The Illinois Constitution, Article I, Section 7 - Seeking a Rational Determination of Probable Cause

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COMMENTS

THE ILLINOIS CONSTITUTION, ARTICLE I, SECTION 7
SEEKING A RATIONAL DETERMINATION
OF PROBABLE CAUSE

INTRODUCTION

The constitutional convention which drafted Illinois' Constitution of 1870 began a debate which has continued to the present day. The issue was and is whether Illinois should continue to require the grand jury indictment as a prerequisite of felony prosecutions. The delegates to the 1870 Convention, after deciding that the legislature should be responsible for any change in the operation of the grand jury, fashioned the indictment as a constitutional requirement. While it may have been assumed, in 1870, that the legislature would act promptly to abolish what has been called the "fifth wheel of justice," the lawmakers took no action.

In 1970, the delegates to the Sixth Illinois Constitutional Convention, having the benefit of one hundred years experience, had the opportunity

1. The states are free to allow for prosecutions of felonies other than upon indictment of a grand jury; the fifth amendment's indictment requirement applies only in the federal system. Hurtado v. California, 110 U.S. 516 (1884).

2. While the indictment was required in all felony cases, ILL. CONST. art. II, § 8 (1870), the Convention provided, in the constitution, that the grand jury "may be abolished by law in all cases." Id.

3. In a pioneering study of the grand jury, the late Wayne Morse stated: "Grand juries are likely to be a fifth wheel in the administration of criminal justice in that they tend to stamp with approval, and often uncritically, the wishes of the prosecuting attorney." Morse, A Survey of the Grand Jury System, ORE. L. REV. 101, 363 (1931).

4. Hereinafter referred to as the Convention.
to do what the legislature had not done: abolish or limit\(^5\) the grand jury. Once again, the decision was reached that the legislature should be responsible for any changes in the functioning of the grand jury.\(^6\) The convention voted to align Illinois with those states which require felony prosecutions to be initiated by grand jury indictment.\(^7\)

The Bill of Rights Committee,\(^8\) the drafter of the indictment section, was nonetheless mindful of the grand jury's shortcomings:

> [T]he views of committee members were influenced by the view that the grand jury indictment, although there has been a determination of probable cause, that in some cases the grand jury indictment is not, perhaps, really that different from simply a decision by the prosecutor to present a charge, because the grand jury has only heard the one side of the case.\(^9\)

Therefore, the Committee constructed a preliminary hearing section: "No person shall be held to answer for a crime punishable by death or imprisonment in the penitentiary without a prompt preliminary hearing to establish probable cause."\(^10\) This section was designed to cure the vices of the grand jury and retain its virtues.\(^11\)

The Committee, by requiring the hearing to be held promptly, sought to achieve a second purpose: making unknown the situation of an accused spending a prolonged period of time under the disabilities of a charge while awaiting a probable cause determination.

\(^5\) The legislature was able to abolish the right to indictment in less than all felony cases. *People ex rel. Latimer v. Randolph*, 13 Ill. 2d 552, 554, 150 N.E.2d 603, 604 (1958). The Convention, therefore, was dealing not merely with the possibility of abolishing the grand jury entirely, but with efforts to "limit or make changes in the use of the grand jury that fall short of abolishing its use in some or all cases."

\(^6\) Article 1, section 7 of the 1970 Constitution provides:

> No person shall be held to answer for a criminal offense unless on indictment of a grand jury, except in cases in which the punishment is by fine or by imprisonment other than in the penitentiary. . . . The General Assembly by law may abolish the grand jury or further limit its use.


\(^8\) Hereinafter referred to as the Committee.

\(^9\) 3 PROCEEDINGS 1454.

\(^10\) 6 PROCEEDINGS 74. Originally designated as Section 23, the preliminary hearing provision which was drafted by the Convention was made part of article I, section 7.

\(^11\) "The Committee felt that despite criticism—legitimate and not so legitimate—of the grand jury, on balance, it still served a useful purpose." 3 PROCEEDINGS 1437. "[The Committee] thought that a grand jury which . . . has investigatory powers does play a vital role . . . and is in a position to contribute a meaningful service to the community." *Id.* at 1439.
In short, the Committee sought to establish, in the Bill of Rights, that an individual charged with a serious offense is entitled to an adversary hearing which is to be held shortly after his being charged to determine probable cause. However, neither goal has been realized.

It is the purpose of this Comment to examine the history of the indictment and preliminary hearing sections of the Illinois Constitution and, by so doing, to: (1) determine why the goals of the Bill of Rights Committee were not achieved; (2) offer suggestions which, if implemented, would (a) provide the accused felon with protection from unwarranted prosecution, while (b) providing prosecutors with the means of fully performing their responsibilities to investigate and prosecute; and (3) determine (a) what rights Illinois courts have found to be contained within the preliminary hearing section accepted by the Convention, and (b) how these rights may be exercised.

**THE COMMITTEE RECOMMENDATIONS**

*Charging an Offense*

The Committee recommendation that the grand jury be retained until such time as the legislature might abolish or limit its functions was viewed as a "compromise solution." The Committee was advised that any change in the existing indictment provision would be difficult to enact, and the advice proved to be correct. As the following statements illustrate, the grand jury was viewed entirely differently by its supporters and critics.

"True Billiever": The greatest asset, I believe, of the grand jury right now for the individual is the fact that it is a buffer; it is a buffer between the accuser and the accused.

"Critic": They [grand jurors] are not students of the law; in a basic sense, they don't really know what probable cause is. The fact that they vote a true bill doesn't necessarily mean that there is, in fact, reason to hold a defendant.

"True Billiever": [The prosecutor] certainly did not try to persuade us. . . . We deliberated on there as strongly as we did here [at the convention] and really attempted to find whether this person had reason to be indicted. . . . [H]e does get an extremely, extremely fair trial.

12. It represents a satisfactory compromise between an absolute requirement of grand jury indictment and a constitutional arrangement that would permit routine resort to prosecution filed by the prosecuting attorney.

13. E. GERTZ, FOR THE FIRST HOURS OF TOMORROW: THE NEW ILLINOIS BILL OF RIGHTS 17 (1972) (Mr. Gertz was chairman of the Bill of Rights Committee).

14. 3 PROCEEDINGS 1449.

15. Id. at 1461.

16. Id. at 1440.
The disagreement regarding the "buffer" function of the grand jury, coupled with the recognition even among critics that the grand jury provides some useful services as an investigator, led the Committee to conclude "that it was preferable, on balance, to have the problem dealt with by the legislature."

The Committee's report indicates rather clearly, however, the belief that the preliminary hearing was preferable to the grand jury as a means of determining probable cause. This conclusion is dictated by the Committee's description of what would occur in a case where the grand jury indicts prior to arrest:

[T]his new provision [the preliminary hearing section] will require that a preliminary hearing be held after the indictment has been returned . . . . If the judge finds an absence of probable cause, then he should quash the indictment and discharge the defendant.

In other words, the Committee believed that a grand jury's determination of probable cause was not sufficiently reliable; review by a judge would be required before an accused would have to stand trial.

Delegate Fennoy, a committee member, relayed to the Convention further evidence of the Committee's preference for the preliminary hearing as a method of determining probable cause. A prosecutor appearing before the Committee testified that a state's attorney naturally will not present to the grand jury witnesses favorable to the accused. In response to this testimony, Fennoy reported, the preliminary hearing section was suggested.

It is clear, therefore, that the Committee did not intend the grand jury proceeding to be a substitute for the preliminary hearing. Indeed, the Committee believed that the greatest shortcoming of the grand jury—a determination of probable cause solely on state's evidence—would be cured by the preliminary hearing provision.

The Committee did not believe that the availability of the grand jury would tempt a prosecutor to dishonor the finding reached at the preliminary hearing. According to the Committee's spokesman, Delegate Weisberg, the existence of the two mechanisms, each capable of determining probable cause, would not lead to instability in the prosecutorial system. If the decision reached at the preliminary hearing were one of no probable cause,

17. See note 11 supra.
18. 3 PROCEEDINGS 1438.
19. 6 PROCEEDINGS 76.
20. See 3 PROCEEDINGS 1439.
Mr. Weisberg: The intention of the committee is that that would not bar another effort by the prosecution to indict.

Mr. Jaskula: You would have a vicious circle then, wouldn't you?

Mr. Weisberg: . . . I think we felt justified in assuming that the prosecutor would not do that unless he felt that he had additional evidence to present. . . .

The grand jury and preliminary hearing were expected to work together harmoniously. If the indictment preceded arrest, the finding reached by the grand jury at an ex parte proceeding would be reviewed by the judge at an adversary proceeding. The judge could dismiss the indictment if he determined that probable cause did not, in fact, exist. If arrest preceded indictment, the preliminary hearing would be held to determine probable cause, but a finding of no probable cause by the judge would not bar the bringing of new charges. A positive finding would still require review by the grand jury. Twelve of the twenty-three grand jurors would have to concur in the judge’s finding if the prosecution were to proceed. The grand jury in this situation would presumably be the defendant’s last line of defense against government oppression. Exactly how practical this defense was expected to be is unclear. However, the available evidence indicates that grand jury deliberation which follows the preliminary hearing is little more than a rubber stamp of the prosecutor’s decision to charge.

21. Id. at 1455.

22. 6 PROCEEDINGS 76.

23. Id.

24. Id.

25. In 1964, Cook County grand juries returned no bills in only nine percent of the cases presented to them. D. OAKS & W. LEHMAN, A CRIMINAL JUSTICE SYSTEM AND THE INDIGENT 44 (1968). However, only 7 to 10 percent of the no bills, which would be about 1% of the total indictments sought, were instances of real screening for lack of evidence. The rest of the no bills were but examples of a record keeping device. At preliminary hearing, a defendant may be bound over on several charges. . . . The Code of Criminal Procedure allows them to be embodied in a single indictment with multiple counts. The defendant, meanwhile, has been held by the jailor on three separate mittimis, one for each charge. To extinguish the two surplus mittimis, the grand jury enters a no bill on two of the charges.

Id. at 44-45.

In 1973, Cook County grand juries returned no bills in less than four percent of their cases. Chicago Tribune, July 23, 1974, at 7, col. 3. If the “record keeping” percentage has remained constant, the grand jury failed to charge in less than one percent of the cases in which indictments were sought.

The observation of a one time magistrate, “that in every instance in which [he] found probable cause, . . . the grand jury has subsequently returned an indictment against the accused,” Calkins, supra note 1, at 440, is, therefore, descriptive of grand jury deliberation which follows the preliminary hearing.
The Committee recognized that while the grand jury may provide some useful investigative services, its ability to fairly determine probable cause is, in most cases, suspect. A preliminary hearing requirement was deemed necessary to correct this deficiency. The question becomes: is the review of indictments, which may be returned in all situations, the most effective way of limiting the grand jury to the function it can best perform? An understanding of the benefit the grand jury can provide in the investigation of criminal activity will illustrate that it is not. This understanding, on the other hand, will disclose a model which will achieve a fair determination of probable cause, offer the individual a meaningful opportunity to avoid unwarranted prosecutions, and aid the prosecutor in performing his responsibility to investigate.

The grand jury in Illinois is under the direction of the state's attorney. It is the prosecutor, and not the grand jurors, who is primarily responsible for investigating suspected criminal acts. If the grand jury is of any investigative value, it is only because its subpoena powers may be utilized by the prosecutor to compel witnesses to appear before the grand jurors, and not because it initiates investigations in the first instance.

What function, then, does the grand jury perform when it merely receives evidence gathered by the prosecutor? It provides a review of the prosecutor's judgment that a charge should be brought. The evidence


27. While the court "may appoint an investigator . . . on petition showing good cause . . . and signed by the foreman and 11 other grand jurors," Ill. Rev. Stat. ch. 38, § 112-5(b) (1973), the grand jury is expected to depend upon the prosecutor's investigative resources:

[I]t is the duty of the grand jury to inquire into offenses which shall come to its knowledge "whether from the court, the State's Attorney, its own members, or from any source," . . . but it is clear from the holding in People v. Parker, 374 Ill. 524, that the proper channel for presenting information to the grand jury is the State's Attorney . . . and it is improper to communicate directly with the grand jury. People v. Sears, 49 Ill. 2d 14, 29, 273 N.E.2d 380, 388 (1971) (citation omitted).

28. Historically, grand jurors have been responsible for developing evidence, as opposed to merely passing judgment upon evidence presented to them, in situations where, as in England, no public prosecutor existed (see Whyte, Is the Grand Jury Necessary?, 45 Va. L. Rev. 461, 482-83 (1959)), or where executive investigative agencies lacked sufficient resources (see Comment, The Grand Jury Witness' Privilege Against Self-incrimination, 62 Nw. U.L. Rev. 207, 209-16 (1967)). Currently, however, both the police and prosecutor do exist and are sufficiently funded to properly investigate criminal activity. Therefore, it cannot be suggested that the grand jury generally provides investigation that would otherwise not occur.

29. In theory, the grand jury represents protection against unwarranted prosecution:
available, however, indicates that when grand juries are asked only to re-
view a decision to prosecute, they are unlikely to seriously challenge the
prosecutor's case.\textsuperscript{30} As the Committee recognized, the indictment may
represent nothing more than the prosecutor's decision to charge an offense.
Thus, no effective "buffer" is created by requiring the prosecutor to submit
his case to the grand jury for review.

If the prosecutor has determined that evidence exists which will support
a charge, subpoena powers are not needed, and therefore, the grand jury
should play no role in the charging procedure. The prosecutor should be
required to place the charge and have it tested at an adversary preliminary
hearing.\textsuperscript{31} In other words, when no investigative services are required,

Historically [the grand jury] has been regarded as a primary security to
the innocent against hasty, malicious and oppressive prosecution; it 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.

\textsuperscript{30} Grand juries in Cook County, for example, return "substantive" no bills in
about one percent of the cases brought before them. See note 25 supra. The vast
majority of these cases are brought to the grand jury after arrest (see 6 PROCEEDINGS
76), or in other words, when the grand jurors are asked only to review a charge al-
ready filed. If post-arrest, grand jury deliberation represents 95 percent of the cases
(as Delegate Weisberg believed, 3 PROCEEDINGS 1462), and all no bills were returned
in these cases, the grand jury would disagree with the prosecutor's decision to charge
(after arrest) scarcely more than one percent of the time (1/95). In fact, it is likely
that when the grand jury is only called upon to review a pending charge, it will dis-
agree with the prosecutor in far less than one percent of the cases.

The suggestion is fanciful that grand jurors will critically review evidence presented
by the prosecutor against an individual whom the prosecutor has already decided
should be tried. The probability of the grand jurors rejecting a case based only upon
evidence probative of guilt (see text accompanying note 20 supra) is, common sense
would dictate, barely positive. It would not be unreasonable to assume that, at best,
one-half of the no bills are returned in those cases where a decision to prosecute has
been made prior to grand jury deliberation. Thus, the true "disagreement" ratio is
not 1/95 but perhaps $\frac{1}{2}$/95 (5 cases out of 1000).

The fact that so few no bills are returned does not indicate that only "strong"
cases are presented by the prosecutor. In 1972, for example, there were 4,486 felony
dispositions at the trial stage in Cook County. ADMINISTRATIVE OFFICE OF THE ILLI-
NOIS COURTS, ANNUAL REPORT TO THE SUPREME COURT 120 (1972). Of these cases,
1,613 were dismissed (1,167-stricken with leave to refile, 253-nolle prosequi, 193-dis-
posed of in some other manner). Undoubtedly some cases involved defense continu-
ances which frustrated prosecution, problems with key witnesses and the like. But
even assuming that all 253 cases which were nolle prosequi involved pleas and one-
half of the SOL cases (584) were "frustrated," 776 indictments were too weak to be
tried. This yields a "weakness" ratio of 776/4,486 or .17, far above the grand jury's
"disagreement" ratio of .005. The indictment, in other words, provides no reasonable
indication that a case will be decided on its merits.

\textsuperscript{31} In those situations where the prosecutor has decided to charge, it is clear that
the "independence" of the grand jury provides, practically, no meaningful check. See
note 30 supra. The adversary hearing, to be sure, includes an "independent" fact
the "information" should replace the grand jury indictment as the method used to initiate prosecutions.\textsuperscript{82}

The Committee believed that the "information" would provide the prosecutor with a "routine resort to prosecution."\textsuperscript{98} This notion, however, is incorrect. Allowing for prosecution by information is not necessarily the equivalent of allowing the prosecutor, alone, to determine probable cause.\textsuperscript{34} If a complaint is filed by the prosecutor in the proposed information system, arrest may certainly be effectuated.\textsuperscript{35} But the filing of the complaint will not establish the existence of probable cause.\textsuperscript{38} Trial upon the charge will ensue only after the judge at the preliminary hearing has finder. But this is not what recommends it as a means for determining probable cause.

By offering the accused adversary tools at the hearing (the right to cross-examine and present evidence), the boundaries of the inquiries may be expanded, something which would not occur in the grand jury room. It is this expansion, rather than the "independence" of the fact finder which provides a meaningful buffer against unwarranted charges.

32. This would include all cases in which individuals have been arrested with or without warrants, and all cases where the prosecutor does not require the subpoena powers of the grand jury.

33. 6 PROCEEDINGS 40.

34. See, e.g.:

[No] person shall be prosecuted for a felony by information without having had a preliminary examination before an examining magistrate, or having waived such preliminary examination.

OKLA. CONST. art. II, § 17.

No prosecuting or circuit attorney in this state shall file any information charging any person or persons with any felony, until such person or persons shall first have been accorded the right of a preliminary examination.


35. Under the present system the prosecutor may file a complaint and seek an arrest warrant. See ILL. REV. STAT. ch. 38, § 107-9(c) (1973). This practice would, of course, be continued.

36. If a prosecuting official cannot properly issue a search warrant in a case he is prosecuting [see Coolidge v. New Hampshire, 403 U.S. 443 (1971)], then he is a fortiori not a proper person for determining the existence of probable cause to hold an accused for trial.


The Supreme Court has held that the due process clause does not require a hearing prior to the filing of an information. Lem Woon v. Oregon, 229 U.S. 586 (1913). However, the Pugh decision rested upon the fourth as well as the fourteenth amendment:

A criminal system wherein the individual faces prolonged imprisonment upon the sole authority of the police and or the prosecutor violates the principles . . . which are the essence of the constitutional guarantees of freedom from unreasonable seizure and deprivation without due process of law.

The court finds that under the Fourth and Fourteenth Amendments, ar-
decided that trial is warranted. The "information" will be filed after the preliminary hearing as a substitute for the "indictment;" it is used merely as a means of providing the defendant with due process notice (as does the "indictment," assuring the defendant that he will not be required to defend against that with which he has not been charged), and as a means of establishing the focus of the prosecution for purposes of avoiding double jeopardy (as does the "indictment"). This type of substitution provides no "routine resort," because the prosecutor is not given the power to compel an individual to stand trial upon the charge brought. The charge can be tried only after a determination of probable cause reached at an adversary preliminary hearing.

Recognition that the grand jury serves no useful purpose when it is asked merely to review a prosecutor's decision to charge does not mean that the grand jury is entirely without utility. Its power to compel the appearance of witnesses, especially when coupled with a grant of immunity, is a valuable aid in uncovering evidence of criminal activity. Such power, does not, however, exist within the executive, investigative agencies (the prosecutor and police). The investigative service provided by the grand jury should, therefore, be retained.

rested persons, whether or not released on bond, have the constitutional right to a judicial hearing on the question of probable cause. 332 F. Supp. at 1113, 1115 (emphasis added). Thus, Pugh is distinguishable from Lem Woon, the former focusing upon the question of seizure and the latter upon the legitimacy of the information system according to general principles of due process. By requiring a hearing prior to trial in order to establish the "reasonableness" of the seizure, the Supreme Court can affirm Pugh without the necessity of overruling Lem Woon.

37. This proposal has, of course, been offered in the past. However, legislative efforts in Illinois to effectuate an information system which would include the preliminary hearing as the mechanism for determining probable cause have not, to date, succeeded. The latest attempt, which managed to pass the House only to be buried in the Senate, provides:

All prosecutions of felonies shall be by information or by indictment. No prosecution may be pursued by information unless a preliminary hearing has been held or waived . . . and at that hearing probable cause . . . was found.


38. Legislative attempts to make definite the defendant's rights (see note 91 infra, and accompanying text) at the preliminary hearing have been unsuccessful. A house bill, buried in the Senate provides:

Prior to the preliminary hearing or examination the defendant shall have the right to subpoena witnesses. During preliminary hearing or examination the defendant shall have the right to be heard, to present evidence . . . to cross-examine witnesses.

The investigative service cannot, however, be performed without the grand jury's being able to determine whether the fruits of its investigation support a charge. The power of subpoena does not exist to provide the prosecutor with a means of discovery; it exists to aid the grand jurors in their decision as to whether a criminal charge shall be brought.

The Committee believed that the grand jury's decision should be reviewed at a preliminary hearing. In this way, it was believed that the benefit of grand jury investigation could be retained while providing the defendant with an opportunity to develop a balanced view of the evidence. However, by requiring a duplication of the probable cause determination, the Committee's scheme attached no finality to either the grand jury's or the judge's finding and provided no method of insuring that the grand jury would, in fact, be used for investigative purposes. In addition, the scheme contained no safeguards to help assure that the grand jury's decision would represent an independent judgment. All of these infirmities could be cured if the function of, and access to, the grand jury were specifically limited.

The prosecutor, as has been suggested earlier, should not have access to the grand jury unless its subpoena powers are needed to fully investigate a situation. Simply providing the prosecutor with the option of proceeding by way of information or indictment might achieve the desired result. However, limiting the availability of the grand jury, by requiring the prosecutor to request the convening of a grand jury and to show good cause that subpoena powers are needed, will insure investigation and not meaningless review.

39.  The Committee's suggestion that the preliminary hearing could follow indictment might help to avoid unwarranted trials, but a non-independent grand jury would not protect an individual from having to assume the disabilities attaching to an unwarranted charge.

40.  See notes 30-32 supra and accompanying text.

41.  When the prosecutor is provided with an option, it appears that most prosecutions will be initiated by information. An early study indicated that the indictment would be used in only six to ten percent of the cases. Moley, Initiation of Criminal Prosecutions by Indictment or Information, 29 Mich. L. Rev. 403, 413 (1931). More recent statistics show that in one urban area the indictment is used in only about three percent of the felony prosecutions. Graham & Letwin, The Preliminary Hearing in Los Angeles, 18 U.C.L.A. L. Rev. 636, 678 n.155 (1970). A simple option would not, of course, preclude the prosecutor from seeking an indictment after a judge has found no probable cause.

42.  Grand juries which are required to be in session, see Ill. Rev. Stat. ch. 38, § 112-3(a) (1973), or routinely called upon motion of the state's attorney, see Ill. Rev. Stat. ch. 38, § 112-3(b) (1973), are able to act in all situations—those in which investigation is required and those in which it is not. To insure that it is only in the former situations the grand jury is called, the prosecutor should be required
As the "investigative" grand jurors will be called upon to evaluate the information obtained through the subpoena power, the prosecutor will necessarily have to present evidence which he has gathered that establishes the basis of a possible charge. The "basis" evidence will not of course represent the prosecutor's judgment that probable cause exists. If the evidence did represent such a judgment, no subpoena power would be necessary and the prosecutor would be required to proceed by way of information. Therefore, the grand jurors will be instructed: (1) that the information initially gathered by the prosecutor does not warrant the bringing of a charge; (2) that a charge may be brought only if additional, relevant information is uncovered which (3) sufficiently adds to the "basis" evidence to establish that a particular individual is probably responsible for the commission of a crime.

In the proposed information-grand jury system, the indictment will not be reviewed at a preliminary hearing. Thus, the individual named in an indictment will not have the opportunity, as does the individual named in an information, to challenge prior to trial the charge leveled against him. For several reasons this difference in treatment is justified: (1) The grand jury will not be available as a means of review when the prosecutor wishes only to present what he believes is evidence establishing probable cause; (2) the grand jury will be instructed that the evidence available prior to its convening does not warrant indictment; and (3) the focus of the grand jury will be the uncovering of evidence which may, when viewed in light of existing evidence, support a charge. These considerations to attest that individuals believed to have information are unwilling to co-operate with him.

Another requirement might also be imposed: A grand jury shall not be convened unless a judge determines that the "public interest so demands." ALI CODE OF CRIMINAL PROCEDURE, § 114 (Official Draft 1930); WASH. REV. CODE ANN. § 10.27.030 (1973 Supp.). The "public interest" showing is aimed at limiting the grand jury investigation to those situations which "affect the members of the community as a whole, rather than individuals." Segal, Spivack & Costillo, Obtaining A Grand Jury Investigation in Pennsylvania, 35 TEMP. L.Q. 73, 79 (1961). To be avoided "is the investigation of individuals on allegations of ordinary crimes solely for the purpose of uncovering wrongdoings of that person." Id. at 86. Implicit in the "public interest" requirement is the idea that it is preferable to place a charge and have it tested at a hearing, rather than have the charge arise out of an ex parte proceeding which offers the defendant no opportunity to challenge the evidence prior to trial. Therefore, before the grand jury is convened, it should be established that there is some compelling reason to curtail the potential defendant's rights. See Commonwealth v. McCloskey, 443 Pa. 117, 277 A.2d 764 (1971). This reason would include a showing that "the ordinary processes of law [are] inadequate to cope with . . . a matter . . . affect[ing] the members of the community as a whole, rather than individuals. The investigation must be aimed at conditions and not primarily at individuals." Segal, et. al, supra at 79.
create within the grand jury an effective independence which assures that the determination of probable cause is not a meaningless exercise. 43

When Shall the Preliminary Hearing be Held?

The Committee believed that the existing statutory provisions 44 concerning the preliminary hearing were not producing promptly held hearings. 45 It is not clear, however, why the constitutional command of "promptness" was expected to be more successful than the statutory directive. It may be, that as the statute does not indicate with any definiteness when the judge must hold the hearing, 46 an imprecise constitutional directive was expected to demand respect, whereas an unclear statute invites avoidance. Yet the Committee Report can be read as encouraging the latter response rather than the former.

The Report suggests that in determining "promptness," emphasis should be placed "upon the essential purpose that a person speedily receive the important rights listed above (confrontation, cross-examination, presentation of evidence), including prompt and public presentation of sufficient

43. It may be suggested, as did the Committee, that the investigative value of the grand jury would not be lessened if a preliminary hearing were required to follow indictment. However, besides being awkward, this could result in "passing the buck." That is if the grand jurors decision to charge were not final, they might routinely indict, expecting the judge at the preliminary hearing to ferret out the weak cases. Cf. Calkins, supra note 1, at 440: "[i]t must be recognized that some magistrates knowing that a case will be subsequently heard by the grand jury, will give only cursory attention to the preliminary hearing."

44. "The judge shall [hold a preliminary hearing in those cases where the judge is without jurisdiction to try the offense." ILL. REV. STAT. ch. 38, § 109-1(b)(3) (1973). "The judge shall hold the defendant to answer . . . if from the evidence it appears there is probable cause to believe an offense has been committed by the defendant." ILL. REV. STAT. ch. 38, § 109-3(a) (1973).

45. Delegate Fennoy reported that his experience in St. Clair and Madison counties showed that, in eight years, perhaps five preliminary hearings were held. See 3 PROCEEDINGS 1457. The Committee was of the belief that "the actual practice seems to have repudiated the words of the statute." GERTZ, supra note 13, at 168.

46. The judge, according to statute is required to hold a hearing if no indictment is returned prior to the scheduled date of the hearing, ILL. REV. STAT. ch. 38, § 111-2(a) (1973); People v. Petruso, 35 Ill. 2d 578, 221 N.E.2d 276 (1966). However, no specifics are provided as to when the date shall be scheduled.

In practice, an arrestee is "taken without unnecessary delay before the . . . judge . . . and a charge . . . filed." ILL. REV. STAT. ch. 38, § 109-1(a) (1973). The judge will not, however, hold a hearing at the initial appearance. This is desirable, as the defendant is unprepared to challenge the charge at this point. At the very least, time is required to obtain counsel to represent the defendant at the preliminary hearing (right to be represented by counsel is constitutionally mandated, Coleman v. Alabama, 399 U.S. 1 (1971)). But the fact remains that the various statutory provisions regarding the preliminary hearing provide no clue as to when it must be held, or under what circumstances a continuance will be granted.
A basic assumption underlying an effective preliminary hearing requirement is that the prosecutor is perfectly able to demonstrate the existence of probable cause shortly after the individual’s arrest. The purpose of the hearing is to establish the validity of the arrest and not to “make the case.” If no reason can be shown to hold the accused for trial, the defendant should not have to bear the burdens which attach to a criminal charge. The preliminary hearing, therefore, fails of its purpose unless held shortly after arrest. Judicial construction is not required to effectuate speed; resort to “all the circumstances” is unnecessary. Rather, the determination of when the preliminary hearing is to be held requires a practical solution; legislation to implement the constitutional principle is required.

The Federal Rules of Criminal Procedure contain a preliminary hearing scheme which is an instructive model. The magistrate must set the date for the hearing at a reasonable time not to exceed ten days if the accused is in custody, and not to exceed twenty days if bail has been posted. The time may be extended with the defendant’s consent upon a showing of good cause. Without the defendant’s consent, the time may be extended only upon a showing that “extraordinary circumstances exist and delay is indispensable to the interests of justice.”

The importance of insuring that hearings are promptly held is illustrated by examining Cook County’s disposition of charges at the preliminary hearing.

47. 6 PROCEEDINGS 75-76.
48. Id. at 75.
49. Supra note 45.
50. 6 PROCEEDINGS 75.
51. ILLINOIS REVISED STATUTE, Chapter 38, § 103-5 (1973), the Speedy Trial provision, is an example of legislation which is necessary to make meaningful a constitutional directive. Section 103-5 provides, basically, for trial within 120 days if the accused is in custody, and trial within 160 days if bail has been posted. It is clear that if judges were left free to “construct” speediness, defendants would have little idea of what to expect, much litigation would ensue, and the results would lack consistency. The preliminary hearing situation, without legislative implementation, provides the potential for just these kinds of problems.
52. FED. R. CRIM. P. 5(c).
53. Id.
54. Id.
hearing stage. In 1964, of the 16,846 felonies filed, only 3,817 or 23 percent resulted in findings of probable cause. The remaining charges were either dismissed (17 percent), dismissed for want of prosecution (9 percent), nolle prosequi (38 percent), stricken with leave to refile (12 percent), or disposed of in some other fashion (1 percent).

The statistics indicate that 39 percent of the charges filed were never prosecuted and some percentage of defendants, originally charged with felonies, were ultimately charged with, or plead to misdemeanors. It is of course crucial that it be determined at the earliest possible moment which defendants will be prosecuted. The earlier the decision is made, the less hardship will be suffered by those who face unwarranted charges. Legislative implementation of the "promptness" requirement will insure that the decision will be made at the earliest practical moment, and that a significant percentage of individuals charged will not have to be unnecessarily burdened for prolonged periods of time.

THE CONVENTION ACTS—THE PARKHURST AMENDMENT

The Committee recommendation that the "indictment" remain a prerequisite to felony prosecutions was accepted by the body of the Conven-


56. Charges which are nolle prosequi (prosecutor's wish not to proceed) involve either the dropping of felony complaints and refiling as misdemeanors, see Oaks & Lehman, supra note 25, at 43, or pleas (according to the Office of the Clerk of the Circuit Court of Cook County).

57. Charges dismissed on the merits (17%), dismissed for want of prosecution (9%), stricken off with leave to refile (SOL) (12%), and "other" (1%), total 39%. It must be pointed out that charges which are SOL may subsequently be prosecuted and that charges which are dismissed on the merits may later be made part of an indictment. See People v. Kent, 54 Ill. 2d 161, 295 N.E.2d 710 (1973). However, it seems that the 39 percent "non-prosecution" ratio is accurate in light of the fact that a substantial percentage of indictments do not get tried. Note 30 supra.

Although currently, Cook County's first district (Chicago) does not record any dispositions at the preliminary hearing other than findings of probable cause, see Administrative Office of the Illinois Courts, Statistical Report of the Circuit Court of Cook County 11 (1973), the "non-prosecution" ratio, in Cook County, appears to have increased in recent years. In 1973, there were 22,749 felony charges filed (figure supplied by the Office of the Clerk of the Circuit Court of Cook County). There were 4,799 findings of probable cause, id., which findings represented 21 percent of all charges filed. This is slightly lower than the 23 percent figure of 1964. The suburban, Cook County districts, meanwhile, had a "non-prosecution" ratio of about 60%. Of 6,129 dispositions, 414 charges were dismissed on the merits, 255 dismissed for want of prosecution, 2,602 stricken with leave to refile, and 620 disposed of in some other manner. Id.

While the suburban dispositions represented only about 27 percent of charges filed in the County, the high "non-prosecution" ratio outside Chicago indicates that the county wide ratio is somewhat higher than the 39 percent of 1964.

58. Note 56 supra.
tion. An amendment offered by Delegate Canfield, which provided that "all offenses heretofore required to be prosecuted by amendment may be prosecuted by indictment or information," was defeated by voice vote. The Convention was offered the opportunity to infuse a greater amount of rationality into the criminal justice system; it chose not to accept the challenge. The convention refused to bury the myth that the grand jury provides a meaningful check upon the prosecutor's decision to charge an offense. Attention turned to the Committee's preliminary hearing recommendation.

The Committee majority presented the preliminary hearing to the delegates as

the basic right of every person, before he is going to be required to stand trial or be held to answer on a serious criminal charge, to have the judge hold a preliminary hearing and decide there is some reasonable basis for subjecting the defendant to that situation.60

The Committee minority believed that the right to a preliminary hearing need not be elevated to constitutional heights because the hearing duplicated the efforts of the grand jury.61 Delegate Lennon, a minority member, was personally in favor of a "latent" constitutional provision—one which would take effect if and when the legislature abolished or limited the use of the grand jury. He offered such an amendment as a substitute for the majority recommendation.

Coupled with the criticism that the preliminary hearing duplicated the efforts of the grand jurors was the observation that legislation existed which provided a right to a hearing in the absence of indictment,62 and

59. 3 PROCEEDINGS 1444. Canfield criticized the grand jury system as "cumbersome, expensive . . . cruel." Id. at 1441. He believed that "[w]hatever the prosecutor says, they want to do. . . ." Id. at 1445.

60. 3 PROCEEDINGS 1466.

61. Since the only question before a grand jury is "probable cause" and since the preliminary hearing also decides "probable cause," the Majority proposal requires a duplication of the same finding. . .

In any event, if the Convention wants to retain the grand jury, a "probable cause" preliminary hearing ought not duplicate the grand jury effort.

6 PROCEEDINGS 152 (Minority Report 1E).

62. According to statute, the return of an indictment prior to the scheduled examination obviates the necessity of the preliminary hearing. ILL. REV. STAT. ch. 38, § 111-2 (1973). It was the belief of several delegates who chose to speak on the subject that the situation was adequately covered by legislation. One delegate believed that:

[We have spent a great amount of time on something which is very basically legislative. The abuses that have been mentioned I think we will have as long as we have men. There are always abuses.

3 PROCEEDINGS 1462.
that the Committee recommendation provided the potential for multiple hearings. Delegate Lennon read section 23 as requiring a preliminary hearing any time a person is "held to answer." He argued that an accused is held to answer after a complaint is lodged, at which time a hearing would be required; and that he is also held to answer after indictment, at which time another hearing would be necessary. Noting that no finality would attach to a hearing held prior to indictment, and that therefore, a finding of no probable cause might still lead to indictment and a second hearing, Delegate Jaskula envisioned a "vicious circle."  

The protestations of the Committee majority and its supporters notwithstanding, Lennon's "latent" provision carried by a vote of fifty-three to thirty-seven. The constitution at this point contained a grand jury but no preliminary hearing.

The effort to include within the Bill of Rights some provision regarding the preliminary hearing was not to be denied. Delegate Parkhurst, chairman of the Local Government Committee, stepped outside the environs of "home rule" to offer an "amendment" to Lennon's "latent" provision. It was actually a substitution, since its acceptance would result in the resurrection of the preliminary hearing immediately, rather than upon legislative abolition or limitation of the grand jury. The amendment, after perfecting language was added, managed to pass and provided that:

Unless the initial charge has been brought by indictment of a grand jury, no person shall be held to answer for a crime punishable by death or imprisonment in the penitentiary without a prompt preliminary hearing to establish probable cause.

Parkhurst believed that his amendment would accomplish what he perceived to be the common goal of both the advocates and the opponents of the preliminary hearing section, "namely, to see that anybody accused of a crime gets one shot at having some decision on probable cause, but not two."

Delegate Weisberg, the Convention's chief advocate of a constitutional right to a preliminary hearing, believed that initial indictments should be reviewed, although he recognized the substantial discomfort created by this notion. At the same time, he was aware that the initial indictment was a relative rarity. Therefore, "if there [was] concern with just that as-

63. See 3 PROCEEDINGS 1457.
64. Id. at 1455.
65. 6 PROCEEDINGS 203 (Committee on Style, Drafting and Submission, Proposal Number 4).
66. 3 PROCEEDINGS 1460.
pect of it," he was willing to accept Parkhurst's proposal, as he preferred "to take care of what [he guessed was] more than 95 percent of the cases where the problem can come up..."

Parkhurst's stated purpose, however, when combined with the language of his amendment, posed some questions for the delegates: (1) Would not the existence of a grand jury provide the one desired shot at probable cause?; (2) Was Parkhurst implying that one procedure is as acceptable as the other as a means of determining probable cause?; and, therefore (3) Since a preliminary hearing would not be required if the individual were arrested after indictment, could it be inferred that what Parkhurst was really concerned with was the hardship of incarceration without *some* determination of probable cause, and not the actual holding of the hearing?

Delegate Jaskula drew the third inference suggested above and proposed that the preliminary hearing be required "unless a true bill has been voted by the grand jury." In other words, if an individual were arrested prior to indictment, he would be entitled to a hearing unless the prosecutor were able to obtain an indictment before any hearing had been held. Weisberg urged Parkhurst to reject Jaskula's suggestion, since it would allow the prosecutor to obtain an indictment without ever having to present a case at the preliminary hearing. Parkhurst, heeding Weisberg's advice, rejected Jaskula's perfecting language.

This rejection seemed to have established the preliminary hearing as a prerequisite to any indictment which was not an initial charge. The Illinois Supreme Court, however, has taken a different view.

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67. *Id.* at 1462.
68. *Id.*
69. *Id.* at 1469.
70. The Jaskula proposal was the equivalent of the statutory provision that a preliminary hearing or examination upon the complaint or information shall be conducted . . . unless the defendant waives such hearing or examination or unless a Bill of Indictment upon the same felony charge is returned . . . prior to such hearing or examination.


71. Jaskula's suggestion would mean that a preliminary hearing right could be easily defeated whenever a prosecutor chose to do so by simply postponing a preliminary hearing until he obtains a grand jury indictment, and then point to the section and say there is no right to a preliminary hearing in view of the "unless" clause.

3 PROCEEDINGS 1469.

72. The rejection of the Jaskula proposal was noted by Justice Ward in his dissenting opinion in People v. Hendrix, 54 Ill. 2d 165, 295 N.E.2d 724 (1973), as support for the notion that unless the initial charge were brought by way of indictment, a preliminary hearing must be held before the defendant is indicted. See 54 Ill. 2d at 172-73, 295 N.E.2d at 728.
The Illinois Supreme Court, in *People v. Kent*, has stated that the purpose of the preliminary hearing section is to "insure that the existence of probable cause will be determined promptly *either* by a grand jury or by a judge." The implication of this statement is, of course, that the preliminary hearing section seeks only to avoid delay in the determination of probable cause by *some* method; the section does not seek to insure that the preliminary hearing must be held prior to an indictment which is not an initial charge.

The court, in *Kent*, supported its explanation by referring to the change in the Committee recommendation brought about by the passage of the Parkhurst amendment. The Committee, the court said, would have required a preliminary hearing to follow initial indictments, but abandoned the idea upon the delegates' acceptance of the Parkhurst amendment. Given the court's conclusion, the following rationale must have been applied.

By requiring no hearing after initial indictments, the grand jury must be viewed as providing the same function as the preliminary hearing: determining probable cause. If, in any event, there must be an indictment before the charge may be tried, it appears that, by passing the Parkhurst amendment, the delegates were seeking to insure that one arrested prior to indictment would not be held for prolonged periods while awaiting grand jury deliberation. Thus, if the true bill is returned prior to the hearing, the above purpose will have been achieved. The delegates were not, on the other hand, establishing that the method used in placing the initial charge would determine whether a preliminary hearing is required.

The court also supported its notion of the purpose of the preliminary hearing section by pointing to the section's language and the explanation thereof provided by the Committee on Style, Drafting, and Submission. The explanation reads:

> This change [from the language of the first draft to the present language] makes it clear that a person must either be charged *initially* by a grand jury indictment or given a prompt preliminary hearing before being held to answer for a crime. . . .

73. 54 Ill. 2d 161, 295 N.E.2d 710 (1973).
74. *Id.* at 163, 295 N.E.2d at 711 (emphasis added).
75. *See* text accompanying note 65 supra.
76. *See* text accompanying note 78 infra.
77. 7 PROCEEDINGS 2600 (Committee on Style, Drafting and Submission, Number 15) (emphasis added).
This language does not, however, support the idea that a promptly returned true bill is the equivalent of a prompt preliminary hearing, as the court suggested.

The preliminary hearing section provides that:

No person shall be held . . . unless either the initial charge has been brought by indictment . . . or the person has been given a prompt preliminary hearing. . . .

The language, unless either (A) initially indicted or (B) given a preliminary hearing, is equivalent to unless (A) or unless (B). Therefore, the unless clause of section 7 is satisfied if either (A) or (B) is satisfied. If the accused has been initially indicted, (A) is satisfied, and clearly no preliminary hearing is required. If (A) is not satisfied, the requirements of the section are met only if (B) is satisfied. An intervening indictment is not an initial charge and would not satisfy (A). An intervening indictment is a determination of probable cause, but it is not a preliminary hearing, and thus does not satisfy (B). Therefore, neither the language nor the explanation of article I, section 7 supports the Kent court's conclusion that the promptly returned true bill and the promptly held hearing are equivalent. Moreover, the Convention debates disclose evidence indicating that the method of placing the initial charge was meant to determine whether the preliminary hearing was to be held.

Delegate Weisberg, who was instrumental in providing the language of the Parkhurst amendment, believed:

the initial charge language [was] . . . designed to make sure there is no duplication or no right to a second preliminary hearing in the situations where the first charge . . . is by grand jury indictment; that in the case where [the charge is filed prior to indictment], that those are the cases where there should be a right to a preliminary hearing.

Mr. Parkhurst, in explaining how his amendment would work, also focused on the method of placing the initial charge:

If you do it by indictment, then there is no preliminary hearing. That's got to be first. If you do it the other way around [arrest precedes indictment], he has a right to a preliminary hearing, and that's what's intended.

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78. ILL. CONST. art. I, § 7 (emphasis added).
79. When Parkhurst initially offered his proposal, he suggested that "[i]n the absence of an indictment . . . no person shall be held to answer . . . without a prompt preliminary hearing." 3 PROCEEDINGS 1461 (emphasis added). Weisberg perfected the language by substituting "except where the initial charge is by indictment of the grand jury" for "in the absence of indictment". Id. He believed his language "would take care of the small percentage of cases where the prosecution goes first to the grand jury—and where there is some concern expressed about the judge then sitting and duplicating the probable cause finding of the grand jury." Id.
80. Id. at 1469 (emphasis added).
81. Id. (emphasis added).
Finally, the rejection of the Jaskula proposal indicates that the supporters of the Parkhurst amendment intended to make certain that the right to a preliminary hearing was a consequence of an arrest before indictment.

The debate surrounding the passage of the Parkhurst amendment does, therefore, support the notion that the right to a preliminary hearing is acquired upon the placing of a charge which is not an initial indictment. But was it the intention of the Convention that this right to a preliminary hearing could somehow be extinguished, or, on the other hand, did the Parkhurst amendment clearly establish the preliminary hearing as a prerequisite to the return of an indictment which was not an initial charge?

The court, in *Kent*, by finding a promptly returned indictment equivalent to a prompt preliminary hearing, answered the two parts of this question yes and no respectively. The justices believed that the preliminary hearing section presented an issue of "when" and not "how." But the debates can support an answer of no and yes; the issue may be viewed as one of "how" as well as "when."

The Committee recommended that preliminary hearings be held in all cases because it felt that a decision based upon only one side of the case was most likely to be no more than a routine ratification of the prosecutor's own judgment.83 This notion definitely applies to situations in which an individual is arrested prior to indictment.84 If a preliminary hearing were not required, it would seem obvious that only evidence probative of guilt would be presented to the grand jurors, who would be unlikely to look beyond the evidence presented to them. This type of review would provide the accused with no effective buffer against unwarranted prosecution. The fact that the decision would be promptly reached is irrelevant. If the preliminary hearing were made the prerequisite to indictment in this situation, the defendant would have a meaningful opportunity to establish that the charge he faces is unwarranted.

Mr. Weisberg, the father of the preliminary hearing section's "unless" clause,85 was not merely seeking, as the court suggested, to insure a

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82. See text accompanying notes 68-72 supra.
83. See text accompanying note 9 supra.
84. It is submitted that Mr. Weisberg (and presumably those who voted in favor of the Parkhurst Amendment) was willing to provide for a preliminary hearing in only those cases (95%) where arrest preceded indictment because, if grand jury deliberation were allowed to follow arrest directly, the likelihood of critical review would be almost non-existent. See note 30 supra. On the other hand, grand jury deliberation which precedes arrest (besides being relatively rare) need not involve only the presentation of evidence designed by the prosecutor to suggest guilt; it may involve investigation. The prosecutor may very well recommend indictment after all "investigation" has been completed. But the recommendation will not result from a notion conceived prior to entry into the grand jury room.
85. See note 79 supra.
prompt determination of probable cause. When it was suggested that the words "to answer" be deleted from the Committee's recommendation in order to avoid the confusion which existed at one time over the possibility of holding multiple hearings, Weisberg responded: "to delete the words 'to answer' might possibly invite an interpretation . . . that this would deal with custody rather than the requirement that a person stand trial." If this were the import of the section prior to the passage of the Lennon amendment, it is only reasonable that it remained so upon the acceptance of the Parkhurst amendment. It was, in other words, the method of determining probable cause, and not merely its prompt resolution, which Weisberg sought to achieve by supporting the Parkhurst amendment after the Committee's recommendation appeared doomed. The preliminary hearing would be necessary so that "before (the defendant) is bound over to the grand jury . . . he has one judicial review—one judge making an independent decision that there is probable cause."88

Divining the intent of a constitutional provision requires examining the thoughts of those responsible for its promulgation. The Illinois Supreme Court is willing to do so.

In prior opinions we have attached great weight to the views expressed by the delegates to the Constitutional Convention . . . ; but in those instances the proceedings indicated a consensus demonstrative of the delegates' intent.89 Nonetheless, the views of Delegates Weisberg and Parkhurst, which supported an interpretation differing from the one reached by the court, were not cited in Kent. But in fairness, the court could have pointed to factors which indicated that a consensus was lacking regarding the proper allocation of function between the grand jury and the preliminary hearing.

First, prior to the passage of, but after debate concerning the Parkhurst amendment, the Convention had "deactivated" the preliminary hearing

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86. See text accompanying notes 63-64 supra.
87. 3 PROCEEDINGS 1460 (emphasis added).
88. Id. The preliminary hearing was viewed not merely as a method of ensuring a prompt resolution of the probable cause issue:
   The importance of [the preliminary hearing] is . . . not only that [the defendant] is deprived of his liberty at that point . . . but also . . . that the preliminary hearing does serve a very important function of screening out cases at that very early stage which is very, very critical for the defendant, and for the prosecution as well.
   Id. at 1454 (emphasis added).
while retaining the grand jury. This indicates that shortly before the passage of the Parkhurst amendment the preliminary hearing was viewed as providing the same function as the grand jury. Therefore, the “resurrection” of the preliminary hearing could represent only an attempt to insure a prompt determination of probable cause, as the *Kent* court suggested.

Second, in order for the preliminary hearing to provide the balanced view of the evidence Weisberg desired, the accused would have to have substantially the same rights at the preliminary hearing as he would have at trial. While the Committee intended these rights to be extended, it is not clear that this intention was widely shared. If the defendant at the preliminary hearing has no adversary rights, there appears no compelling reason to favor the preliminary hearing over the grand jury as a method of determining probable cause.

The evidence, therefore, which indicates that the preliminary hearing section was designed not merely to (1) provide a prompt determination of probable cause, but to (2) provide an opportunity to avoid unwarranted prosecution through an adversary test, must be weighed against the evidence which indicates it was only the former purpose the Convention sought to achieve. If the court in *Kent* were to have held that the section was designed to accomplish both purposes, it would have had to accept the following propositions: (a) unwarranted prosecutions may be avoided if a balanced view of the evidence is had when determining probable cause; (b) the preliminary hearing may not extend to the defendant the

90. See 6 PROCEEDINGS 75.

91. Some delegates did not believe that the defendant at the preliminary hearing had the right to cross-examine or present evidence. See 3 PROCEEDINGS 1454; 3 PROCEEDINGS 1464. Another delegate believed that the defendant had a right to cross-examine, but not to present evidence. See 3 PROCEEDINGS 1472. “Subsequent to Con-Con, there is still no consensus as to what a preliminary hearing entails. Practice varies around the State.” Duff & Harrison, *The Grand Jury in Illinois: To Slaughter a Sacred Cow*, 1973 U. ILL. L.F. 635, 657 n.73. Efforts to provide the rights of cross-examination and presenting evidence, via legislation, have not succeeded in Illinois. See note 38 supra.

92. It may be suggested that the preliminary hearing is preferable to the grand jury because a judge, given his expertise, is better able than a lay person to recognize probable cause. This suggestion would dictate that the judge’s decision should control. However, the Committee Report, 6 PROCEEDINGS 76, as well as the Convention debates, see, e.g., 3 PROCEEDINGS 1455, clearly establish that the judge's decision is not binding upon the prosecutor. Indeed, if the judge were to find probable cause, the grand jury might, although it is extremely unlikely, refuse to indict. See Calkins, *supra* note 1, at 440. The lack of finality which attaches to the decision reached at the preliminary hearing, therefore, does little to convince a court that a preliminary hearing must precede an indictment which is not an initial charge.
tools necessary to achieve a balanced view; (c) the decision reached at
the preliminary hearing is not, in any event, binding on the prosecutor;
and (d) the prosecutor may, therefore, seek an indictment notwithstand-
ing a judge's finding of no probable cause.

Thus, if the preliminary hearing were found to be the prerequisite of
an indictment which is not an initial charge, there would be no way of
assuring an individual that he would not have to face a charge that had
earlier been found to be unwarranted. If prosecution were to be avoided,
it would not be because the constitution had provided a mechanism for
determining probable cause whose result was deserving of finality.
Rather, it would be avoided only if the prosecutor chose to honor the
judge's finding. As the constitution vests the ultimate judgment of the
prosecutor's case in the grand jury, there appears no compelling reason
to require a judge's nonfinal factual determination to precede grand jury
deliberation. The court in Kent, by defining the purpose of the prelimi-
ary hearing section as insuring a prompt determination of probable cause
by either grand jury or judge, indicated that no such compelling reason
was suggested by the Convention delegates.

After a finding of no probable cause at the preliminary hearing, the de-
fendant in Kent was indicted by the grand jury upon the same evidence
that was rejected at the hearing. The defendant argued that section 7
required the quashing of the indictment. But the court held that the find-

93. In explaining the operation of the Parkhurst Amendment, Mr. Weisberg spe-
cifically stated that an intervening indictment (one returned after arrest but before
the scheduled hearing) would not obviate the necessity of the hearing;
[It is required] because the initial charge . . . would be the charge filed
by the police officer or perhaps the . . . prosecutor, but in any case, before
any grand jury proceedings.

3 PROCEEDINGS 1462. This statement, while it appears to directly contradict the
court's suggestion in Kent that a promptly returned indictment makes unnecessary
the holding of a hearing, points up a basic weakness in the preliminary hearing sec-
tion. It concedes that after arrest a prosecutor may go directly to the grand jury.
Thus, if an indictment were returned and a judge later determined that probable cause
did not, in fact, exist, would not re-indictment become a certainty? It appears it
would, as once having convinced the grand jurors that trial was warranted, the prose-
cutor would likely disregard the judge's finding. The second indictment would not
be reviewed as it would represent an initial charge. Perhaps, if the preliminary
hearing were a prerequisite to indictment, after arrest, the prosecutor would be
less inclined to dishonor a judge's finding regarding probable cause. But even disre-
garding Weisberg's failure to state, when he had the opportunity to do so, that the
preliminary hearing is a prerequisite to indictment, the fact remains, that by failing
to limit access to the grand jury, the judge's finding controls only when the prosecu-
tor chooses to honor it.
ing of no probable cause is not binding on the grand jury.94 This holding is consistent with the view that the preliminary hearing serves only as a first test of the defendant's "custody." But more importantly, the holding is dictated by the language of section 7 itself. After charges are dismissed at the preliminary hearing, the defendant is not being held to answer. However, section 7 does not provide that he may not subsequently be held to answer. In other words, the section does not make a judge's finding of probable cause a prerequisite to indictment.95

The issue to be decided in Kent was whether the indictment following the preliminary hearing was valid. In resolving this issue, the court decided much more than was necessary. The statement that section 7 seeks to insure a prompt determination of probable cause by either a judge or a grand jury was unnecessary to the resolution of the case, and could be viewed as dictum if it were not for the case of People v. Hendrix.96

In Hendrix, the defendant was indicted one day after arrest. A preliminary hearing was never held, although the prosecutor offered to hold one in order to cure any possible defect. The defendant refused the offer, contending that an indictment must be preceded by a preliminary hearing unless the indictment represents the initial charge. The court, noting that the proffered hearing was waived, concluded that:

The second paragraph of section 7 does not provide a grant of immunity . . . as a sanction for its violation. Nor would an interpretation make sense which requires the dismissal of the present indictment and the discharge of the defendant to be followed by reindictment and rearrest . . . . What is a prompt preliminary hearing must, of course, depend upon an appraisal of all the relevant circumstances, and in this case it does not appear that there was any violation of the defendant's constitutional right to a prompt preliminary hearing.97

94. In our opinion the language of the constitutional provision, as well as the history of its evolution, negates any thought that its purpose was to attach finality to a finding of no probable cause, or to establish mutually exclusive procedures, so that grand jury proceedings would be barred if an accused had been discharged upon preliminary hearing.

95. The suggestion that a preliminary hearing be required prior to indictment where the individual was not under arrest was rejected by the Committee, (see 6 PROCEEDINGS 41) and never considered by the Convention. The Committee's statement that "[a] discharge [would] be without prejudice to the prosecution's ability to institute new charge," 6 PROCEEDINGS 76, was never challenged during debate. While the prosecutor was expected, by the Committee, "to institute new charges upon being satisfied that evidence . . . is sufficient to establish probable cause," id., there was never any attempt, by the Convention, to fashion some means whereby the evidence presented to the grand jury could be compared to that which was rejected at the preliminary hearing.

96. 54 Ill. 2d 165, 295 N.E.2d 724 (1973).
97. id. at 169, 295 N.E.2d at 727.
The court seems to be saying that section 7 will be violated, technically, if the preliminary hearing does not precede an indictment which is not an initial charge. Yet in *Kent*, it seemed that a prompt indictment was unobjectionable, as it represented the equivalent of a prompt preliminary hearing. In any event, the court in *Hendrix* did not believe that dismissal of the indictment with or without immunity was the proper remedy. The court could have cited its language in *Kent* to dispel any lingering notions that the preliminary hearing is a prerequisite to an indictment that is not an initial charge; it did not do so. Lower courts, however, have read *Hendrix* as if the supreme court had done just that.98

**SEEKING RELIEF BEFORE INDICTMENT**

The Illinois courts have made clear that "prompt" intervening indictments are not invalidated by the failure to hold a preliminary hearing, and that the prosecutor is not bound by the finding reached at the hearing. What stands unresolved is the method of effectuating whatever right remains in the "constitutional right to a preliminary hearing."

The Fifth District of the Illinois Appellate Court has held that a defendant's right to a prompt preliminary hearing may be violated by failing to afford him a prompt determination of probable cause, but that the violation will not result in the overturning of a conviction:

> Defendant was not given a preliminary hearing, and even the indictment was not "prompt," as defendant was not indicted until 65 days after his arrest. We hold that this violated the defendant's constitutional right to a prompt preliminary hearing.

> We must therefore determine what action is appropriate to remedy this violation . . . . Under the rationale of *Hendrix* we are obliged to hold that this error does not invalidate the conviction.99

The fifth district's recognition that a violation can occur dictates that some remedy be available prior to indictment. The appropriate remedy to be afforded depends upon the nature of the violation. If the failure to hold a preliminary hearing is considered an omission which makes the

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98. Summarizing the court in *Hendrix* it would appear that the substance of the court's holding was that it was not necessary to afford an accused a preliminary hearing and that he could under the 1970 Constitution be indicted directly by the grand jury. *People v. Brown*, 11 Ill. App. 3d 67, 69-70, 296 N.E.2d 77, 79 (2d Dist. 1973). *See also* *People v. Williams*, 20 Ill. App. 3d 840, 314 N.E.2d 276 (1st Dist. 1974); *People v. Howell*, 16 Ill. App. 3d 989, 307 N.E.2d 172 (5th Dist. 1974), (appeal allowed, No. 46625).

arrestee's detention illegal, habeas corpus is the proper remedy. If the judge's failure to hold a preliminary hearing is considered the nonperformance of a ministerial duty, mandamus will lie.

Habeas Corpus

The Convention debates indicate that a failure to hold a preliminary hearing does not attach illegality to the defendant's detention. Therefore, even if a constitutional command were violated, state habeas corpus would not lie.

Assuming an exhaustion of state remedies, federal habeas corpus will lie if a defendant "is in custody in violation of the Constitution . . . of the United States." It has been held that the fourth amendment requires that state authorities, in the absence of indictment, establish at a hearing that probable cause exists to support an arrest. Therefore, if an individual has been charged but not indicted, and has exhausted state remedies, he may allege in a federal petition for habeas corpus that his constitutional right to a determination of probable cause has been violated. He will succeed in obtaining relief if he can establish that he is "in custody."

The defendant who is sitting in jail is obviously in custody, but actual physical custody is not a prerequisite to federal habeas relief. As a general principle, the defendant who has been released on bond has been found to be sufficiently restrained of his liberty to qualify for relief. But in determining whether the defendant who has been charged but not

102. Delegate Weisberg: "We [the Committee majority] do not intend here that a person would have to be released unless and until he has a preliminary hearing."
3 Proceedings 1460.
107. [B]esides physical imprisonment there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus.
indicted or given a preliminary hearing qualifies for relief, the restraints provided by bail are really not in issue:

To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not. Therefore, the "in custody" requirement is satisfied by virtue of the arrest, and the physical location of the defendant is irrelevant.

The restraint in question is in violation of the Constitution not because probable cause does not exist, but because it has not been established. Thus, the defendant's proper relief is the holding of a hearing to establish the existence or non-existence of probable cause. The proper relief is not release. The request for a hearing is obtainable even though release is not demanded. Federal habeas relief is not dependent upon a request for immediate release.

Mandamus

It is clear that although the Illinois Constitution requires a judge to set a date for a preliminary hearing, the setting of a specific date and the granting of continuances are within judicial discretion. Thus, if the accused but non-indicted arrestee were to maintain in a mandamus proceeding that the judge be ordered to hold a preliminary hearing to determine probable cause, the defendant would be faced with the contention that mandamus will not be used to control the exercise of judicial discretion. In order to succeed, the petitioner would have to establish that "to prevent discretionary power from being exercised with manifest injustice" mandamus should lie, or alternatively, that the failure to hold a preliminary hearing within "X" days of arrest has been an abuse of discretion.

111. Cf. Peyton v. Rowe, 391 U.S. 54 (1968): "Where [habeas corpus relief] is available, it assumes among other things that a prisoner may require his jailer to justify the detention under law." Id. at 58.
113. Note 46 supra; see also 6 Proceedings 75.
116. People ex rel. Collins v. Young, 83 Ill. App. 2d 312, 227 N.E.2d 524 (3d Dist. 1967) (Mandamus will lie to prevent a clear abuse of discretion.).
In the absence of legislation or a supreme court rule which states when the preliminary hearing is to be held and which provides guidelines for the granting of continuances, it would appear difficult to establish an "abuse of discretion." The determination of "manifest injustice" appears similarly difficult.

CONCLUSION

Because the grand jury provides no meaningful buffer when it is asked only to review a prosecutor's decision to charge an offense, access to the grand jury must be restricted. The grand jury should be used only as an investigative tool in situations where the prosecutor is unable to adequately perform his investigative responsibilities. "[A] grand jury should be convened whenever the judge believes it can be of value in the investigation of criminal activity . . . " When investigative services are not needed, the grand jury should play no part in the determination of probable cause. Such a determination of probable cause should be made only at an adversary preliminary hearing.

The existence of two mechanisms, the grand jury and the preliminary hearing, each empowered to make a probable cause determination, suggests that the former may be substituted for the latter. The supporters of the Parkhurst amendment indicated that the substitution is unwarranted when arrest precedes indictment. However, uncertainty as to how the preliminary hearing operates and the lack of finality attaching to the decision reached at the hearing, encouraged the Illinois Supreme Court to find equivalent a "promptly" returned indictment and a preliminary hearing.

The possibility of obtaining an indictment without ever having to hold a hearing creates a certain probability that the hearing will, in fact, not be held. Thus, indictments are assured which will represent neither an

117. Morse, supra note 3, at 364.
118. See note 98 supra and the cases cited therein.
119. The question arises as to why the prosecutor would desire to avoid the preliminary hearing. If there is no problem getting a case before the grand jury, the answer would appear to be that as long as an indictment is required before trial can begin, the prosecutor might as well go before the grand jurors as soon as possible. Would, however, the prosecutor seek to avoid a hearing to deny the defendant discovery? The Illinois discovery rules, ILL. REV. STAT. ch. 110A, §§ 411-15 (1973), are liberal and become applicable following indictment. Id. at § 411. Therefore, by avoiding the preliminary hearing, the prosecutor will not be able to avoid providing the defendant with, for example, lists of witnesses (id. at § 412(a)(i)), defendant's own statement (id. at § 412(a)(ii)), books, papers, photographs and the like (id. at § 412(a)(v)). It is, therefore, only reasonable to assume that the prosecutor who seeks to delay the preliminary hearing or avoid it altogether through repeated continuances does so because evidence does not exist, at the time of the scheduled hearing, which would justify an arrest.
independent nor balanced view of probable cause.

The failure to implement by legislation or supreme court rule the constitutional requirement that preliminary hearings be promptly held assures unnecessary and, inevitably, inconsistent decisions regarding the exercise of judicial discretion. The absence of definite "time" guidelines, as well as "continuance" guidelines, creates the probability that some defendants will have to assume the burdens of a criminal charge while the prosecutor seeks evidence to justify the disability.

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