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GRAND JURY REFORM: A PROPOSAL FOR CHANGE IN VIRGINIA

I. INTRODUCTION

Once a cornerstone of American jurisprudence, the requirement of prosecution based upon grand jury indictment no longer stands unchallenged. Instead, alternate means of commencing prosecution, most notably by information¹ and the preliminary hearing,² have prompted lawmakers to look at the grand jury with a heightened scrutiny. Subsequently, such alternatives have become the primary prosecutorial tools in many states.³ Virginia, however, retains the grand jury system which was implemented in colonial times.⁴

Pronounced disparities exist between Virginia's constitutional and statutory provisions concerning the necessity of the grand jury.⁵ When combined with a wave of modern legal thought which challenges this historic institution,⁶ these disparities call for an inquiry into the continued use of the Commonwealth's current system. This Note will explore the more notable inequities of the grand jury system in Virginia. A brief history of the grand jury will explain how the modern system developed.⁷ Current procedures, especially the more controversial aspects, will be examined,⁸ and remedies for demonstrated problems will be proposed.⁹

II. HISTORICAL DEVELOPMENT

A. *Origins of the Grand Jury*

The American grand jury system has its roots deeply embedded in the

1. Information is defined as "[a] written accusation made by a public prosecutor, without the intervention of a grand jury." BLACK'S LAW DICTIONARY 701 (5th ed. 1979).

2. A preliminary hearing is defined as "[t]he hearing by a judge to determine whether a person charged with a crime should be held for the trial." *Id.* at 1062.

3. Twenty-nine states permit use of the information; twenty-one states allow it as an alternative to the indictment for all offenses; five states allow it in all but capital crimes. See Watts, *Michigan Grand Jury: An Anachronism or Useful Tool?* 1983 DET. C.L. REV. 1477, 1477.

4. See *infra* notes 18-22 and accompanying text.

5. See *infra* notes 32-41 and accompanying text.

6. See *infra* notes 67-94 and accompanying text; see also *infra* notes 108-25 and accompanying text.

7. See *infra* notes 10-22 and accompanying text.

8. See *infra* notes 23-125 and accompanying text.

9. See *infra* notes 82-94 and accompanying text; see also *infra* notes 120-25 and accompanying text.

English common law.¹⁰ Dating back to the twelfth century,¹¹ the English grand jury's¹² function was the discovery and presentment of suspected criminals to the King.¹³ In fulfilling that obligation, jurors were free to present matters which they themselves had observed or, as was the more common practice, to endorse indictments prepared by others.¹⁴ During the thirteenth and early fourteenth centuries, members of the grand jury also served as part of the petit jury.¹⁵ Thereafter, the two juries became separate bodies, and the make-up and functions of each became more distinct.¹⁶ The present day grand jury closely resembles its thirteenth-century predecessor since few material changes have occurred since that time.¹⁷

The history of Virginia's grand jury system extends back to early colonial times. The criminal laws of the colony of Virginia evidenced Charles I's order for the impanelling of a grand jury in 1645.¹⁸ Twelve years later, a grand jury was established in each of the county courts.¹⁹ In 1686, the governor of the colony took other measures to ensure that criminal proceedings in Virginia emulated those of the English courts.²⁰ Even though Virginia tended to stray from some of the more technical aspects of grand jury mechanics,²¹ the procedures involved in obtaining common-law indictments were largely followed in colonial Virginia.²²

10. See *Costello v. United States*, 350 U.S. 359, 362-64 (1955); *United States v. Johnson*, 319 U.S. 503, 512 (1943); *McGrain v. Daugherty*, 273 U.S. 135, 157 (1927); *Blair v. United States*, 250 U.S. 273, 282 (1919); *Hale v. Henkel*, 201 U.S. 43, 59-66 (1906).

11. According to one authority, the first record of the English grand jury is contained in the Constitutions of Clarendon which were written in the year 1164. 1 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 321 (7th ed. 1956). See *infra* note 12.

12. The Assize of Clarendon provided for a "presenting jury general" which was functionally similar to the modern grand jury. 1 W. HOLDSWORTH, *supra* note 11, at 321.

13. *Id.* Such presentments were merely assertions that a presented individual was suspected, not guilty, of criminal behavior. *Id.*

14. *Id.*

15. *Id.* at 322.

16. *Id.* The role of the grand jury was to determine, upon consideration of the prosecution's evidence, whether there was probable ground of suspicion. See 4 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 305-06 (London 1783).

17. 1 W. HOLDSWORTH, *supra* note 11, at 322-23. Holdsworth points out that two notable characteristics of the modern grand jury, secrecy and freedom from strict court control, were indeed present in the thirteenth century version. *Id.*

18. 1 HENING, *STATUTES AT LARGE* 304 (New York 1823).

19. 1 HENING, *supra* note 18, at 463.

20. See Whyte, *Is the Grand Jury Necessary?*, 45 VA. L. REV. 461, 467-68 (1959) (citing A. SCOTT, *CRIMINAL LAW IN COLONIAL VIRGINIA* 50 (1930)).

21. For example, presentment in the common-law grand jury could be made on the knowledge of only one juror while Virginia law denied presentment unless made by two jurors. See *id.* at 471 (citing A. SCOTT, *CRIMINAL LAW IN COLONIAL VIRGINIA* 71 (1930)).

22. See Whyte, *supra* note 20, at 466-71.

B. *Constitutional Considerations: Grand Jury as "Sword" and "Shield"*

The fifth amendment to the Constitution of the United States necessitates the use of the grand juries in federal prosecutions for capital and infamous crimes.²³ However, in *Hurtado v. California*,²⁴ the Supreme Court of the United States found that when applied to prosecutions for felonies, due process as guaranteed under the fourteenth amendment could be achieved without a grand jury indictment.²⁵ Even so, the Court has traditionally applauded state use of the grand jury system,²⁶ claiming that it is "a primary security to the innocent against hasty, malicious and oppressive persecution."²⁷

Historical justifications for retaining the grand jury have focused on its unique role as both a "shield" against a state's unjust and overzealous prosecution,²⁸ and a "sword" in initiating and conducting criminal investigations.²⁹ As Chief Justice Warren articulated: "[The grand jury] serves the invaluable function in our society of standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will."³⁰ Moreover, he stated that the jurors are "'to give voice to common repute.'"³¹

C. *Statutory Provisions: Indictment and Duties of the Grand Jury*

Virginia legislators have consistently retained a statutory scheme requiring a grand jury presentment or indictment before one may be tried on felony charges.³² The Constitution of Virginia, however, imposes a less

23. U.S. CONST. amend. V. The fifth amendment states in pertinent part that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury." *Id.*; see also *Ex parte Bain*, 121 U.S. 1, 10 (1887).

24. 110 U.S. 516 (1884).

25. *Hurtado*, 110 U.S. at 538; see also U.S. CONST. amend. XIV, § 1.

26. See, e.g., *Hale v. Henkel*, 201 U.S. 43, 59-66 (1906). But see *United States v. Dionisio*, 410 U.S. 1, 23 (1972) (Douglas, J., dissenting) ("It is indeed common knowledge that the grand jury, having been conceived as a bulwark between the citizen and the government, is now a tool of the executive.").

27. *Wood v. Georgia*, 370 U.S. 375, 390 (1962).

28. *United States v. Mandujano*, 425 U.S. 564, 571 (1976) (stating that "[the grand jury's] historic office has been to provide a shield against arbitrary or oppressive action.").

29. See *Blair v. United States*, 250 U.S. 273, 282 (1919) (noting that the grand jury's scope of interrogation is not limited by preconceived notions of guilt).

30. *Wood*, 370 U.S. at 390 (citing L. ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL*, 144-46 (1947)).

31. *Id.* (quoting 2 F. POLLOCK & F. MAITLAND, *HISTORY OF THE ENGLISH LAW* 642 (2d ed. 1909)).

32. VA. CODE ANN. § 19.2-217 (Repl. Vol. 1983); *id.* § 19.1-162 (Repl. Vol. 1960); *id.* § 19-136 (1950); *id.* § 4866 (1919); VA. CODE § 3990 (1887); *id.* c. 201 § 2 (1873).

stringent standard regarding commencement of criminal prosecutions and provides only that "a man hath a right to demand the cause and nature of his accusation."³³ Noticeably absent from the Constitution of Virginia is a grand jury requirement.

The Supreme Court of Virginia has not only recognized this constitutional omission,³⁴ but has also seized numerous opportunities to comment upon it.³⁵ The court's longstanding position is that "a presentment or indictment found by a grand jury . . . is not predicated upon any guarantee

Since 1950, however, the General Assembly has provided that the grand jury requirement may be waived by the accused. VA. CODE ANN. § 19.2-217 (Repl. Vol. 1983). Such waiver must be in writing and signed by the accused before the court or judge of that court having jurisdiction to try the felony. *Id.*; see also *Council v. Smyth*, 201 Va. 135, 139, 109 S.E.2d 116, 119 (1959) (noting that the requirement of an indictment is not jurisdictional).

33. VA. CONST. art. I, § 8. Accordingly, an accused has the right to be told in clear and certain language the cause of the complaint against him. See *Pine v. Commonwealth*, 121 Va. 812, 834, 93 S.E. 652, 659 (1917). Even though this is a constitutional right of which an accused cannot be deprived, the legislature may fix a stage of the procedure beyond which he can no longer assert that right. *Flanary v. Commonwealth*, 133 Va. 665, 668, 112 S.E. 604, 604 (1922).

Section 8 of the Virginia Constitution does indeed contain several other important provisions concerning criminal prosecutions. The passage quoted in the text, however, is the only part pertinent to pre-trial accusation procedures. Remaining portions of section 8 concern other prosecutorial procedures, discussion of which lies beyond the scope of this Note.

The full text of section 8 reads as follows:

That in criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, and to call for evidence in his favor, and he shall enjoy the right to a speedy and public trial, by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty. He shall not be deprived of life or liberty, except by the law of the land or the judgment of his peers, nor be compelled in any criminal proceeding to give evidence against himself, nor be put twice in jeopardy for the same offense.

Laws may be enacted providing for the trial of offenses not felonious by a court not of record without a jury, preserving the right of the accused to an appeal to and a trial by jury in some court of record having original criminal jurisdiction. Laws may also provide for juries consisting of less than twelve, but not less than five, for the trial of offenses not felonious, and may classify such cases, and prescribe the number of jurors for each class.

In criminal cases, the accused may plead guilty. If the accused pleads not guilty, he may, with his consent and the concurrence of the Commonwealth's Attorney and of the court entered of record, be tried by a smaller number of jurors, or waive a jury. In case of such waiver or plea of guilty, the court shall try the case.

VA. CONST. art. I, § 8.

34. *E.g.*, *Pine v. Commonwealth*, 121 Va. 812, 834-35, 93 S.E. 652, 659 (1917).

35. See *Scales v. Commonwealth*, 214 Va. 728, 730, 204 S.E.2d 274, 276 (1974), *cert. denied*, 419 U.S. 1123 (1975); *Forrester v. Commonwealth*, 210 Va. 764, 766, 173 S.E.2d 851, 853 (1970); *Cunningham v. Hayes*, 204 Va. 851, 854-55, 134 S.E.2d 271, 274, *cert. denied*, 376 U.S. 973 (1964); *Council v. Smyth*, 201 Va. 135, 138-39, 109 S.E.2d 116, 119 (1959); *Bailey v. Commonwealth*, 193 Va. 814, 822, 71 S.E.2d 368, 372 (1952); *Livingston v. Commonwealth*, 184 Va. 830, 836, 36 S.E.2d 561, 564 (1946); *Pine v. Commonwealth*, 121 Va. 812, 834, 93 S.E. 652, 659 (1917).

or provision found in the Constitution of Virginia."³⁶ Furthermore, the court has reiterated that, under the state's constitutional guidelines, prosecution may be commenced "by presentment, information, or in any other manner the Legislature may provide."³⁷ Therefore, indictment by grand jury is a purely statutory requirement.³⁸ In fact, Virginia's only judicially recognized purpose of the indictment³⁹ is to provide the accused with "notice of the nature and character of the offense charged."⁴⁰ Thus, since the grand jury indictment neither pursues nor achieves any additional objectives, the legislature recognizes no justification for the indictment superior to that of any other means of accomplishing such notice.⁴¹

The duties prescribed to the grand jury by the legislature are more expansive than the mere signing of true bills of indictment. Section 19.2-200 of the Code of Virginia (the "Code") spells out the jurors responsibilities, which are functionally equivalent to those of the common-law grand jury.⁴² One of these duties is the inquiry into all felonies and misdemeanors and other violations of the penal laws.⁴³ Grand jurors are empowered with broad investigative powers, including the authority to compel the attendance and testimony of witnesses.⁴⁴ The Code also charges the grand jury with the duty and ability to investigate and report on any community or governmental condition which involves or tends to promote criminal activity.⁴⁵ This particular function has proven especially useful in seeking out and ridding communities of vice, racketeering and corrup-

36. *Scales v. Commonwealth*, 214 Va. 728, 730, 204 S.E.2d 274, 276 (1974), *cert. denied*, 419 U.S. 1123 (1975) (citing *Bensen v. Commonwealth*, 190 Va. 744, 58 S.E.2d 312 (1950)).

37. *Cunningham v. Hayes*, 204 Va. 851, 855, 134 S.E.2d 271, 274, *cert. denied*, 376 U.S. 973 (1964) (quoting *Pine v. Commonwealth*, 121 Va. 812, 834-35, 93 S.E. 652, 659 (1917), *see also* *Andrews v. Commonwealth*, 135 Va. 451, 454-55, 115 S.E. 558, 559 (1923)).

38. *Cunningham*, 204 Va. at 855, 134 S.E.2d at 274.

39. Use of "indictment" in this context concerns merely the indictment itself, as distinguished from the grand jury's consideration of the indictment, which is an entirely separate concern with purposes of its own. *Compare* *Cantwell v. Commonwealth*, 2 Va. App. 606, 608, 347 S.E.2d 523, 524 (1986) (stating that the purpose of a grand jury is to inform the accused of the nature and character of the offense with which he is charged) *with* *Sullivan v. Commonwealth*, 157 Va. 867, 884, 161 S.E. 297, 302 (1931) (Epes, J., dissenting) (stating that the purpose behind a grand jury is to protect the innocent from malicious prosecution).

40. *Cantwell*, 2 Va. App. at 608, 347 S.E.2d at 524. The *Cantwell* court implicitly subscribes to the longstanding position that notice to the accused of the cause and nature of the crime are all that the state constitution requires. *See id.*

41. *See id.*

42. VA. CODE ANN. § 19.2-200 (Repl. Vol. 1983).

43. *Id.*

44. R. BACIGAL, VIRGINIA CRIMINAL PROCEDURE § 12-4 (1983) (citing *United States v. Mandujano*, 425 U.S. 564 (1976); *United States v. Calandra*, 414 U.S. 338 (1974)). Professor Bacigal points out that inexcusable failure to obey a subpoena may be deemed contempt of the court to which the subpoena is returnable. R. BACIGAL, *supra* § 12-4 n.5 (citing VA. SUP. CT. R. 3A:12(d)).

45. VA. CODE ANN. § 19.2-191 (Repl. Vol. 1983).

tion.⁴⁶ As a result, both courts⁴⁷ and commentators⁴⁸ have recognized a grand jury's investigative powers as one of its more important characteristics.

III. THE MODERN GRAND JURY

A. *A Struggle Between Influence and Independence*

1. The Role of the Commonwealth's Attorney

Despite the high acclaim associated with the grand jury's investigative function,⁴⁹ the bulk of the grand jury's work is performed through consideration of bills of indictment prepared by the prosecution.⁵⁰ Furthermore, the Commonwealth's Attorney supplies the vast majority of witnesses appearing before a regular grand jury.⁵¹ Nevertheless, during the examination process, only the jurors and the witness being questioned may be present.⁵²

Section 19.2-201 of the Code provides the general rule that the Commonwealth's Attorney shall not appear before any grand jury except as a witness.⁵³ Appended to this rule is an exception which allows the Commonwealth's Attorney to advise the grand jury foreman and any other

46. For example, a grand jury acting on its own initiative filed a report which tended to show misfeasance, malfeasance, and gross neglect of official duty on behalf of a Roanoke mayor. The mayor was subsequently indicted for permitting and encouraging prostitution and gambling houses, and for refusing to investigate the conduct of police officers. *Cutchin v. Commonwealth*, 113 Va. 452, 74 S.E. 403 (1912). The court praised the indicting grand jury and stated that when jurors faithfully perform their investigative function they deserve public commendation. *Id.* at 478, 74 S.E. at 409. *But see infra* note 48 (noting that some commentators question the usefulness of the grand jury as an investigative body).

47. *See, e.g., Cutchin*, 113 Va. at 478, 74 S.E. at 409.

48. *See, e.g., Whyte, supra* note 20, at 485-87 (reporting the advantages of the grand jury system as expressed by Virginia prosecutors).

Despite the achievements of the grand jury in *Cutchin*, some commentators question the practicality of an independent grand jury investigation. *See Antell, The Modern Grand Jury: Benighted Supergovernment*, 51 A.B.A. J. 153, 155 (1965) ("[t]he so-called grand jury 'investigation' . . . is really nothing more than a review of the prosecutor's predigested evidence and a ratification of his conclusions"); Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174, 177 (1973) (noting that investigations of consequence are invariably preceded by a prosecutor's careful study); Thompson, *The Fourth Amendment Function of the Grand Jury*, 37 OHIO ST. L.J. 727, 744 (1976) ("[w]ithout the prosecutor's guidance, the grand jury lacks the experience and expertise necessary to conduct even a moderate-sized investigation").

49. *See supra* notes 43-48 and accompanying text.

50. *See generally* R. BACIGAL, *supra* note 44, § 12-4.

51. *See* Campbell, *supra* note 48, at 177. In Virginia, the Commonwealth's Attorney has authority to issue a summons for any witness he may deem material to be examined before a grand jury. VA. CODE ANN. § 19.2-201 (Repl. Vol. 1983).

52. VA. SUP. CT. R. 3A:5(a). The court may also provide for the presence of an interpreter. *Id.*

53. VA. CODE ANN. § 19.2-201.

jurors, but only regarding the discharge of their duties.⁵⁴ Courts, however, have been fairly liberal in defining the extent to which prosecuting attorneys may participate in grand jury proceedings.⁵⁵ In *Mullins v. Commonwealth*,⁵⁶ the Supreme Court of Virginia held that a Commonwealth's Attorney is free to consult with jurors as long as he does not advise the grand jury to return an indictment and is not present during deliberations.⁵⁷ Commentators have argued that, in an effort to facilitate prosecution, courts tend to overlook technicalities concerning a prosecutor's presence in front of a grand jury.⁵⁸ Although the standards explained in *Mullins* are generally cited as controlling on this issue, the court's underlying test appears to be whether the accused is prejudiced by the presence of the Commonwealth's Attorney.⁵⁹ The threshold for successfully claiming such prejudice is quite high as evidenced by the court's repeated tolerance of prosecutors' interaction with jurors.⁶⁰

2. Denial of Counsel in the Grand Jury Room

Despite their leniency toward the Commonwealth's Attorneys' interaction with the grand jury system, courts have clung to the rule that counsel for witnesses must be excluded from all regular grand jury proceedings.⁶¹ Furthermore, even though the fifth amendment privilege against self-incrimination⁶² applies to grand jury proceedings,⁶³ a witness appear-

54. *Id.*

55. See *infra* notes 59-60 and accompanying text.

56. 115 Va. 945, 79 S.E. 324 (1913).

57. *Mullins*, 115 Va. at 950, 79 S.E. at 326; see also *Hall v. Commonwealth*, 143 Va. 554, 560, 130 S.E. 416, 418 (1925). In dictum, the *Mullins* court added that it would be "highly reprehensible" for a prosecuting attorney to violate in any degree either the terms or the policy of the statute addressing interaction with grand jurors. *Mullins*, 115 Va. at 950, 79 S.E. at 326.

58. See, e.g., Whyte, *supra* note 20, at 478.

59. See *Draper v. Commonwealth*, 132 Va. 648, 655, 111 S.E. 471, 473 (1922). The *Draper* court held that the indictment before it should not be invalidated even though the Commonwealth's Attorney had counseled the jurors inside the grand jury room. The court reasoned that the defendant had not been prejudiced since the Commonwealth's Attorney, who appeared only at the grand jury's request, had limited his comments to the issue of whether the jurors could return a true bill against some, but not all, of those persons named on the prosecutor's draft of the indictment. *Id.* at 655-57, 111 S.E. at 473.

60. See, e.g., *Hall v. Commonwealth*, 143 Va. 554, 130 S.E. 416 (1925) (indictment upheld after Commonwealth's Attorney discussed with the jurors the law regarding certain indictments without special reference to the indictment against the accused); *Lawrence v. Commonwealth*, 86 Va. 573, 10 S.E. 840 (1890) (Commonwealth's Attorney held to have the status of a witness before the grand jury since defendant alleged that he had assisted in the examination of "other witnesses").

61. See VA. SUP. CR. R. 3A:5(a). Unlike its restrictions concerning regular grand juries, the Code provides that a witness before a special grand jury should be informed of his right against self-incrimination and shall have the right to have counsel of his procurement present when he testifies. See VA. CODE ANN. §§ 19.2-208 to -209 (Repl. Vol. 1983).

62. U.S. CONST. amend. V. The privilege is expressed as follows: "No person . . . shall be compelled in any criminal case to be a witness against himself." *Id.*

63. *Sikle v. Commonwealth*, 133 Va. 789, 795, 112 S.E. 605, 606 (1922).

ing before a regular grand jury has no right to receive Miranda warnings.⁶⁴ Accordingly, lay witnesses testifying before such a jury must decide for themselves how and when to invoke their constitutional rights if, in fact, they are even aware of those rights.⁶⁵ An error in asserting one's constitutional rights could result in contempt charges.⁶⁶

Proponents of grand jury reform have focused much attention on one's right to be accompanied by counsel while appearing as a witness before a grand jury.⁶⁷ The American Bar Association (the "ABA") has expressed its support for this right, partly because of the awkwardness and potential prejudice involved when a witness constantly removes himself from the jury room to consult with his attorney.⁶⁸ Likewise, the American Law Institute (the "ALI") in its Model Code of Pre-Arrest Procedure (the "Model Code"), endorses reform efforts which allow the witnesses' counsel to be present in the grand jury room.⁶⁹ Some commentators have argued that criminal process should provide at least for the presence of counsel for the defendant.⁷⁰ As one proponent argued, "[i]f the accused is in need of a lawyer to argue the probable cause issue before a judicial officer, the presence of counsel is even more indispensable when a body of laymen is called upon to apply this legal standard."⁷¹

64. See *United States v. Mandujano*, 425 U.S. 564, 580-584 (1976). *But see supra* note 61.

According to the Supreme Court of Virginia, one may appear as a witness before a grand jury and not be warned of his constitutional right to refuse to answer. Nevertheless, anything that witness says can be used against him to indict him. *Siklek*, 133 Va. at 795, 112 S.E. at 606. In dictum, the *Siklek* court stated that one who has the privilege against self-incrimination and testifies without objection is deemed to have waived his right and to have testified voluntarily. *Id.*

65. During questioning, witnesses do have a right to consult with an attorney outside of the grand jury room so that the witness may determine whether to invoke the fifth amendment in regard to a particular question. See R. BACIGAL, *supra* note 44, § 12-5 n.12 (citing *Branzburg v. Hayes*, 408 U.S. 665 (1972)).

66. See *Branzburg v. Hayes*, 408 U.S. 665 (1972).

67. A growing number of scholars and professional organizations are supporting numerous changes to the traditional grand jury system. See, e.g., Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 463 (1980); ABA GRAND JURY PRINCIPLES (1982). However, many of these proposed changes, such as transactional immunity and recorded proceedings, are beyond the scope of this Note. See generally ABA GRAND JURY PRINCIPLES (1982).

68. See, e.g., ABA GRAND JURY PRINCIPLES, commentary at 6 (1982).

69. See MODEL CODE OF PRE-ARREST PROCEDURE § 340.3 (1975).

70. See, e.g., Dash, *The Indicting Grand Jury: A Critical Stage?*, 10 AM. CRIM. L. REV. 807, 815 (1972).

71. *Id.*

B. *Determining Probable Cause*

The ultimate goal of a grand jury is an accurate determination of probable cause. However, the fact that grand juries are made up of laypersons who serve without any legal training can block the grand juries' success in achieving that goal.⁷² Although one of the traditional justifications for the use of grand juries is its ability to involve citizens in the judicial process,⁷³ that argument does not address the jurors' inability to comprehend the subtleties of evidence and criminal law or the legal ramifications attached to each.⁷⁴ As a result, indictments are returned which are based wholly or substantially on evidence which would not be admissible at trial.⁷⁵ Nevertheless, such indictments are upheld;⁷⁶ otherwise, courts argue, delays would make the system unworkable.⁷⁷

Regarding the accuracy of the grand jury as a determiner of probable cause, studies have shown that indicted defendants are significantly less likely to be convicted than are those defendants proceeded against by information.⁷⁸ Seeking a cure to this disparity, many commentators⁷⁹ have looked to the merits of the preliminary hearing, most notably the fact that probable cause is determined, not by laypersons, but by a judicial magistrate.⁸⁰ Subsequently, many of those legal scholars, citing the reliability of the probable cause determination as a major criterion, have lent their support to the use accusation by information or preliminary hearing as alternatives to or even replacements of the grand jury indictment.⁸¹

72. See Whyte, *supra* note 20, at 488 (noting disadvantages of the grand jury system according to prosecutors).

73. See *id.* at 486.

74. See Campbell, *supra* note 48, at 178; Comment, *The Improbability of Probable Cause—The Inequity of the Grand Jury Indictment Versus the Preliminary Hearing in the Illinois Criminal Process*, 1981 S. ILL. L.J. 281, 293.

75. See Whyte, *supra* note 20, at 488 (noting that “[t]here is nothing to prohibit the grand jury from returning a true bill based solely on hearsay evidence”).

76. *E.g.*, *Wadley v. Commonwealth*, 98 Va. 803, 805, 35 S.E. 452, 453 (1900). The *Wadley* court held that “[t]he presumption is that every indictment is found upon proper evidence.” *Id.*

77. *E.g.*, *id.* at 805, 35 S.E. at 453 (stating that even though jurors are laypersons and act on evidence not strictly legal, few indictments would come to trial if courts inquired into their proceedings).

78. See Moley, *The Initiation of Criminal Prosecutions by Indictment or Information*, 29 MICH. L. REV. 403, 417-19 (1931). In his multi-state study, Professor Moley found that 52% of prosecutions by indictment resulted in conviction as opposed to a 67% conviction rate for those prosecuted by information. *Id.* See also Whyte, *supra* note 20, at 489; Comment, *supra* note 74, at 305 n.157 (which also suggests that defendants prosecuted by indictment were convicted at a lesser rate than defendants prosecuted by information).

79. See, *e.g.*, Anderson, *The Preliminary Hearing—Better Alternatives or More of the Same?*, 35 Mo. L. Rev. 281 (1970); Arenella, *supra* note 67, at 529-34.

80. See, Anderson, *supra* note 79, at 294 n.61; Arenella, *supra* note 67, at 477-82.

81. See, *e.g.*, Whyte, *supra* note 20, at 489-91 (suggesting that although obsolete in many of its traditional functions, the grand jury is still valuable in investigating criminal activity).

C. *Nursing a Decrepit Institution: A Proposal for the Information as an Alternative to the Indictment*

Dominance by the Commonwealth's Attorney,⁸² denial of counsel,⁸³ and problematic probable cause determinations⁸⁴ have worked to skew the grand jury's traditional "sword" and "shield" objectives.⁸⁵ These developments beg the question of whether grand juries continue to perform as independent bodies, contemplating weighty concerns for both the effective prosecution of crime and the preservation of individual rights. Many commentators argue that the system no longer achieves its exalted expectations; rather, it has developed into little more than a "rubber stamp" of the prosecutor's recommendation.⁸⁶ Even the Supreme Court of the United States, which has traditionally praised state implementation of this historic institution,⁸⁷ has displayed symptoms of weakening its endorsement of the grand jury. Justice Stewart, speaking for the Court's majority in *United States v. Dionisio*,⁸⁸ conceded that "[t]he grand jury may not always serve its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor."⁸⁹ Similar disenchantment with grand jury proceedings⁹⁰ led British lawmakers to abolish their system in 1933.⁹¹

The Supreme Court of the United States in *Hurtado v. California*⁹² held that prosecution by information instead of indictment, if provided for by state law, is not a violation of the federal Constitution.⁹³ Since the *Hurtado* decision, which was decided in 1884, many states have established prosecution by information as an integral component of their prosecutorial system.⁹⁴ It is submitted that legislative implementation of the information system and the preliminary hearing as an alternative to

amongst governmental bodies); Arenella, *supra* note 67, at 532-34.

82. See *supra* notes 49-60 and accompanying text.

83. See *supra* notes 61-71 and accompanying text.

84. See *supra* notes 72-81 and accompanying text.

85. See *supra* notes 28-31 and accompanying text.

86. See, e.g., Campbell, *supra* note 48, at 178-79. Meshbesh, *Right to Counsel Before Grand Jury*, 41 F.R.D. 189, 189 (1966); Moley, *supra* note 78, at 430; Morse, *A Survey of the Grand Jury System*, 10 OR. L. REV. 295, 363 (1931).

87. See, e.g., *Hale v. Henkel*, 201 U.S. 43, 58-66 (1906).

88. 410 U.S. 1 (1973).

89. *Id.* at 17. Dissenting opinions of Justices Douglas and Marshall reveal even stronger sentiments regarding the lack of independent judicial value maintained by the modern grand jury. See *id.* at 23-51 (Douglas, J. & Marshall, J., dissenting).

90. See Younger, *The Grand Jury Under Attack*, 46 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 26, 32 (1955).

91. The Administration of Justice Act (Miscellaneous Provisions), 1933, 23 & 24 Geo. 5, ch. 36, § 1.

92. 110 U.S. 516 (1884).

93. *Id.* at 538.

94. See *supra* note 3.

indictment by grand jury would prove beneficial to Virginia criminal process. Not only would an accused individual's rights be better preserved, but more accurate determinations of probable cause would result in higher conviction rates within the Commonwealth.

IV. PROBABLE CAUSE AND THE PRELIMINARY HEARING

A. *Applicability and Denial of the Preliminary Hearing*

Section 19.2-218 of the Code provides that one charged with a felony shall not be denied a preliminary hearing.⁹⁵ Within the explicit statutory language lies the purpose of this hearing: to determine whether there is reasonable ground to believe that the charged individual committed the offense.⁹⁶ Therefore, an accused who is arrested⁹⁷ prior to a grand jury's return of a true bill of indictment is guaranteed the right to a preliminary hearing⁹⁸ unless he waives that right.⁹⁹ The courts have protected this right by requiring trial courts to grant a preliminary hearing when a defendant insists upon his statutory right.¹⁰⁰ Further, the preliminary hearing has been held to be a "critical stage" of Virginia criminal process.¹⁰¹ Accordingly, an accused is permitted to have counsel throughout the hearing, and an indigent accused is entitled to appointed counsel.¹⁰²

Courts have interpreted the preliminary hearing requirement¹⁰³ as inapplicable to an accused against whom a true bill has been returned prior to arrest. Thus, action of the grand jury preempts the accused individ-

95. VA. CODE ANN. § 19.2-218 (Repl. Vol. 1983).

96. *Id.* Paraphrasing the statutory language, the Supreme Court of Virginia stated that the primary purpose of the preliminary hearing is to determine whether there is "sufficient cause" for charging the accused with the crime alleged. *Moore v. Commonwealth*, 218 Va. 388, 391, 237 S.E.2d 187, 190 (1977) (citing *Williams v. Commonwealth*, 208 Va. 724, 160 S.E.2d 781, *cert. denied*, 393 U.S. 1006 (1968)).

Use of the preliminary hearing as a discovery mechanism is clearly not the purpose of the hearing. *Foster v. Commonwealth*, 209 Va. 297, 300, 163 S.E.2d 565, 567-68 (1968) (quoting *Williams v. Commonwealth*, 208 Va. 724, 729, 160 S.E.2d 781, 784, *cert. denied* 393 U.S. 1006 (1968)).

97. Within this context, a person who has been "arrested" means one detained in custody by authority of law or one under a legal restraint. *Moore*, 218 Va. at 394, 237 S.E.2d at 192.

98. *See Triplett v. Commonwealth*, 212 Va. 649, 650-51, 186 S.E.2d 16, 17 (1972).

99. The Code provides for waiver of a preliminary hearing at the defendant's option. VA. CODE ANN. § 19.2-218 (Repl. Vol. 1983).

100. *Triplett*, 212 Va. at 651, 186 S.E.2d at 17 (holding as a reversible error a trial court's failure to provide for a preliminary hearing and indictment).

101. *Noe v. Cox*, 320 F. Supp. 849, 850 (W.D. Va. 1970) (holding that an indigent accused is entitled to have an appointed counsel at the preliminary hearing).

102. *Id.* at 850-51 (noting that the purpose underlying the indigent's right to appointed counsel is protection against an erroneous or improper prosecution). *See Coleman v. Alabama*, 399 U.S. 1, 9 (1970).

103. *See* VA. CODE ANN. § 19.2-218 (Repl. Vol. 1983).

ual's right to a hearing.¹⁰⁴ Federal courts have upheld the constitutionality of this statutory interpretation and have not required the Commonwealth to provide a preliminary hearing under those circumstances.¹⁰⁵ This reading stems from the lack of a constitutional right to a preliminary hearing.¹⁰⁶ Thus, its denial violates neither the due process nor the equal protection clauses¹⁰⁷ of the United States and Virginia Constitutions.

B. *The Postindictment Preliminary Hearing*

Despite Virginia's nonrecognition of a postindictment preliminary hearing, commentators¹⁰⁸ and courts outside the Commonwealth have proclaimed the merits of such a procedural requirement.¹⁰⁹ Spawned by recognition of the inherent inequities faced by indicted defendants who are not guaranteed a hearing, the postindictment preliminary hearing is one viable means of securing a more equitable proceeding for all accused individuals.¹¹⁰ Furthermore, advocates of such a hearing submit that it would also ensure a more accurate probable cause determination.¹¹¹

Other jurisdictions have recognized the benefits of the postindictment preliminary hearing and have taken the steps necessary to incorporate it into their criminal systems. In 1972, Michigan became the first state to take such initiative through judicial means. Noting reliability problems with the grand jury's determinations of probable cause, the Supreme Court of Michigan in *People v. Duncan*¹¹² implemented a court rule that

104. *E.g.*, *Webb v. Commonwealth*, 204 Va. 24, 30-31, 129 S.E.2d 22, 27 (1963).

105. *Couser v. Cox*, 324 F. Supp. 1140, 1141 (W.D. Va. 1971).

106. *Ashby v. Cox*, 344 F. Supp. 759, 763 (W.D. Va. 1972); *McCormick v. Peyton*, 274 F. Supp. 797, 799 (W.D. Va. 1967).

As a basis for this position, both state and federal courts have held that the preliminary hearing is not jurisdictionally required but is merely a procedural requirement. *Nottingham v. Zahradick*, 573 F.2d 193, 194 (4th Cir.), *cert. denied*, 439 U.S. 970 (1978); *Triplett v. Commonwealth*, 212 Va. 649, 650, 186 S.E.2d 16, 17 (1972).

107. Both of these clauses are actually found in section one of the fourteenth amendment to the United States Constitution, the text of which reads in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend XIV, § 1. Similar provisions appear in the Virginia Constitution. VA. CONST. art. I, § 8. For the complete text of this section, see *supra* note 33.

108. *See, e.g.*, *Alexander & Portman, Grand Jury Indictment Versus Prosecution by Information—An Equal Protection-Due Process Issue*, 25 HASTINGS L.J. 997, 1013-16 (1974).

109. *See, e.g.*, *Hawkins v. Superior Court*, 22 Cal. 3d 584, 592-94, 586 P.2d 916, 921-22, 150 Cal. Rptr. 435, 440-41 (1978); *People v. Duncan*, 388 Mich. 489, 499-502, 201 N.W.2d 629, 633-35 (1972).

110. *See Hawkins*, 22 Cal. 3d at 592-94, 586 P.2d at 921-22, 150 Cal. Rptr. at 440-41; *Duncan*, 388 Mich. at 499-502, 201 N.W.2d at 633-35.

111. *See, e.g.*, *Comment, supra* note 74, at 306-10.

112. 388 Mich. 489, 201 N.W.2d 629 (1972).

in effect guaranteed a felony defendant the right to a postindictment preliminary hearing.¹¹³ Six years later, the Supreme Court of California in *Hawkins v. Superior Court*¹¹⁴ adopted a similar guarantee.¹¹⁵ Oklahoma had earlier achieved the same result through its legislature, which explicitly granted the right by statute in 1969.¹¹⁶

In addition, the ALI has advocated a similar use of the postindictment preliminary hearing. In the Model Code, the ALI endorses a felony defendant's right to a hearing "to determine whether there is sufficient evidence to proceed to trial."¹¹⁷ The filing of the grand jury indictment under the Model Code does not extinguish that right;¹¹⁸ thus, the defendant's right to a postindictment preliminary hearing may be exercised at his own discretion.¹¹⁹

C. *Equity Among Defendants: A Proposal for the Implementation of the Postindictment Preliminary Hearing*

It is submitted that legislative enactment of the postindictment preliminary hearing in Virginia is a feasible means of protecting against disparate treatment of defendants arrested subsequent to indictment. Implementation of such a system need not be complemented by elimination or radical alteration of the present grand jury.¹²⁰ Instead, when combined with the permitted use of the information system,¹²¹ the guarantee of a hearing could be systematically included without significantly interfering with the grand jury's indictment procedures. Such an enactment by the General Assembly would go far in diminishing the very real differentiation to which defendants indicted prior to arrest are currently subjected.

Since cost concerns create an inevitable point of contention regarding any proposed legislation, financial resistance may be anticipated among Virginia lawmakers. Obviously, the securing of a hearing where none previously existed will result in a new expense for state taxpayers. However, concurrent implementation of the information system¹²² will work to significantly offset the additional cost. In cases where the Commonwealth's

113. *Id.* at 502, 201 N.W.2d at 635. The *Duncan* court deliberately sidestepped a ruling on the constitutional issue involved. *Id.*

The preliminary hearing procedure required under *Duncan* is now codified. MICH. CT. R. 6.108.

114. 22 Cal. 3d 584, 586 P.2d 916, 150 Cal. Rptr. 435 (1978).

115. *Id.* at 593-94, 586 P.2d at 922, 150 Cal. Rptr. at 441.

116. OKLA. STAT. ANN. tit. 22, § 524 (West 1969).

117. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 330.1 (1975).

118. *Id.*, commentary at 592.

119. *See id.*, commentary at 592-94.

120. *See Hawkins v. Superior Court*, 22 Cal. 3d. 584, 592-94, 586 P.2d 916, 921-22, 150 Cal. Rptr. 435, 440-41 (1978).

121. *See supra* notes 82-94 and accompanying text.

122. *Id.*

Attorney opts for the information system, the monetary burden of grand jury proceedings will be completely eliminated.¹²³ Furthermore, prosecutors will be encouraged to use the less expensive information system as a means of notifying the accused because of the cost and delay involved in proceeding with both a grand jury and a hearing.¹²⁴ In fact, institution of both the information system and the postindictment preliminary hearing could ultimately result in costs which are lower than those of current procedures.¹²⁵ The upshot of the cost-benefit analysis of this proposed legislation is that ultimately Virginia taxpayers will not bear the expense of providing felony defendants with a more reliable determiner of probable cause.

V. CONCLUSION

As an accurate determiner of probable cause, the grand jury has fallen into obsolescence. Prosecutions commenced by the information system and preliminary hearing in other jurisdictions have shown that the grand jury indictment is comparatively less reliable than the available alternative. Grand juries have evolved into a mere "rubber stamp" of the prosecutors' preconceived notions of guilt or innocence. Witnesses, who are denied the presence of counsel, fall largely under the control of the Commonwealth's Attorney; thus, they are left with little more than a semblance of their constitutional rights.

Prosecution by information and the preliminary hearing, as an alternative to the grand jury indictment, would cure a substantial portion of the problems which are continuing to mount under the Commonwealth's current system. Similarly, a guaranteed postindictment preliminary hearing would go far in assuring indicted defendants of a fair probable cause determination. Implementation of these procedural remedies would provide for more proficient administration of criminal law in Virginia.

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123. The Code requires that grand jurors be compensated for their time and reimbursed for their mileage. VA. CODE ANN. § 19.2-205 (Repl. Vol. 1983). Additionally, both court costs and the time of the Commonwealth's Attorney must be considered as grand jury expenses.

British lawmakers abolished the grand jury system in 1933, in part because of its economic inefficiency. See The Administration of Justice Act (Miscellaneous Provisions), 1933, 23 & 24 Geo. 5, ch. 36, § 1; Note, *Criminal Procedure—Should the Grand Jury System be Abolished?*, 45 Ky. L.J. 151, 151 (1956) (citing Heyting, *The Abolition of Grand Juries in England*, 19 A.B.A. J. 648, 649 (1933)).

124. See Comment, *supra* note 74, at 308.

125. See *id.*