

## BOOK REVIEW

THE GRAND JURY: AN INSTITUTION ON TRIAL. By Marvin E. Frankel and Gary P. Naftalis. New York: Hill & Wang. 1977 Pp. 138. \$8.95.

It becomes apparent as early as the introduction that the grand jury is not on trial for its life. The authors' preference is for revision rather than abolition, for reform rather than revolution. The book is an "attempt to supplement the resources for knowledgeable action by the people through their representatives" (p. 118).

*The Grand Jury: An Institution on Trial* is certainly a useful resource tool, especially for a reader who knows little about the grand jury. The book begins by tracing the origins of the grand jury and by providing a history of its development. There follows a brief description of the manner in which the grand jury functions. The authors consider grand jury operation in detail in two chapters: "Selection and Prejudice" and "Impaneling and Indicting." The chapter devoted to the choice of grand jurors discusses the problem of bias in the selection process. Although sex discrimination is mentioned, the main focus is on racial discrimination. The chapter on impaneling and indicting contains a step-by-step description of a typical grand jury's operations from its formation to the filing of an indictment.

In the body of the book, the authors analyze several major issues involved in the grand jury process. Among the topics discussed are: the allocation of powers between the prosecutor and the grand jurors; the use of the grand jury as a mechanism for oppressing targets (those persons whom the grand jury is considering for indictment) and witnesses; the scope of immunity granted to grand jury witnesses; the role of counsel; and the dangers of excessive publicity. The information presented in this section is summarized in the final chapter and is used as the basis of the authors' conclusion that, given a choice between abolition and reform, the latter is the wiser alternative.

So ambitious an undertaking is not fully realized in such a short book. Many controversial issues, such as the use of privilege and immunity, or the problem of news leaks to the media, are only touched upon. A reader acquainted with the legal process may be frustrated by the limitations the authors have imposed on the discussion. This restraint is probably explained by the fact that the book appears to have been written more for the interested citizen than for the practicing attorney or legal scholar. Much of the book's substance appeared originally in a special issue of the magazine, *The New Leader*. The book itself was written under a grant from the Tamiment Institute as part of a series conceived to deal with topics concerning matters of social welfare. A consequence of the authors' awareness of their likely audience is the deliberate avoidance of details and complexities that would be confusing to a lay reader.

Frankel and Naftalis seek to present the issues objectively. For example, on the thorny question whether a prospective defendant should have an unqualified right to defend himself before a grand jury by presenting his own tes-

timony, the authors offer much persuasive authority, including a statement by Judge Augustus Hand, to support the denial of the right, as well as their own reasoning in rebuttal. This emphasis on objectivity, however, does not prevent the authors from emphasizing certain practices which they have concluded must be upheld. The reader is often reminded that the function of the grand jury is merely to indict, not to determine guilt. The authors reject any practice which jeopardizes a person's chance for a fair trial if indicted. Thus, the authors urge that prosecutors' press conferences announcing indictments should be forbidden because the public views an indictment as "a long step toward condemnation" (p. 87). Similarly, the authors regard grand jury leaks, which may subject witnesses as well as targets to potential harm, as an evil which should give rise to a cause of action for money damages against a prosecutor, juror, or stenographer who reveals secret information, without proof of actual damage. This is one subject for which the authors do not recognize any countervailing arguments. "The casual assassination of character or impairment of status through the illicit breach of grand jury secrecy ought to be seen always as a wrong, to be prevented when possible and punished when appropriate" (p. 85). Interestingly, Frankel and Naftalis do not favor imposing liability on the media for disseminating information obtained through leaks. In their view, the first amendment guarantees of freedom of speech and of the press should not be impinged upon unless all other methods of controlling leaks prove ineffective.

The authors' analysis of the various issues is enhanced by their choice of illustrative material. Sometimes the point is made through humor, as in the discussion of the use of grand jury testimony as a tool to trap witnesses on perjury charges. The authors cite a case that arose during the period of Prohibition,<sup>1</sup> which involved a naked woman found in a bathtub of champagne. The stated purpose of the grand jury investigation was to determine whether or not alcohol had been served at a party. One witness denied in his testimony that anyone had been in the tub, and it was upon this untruth that the perjury conviction rested. The witness argued on appeal that, as bathing in champagne was not criminal conduct, perjury related to such conduct could not be prosecuted. The court of appeals disagreed and affirmed his conviction. The point is neatly made that the perjury need not relate to a crime *per se* for it to result in a conviction; it only need be what the court considers "material." The authors approve of this rule as promoting the grand jury's ability to uncover the truth. Yet, they insist that the power to convict for perjury must be used fairly. A prosecutor who, in light of what he already knows, believes that a witness' testimony will be false, and calls that witness to testify solely to obtain a perjury charge, is condemned as engaging in what amounts to entrapment. Such conduct, the authors believe, goes beyond the prosecutor's rightful power.

Other examples derive their force from the vivid depiction of flagrant abuses that can result under the present system. The argument for allowing attorneys in the grand jury room to aid witnesses is supplemented by the quotation of the transcript of an exchange between prosecutor and witness, the distraught and confused witness begging the grand jury foreman to allow him the assistance of counsel, the prosecutor coldly insisting that his question be

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1. *Carroll v. United States*, 16 F.2d 951 (2d Cir.), *cert. denied*, 273 U.S. 763 (1927).

answered. The use of the transcript is a bold stroke on the part of the authors. Although subject to criticism as an extreme example of prosecutorial heavy-handedness, the quotation serves to remind the reader that fairness and decency are values which persons involved in the criminal justice system cannot afford to overlook.

Indeed, an appeal to fundamental fairness is made often in *The Grand Jury*. Prosecutors are urged to voluntarily disclose exculpatory evidence concerning the target of a grand jury investigation. As for the problem of prosecutors who summon witnesses only to obtain a perjury charge, the authors conclude that, "The best hope in this quarter . . . is that we have prosecutors busy enough with important matters, and decent enough, to refrain from summoning people to testify for the sole purpose of securing a perjury charge" (p. 107). Although reliance on the integrity of prosecutors may, in some instances, be misplaced, advancing the ideal may encourage more people to strive for it.

*The Grand Jury* is, on the whole, a thoughtful and intelligent study. Unfortunately, certain issues do not receive the attention they deserve. Although the authors recognize the fact that grand juries, which are composed of people chosen from voter registration lists, often do not fairly represent minorities, the young, and the poor, they can offer no alternative selection methods. They do not consider welfare records or unemployment rolls as possible sources, but instead assume that those who do not register to vote do not demonstrate sufficient interest in public affairs to warrant consideration as jurors. This conclusion, unsupported by empirical data, is unconvincing.

Similarly, the authors argue against a proposed requirement that additional evidence be presented before a prosecutor may initiate a second grand jury after a first has failed to indict. They feel that this is unnecessary because, "While grand jury inquiries often end with indictments, they don't start out with indictments" (p. 130). This assumption contradicts the assertion, often made throughout the book, that the grand jury "by and large indicts those whom the prosecutor wants to be indicted" (p. 100). Thus, the grand jury does often begin its investigation predisposed to indict. If, despite this strong bias, the person under investigation is not indicted, he should be free from further prosecutorial assault. Allowing him to be placed in jeopardy twice is dangerously akin to implying that he is guilty until proven innocent.

Such facile treatment of difficult issues leads one to suspect that the authors reached their conclusions concerning the grand jury before they began their research. When there are moderate alternatives available, their criticism is often genuinely probing. When, however, they are faced with issues that seem capable of resolution only by abandoning the present order, the authors regrettably back down. A more vigorous and critical view is called for, but until one is voiced, *The Grand Jury* stands as a helpful, if timid, attempt to explore a subject which hopefully will receive more discriminating treatment in the future.

J.A.E.

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