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Grand Jury Reports: An Examination of the Law in Texas and Other Jurisdictions.

Richard Meyer

GRAND JURY REPORTS: AN EXAMINATION OF THE LAW IN TEXAS AND OTHER JURISDICTIONS

RICHARD MEYER

A grand jury report consists of information released by a grand jury which, unlike an indictment, does not necessarily contemplate a subsequent trial nor is it necessarily accusatory in nature.[1] Moreover, at least one court has concluded that a report contains nothing upon which a court can act.[2] In Texas, grand juries have issued numerous reports over the years relating to general matters of public interest as well as those relating to misconduct of public officials and organized crime.[3] Recent litigation, however, has revealed that there is very little Texas law regarding a grand jury's authority to issue any report.[4] The Texas Constitution does not define the scope of

1. Dession, *The Inquisitorial Functions of Grand Juries*, 41 YALE L.J. 687, 705-706 (1932); *see* Wood v. Hughes, 212 N.Y.S.2d 33, 34 n.1 (1961); Shoemaker v. State, 260 P.2d 521, 522 (Utah 1953). Generally, an *indictment* is a formal accusation by a grand jury presented to the court in which it is impaneled, charging that a person named therein is guilty of a criminal offense. Application of United Elec., Radio & Mach. Workers of America, 111 F. Supp. 858, 863 n.13 (S.D.N.Y. 1953); *In re* Report of Grand Jury of Baltimore City, 137 A. 370, 372 (Md. Civ. App. 1927); 4 W. Blackstone, Commentaries *302. A *presentment* is similar to an indictment in that it is an accusation made by a grand jury, but it differs from an indictment in that it is treated as an instruction for an indictment, made by the grand jury and presented to the prosecutor. *Ex parte* Faulkner, 251 S.W.2d 822, 823 (Ark. 1952); *In re* Davis, 257 So. 2d 884, 886 (Miss. 1972). *See generally* 4 W. Blackstone, Commentaries *301; Kuh, *The Grand Jury "Presentment": Foul Blow or Fair Play?*, 55 COLUM. L. REV. 1103 n.1 (1955); Comment, *Constitutional Law—Judicial Powers—Legality of the Grand Jury Report*, 52 MICH. L. REV. 711, 714-15 (1954); Comment, *The Propriety of the Grand Jury Report*, 34 TEXAS L. REV. 746, 747 (1956).

2. Rector v. Smith, 11 Iowa 302, 307 (1860); *see* Rich v. Eason, 180 S.W. 303, 305-306 (Tex. Civ. App.—Beaumont 1915, no writ). Although some courts have used the terms "report" and "presentment" interchangeably, to avoid confusion in this paper the term "report" will be used to signify grand jury commentary where no crime is charged, that is, where no one is presented to the district attorney for prosecution.

3. *See* Bexar County Grand Jury Report of May 2, 1972; THE TEXAS OBSERVER, Nov. 15, 1974 at 8 (one grand jury report was issued in Bexar County, Texas between 1959 and 1968; 12 reports were issued between 1968 and 1972).

4. On January 2, 1975, a hearing was held in the 175th District Courtroom of Bexar County, Texas, Judge Preston H. Dial presiding. The hearing involved the special report of the July-August 1974 Grand Jury, sitting in Bexar County, which reported on the local energy crisis. Counsel on both sides of the controversy acknowledged the absence of controlling Texas authority, relied on the law in other jurisdictions, and resorted to several law review commentaries. The sparsity of Texas authority, however, was first recognized by the Beaumont Court of Civil Appeals in 1915. Rich v. Eason, 180 S.W. 303, 304 (Tex. Civ. App.—Beaumont 1915, no writ). Only two courts of civil appeals and one Attorney General's Opinion have indirectly addressed a Texas Grand Jury's authority to issue reports. Dunnam v. Dolezal, 346 S.W.2d 631 (Tex. Civ. App.—San Antonio 1961, writ ref'd) (only indirectly addressed by reference to *Rich*); Rich v. Eason, 180 S.W. 303 (Tex. Civ. App.—Beaumont 1915, no writ); TEX. ATT'Y GEN. OP. No. M-1171 (1972).

grand jury inquiry and the Texas Code of Criminal Procedure, dealing solely with indictments, is also silent on the matter of grand jury reports.[5] The lack of adequate Texas authority, therefore, necessitates an examination of the law in other jurisdictions and a discussion of the policy considerations concerning the issuance of grand jury reports.

GRAND JURY REPORTS: PRO AND CON

The policy considerations involving grand jury reports have been discussed by several commentators.[6] For example, it has been argued that suppression of grand jury reports regarding matters of public welfare would hamper democratic government.[7] Therefore, the grand jury should not remain silent if conditions contrary to the public interest are brought to its attention.[8] This function of voicing the "conscience of the community" includes the power to investigate alleged delinquent conduct of public officials, and publicly report the results of the investigation, *non-criminal aspects* of the alleged delinquency notwithstanding.[9] This is especially true when a grand jury investigation is prompted by a citizens' committee, and where a voluntary request is made by the citizens of the locality for such a report.[10] Furthermore, reports are especially important today when the complexity of government prevents the inquiring citizen from knowing important matters concerning the public welfare.[11] Such democratic ideals are indeed desirable; however, contrary considerations exist which oppose grand jury reports.

The Supreme Court of Nevada has stated that grand jury procedures are not conducive to a final determination being fairly reached where the rights of persons or the issue of wrongdoing is involved.[12] Anglo-American justice involving an open adversary process is better suited.[13] More recently, the Supreme Court of Mississippi stated that the basic principles of jurispru-

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5. The TEX. CODE CRIM. PROC. ANN. art. 20.09 (1966) states:
The grand jury shall inquire into all offenses liable to indictment of which any member may have knowledge, or of which they shall be informed by the attorney representing the State, or any other credible person.

6. Dession, *The Inquisitorial Functions of Grand Juries*, 41 YALE L.J. 687, 691, 706-11 (1932); Kuh, *The Grand Jury "Presentment": Foul Blow or Fair Play?*, 55 COLUM. L. REV. 1103, 1115-22 (1955); Comment, *The Propriety of a Breach of Grand Jury Secrecy When No Indictment Is Returned*, 7 HOUS. L. REV. 341, 349-51 (1970); Comment, *The Propriety of the Grand Jury Report*, 34 TEXAS L. REV. 746, 755 (1956); Note, *The Grand Jury As An Investigatory Body*, 74 HARV. L. REV. 590, 592 (1961).

7. Ryon v. Shaw, 77 So. 2d 455, 457 (Fla. 1955).

8. Wood v. Hughes, 212 N.Y.S.2d 33, 46 (1961) (Froessel, J., dissenting).

9. Owens v. State, 59 So.2d 254, 256 (Fla. 1952).

10. *Id.* at 256.

11. *In re* Presentment by Camden County Grand Jury, 89 A.2d 416, 443 (N.J. 1952); *see* Monroe v. Garrett, 94 Cal. Rptr. 531, 533-34 (Ct. App. 1971) (opportunity to see government on broad basis); Comment, *Constitutional Law—Judicial Powers—Legality of the Grand Jury Report*, 52 MICH. L. REV. 711, 725-26 (1954).

12. *In re* Report of Ormsby County Grand Jury, 322 P.2d 1099, 1102 (Nev. 1958).

13. *Id.* at 1102.

dence such as due process and fairness are incompatible with "conviction by innuendo," where a report attacking an individual is the result of an *ex parte* grand jury proceeding.[14] Several courts have recognized as an essential part of this argument, that the injury to an individual named in a report arises not only from grand jury procedure, but also from the public belief that a grand jury speaks with judicial authority, "thereby giving to its deliverances a solemnity which impresses the public."[15] In Texas, the grand jurors are even instructed that they are acting as a judge.[16]

A second policy consideration in opposition to grand jury reports relates to separation of powers.[17] The Wisconsin Supreme Court has determined that the legislature, as opposed to the grand jury, has the authority to investigate matters contrary to the public welfare as well as the power to act upon such matters.[18] Accordingly, the grand jury should not invade the province of the legislative branch of government.[19] The legislature is best suited for the task since it has the authority as well as the power to act upon the results of its investigation, whereas the grand jury's power terminates with its report.[20]

A third policy consideration is that legal remedies available to a party criticized in a report may be inadequate. A Minnesota federal district court has suggested that once a report has been published in the newspapers, the mere expunging of the report might result in further unwanted publicity, as opposed to the desired end of removing the adverse effect of the original pub-

14. *In re* Davis, 257 So. 2d 884, 888 (Miss. 1972). Other courts have been even more critical of grand jury reports which point to unindicted individuals. *Ex parte* Burns, 73 So. 2d 912 (Ala. 1954) (a perversion of the grand jury system); State v. Interim Report of Grand Jury, 93 So. 2d 99, 102 (Fla. 1957) (the work of a lynch mob; torture on the rack); *In re* Camden County Grand Jury, 169 A.2d 465, 476 (N.J. 1961) (an odious practice); *accord, In re* Brevard County Grand Jury Interim Report, Fall Term 1970, 249 So. 2d 709, 710 (Fla. Dist. Ct. App. 1971). *See also* Texas District & County Attorney's Ass'n, HANDBOOK FOR GRAND JURORS 6 (1974) (ultimate function of grand jury is to indict).

15. State v. Bramlett, 164 S.E. 873, 875 (S.C. 1932); *see* State v. Platt, 192 So. 659, 673 (La. 1939); *In re* Camden County Grand Jury, 169 A.2d 465, 471 (N.J. 1961). The problem is not necessarily that the public believes the report to be a verdict of guilt, but rather that rebuttal by the named individual does not have the same "official weight" as the accusation. *In re* Report of Grand Jury of Baltimore City, 137 A. 370, 376 (Md. Civ. App. 1927).

16. Texas Dist. & County Attorney's Ass'n, HANDBOOK FOR GRAND JURORS 13 (1974).

17. Nixon v. Sirica, 487 F.2d 700, 790-92 (D.C. Cir. 1973) (Wilkey, J., dissenting); Hammond v. Brown, 323 F. Supp. 326, 345 (N.D. Ohio), *aff'd*, 450 F.2d 480 (6th Cir. 1971); Application of United Elec., Radio & Mach. Workers of America, 111 F. Supp. 858, 863-64 (S.D.N.Y. 1953); Comment, *Constitutional Law—Judicial Process—Legality of the Grand Jury Report*, 52 MICH. L. REV., 722, 719-20 (1954).

18. *In re* Grand Jury Report, 235 N.W. 789, 791 (Wis. 1931).

19. Hammond v. Brown, 323 F. Supp. 326, 345 (N.D. Ohio), *aff'd*, 450 F.2d 480 (6th Cir. 1971); *In re* Grand Jury Report, 235 N.W. 789, 791 (Wis. 1931).

20. *See In re* Report of Ormsby County Grand Jury, 322 P.2d 1099, 1102 (Nev. 1958).

licity.[21] The futility of expungement may very well account for the lack of litigation in some states. For example, due to the secrecy surrounding a grand jury investigation, it is possible that a citizen will not know that a report concerning him is going to be issued.[22] When the report is made public, it is too late to erase the harmful effects to the named party—the report is already common knowledge to all. Though he may have the legal right to quash the report, such action will serve no practical purpose.[23] Furthermore, an action in libel may not be sufficient,[24] as in Texas where an action will not lie in the absence of proving malice.[25]

Traditionally, the proceedings of a grand jury are required to be kept secret.[26] Surprisingly, this rule of secrecy normally associated with grand jury proceedings has been rarely utilized to oppose the grand jury's authority to make reports. This matter of secrecy has arisen most frequently in federal cases.[27] From these cases it is apparent that the need for secrecy outweighs the need for disclosure when a report refers to an unindicted individual, but such is not the case when a report of a general nature refers to conditions in a community.[28]

It is evident that the policy considerations presented against the use of grand jury reports outweigh those supporting their continued use. The doc-

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21. United States v. Conelly, 129 F. Supp. 786, 787-88 (D. Minn. 1955). A New York court has aptly stated that "[t]he muffling of the echo of a false accusation is an extremely difficult task; the only acceptable remedy in may [sic] cases is the silencing of the original argument." *In re* Investigation of South Mall Financing, 330 N.Y.S.2d 170, 174 (Albany County Ct. 1972); *cf.* U.S. v. Briggs, Crim. No. 73-2027 (5th Cir., June 13, 1975).

22. *But see* 18 U.S.C. § 3333(b)(2) (1970) (mandatory provision for notifying party named in report providing party with opportunity to answer).

23. People v. McCabe, 266 N.Y.S. 363, 367 (Sup. Ct. 1933); *see* Comment, *Constitutional Law—Judicial Powers—Legality of the Grand Jury Report*, 52 MICH. L. REV. 711, 717 (1954) (expungement is a shallow victory).

24. People v. Superior Court of Santa Barbara County, 531 P.2d 761, 767 n.10 (Cal. 1975).

25. Dunnam v. Dolezal, 346 S.W.2d 631, 632 (Tex. Civ. App.—San Antonio 1961, writ ref'd) (report is conditionally privileged); Comment, *Civil Liability of Grand Jury Members For Libelous Matter In Unauthorized Reports*, 1 SOUTH TEXAS L.J. 193, 197 (1954).

26. For a general discussion on reports and grand jury secrecy, see Comment, *The Propriety of a Breach of Grand Jury Secrecy When No Indictment Is Returned*, 7 HOUS. L. REV. 341, 343 (1970).

27. *See* Hammond v. Brown, 323 F. Supp. 326, 345 (N.D. Ohio), *aff'd*, 450 F.2d 480 (6th Cir. 1971); *In re* Report & Recommendation of June 5, 1972 Grand Jury, 370 F. Supp. 1219, 1227-30 (D.D.C. 1974); Application of United Elec., Radio & Mach. Workers of America, 111 F. Supp. 858, 866 (S.D.N.Y. 1953).

28. A recent case limits grand jury secrecy by maintaining that there is no justification for suggesting that the traditional practice of grand jury secrecy renders the proper function of grand jury reports meaningless. *In re* Report & Recommendation of June 5, 1972 Grand Jury, 370 F. Supp. 1219, 1228 (D.D.C. 1974). A balance must be struck between the need for disclosure and the need for grand jury secrecy. *Id.* at 1228. But the issue is still met with some skepticism even in those jurisdictions where the grand jury has a statutory right to report. For example, in New York a dissenting judge has

trine of separation of powers, grand jury secrecy, the inadequacy of legal remedies, and the demands of due process support this conclusion.

ENGLISH COMMON LAW

Some courts have looked to the English common law to determine whether a grand jury has the authority to issue reports.[29] English grand juries made reports concerning numerous matters of public interest, such as maintenance of public property and misconduct in public office; the reports being used to compel officials, communities, and private citizens to fulfill their lawful duties.[30] The existence of these reports has prompted several American judges to conclude that such reports were authorized,[31] but a conclusion based on the *mere existence* of reports, however, should not alone sanction their use, especially in light of the prevailing policy considerations against their use. There have been no reported cases in the English courts where a grand jury's authority to issue reports was expressly questioned by the judiciary. Where reports were authorized, it is clear that such authorization was pursuant to statute.[32] Therefore, the best available argument to support common law authority is that in the absence of a statute, the issuance of reports was customary and hence, maintained a solid historical foundation.[33]

Though Blackstone recognized the existence of grand jury reports, his *Commentaries* indicates that reports were outside the grand jury's duties. According to Blackstone, the grand jury is to receive indictments which are only in the nature of an inquiry or accusation, "and the grand jury are only to inquire . . . whether there be sufficient cause to call upon the party to answer it."[34] He concludes that if the grand jury determines that the indictment is groundless, they should state "not a true bill" and then discharge the party "*without further answer.*"[35]

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stated:

> [A legislative] . . . reexamination might well result in the conclusion that grand jury secrecy is of greater value than grand jury reports and that, as a result, the entire reporting process should be scrapped. . . .

In re Second Report of November, 1968 Grand Jury of County of Erie, 309 N.Y.S.2d 297, 303 (1970).

29. *See e.g., In re* Grand Jury January, 1969, 315 F. Supp. 662, 675 (D. Md. 1970); *In re* Monmouth County Grand Jury, 131 A.2d 751, 755 (N.J. 1957); Wood v. Hughes, 212 N.Y.S.2d 33, 36 n.3 (1961); Shoemaker v. State, 260 P.2d 521, 522 (Utah 1953).

30. 10 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 147-49 (1938).

31. *In re* Grand Jury January, 1969, 315 F. Supp. 662, 675 (D. Md. 1970); *In re* Presentment by Camden County Grand Jury, 89 A.2d 416, 443 (N.J. 1952); Wood v. Hughes, 212 N.Y.S.2d 33, 46-47 (1961) (Froessel, J., dissenting).

32. *See* 10 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 147-49 (1938) (procedure approved by statute).

33. *In re* Presentment by Camden County Grand Jury, 89 A.2d 416, 443 (N.J. 1952); Comment, *The Propriety of a Breach of Grand Jury Secrecy When No Indictment Is Returned*, 7 HOUS. L. REV. 341, 349 (1970); *cf. In re* Grand Jury Proceedings, 479 F.2d 458, 460 (5th Cir. 1973) (giving historical instances of grand jury reports).

34. 4 W. BLACKSTONE COMMENTARIES *303.

35. *Id.* at *305 (emphasis added).

The Supreme Court of Maryland has interpreted the functions of the common law grand jury in a manner similar to Blackstone and Lord Mansfield. In *In re Report of Grand Jury of Baltimore City*,[36] the Maryland Court of Appeals concluded that the function of the grand jury at common law is confined to investigation of criminal matters, and unless a violation under the penal statutes is found to have occurred, "they are bound to refrain from making public the results of their investigation."[37]

Predominantly, however, judicial opinion is divided as to whether the English grand jury had authority to issue public reports prior to the abolition of the English grand jury system in 1933.[38] This split in authority is probably the result of a misunderstanding of the functional operation of English reports as well as the citing of weak authority. For example, the English case often discussed in relation to grand jury reports at common law is *Earl of Macclesfield v. Starkey*.[39] In that case, the Earl of Macclesfield sued a member of the grand jury in a libel action, subsequent to that body's issuance of a report charging the Earl with disloyal conduct, without indicting him for a crime. Plaintiff contended not only that the report was libelous, and that Starkey was guilty of participating in a conspiracy, but that the report was outside the grand jury's jurisdiction. He based this last contention on the fact that the report originated from a Chester County grand jury while plaintiff's alleged conduct took place in Berkshire County. Plaintiff argued policy considerations similar to those attributed to Lord Mansfield nearly one century earlier.[40] Defendant argued that the report was privileged, not only because reports are authorized, but because a report constitutes grand jury action made pursuant to "conscience" in an attempt to protect the country.[41] It was also alleged that no conspiracy to libel plaintiff ever existed,[42] and that the remarks contained in the report were merely inferential accusations, not the proper basis for a libel action.[43] *Without opinion*, the court rendered judgment for the defendant.[44] Consequently, it is unknown if the basis for the decision was immunity based on grand jury jurisdiction, immunity contingent on the absence of malice, plaintiff's failure to prove conspiracy, or plaintiff's failure to prove that defendant's remarks were more than mere in-

36. 137 A. 370 (Md. Ct. App. 1927).
37. *Id.* at 372-73.
38. *Compare In re* Grand Jury January, 1969, 315 F. Supp. 662, 675 (D. Md. 1970) *and In re* Monmouth County Grand Jury, 131 A.2d 751, 755 (N.J. 1957) *with* Wood v. Hughes, 212 N.Y.S.2d 33, 36 (1961) *and* Shoemaker v. State, 260 P.2d 521, 522 (Utah 1953) (citing cases holding that common law grand juries were without authority to issue reports absent indictment).
39. 10 How. St. Tr. 1330 (1684-85).
40. *Compare* Rex v. Roupell, 98 Eng. Rep. 1185, 1186 (1776) *with* Earl of Macclesfield v. Starkey, 10 How. St. Tr. 1330, 1347 (1684-85).
41. Earl of Macclesfield v. Starkey, 10 How. St. Tr. 1330, 1355-60, 1382 (1684-85).
42. *Id.* at 1351, 1355.
43. *Id.* at 1358.
44. *Id.* at 1414.

ferential accusations.[45] The absence of judicial opinion in *Macclesfield* in conjunction with the concept that any authority to report is collateral to the libel issue,[46] forces the conclusion that this case is very weak authority for the proposition that English grand juries had common law authority to issue reports.

FEDERAL AUTHORITY

In *Application of United Electrical, Radio & Machine Workers of America*,[47] petitioners moved to expunge from the court's records a document, filed by a federal grand jury, linking individuals to a possible conspiracy. Although there were no indictments, the allegations in the document could have been the basis for a criminal proceeding.[48] The court reasoned that the policy behind the indictment process is defeated when the grand jury makes public its suspicions through a widely publicized report.[49] In deciding to expunge the report, the court noted its objections to this report were inapplicable to reports of a general nature touching upon general conditions in the community.[50]

Hammond v. Brown[51] involved a grand jury report concerned with the Kent State University incident in which four students were killed by national guardsmen. The court maintained that in rendering a written report referring to individuals, a grand jury in effect determines guilt and acts more like a petit jury. The court concluded that the report injures a citizen's right to due process, and consequently, held that the report was issued wholly without lawful authority.[52] Though both *United Electrical* and *Hammond* expressly denied grand jury reporting powers, each decision enumerates the factors militating against specified types of reports but refrains from a blanket denial of the reporting process.

In the later case of *In re Report & Recommendation of June 5, 1972 Grand Jury*,[53] a federal district court reasoned that a report which does not suffer from the objectionable qualities noted in *Hammond* and *United Electrical* is within the grand jury's authority and should not be expunged.[54] Accordingly,

45. Notes on the trial manuscript, however, made by an undisclosed writer strongly indicate that reports are without any authority in law. *Id.* at 1359 n.↑, 1361 n.||, 1382 n.*.

46. *See Ex parte* Robinson, 165 So. 582, 583 (Ala. 1936); *cf.* Rich v. Eason, 180 S.W. 303, 304-306 (Tex. Civ. App.—Beaumont 1915, no writ).

47. 111 F. Supp. 858 (S.D.N.Y. 1953).

48. *See In re* Report & Recommendation of June 5, 1972 Grand Jury, 370 F. Supp. 1219, 1225 (D.D.C. 1974) (discussing *United Elec.*).

49. Application of United Elec., Radio & Mach. Workers of America, 111 F. Supp. 858, 866 (S.D.N.Y. 1953).

50. *Id.* at 869.

51. 323 F. Supp. 326 (N.D. Ohio), *aff'd*, 450 F.2d 480 (6th Cir. 1971).

52. *Id.* at 357.

53. 370 F. Supp. 1219, 1224 (D.D.C. 1974).

54. *Id.* at 1226.

a grand jury report is proper where it: (1) draws no accusatory conclusions; (2) deprives no one of an official forum in which to respond; (3) is not a substitute for indictments where indictments may properly be found; (4) does not infringe on other branches of the government; and (5) does not render moral or social judgments.[55]

In 1970, Congress enacted a statute authorizing a federal grand jury to issue reports referring to specified individuals in limited circumstances.[56] The statute resulted from the work of the President's Commission on Law Enforcement and Administration of Justice which recommended that at least one grand jury be impaneled annually in each jurisdiction evidencing major crime activity; that when the grand jury terminates, it should be authorized to file reports regarding organized crime conditions in the district.[57] Under the statute, a "special" grand jury is authorized to make reports concerning the non-criminal misconduct of an appointed official while in office or employee where organized crime is involved, or where organized crime exists in the federal district.[58] When a report criticizes an identified individual, procedures are established for notice, opportunity to present evidence, and judicial review prior to publication.[59] Furthermore, the named party has a statutory right to file an answer which becomes part of the report, subject to the district court's power to pare irrelevant, prejudicial, or scandalous material.[60] Considering this statute in conjunction with *In re Report & Recommendation*, a federal grand jury has authority to report on public officials or organized crime pursuant to strict procedural guidelines. Otherwise the grand jury is limited to issuing reports of a general nature touching on conditions in the community.[61]

The federal statute presents a model that the states, including Texas, should follow. Not only does it clearly define the grand jury's powers, but it takes into account many of the policy considerations voiced by the state courts, and in many ways the statute reconciles opposing arguments. By including public officials, it recognizes that officials may be called to account for their actions while in office. Moreover, by allowing the criticized party to file an answer which becomes an appendix to the report, it permits the

55. *Id.* at 1226; *see In re* Grand Jury Proceedings, 479 F.2d 458, 460 n.2 (5th Cir. 1973). *But cf.* U.S. v. Briggs, Crim. No. 73-2027 (5th Cir., June 13, 1975).

56. 18 U.S.C. § 3333 (1970).

57. U.S. Code Cong. & Admin. News 4014-15 (1970).

58. 18 U.S.C. § 3333(a)(1)(2) (1970).

59. *Id.* § 3333(b).

60. *Id.* § 3333(c)(2).

61. *But see* Hammond v. Brown, 323 F. Supp. 326 (N.D. Ohio), *aff'd*, 450 F.2d 480 (6th Cir. 1971) in which the court stated:

> [A]s long as no public officials or private citizens are singled out for derogatory comment . . . [reports are] . . . *though without express or implied foundations in law*, harmless and may serve some good.

Id. at 345 (emphasis added); *cf.* U.S. v. Briggs, Crim. No. 73-2027 (5th Cir., June 13, 1975).

criticized party to officially counter the allegations of the grand jury thereby ensuring due process. The statute also authorizes the party to call witnesses in his own behalf, thus making the resulting report more compatible with due process.[62] The positions asserted by the grand jury in the report must be based on a preponderance of evidence,[63] yet the named party need not meet that requirement in his answer.[64] Finally, in the interests of justice, "the court may issue such orders as it shall deem appropriate to prevent unauthorized publication of a report."[65] Thus, under the statute, the report is not filed independently by the grand jury, but under a court's authorization.

AUTHORITY AMONG THE STATES

Grand juries have traditionally issued two types of reports without an accompanying indictment: (1) reports specifically referring to an individual or group; and (2) reports concerning general conditions in the community.[66] It is the former type of report which has resulted in the majority of litigation. In these cases, the movant was generally either attempting to have the report expunged,[67] or sue the grand jury for libel.[68] Libel cases should not be construed as authority for grand jury reports, such authority being a mere collateral issue.[69] In Texas, for example, dictum may suggest disapproval of reports,[70] yet the privilege is enforced to protect the jurors from liability.[71] The overwhelming weight of authority denies grand juries the power to issue reports criticizing identified individuals.[72] And in those jurisdictions where reports criticizing individuals have traditionally met with judicial approval,

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62. *Id.* § 3333(b)(2).

63. *Id.* § 3333(b)(1).

64. *See id.* § 3333(c)(2) (answer must merely state the facts and law constituting the defense).

65. *Id.* § 3333(c)(1).

66. For a discussion regarding the fine line of demarcation between these two types of reports, see State v. Interim Report of Grand Jury, 93 So. 2d 99, 103 (Fla. 1957) (difficulty in drawing "line of demarcation" is no reason for failing to observe line).

67. *E.g., In re* Brevard County Grand Jury Interim Report, 249 So. 2d 709, 710-11 (Fla. Dist. Ct. App. 1971); *In re* Richard Roe Investigation, Etc., 360 N.Y.S.2d 123, 124 (Sup. Ct. 1974).

68. *E.g.*, People v. Superior Court of the County of Santa Barbara, 108 Cal. Rptr. 209, 214 (Dist. Ct. App. 1973); Dunnam v. Dolezal, 346 S.W.2d 631, 632 (Tex. Civ. App.—San Antonio 1961, writ ref'd); Rich v. Eason, 180 S.W. 303, 305-306 (Tex. Civ. App.—Beaumont 1915, no writ).

69. *See Ex parte* Robinson, 165 So. 582, 583 (Ala. 1936).

70. Rich v. Eason, 180 S.W. 303, 305-306 (Tex. Civ. App.—Beaumont 1915, no writ).

71. *See id.* at 305-306; Rich v. Eason, 214 S.W. 581, 583 (Tex. Civ. App.—Beaumont 1919, no writ); Annot., 42 A.L.R.2d 825 *et seq.* (1955), *cited in* Dunnam v. Dolezal, 346 S.W.2d 631, 632 (Tex. Civ. App.—San Antonio 1961, writ ref'd).

72. *E.g., Ex parte* Burns, 73 So. 2d 912, 915 (Ala. 1954); *In re* Brevard County Grand Jury Interim Report, Fall Term 1970, 249 So. 2d 709, 710-11 (Fla. Dist. Ct. App. 1971); Harris v. Edmonds, 166 S.E.2d 909 (Ga. Ct. App. 1969).

as in Florida and New Jersey, there is a discernible trend towards either eliminating such reports,[73] or limiting their application.[74]

In most cases, express statutory authority is required.[75] In New York, for example, a grand jury has statutory authority to report on public officials, even where there is no evidence of a criminal offense.[76] The statute provides that the court has a duty to thoroughly examine the record to determine if the report complies with statutory requirements before it accepts the report.[77] Additionally, there must be attached to the report as an appendix, the answer of the party named therein.[78] This provision, as well as others analogous to those of the federal statute concerning grand jury reports, satisfies many of the policy considerations criticizing the use of reports.[79]

Several cases, however, support a theory of *implied* authority wherein a grand jury having the statutory power to investigate a fortiori has the authority to report.[80] The rationale behind this theory is that if a grand jury is authorized to inquire into public offenses, a necessary element of this authority is the power to disclose the results of the inquiry.[81] This reasoning,

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73. *Compare* Ryon v. Shaw, 77 So. 2d 455, 457 (Fla. 1955) (report may criticize public official) *with In re* Brevard County Grand Jury Interim Report, Fall Term 1970, 249 So. 2d 709, 710 (Fla. Dist. Ct. App. 1971) (report may not criticize any individual). Florida is now in agreement with a majority of the state decisions opposing reports. The departure from *Ryon* occurred in Interim Report of Grand Jury, 93 So. 2d 99, 102 (Fla. 1957).

74. *In re* Presentment by Camden County Grand Jury, 89 A.2d 416, 444 (N.J. 1952) (report may criticize public official). But this aspect of *Camden* was expressly overruled nine years later in *In re* Presentment Made by Camden County Grand Jury, 169 A.2d 465, 476 (N.J. 1961). On remand, the New Jersey Superior Court stated:

> If . . . the evidence supporting the censorious comment . . . [of the report] . . . is conflicting or susceptible of diverse influences, or if any doubt exists . . . as to whether the supporting facts are conclusive, the challenged portion of the report should be suppressed or expunged.

In re Presentment Made by Camden County Grand Jury, 170 A.2d 258, 259 (N.J. Super. Ct. 1961); *accord, In re* Presentment of Camden County Grand Jury, 304 A.2d 573, 574-75 (N.J. Super. Ct. 1973) (report did not deal with ascertainable individuals); *In re* Presentment of Essex County Grand Jury, 264 A.2d 253, 255 (N.J. Super. Ct. 1970) (proof must be conclusive).

75. *See, e.g.*, Kelly v. Tanksley, 123 S.E.2d 462, 463 (Ga. Ct. App. 1961); Mathews v. Pound, 403 S.W.2d 7, 10 (Ky. Ct. App. 1966) (citing holdings in other jurisdictions); *In re* Davis, 257 So. 2d 884, 887 (Miss. 1972).

76. *See* NEW YORK CRIM. PROC. LAW § 190.85 (McKinney 1975).

77. *In re* Investigation of South Mall Financing, 330 N.Y.S.2d 170, 171 (Albany County Ct. 1972); NEW YORK CRIM. PROC. LAW § 190.85(2) (McKinney 1975).

78. *In re* First Report, Etc., 354 N.Y.S.2d 966, 968 (Sup. Ct. 1974); NEW YORK CRIM. PROC. LAW § 190.85(3) (McKinney 1975).

79. *Compare* NEW YORK CRIM. PROC. LAW § 190.85(3) (McKinney 1975) *with* 18 U.S.C. § 3333(c)(2) (1970). For example, the aggrieved party has an official forum in which to respond: His answer becomes part of the report.

80. *See* People v. Superior Court, 108 Cal. Rptr. 209, 213 (Dist. Ct. App. 1973); Application of Quinn, 166 N.Y.S.2d 418, 422 (N.Y. Ct. Gen. Sess. 1957). *But see* Wood v. Hughes, 212 N.Y.S.2d 33, 37-38 (1961).

81. Irwin v. Murphy, 19 P.2d 292, 293 (Cal. Dist. Ct. App. 1933); *see* People v. Superior Court, 108 Cal. Rptr. 209, 213 (Dist. Ct. App. 1973).

however, is defective. Grand jury silence "means" that the grand jury failed to find probable cause regarding the commission of a criminal offense; finding a "no bill" as opposed to a "true bill" is in itself a prima facie "report" of innocence.[82] Thus, where the grand jury indicts someone, it informs the public regarding probable cause of crime, and the failure to indict does not inform any less. Second, if the power to inquire justifies the power to report, then the grand jury would have the power to report on *any* citizen in connection with any investigation, even where probable cause of a criminal offense was not found.[83] The grand jury was never meant to function in this manner.[84]

There is very little state judicial authority on the power of a grand jury to issue reports of a general nature, naming no individual or group. Several cases maintain that the grand jury's sole function is that of an indicting body,[85] but other cases have indicated that it is within the grand jury's authority to issue reports on the community in general.[86] These reports, however, have been tolerated, not sanctioned, and "the exercise of a nonexistent right to power gains no sanction by repetition, especially when such exercise has gone unchallenged."[87]

INSUFFICIENT TEXAS AUTHORITY

To date, there have been only two Texas cases which have even remotely considered the authority of grand juries to report. In *Rich v. Eason*,[88] a sheriff sued members of a grand jury in a libel action for issuing a report stating that the sheriff and marshal of Nacogdoches were engaged in immoral conduct "unbecoming the dignity of their exalted position."[89] The Beaumont

82. Jones v. New Orleans, 79 So. 865, 866 (La. 1918); State v. Bramlett, 164 S.E. 873, 876 (S.C. 1932).

83. Wood v. Hughes, 212 N.Y.S.2d 33, 37-38 (1961).

84. Several cases, however, have held that a grand jury report may directly criticize an individual where that party has intentionally instigated a grand jury investigation. *Ex parte* Cook, 137 S.W.2d 248, 249 (Ark. 1940); Rubin v. Interim Report of the Dade County Grand Jury, 159 So. 2d 918, 919 (Fla. Dist. Ct. App. 1964). In *Rubin*, the court stated that a report may not ciriticize a public official, but that a different rule applies where the party moving to expunge the report was the party who initiated the investigation proceedings. *Id.* at 919. But subsequent cases indicate that grand jury authorization may no longer be derived in this manner. *Compare Rubin with In re* Brevard County Grand Jury Interim Report, Fall Term 1970, 249 So. 2d 709, 710-11 (Fla. Dist. Ct. App. 1971).

85. Rector v. Smith, 11 Iowa 302, 305 (1860) (a court can take no jurisdiction over a complaint charged in a report); *In re* Davis, 257 So. 2d 884, 887 (Miss. 1972) (legislature may expand grand jury's powers); *In re* Grand Jury Report, 235 N.W. 789, 790 (Wis. 1931) (where grand jury is unable to indict, they should say so and depart).

86. *Ex parte* Faulkner, 251 S.W.2d 822, 823 (Ark. 1952) (reports of a general nature may serve a wholesome purpose); *In re* Report of Grand Jury of Baltimore City, 137 A. 370, 376 (Md. Ct. App. 1927).

87. Wood v. Hughes, 212 N.Y.S.2d 33, 40 (1961).

88. 180 S.W. 303 (Tex. Civ. App.—Beaumont 1915, no writ).

89. *Id.* at 304.

Court of Civil Appeals noted that the Code of Criminal Procedure, which defines the grand jury's duties, is silent with respect to their authority to issue reports.[90] In reversing for petitioner, the court recognized the absence of Texas authority and relied on the libel case of *Rector v. Smith*,[91] decided by the Iowa Supreme Court 65 years earlier. In *Rector*, the grand jury report alleged that a former county judge appeared to be involved, while in office, in misappropriating public funds.[92] The court in *Rector* stated that the sole function of a grand jury is to inquire into indictable offenses and consequently, that it is without authority to issue reports.[93] Likewise, the grand jury has no authority over an alleged offense if the misconduct does not amount to a crime. The court stated two reasons for its decision: First, the court has no jurisdiction over allegations contained in a report because the court may only act upon an indictment; second, a person accused in a report has no opportunity to defend himself, unlike a party under indictment who is guaranteed the constitutional right to plead his innocence in a court of law.[94] The Beaumont court gave no specific holding on the authority of grand juries to report, however, by following *Rector* on the issue of conditional privilege it can be argued that the court apparently sustained the reasoning in *Rector*, that a grand jury is without any authority to issue reports absent indictment.[95] Upon remand, however, the trial court directed a verdict in favor of defendants on the ground that malice, a necessary element to defeat the conditional privilege, had not been established.[96] The court of civil appeals affirmed.[97]

The parameters of a grand jury's function concerning reports was questioned again in *Dunnam v. Dolezal*,[98] 46 years after *Rich*. *Dunnam* involved

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90. *Id.* at 304. The present code is also silent. TEX. CODE CRIM. PROC. ANN. art. 20.09 (1970).

91. 11 Iowa 302 (1860).

92. *Id.* at 303.

93. *Id.* at 307.

94. *Id.* at 307.

95. Rich v. Eason, 180 S.W. 303, 305-306 (Tex. Civ. App.—Beaumont 1915, no writ). The court recognized the similarity between *Rector* and the case at bar. *Id.* at 305. Consequently, the court stated that *Rector* "expresses the correct principles and is decisive of the instant case . . . ." *Id.* at 306.

96. Conditional or "qualified" privilege is discussed more fully as related to *Rich*, in Comment, *Civil Liability of Grand Jury Members For Libelous Matter In Unauthorized Reports*, 1 S. TEX. L.J. 193, 194, 197 (1954).

97. Rich v. Eason, 214 S.W. 581, 583 (Tex. Civ. App.—Beaumont 1919, no writ). This decision supports the contention that tort immunity does not directly relate to the authority of a grand jury to report. By following the opinion of the earlier appeal, *Rich* indicates that a grand jury is without authority to report, yet the members of a grand jury are immune in a libel action absent proof of malice. *See id.* at 583; Rector v. Smith, 11 Iowa 302, 307-308 (1860); Annot., 42 A.L.R.2d 825 *et seq.* (1955), *cited in* Dunnam v. Dolezal, 346 S.W.2d 631, 632 (Tex. Civ. App.—San Antonio 1961, writ ref'd) (conditional privilege denies liability in the absence of malice).

98. 346 S.W.2d 631 (Tex. Civ. App.—San Antonio 1961, writ ref'd).

a libel suit based on statements contained in a grand jury report directly criticizing an attorney. The report stated that the attorney was guilty of misconduct and should be reported to the State Bar Association. In deciding the controlling question of whether a written report of a grand jury is absolutely privileged or conditionally privileged, the San Antonio Court of Civil Appeals failed to discuss the *authority* of a grand jury to issue reports. Instead, it recognized that although some states extend absolute privilege to grand juries regarding the contents of their reports, the opposing view of conditional privilege as expressed in *Rich* is the applicable law in Texas.[99]

In 1972, the Attorney General of Texas issued an opinion based on the question of whether a grand jury's report of probable public interest, not involving criminal matters, may be disclosed when less than nine grand jurors sign the report.[100] Relying on the Texas Code of Criminal Procedure and *Rich*, the Attorney General concluded that:

> A Grand Jury can only investigate criminal matters with the end view being the voting of or a rejection of an indictment. It follows that a Grand Jury has no authority to report on non-criminal matters and any such report should not be filed or disclosed by the District Court.[101]

This opinion was directed at reports which are non-criminal in nature, thus leaving unresolved the Attorney General's views on the status of criminal reports.[102] Likewise, *Rich* and *Dunnam* were libel cases wherein the issue entailed a choice between conditional and absolute tort immunity. The arguments in those cases regarding the authority of a grand jury to issue reports were mere dictum, consequently Texas law remains unsettled.

CONCLUSION

While it is undisputed that English grand juries issued reports, the grand juries were presumably without authority to issue them in the absence of a statute granting reportorial powers. At best, the state of the common law on this subject remains uncertain and the question is left unresolved. But in no event is it "crystal clear" that the common law authorized such reports.

Today, "special" federal grand juries have the power to report on public officials or organized crime pursuant to statutory guidelines.[103] Otherwise, the grand jury is probably limited to issuing reports of a general nature touching upon conditions in the community. Underlying the considerations involving the issuance of a general report is the question of whether the need for

99. *Id.* at 632.
100. TEX. ATT'Y GEN. OP. No. M-1171 (1972).
101. *Id.* Although considered very persuasive authority, an Attorney General's Opinion is not binding on the courts. Texas Ass'n of Steel Importers, Inc. v. Texas Highway Comm'n, 364 S.W.2d 749, 751 (Tex. Civ. App.—Austin 1963), *aff'd*, 372 S.W.2d 525 (Tex. 1963).
102. TEX. ATT'Y GEN. OP. No. M-1171 (1972).
103. 18 U.S.C. § 3333 (1970).

disclosure outweighs the need for secrecy.[104] Although there are guidelines which general reports should follow, there is no general rule granting a federal grand jury the authority to issue this type of report. Consequently, decisions are made on the basis of the facts of the case.[105]

State courts and legislatures authorizing reports have begun to realize the policy considerations which condemn reports. In those jurisdictions where reports criticizing individuals have been authorized there is a move toward eliminating such reports or limiting their scope. Furthermore, New York, the most litigious state regarding this issue, has enacted a statute carefully delineating the grand jury's reporting powers.[106] This statute, analogous to its federal counterpart, results in a reporting procedure which affords the criticized party the benefit of due process.

Though grand jury reports have been issued in Texas, they should now be prohibited in light of policy considerations from other states which deny the power to report on specific individuals,[107] especially absent express statutory authority.[108] General reports have not been subjected to similar criticism, but there is an indication that tradition alone cannot authorize such reports,[109] and that reports of a general nature commenting upon conditions in the community are without any authority in law.[110] Additionally, there is always the danger in a general report that individuals will be singled out by inference—inference not strong enough to enable expungement, but sufficient to cause discredit in the community.[111]

In Texas, *Rich*, *Dunnam*, and the Attorney General's Opinion indicate that reports are unauthorized, and the silence of the Code of Criminal Procedure on the subject of reports permits the same conclusion. Considering the Code of Criminal Procedure in conjunction with the Attorney General's Opinion, a very strong argument is made against reports. The opinion of the Attorney

104. *In re* Report & Recommendation of June 5, 1972 Grand Jury, 370 F. Supp. 1219, 1226 (D.D.C. 1974).

105. *In re* Grand Jury Proceedings, 479 F.2d 458, 460 n.2 (5th Cir. 1973).

106. NEW YORK CRIM. PROC. LAW § 190.85 (McKinney 1975). California remains the only jurisdiction where reports are frequently issued without the procedural safeguards of New York or federal law, and where there is no trend toward mitigating the hardships of the party named within the report. *See* People v. Superior Court of Santa Barbara County, 531 P.2d 761, 764 (Cal. 1975).

107. Cases cited note 85 *supra.*

108. Cases cited note 88 *supra.*

109. Wood v. Hughes, 212 N.Y.S.2d 33, 40 (1961).

110. Hammond v. Brown, 323 F. Supp. 326, 345 (N.D. Ohio), *aff'd*, 450 F.2d 480 (6th Cir. 1971).

111. *In re* Presentment of Camden County Grand Jury, 304 A.2d 573, 574-75 (N.J. Super. Ct. 1973) (petitioners unable to prove that report dealt with ascertainable individuals). *Compare* fact situation in *Camden County with* Grand Jury Report on Organized Crime in Bexar County. The Bexar County report stated: "The Grand Jury investigation has shown that the sale and operation of pornographic book stores and movie houses is, *in most cases*, directly owned and supplied by organized crime." (emphasis added).

General, however, is not binding, though it is persuasive authority.[112] Thus, if the section in the Code of Criminal Procedure is presumed to be doubtful regarding the grand jury's reporting powers, then it must be concluded that the Attorney General's Opinion, "a Grand Jury can only investigate criminal matters with the end view being the voting of or a rejection of an indictment,"[113] must be given greater force and effect. And if the Code of Criminal Procedure is considered neither vague nor doubtful regarding this matter, then its silence must manifest a denial of grand jury reporting powers. Therefore, a Texas grand jury is presumably without authority to report. That some good may ultimately result from the use of reports is not doubted, but unless there are ways of maintaining these benefits without incurring the seemingly inevitable detriments, the reporting process should be ended.

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112. Texas Ass'n of Steel Importers, Inc. v. Texas Highway Comm'n, 364 S.W.2d 749, 750 (Tex. Civ. App.—Austin 1963), *aff'd*, 372 S.W.2d 525 (Tex. 1963); *see* Jones v. Marrs, 114 Tex. 62, 77, 263 S.W. 570, 577 (Tex. Comm'n App. 1924, jdgmt adopted).

113. TEX. ATT'Y GEN. OP. No. M-1171 (1972).