study of Democratic Institutions, is a penetrating criticism of the fundamental lack of due process in the operations of grand juries as they function now.

91. See text accompanying notes 29, 30, 40, 59, 77, 80, 83 and 85, supra.

the county coroner’s jury, the case of criminal conspiracy against the state’s attorney and twelve police officers is currently being prepared for trial.93

In Santa Fe, despite a grand jury decision that no arguable case could lie against Officer Vance Mabry, a civil action for wrongful death will probably be filed against him in District Court.94

In Albuquerque, summons and complaint in a civil suit for wrongful death have already been filed against the grocery clerk who killed Betty Griffiths.5

At this date no civil action is pending in Ruidoso against Officer Brooks for his killing of Paul Green. It would appear, however, that the family of Paul Green may well soon file charges of wrongful death against Officer Brooks, even though the Grand Jury of Lincoln County has said the facts of that case do not warrant any criminal charge.96

From Anglo-Norman times until recent decades the grand jury has acquired a good name as a shield protecting the citizenry from arbitrary prosecution by the state and from false charges by their fellows. However, the modern development of procedural protections, particularly in criminal actions, has largely usurped these traditional functions of the grand jury.

The decisions cited above make at least an arguable case that in many instances political officers or prosecuting attorneys now control and direct grand juries in order to protect narrow and subjective interests contrary to the common good and even to shield from prosecution law officers whose conduct on its face violates the law. To say all this is not to say that opposite conclusions were necessary in any or all of the cases cited above, but rather to say that in each instance there is at least an arguable charge of criminal conduct against the persons responsible for the nine listed homicides. And in each of these instances the grand jury said there is no such arguable case to be raised.

THE LIMITS OF DISCRETIONARY JUSTICE

By a curious recent shift in its allegiance the grand jury has lost its historical identity as a shield protecting innocent citizens from unwarranted charges by officers of the law, and has become a shield

93. See text accompanying note 52, supra.
94. Interview with Joan Friedland, Counsel for the family of Roy Gallegos, in Albuquerque, New Mexico, Nov. 29, 1971.
protecting officers of the law from possible criminal charges by the citizenry. The grand jury has thus become in effect an administrative agency, executing in secrecy and with unlimited discretionary power, the policies, also determined in secret, of law enforcement officers who continue to maintain the fiction that the grand jury is a free and autonomous body impartially ferreting out objective truth. This proposition is simply no longer believable.

In the uncharted land of discretionary justice and selective enforcement of the law the once virtuous grand jury has, to borrow the words of Jefferson, "to the will and designs of power." 9

Discretion in the exercise of police or prosecutorial power is both good and necessary. It is, however, a discretion that has grown to unexpected proportions with few checks on its misuse, aside from the native integrity of its users or the intervention of such unforeseen participants as Barnabas Sears or the corrective decrees of courts of appeal. In an excellent series of lectures entitled *Discretionary Justice,* 98 Professor Kenneth Culp Davis has put the glass of scholarly scrutiny on the curious historical process whereby police and public prosecutors have become administrative agents exercising wide discretionary powers, yet accounting to no bar of review for their possible abuse of such discretion.

The complex government of twentieth century society has found it necessary and desirable to delegate larger and larger amounts of discretion to administrative and regulatory agencies on every level of government. However, contemporaneously with this delegation has come a variety of legislative controls tailored to the needs of different agencies and marking the permissible limits for the exercise of such discretion.

In the field of discretionary justice, however, the development of controls has not followed the pattern of other administrative agencies, partly because police and prosecutors have not usually been considered administrative agents, and partly because American prosecutors and police officers have come to believe that they deserve the unique privilege of "discretionary power... completely uncontrolled."

Contrasting this American tradition with the West German pattern, Davis readily favors the latter:

The seeming unanimity of American prosecutors that their discretionary power must be completely uncontrolled is conclusively contradicted by the experience of West Germany, where the dis-

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cretionary power of prosecutors is so slight as to be almost non-existent, and almost all they do is closely supervised.

I think we Americans should learn from other nations that the huge discretionary power of prosecutors need not be unconfined, unstructured, and unchecked. We should re-examine the assumptions to which our drifting has led us. ...99

Davis wisely refrains in this passage from any sinister implication that the manipulation of discretionary justice in our system of law is a deliberate plot. He calls it merely a process of unplanned and unintentional "drifting," whereby "ungranted power of selective enforcement [of the law] has been assumed by police and by prosecutors at all levels. ..."100

In the same lecture, Davis warns that it is high time for the unexamined assumptions underlying this process of drift to be re-examined. One such basic assumption, accepted as axiomatic among many prosecutors, is that their office owes greater protection to the police than to the citizenry at large. This assumption is categorically false and yet it is regularly invoked by prosecutors, and by grand juries whose only guidance and direction come from prosecuting attorneys.101

When Davis speaks of the "best administrative agencies" he means those with such procedural norms as openness, full disclosure, public records, equal treatment, accountability, published rules, and the availability of appeal. Judged by these norms the secrecy of much discretionary justice, as decided by police and prosecutors today, fails to measure up to the minimal standards of procedural due process. And nowhere in the legal system is this criticism more valid than in its application to the grand jury method of bringing individual criminal indictments.

CONCLUSION

Defenders of the grand jury system of indictment might argue that it is not beyond repair and deserves to be rehabilitated. Possibly, they argue, it is not too late to adopt Jefferson's suggestion that

99. Id. at 224.
100. Id. at 219.
101. In exposing the fallacy of this secret premise Davis minces no words:
	In our entire system of law and government, the greatest concentrations of
	unnecessary discretionary power over individual parties are not in the regula-
	ry agencies but are in police and prosecutors. Unfortunately, our traditional
	legal classifications—"administrative law," "the administrative process," and
	"administrative agencies"—have customarily excluded police and prosecutors.
	[T]here has been a failure to transfer know-how from advanced agencies, such
	as the federal regulatory agencies, to such backward agencies as the police
departments of our cities. I think that both police and prosecutors, federal as
grand jurors be elected by vote of their peers in every county of each state. Such a procedure would undoubtedly recruit for grand jury service persons of sufficient independence of mind and talent to protect jury panels from their all but total dependence on prosecutors in the present system. Even among articulate critics of grand jury decisions one seldom hears the charge of venality or corruption on the part of jurors. The typical criticism is that the jurors are assured independence by law but in practice must rely on their own members or on the prosecutor to chart their course. Regularly the helpful prosecutor is only too happy to be their navigator and to guide them to his home port.

Theoretically one could argue that rehabilitation of the grand jury system by new methods of jury selection is possible. The larger question remains, however: Is it desirable? In his comprehensive study of the grand jury, Wayne Morse concluded that this system, as a device for bringing criminal indictments, was too expensive, too cumbersome, too inefficient, too slow, too vulnerable to outside pressures, and too likely to result in a miscarriage of justice to be worth the effort and cost of revamping its procedures.102

The Morse study was published in 1931. Its focus of investigation and its conclusions are remarkably fresh today, showing few signs of being dated. However, in the four decades since its completion the erosion of public confidence in the grand jury system of indictment has been so great that the present writer would seriously doubt the wisdom or the possibility of trying to rehabilitate this once healthy but now corrupted institution.

In the spectrum of problems currently troubling our system of criminal justice by far the greater effort of study and reform has been concentrated at what Davis calls the “rules end” of the spectrum rather than at the other end of “discretionary justice.” Davis

102. The three principal conclusions of the Morse study, based on detailed questionnaires answered by hundreds of judges and attorneys were that:

1. The grand jury should be retained as a special instrumentality for investigating charges of political fraud or of corruption among public officer-holders;
2. The grand jury should be dropped as a regular mode of bringing criminal indictments;
3. The process of filing a criminal information should replace indictment by grand jury, except in those rare cases where the judge deems it necessary or where the prosecuting attorney can by motion demonstrate to the judge that some particular public good would be accomplished by convening a grand jury. Morse, supra note 6, at 273-74.
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says flatly that the rules end is the easy half of the task. Rules are easier to make, to explicate, and to study than are those myriad prudential judgments to be made by persons exercising wide-ranging discretion. The latter field is uncharted and has fewer surveyor's monuments fixed in the terrain to guide scholars who would study or chart this vast region of jurisprudence. The present paper, with its frequent use of newspaper stories, oral interviews, prudential judgments, and personalized interpretation is but one modest step in the direction urged by Professor Davis when he counseled his confreres in administrative law:

If we stay within the comfortable areas where jurisprudence scholars work and concern ourselves mostly with statutory and judge-made law, we can at best accomplish no more than to refine what is already tolerably good. To do more than that, we have to open our eyes to the reality that justice to individual parties is administered more outside courts than in them, and we have to penetrate the unpleasant areas of discretionary determinations by police and prosecutors and other administrators, where huge concentrations of injustice invite drastic reforms.\(^\text{103}\)

One of those unpleasant areas mentioned by Davis is that of criminal indictment by grand jury. Challenging this venerable institution could well prove non-habit forming for young lawyers or law school students. Nonetheless it is a field ripe for reform. Those who would reform it might well adopt as their model the sage counsel of one judge from Wisconsin who answered the Morse questionnaire in 1930 with these words:

I can think of no possible use for a grand jury where there is a conscientious prosecutor. Where the prosecutor is no good I cannot imagine where a grand jury is going to make him any better. . . .\(^\text{104}\)

It is the considered conclusion of the present writer that conscientious prosecutors working to file charges by criminal information in open court are far more likely to advance the cause of justice in our society than are the indictments handed down by the secret, unstructured, leaderless, and unaccountable deliberations of grand juries as these bodies operate today.

Criminal indictment by grand jury is often praised as an ornament of distinction in Anglo-American common law. In England this venerable arm of the law was abolished by Act of Parliament in 1933.\(^\text{105}\) A span of 38 years is a decent interval for us to allow before rushing to adopt any innovation in the law merely because the English have done it already.

103. Davis, supra note 98, at 215.
105. Plucknett, supra note 12, at 112 n. 1.