A Guide to the Grand Jury

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It wasn't the Justice Department or the FBI or Daley, Johnson or Nixon who decided that leaders of last summer's Chicago actions should be tried for a federal crime. Not technically, that is.

Officially a grand jury did it. Other grand juries have indicted black militants and student activists. Many of us who do not face criminal charges have already been called as grand jury witnesses or will be soon. We're learning first hand how, in a society divided along lines of race and class, legal institutions are used by the powerful to perpetuate the status quo.

The purpose of legal repression is to intimidate and isolate us from our base. Unless we are careful, repression can divert needed energy into defense groups for raising money and publicizing repression.

I

The Grand Jury. Part of the Bill of Rights. A bulwark of American justice, supposedly serving three vital functions.

As the "conscience of the community," the Grand Jury is supposed to protect people against unfair prosecution. Until it finds that the government has substantial evidence, no person can be tried for a serious crime in federal court or in the courts of nearly half the states. (In the other states and for non-serious crimes, a judge makes this decision in a preliminary hearing.)

As "the people's big stick," the Grand Jury is supposed to investigate official misconduct. In many states it can issue a muckraking report even when it decides no crime has been committed.

Finally, the Grand Jury supposedly provides opportunities for citizen parti-

cipation in government. To the president of New York's Grand Jury Association it represents democracy in action:

"Effective government can function–and our communities can maintain their vitality–only so long as the ordinary citizen can and will participate in determining the circumstances under which he lives his life. Even before our country achieved its independence, grand juries were a means by which ordinary citizens have had a direct and powerful voice in the conduct of community affairs."

A close look at what the grand jury really is and does illustrates this general principle. Those who now actively oppose the status quo–youth, blacks, poor people–are excluded from jury duty. Moreover, the Grand Jury does not itself exercise significant power; it is controlled by the prosecutor (D.A., U.S. Attorney), who uses it as a weapon against movements for change.

The Grand Jury originated in the 13th century in England as a corps of knights assigned to help the Crown identify and prosecute criminals. In the United States today many Grand Juries still consist mainly of "blue ribbon" aristocrats.

From 1938-43 the federal court for the southern district of New York (Manhattan, Bronx, and Westchester) drew jurors primarily from Who's Who in New York, Who's Who in Engineering, the Social Register, the alumni directories of Harvard, Yale, Princeton, and Dartmouth, and Poor's Register of Executives and Directory of Directors. Many of these people stayed on the jury panel for years and helped indict the Rosenbergs and many Smith Act defendants. The federal court agreed that this procedure systematically excluded black people and workers. But it still upheld the procedure as an efficient way to find jurors who were properly "qualified."

Today many states use only slightly more subtle methods to select similarly elite juries. The grand juries which indicted Huey Newton and the Oakland Seven, for instance, were picked only from names provided by the Alameda County Superior Court judges. Twenty-six company presidents, 31 bankers, 5 utility executives, and a number of realtors and other business officials were among the 261 jurors selected by the same method in San Francisco from 1950 to 1968. Nonwhites, over one-third the San Francisco population, provided only five percent of the jurors.

The New York County grand juries which have indicted Columbia strike leaders and Black Panthers are not much different. According to an analysis prepared for a court challenge, the New York grand jurors who sat in 1964 were 1.65 percent black, .003 percent Puerto Rican, and slightly over 1 percent blue collar. None were under 35. Most lived in census districts with a median income of over $10,000 per year.

These jurors were chosen from names supplied by judges and other grand jurors, plus anyone who applied in person at the jury clerk office. Over nine-tenths of the panel from which New York juries are now picked qualified at a time when a grand juror was required by law to own at least $250 worth of property. The chief jury clerk admits that his office still rejects any applicant under 35 unless he is recommended by a judge. The clerks also exclude anyone on welfare, anyone who was ever declared bankrupt, and anyone who has a lien or judgement outstanding against him. As the New York Times recently put it, "credit checks screen out fly-by-nights and unreliables."

Recent civil rights legislation gives federal defendants the right to a jury "selected at random from a fair cross-section of the community." The new law also prohibits exclusion from federal grand juries "on account of race, color, religion, sex, national origin or economic status."

The real effect of this reform is only to open the federal Grand Jury to the salaried middle classes. Jurors' names are drawn only from lists of voters or persons registered to vote, despite the well-known fact that disproportionately large numbers of blacks, Puerto Ricans and poor people take no part in the electoral process. Jury clerks continue to exercise vase discretion–remaining free, for example, to treat misspelling on the required written application as proof of disqualifying illiteracy. Finally, the clerks excuse from jury duty any wage earner who claims financial hardship because he might lose his job as a result of a month's absence or because he can't support his family on the juror's fee. (Most states pay only a few dollars a day. The new law raised the federal fee from $10 to $20 per day, still only half what the U.S. Labor Department estimates that a city family of four needs to live decently.)

II

Grand juries are made up mainly of white, middle-aged and elderly representatives of the propertied and managerial classes. It's hardly surprising that in their watchdog function such grand juries protect their own economic and political power and their social privilege. The reports issued by San Franciso grand juries during 1968 condemned "welfare chiselers" and drug use, while supporting freeways and downtown redevelopment and giving "special recognition" to the police department's tactical squad.

The unrepresentative make-up of the Grand Jury combines with the tructure of the legal process to ensure that the Grand Jury will rubber stamp the prosecutor, not protect the people against unjust prosecution. Most grand juries are mystified by the technicalities of the law. They serve only one month every two or three years. They have no staff except for the prosecutor's office, and they are not allowed to hire outside experts. The prosecutor manages the proceedings, bringing documents and witnesses, leading the question and drafting the indictment which the jury approves.

If one grand jury refuses to issue an indictment the prosecutor is free to call another jury and yet another until he persuades one to go along. If a grand jury decides to indict someone he doesn't want convicted, the prosecutor can always find a way to let the case die. In some states he has the legal right to dismiss any indictment. In the others he can neglect to proceed on the case, accept a guilty plea to a trivial charge, or try the case in a way which allows the defendant to win easily.

A defendant can gain nothing from grand jury proceedings. He and his attorney are excluded from the jury room. They cannot cross-examine the states' witnesses or object to questions put to friendly witnesses. In federal courts and in many states the defendant cannot appear before the grand jury even if he does discover that it is discussing him, and in other states he can testify (and then leave) only if he agrees to allow the prosecutor to use anything he says against him at trial. Although the prosecutor automatically receives the transcript of the jury proceedings, the defendant can see a copy only under special circumstances and with a court order.

Though the grand jury is useless to defendants, it can help the prosecutor in several important ways. When pressed to bring to trial someone he wants to protect, the prosecutor can have the case killed by a grand jury of "ordinary citizens." The Brooklyn D.A. used this tactic with great success when a police officer shot a black youth in 1965. The grand jury issued a report exonerating the cop. D.A. Koota said there was nothing more he could do, and the courts rejected CORE's petition demanding further inquiry. Precisely the same technique is now being used to protect the off-duty cops who attacked Black Panthers near a Brooklyn courtroom.

Through a grand jury report—one which names names—a D.A. may be able to prosecute in the mass media opponents against whom he could prove no case in court. Black militants in Cleveland were harassed in just this way after that city's most recent "riots." In the early Fifties a New York grand jury report accused officials of the United Electrical Workers union of membership in the Communist Party, which was not a crime even then, and recommended that the National Labor Relations Board decertify the union.

The prosecutor's third possible use of the grand jury is to deprive a defendant of the tactical advantages of a judicial preliminary hearing. At a preliminary hearing a defendant need not take the stand or present any part of his case. The defendant's attorney can discover the state's case and cross-examine its witnesses; if the witnesses change their testimony at trial, he can quote from the transcript of the hearing to cast doubt on their honesty. Since court dockets are almost always crowded, defendants can use preliminary hearings to gain time before they have to stand trial. Attorneys for the Columbia strikers used preliminary hearings to delay almost all trials until the fall, when a new University administration withdrew most of the charges against the students.

Since the grand jury serves the same procedural functions as the preliminary hearing—both are supposed to protect against unjust prosecution and both in fact rubber stamp the D.A.—the defendant is not entitled to both a preliminary hearing and a grand jury. In federal court and in states which use grand juries, a person cannot be required to stand trial for a serious crime (felony) until he is indicted by a grand jury. But in trials for the minor crimes (misdemeanors) that most people are charged with, the prosecutor can choose between preliminary hearing and grand jury. If the defendant requests a preliminary hearing, the prosecutor can simply stall the case until he obtains a grand jury indictment.

The New York D.A. used this tactic to avoid repeating his Columbia fiasco when CCNY students were arrested this fall for giving sanctuary to an AWOL soldier. The students were booked, charged and bailed out in the ordinary manner. They then planned collectively for the expected next stage, the preliminary hearing, at which many of them were going to represent themselves so they could more effectively present their political views. To the students' surprise, and the surprise of their lawyers, the D.A. presented grand jury findings on the basis of which the judges denied requests for preliminary hearing and immediately set dates for trial.

Finally, the prosecutor can use the grand jury to force potential defendants' friends and comrades to talk with him and turn books and papers over to him before trial, unless they assert their Fifth Amendment privilege against self-incrimination. He can use the transcript of the grand jury proceedings at trial to contradict a defense witness who changes his story. He may be able to trap a witness into lying to the grand jury and then convict the witness of perjury, even if he doesn't have enough evidence to try the witness or anyone else for a substantial crime.

The prosecutor has these powers only through the grand jury. Ordinarily we are no more required to talk with a D.A. or U.S. Attorney than with the FBI or the police. We can refuse to talk with any of them without fear of being jailed for contempt of court. (A person who lies to such officials can, however, be prosecuted for willful misrepresentation. In the Fifties political activists frequently were trapped into petty lies and then were forced to inform or spend several years in jail.)

III

The power to compel testimony through the grand jury gives the D.A. even more than significant technical advantages. It provides him, and the government generally, with a powerful weapon for terrorizing people active in movements for social change.

The grand jury meets in secret and is surrounded by an aura of mystery. Not only are the prospective defendants, the media and the public excluded, but a witness cannot even bring his own lawyer into the grand jury room. His attorney can be in the hall, and the witness can be excused to consult him, but this is a far cry from having counsel at his side throughout the proceeding. The D.A. may well be able to pressure him into answering questions he shouldn't answer and to embarrass him so he will leave to talk with his lawyer only rarely.

The grand jury proceeding is the only situation in which a person can legally be forced to talk to the authorities entirely alone, with no lawyer or friends to advise and support him. The prospect of such an experience can terrify even the strongest and most experienced of activists. The government tries to intensify these fears by calling witnesses separately, or only a couple at a time, and encouraging them to respond as isolated individuals.

Most of the people called before the Chicago federal grand jury quietly appeared and talked. By acting individualistically they reinforced the sense of loneliness and terror which the

grand jury evokes. They failed to draw on our one source of psychic and political strength in confronting the enemy on his turf, the power of collective action.

Some of those who talked in Chicago thought they could persuade the jurors to refuse to issue indictments, an unlikely prospect given who sits on grand juries and the fact that the decision to indict had already been made politically and was only being implemented through the grand jury. Others believed they could outsmart the U.S. Attorney, which seems equally unlikely since we never know just what the prosecutor's looking for and when seemingly harmless information will help him. Since the grand jury meets in secret and no one can be certain precisely what any witness said, testifying cannot help but spread suspicion and distrust within the movement. Cooperation with the grand jury also reinforces its legitimacy and leads even more people to believe it is in fact the protector of justice that it pretends to be.

Activist recent success in talking before HUAC in no way indicates that the same approach would be appropriate in responding to the grand jury. HUAC could be made to look ridiculous and its hearings could be used as a political platform because, unlike the grand jury, HUAC meets in public, with the media present. Moreover, HUAC can use the information it gathers only to recommend legislation and publish propoganda; it has no power to issue indictments and use testimony before it as the basis of criminal prosecution (except for perjury or contempt).

Strategy before a grand jury must also be distinguished from strategy before a trial jury. Trial juries are relatively more representative than grand juries (though not made up of the "peers" of most defendants); the defendant generally has power to exclude obviously biased jurors, plus some others. While the grand jury hears only witnesses' answers to the prosecutor's questions and then confers privately with the prosecutor, the trial jury hears the defendant's full case–as he wants it presented–and hears the prosecutor only in open court.

The people who testified in Chicago almost certainly could have refused to talk without risking jail. The last three witnesses, who planned their responses with other movement activists and lawyers, were excused by the U.S. Attorney after they pleaded the Fifth Amendment privilege against self-incrimination.

The U.S. Constitution prohibits federal or state officials from forcing anyone to give any information which might tend to incriminate him. Although technically there is no constitutional right to refuse to give information because it might incriminate *someone* else, in practice the courts are forced to accept almost all claims of possible self-incrimination, since no one can prove his testimony might incriminate another person without in the process incriminating himself.

The only legal obstacle to using the Fifth Amendment is the grand jury's power in some courts and in some kinds of cases, to offer a witness immunity from prosecution on the basis of his testimony and then to have him held in contempt if he still refuses to talk. The Chicago witnesses who took the Fifth were not offered immunity, possibly because federal immunity laws may not cover the supposed crimes which the grand jury was investigating.

Taking the Fifth, like accepting a deferment to the draft, still involves some cooperation with the authorities and still appears to accept the legitimacy of their power. As with the draft, the alternative is total non-cooperation leading to imprisonment. (First Amendment free speech offers no protection, as a number of people on the left discovered when they were jailed for contempt in the Fifties.)

The criteria for choosing between the two possible responses are essentially the same as those applicable to Selective Service. What would be the likely political impact of total refusal, given the witness's status and constituency? To what extent does the movement seem ready and able to organize around a refusal? How would the witness use his liberty if he avoided jail? Can his use of the Fifth Amendment be explained publicly in a way which avoids (as the left did not in the Fifties) the appearance of defensiveness and of admitting having done something wrong?

The decision almost certainly will vary with time, place and person. Whatever response is chosen, it is critically important that it be determined collectively, on political as well as personal grounds, and that it be joined with a political offensive against the Grand Jury and the oppressive legal system of which it is a part.

The witnesses who took the Fifth in Chicago first moved in a highly publicized court session to have their subpoenas dismissed. They used the court hearing and press conferences to attack the grand jury's composition and procedures, as well as the prosecutor's breach of secrecy and the bias of the judge who convened the jury. Other methods of attack might range from leaflets and guerrilla theater to providing sanctuary for a witness who refused to appear or physically invaded the grand jury room.

We need to attack the legal system of the United States–courts, grand juries, legislative committees, the ideology itself–just as we attacked its fraternal institutions, the university and the Selective Service System.

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