THE GRAND JURY IN NEBRASKA

RICHARD E. SHUGRUE†

INTRODUCTION

In an age in which many, if not most, commentators have come to criticize the utility and practice of the grand jury system of indicting people for criminal conduct,[1] Nebraska has reexamined its century-old practice of relying on elected prosecutors for investigating crime and charging criminals.[2] Nebraska has, under limited circumstances, returned to the ancient system of grand jury inquest into certain conduct.[3] Nebraska's determination was predicated on a belief, by the proponents of the use of this citizen panel, that in the class of cases where the grand jury would be the tool by which society investigated and charged, it alone could be unbiased, uncorrupted and fair.[4]

The grand jury served the English system for ages[5] and the American national government since the beginning of the republic.[6] Over a

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† Professor of Law, Creighton University. The author thanks Cheryl Eastman, a senior student at Creighton Law School, for her invaluable help in preparing this article for publication.

1. Jeremy Bentham criticized the grand jury as anachronistic, inefficient, expensive and a tool of the prosecutors. 2 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, 312-14 (1827). By the middle of the last century, a consensus no longer existed regarding the value or the appropriate function of the institution. It was regarded by critics as an expensive and cumbersome throwback to ancient times. *See generally* SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 1:5 (2d ed. 1998) and Ron S. Chun, *The Right to Grand Jury Indictment,* 26 AM. CRIM. L. REV. 1457, 1467-72 (1989). Justice William O. Douglas castigated the institution of the grand jury asking, "[a]re we to stand still and watch the prosecution evade its own constitutional restrictions on its powers by turning the grand jury into its agent? Are we to allow the Government to usurp powers that were granted to the people by the Magna Carta and codified in our Constitution?" United States v. Mara, 410 U.S. 19, 29 (1973) (Douglas, J., dissenting). *See also* Susan W. Brenner, *Is the Grand Jury Worth Keeping?,* 81 JUDICATURE 190 (1998), and Gerald B. Lefcourt, *Curbing Abuse of the Grand Jury,* 81 JUDICATURE 196 (1998).

2. Nebraska's original constitution provided for indictment by grand jury. While the question of retaining the ancient method of indictment was intensely debated in the 1871 constitutional convention, the fundamental law was not changed until 1875 when a compromise retained the grand jury, but the legislature was made free to provide for charging in other manners. *See* ROBERT D. MIEWALD & PETER J. LONGO, THE NEBRASKA STATE CONSTITUTION 41 (1993).

3. NEB. REV. STAT. § 29-1401 (Reissue 1995).

4. *Introducer's Statement of Intent: Hearing on LB 73 Before the Judiciary Committee,* 96th Leg. 1st Sess. 1 (Neb. 1999).

5. Lawrence N. Gray, *The Grand Jury As An Institution: Its Essential Character and Miscellaneous Supervision,* 65 N.Y. ST. B.J. 38, 46 (Dec. 1993). *See also* Susan W. Brenner, *The Voice of the Community: A Case for Grand Jury Independence,* 3 VA. J. SOC. POL'Y & L. 67, 68-73 (1995).

6. U.S. CONST. amend. V. *See* BEALE ET AL., *supra* note 1, §§ 1:3-1:4.

century ago, the states began experimenting with prosecution by complaint or information as filed by local prosecutors.[7] The United States Supreme Court, in an era long before the doctrine of incorporation, as it came to be used in the mid-twentieth century,[8] was employed to apply the guarantees of the Bill of Rights to the states through the Fourteenth Amendment, and ruled that the states were free to use a system other than indictment by grand jury.[9] The Court held that neither the due process of law nor law of the land commanded adherence by the states to the ancient method of charging for felony-class crimes.[10]

How did the states come to abandon the grand jury in favor of charging by information? What was left of the 19th century grand jury system at the state level by the time Nebraska approved its second constitution, implemented it with law, and was prepared to enter the twentieth century? Why did Nebraska decide that this system which harked back to the middle ages, and was virtually abandoned, should be dusted off and restored to the criminal procedure code albeit for the limited purposes of the recent legislation?

These questions will be addressed in this article. In addition, the structure and operation of the grand jury, as it is employed in this State at the dawn of the millennium, will be explained for the benefit of practitioner and student alike. It is left for the reader to determine the wisdom of the return to the grand jury in cases in which a person dies at the hand of authorities making an arrest or having custody of a prisoner.

HISTORY OF THE GRAND JURY SYSTEM IN NEBRASKA

The State of Nebraska has adopted two constitutions and two formal versions of a provision dealing with indictment by grand jury.[11] In 1871, when the State's constitutional convention debated the grand jury issue, fierce debate centered on the cost, fairness and efficiency of the grand jury system.[12] That convention's entire product was re-

7. BEALE ET AL., *supra* note 1, § 1:5. "Michigan was the first state to eliminate the right to grand jury review." *Id.*

8. For an examination of the literature on incorporation, see RAOUL BERGER, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 5 (1989).

9. Hurtado v. California, 110 U.S. 516 (1884).

10. *Hurtado*, 110 U.S. at 516.

11. 6 WILLIAM F. SWINDLER, SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 150, 203 (1976).

12. *See, e.g.*, 1 NEBRASKA CONSTITUTIONAL CONVENTIONS 224, 228-29 (Addison E. Sheldon ed., 1905).

jected by the voters.[13] This best-reported convention of the 19th century captured the volatility of public sentiment concerning the continued employment of the grand jury.[14] It demonstrated a shift in attitude of many Nebraskans about how the criminal process should be initiated, and resulted in a determination in 1875 to try a new method of charging criminals.[15]

Nebraska's first constitution in 1866[16] was drafted shortly after the Congressional Enabling Act of 1864,[17] which had directed that a new state must obey "the laws of the United States, not locally inapplicable," and that these laws "shall have the same force and effect within said state as elsewhere within the United States."[18] That document stated, "[n]o person shall be held to answer for a criminal offense unless on the presentment or indictment of a grand jury,"[19] with the exceptions of impeachment, cases arising in the army, navy or militia, when in actual service in time of war, or public danger, and matters cognizable before a justice of the peace.[20] The political turmoil of the state's first years, the impeachment and removal of a governor, and other factors associated with settlement resulted in a demand for a new basic law.[21]

The fifty-two delegates to the 1871 convention engaged in a heated debate over the grand jury issue.[22] An Omaha delegate, C.F. Manderson, moved to adopt language continuing the traditional method of grand jury indictment,[23] but his motion was followed immediately by an amendment from J. E. Philpott of Lancaster which provided that the grand jury system could be "abolished by law in all cases."[24] The debate centered on whether grand jury practice was anachronistic, expensive and arbitrary.[25] Samuel Maxwell of Cass County castigated the system charging that "any sneak" could go before a grand jury and bring injury and trouble on a person with whom he had a controversy.[26] This was done frequently, the former

13. MEIWALD & LONGO, *supra* note 2, at 11. "[T]he entire constitution was rejected by a vote of 8,627 to 7,986. All the specific proposals did even more poorly, with woman suffrage defeated, 12,490 to 3,502." *Id.*
14. *See* 1 NEBRASKA CONSTITUTIONAL CONVENTIONS, *supra* note 12, at 224-46.
15. NEB. CONST. art. I, § 10.
16. NEB. CONST. of 1866.
17. Act of Apr. 19, 1864, ch. 59, § 4, 13 Stat. 47, 48.
18. *Id.* § 13, 13 Stat. at 49-50.
19. NEB. CONST. of 1866, art. I, § 8.
20. *Id.*
21. MIEWALD & LONGO, *supra* note 2, at 9.
22. *See* 1 NEBRASKA CONSTITUTIONAL CONVENTIONS, *supra* note 12, at 224-46.
23. *Id.* at 224.
24. *Id.*
25. *Id.*
26. *Id.* at 229.

member of the territorial legislature declared.[27] He favored a system which would give to the legislature power to suppress this "great nuisance."[28]

Siding with Maxwell was Silas A. Strickland, president of the constitutional convention and former United States Attorney for Nebraska.[29] He passionately argued that the grand jury was a secret system, tainted with barbarism and not unlike the dreaded Star Chambers of English history.[30] Strickland railed against informers who could sneak in the back door of a grand jury and do great mischief to the innocent.[31] He characterized the grand jury as "the place to spend all the gall and venom which some men possess."[32] Strickland added:

> Often an indictment is found against an honest upright man, who, for months perhaps writhes in the agony of being the object of unjust suspicion, while the fellow who has done this, walks about the street in the image of his Maker, when he should have hoofs and horns.[33]

Strickland was also concerned because, under the Nebraska grand jury system, the only witnesses which could be heard were those on behalf of the territory.[34]

On the other side of the argument, Eleazer Wakeley of Douglas County insisted that the grand jury is a barrier to crime epidemics.[35] In places ridden by crime, he declared, how could it be expected that one man would be brave enough to stand up against evil doers.[36] Who is it who fears the grand jury, Wakeley asked? It is the murderers and felons, he insisted.[37] O.P. Mason of Otoe County invoked the name of the great scholar Thomas Cooley whose work on constitutional limitations[38] inspired many states in their fabricating a new fundamental

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27. *Id.*
28. *Id.* at 230.
29. *Id.* at 237-38.
30. *Id.* at 237.
31. *Id.*
32. *Id.*
33. *Id.* at 238.
34. *Id.*
35. *Id.* at 224-25.
36. *Id.*
37. *Id.* at 239.
38. *Id.* at 245. *See generally* THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (1871). The earliest edition of the treatise held by Creighton University Law Library is the seventh edition (1903). The section on criminal accusations begins at page 436. At page 436, n.2, the treatise cites *Commonwealth v. Freelove*, 150 Mass. 66, 22 N.E. 435 (1889), for the proposition that the legislature may allow simplification of old forms of indictment. It cites *Hurtado v. California*, 110 U.S. 516 (1884) and *State v. Boswell*, 104 Ind. 541, 4 N.E. 675 (1886) for the rule that prosecution by information is due process.

law after the civil war. He pleaded that the delegates not place such great authority in the hands of one individual because the information indictment was a "dangerous innovation."[39]

J.C. Campbell, from the same jurisdiction, lashed out at prosecutors and charged that the man in that job "is generally some little petifogging jack-leg of a lawyer."[40] Let us stand, Campbell pleaded, "by the good old system."[41]

Other delegates called for compromise, allowing the legislature to decide when a grand jury indictment was required and when an indictment by information was preferable.[42] The renowned Omaha lawyer Experience Estabrook led this compromise movement, calling for the convention to permit the legislative experimentation.[43] He observed that no state which had done away with mandatory indictment by grand jury desired to return to it.[44]

The Nebraska Constitutional Convention of 1871 did not result in the people's ratification of a new fundamental law.[45] The convention drew heavily on a Granger constitution adopted the previous year in Illinois which, itself, had moved through several alterations of the fundamental law regarding grand juries.[46] In the Illinois Constitution of 1818, for example, the state's basic document upon admission to the Union, article I section 10, specifically prohibited proceeding in a criminal matter by information, except in cases relating to military jurisdiction.[47]

In 1848, the Illinois Constitution's provision relating to the proceedings in criminal cases was reworked to require presentment or indictment by a grand jury.[48] The exceptions were for impeachments and matters cognizable by a justice of the peace.[49] In 1870, Illinois once again amended the document to provide that "the grand jury may be abolished by law in all cases."[50] The 1871 Nebraska provision stated:

> No person shall be held to answer for a criminal offense, except in cases in which the punishment is by fine, or imprisonment otherwise than in the penitentiary, and in cases of

39. *See* 1 NEBRASKA CONSTITUTIONAL CONVENTIONS, *supra* note 12, at 245-46.
40. *Id.* at 239.
41. *Id.*
42. *Id.* at 228. Modification offered by Mr. Thomas. *Id.*
43. 1 NEBRASKA CONSTITUTIONAL CONVENTIONS, *supra* note 12, at 228.
44. *Id.* at 229.
45. *See supra* notes 2, 13 and accompanying text.
46. *See* MIEWALD & LONGO, *supra* note 2, at 10-13.
47. 3 WILLIAM F. SWINDLER, SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 245 (1974).
48. 3 SWINDLER, *supra* note 47, at 267; ILL. CONST. art. XIII, § 10.
49. 3 SWINDLER, *supra* note 47, at 267.
50. *Id.* at 287; ILL. CONST. art. II, § 8.

> impeachment, and in cases arising in the army or navy, or in the militia when in actual service in time of war or public danger, unless on a presentment or indictment of a grand jury, or information of a public prosecutor: and provision shall be made by law for the impaneling of grand juries wherever [whenever] the respective courts or the judges thereof shall order.[51]

Although this language was rejected by the voters in a subsequent election in 1874, voters authorized another constitutional convention. The delegates convened in May of the following year.[52] Relying once again on the Illinois Constitution of 1870 as its template, the convention submitted the document with textual changes to the grand jury provision, now emphasizing the power of the legislature to control the method by which to initiate criminal complaints. The section states:

> No person shall be held to answer for a criminal offense, except in cases in which the punishment is by fine, or imprisonment otherwise than in the penitentiary, in case of impeachment, and in cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, unless on a presentment or indictment of a grand jury; *Provided*, That the Legislature may by law provide for holding persons to answer for criminal offenses on information of a public prosecutor; and may by law, abolish, limit, change, amend, or otherwise regulate the grand jury system.[53]

There is no transcript of the 1875 convention. Most of the provisions of the 1871 convention, including the grand jury provision, were adopted by the delegates four years later. At the general election that fall, the voters approved the new constitution by a vote of almost six to one.[54]

Although the constitutional amendment, which permitted the Nebraska legislature to provide a substitute, was passed following the 1875 convention, the lawmakers did not act under that power until ten years later. The Compiled Statutes of 1881 provided that no person "shall be prosecuted for any felony . . . unless the indictment for the same shall be found by a grand jury, within three years next after the offense."[55] That early statutory compilation included several pro-

51. 6 SWINDLER, *supra* note 11, at 170; NEBRASKA DRAFT CONSTITUTION OF 1871, art. I, § 8.

52. MIEWALD & LONGO, *supra* note 2, at 12.

53. NEB. CONST. art. I, § 10.

54. MIEWALD & LONGO, *supra* note 2, at 13. The new constitution was approved by a vote of 30,323 to 5,474. *Id.*

55. NEB. COMP. STAT. CRIM. CODE, § 256 (1881).

visions about the operation of grand juries in the state, including the process for calling jurors,[56] the number required for action,[57] and the role of the prosecuting attorney acting before a grand jury.[58] A specific provision was created for the filling of a vacancy on the body,[59] but there was none about alternates sitting with a grand jury as it undertook its role. The statute stressed the obligation of secrecy[60] and declared that a grand juror could not be called to testify how he voted.[61]

The legislature finally implemented charging by information in 1885, approving the new statute on March 9 of that year.[62] Its first section declared that the courts of the state, "may exercise the same power and jurisdiction to hear, try, and determine prosecutions upon information, for crimes, misdemeanors, and offenses, to issue writs and process, and do all other acts therein, as they possess and may exercise in cases of like prosecutions upon indictments."[63] The new law specifically required timely filing, in appropriate jurisdictions, and with the same precision which was imposed upon indictments.[64] The new law added that all other provisions of law applying to prosecutions upon indictments and the practice applicable thereto "shall in the same manner and to the same extent, as near as may be, apply to informations."[65] The statute dealt directly with the new role grand juries would play in the Nebraska criminal justice system, pronouncing that they, "shall not hereafter be drawn, summoned, or required to attend at the sittings of any court within this state . . . unless the judge thereof shall so direct by writing, under his hand, and filed with the clerk of said court."[66] From that statute derived the requirement that informations not be filed until the defendant "shall have had a preliminary examination therefor as provided by law."[67] A person was entitled by the statute to waive the right to a preliminary examination.[68]

Although the "pro-information" forces won the battle during Nebraska's 1875 constitutional convention, no United States Supreme

56. NEB. COMP. STAT. CRIM. CODE, § 393 (1881).
57. NEB. COMP. STAT. CRIM. CODE, § 408 (1881).
58. NEB. COMP. STAT. CRIM. CODE, § 399 (1881).
59. NEB. COMP. STAT. CRIM. CODE, § 404 (1881).
60. NEB. COMP. STAT. CRIM. CODE, § 406 (1881).
61. NEB. COMP. STAT. CRIM. CODE, § 407 (1881).
62. Act of Mar. 9, 1885, ch. 108, 1885 Neb. Laws 397 (providing that state courts have jurisdiction to hear prosecutions based upon an information).
63. *Id.* ch. 108, 1885 Neb. Laws at 397.
64. *Id.* ch. 108, 1885 Neb. Laws at 397-98.
65. *Id.* ch. 108, 1885 Neb. Laws at 398.
66. *Id.* ch. 108, 1885 Neb. Laws at 399.
67. *Id.*
68. *Id.*

Court decision had yet resolved the issue of whether due process and the Fourteenth Amendment required indictment by a grand jury.[69]

GRAND JURIES, DUE PROCESS, AND THE FOURTEENTH AMENDMENT

The United States Supreme Court finally resolved that issue in *Hurtado v. California*[70] less than a decade after the Nebraska Constitution had been adopted, allowing the legislature to devise a system for the use of indictment by information but preserving the right to employ the ancient grand jury indictment in appropriate cases. Before *Hurtado* reached the high court, courts in other states had construed their own new constitutional provisions allowing charging by information as not to be in violation of the recent Fourteenth Amendment's Due Process Clause or of the states' own due process clauses.[71] The "due process" language was at the center of the grand jury debate in the decades following the Civil War.[72]

In 1872, the Wisconsin Supreme Court decided *Rowan v. State*,[73] a case in which the plaintiff in error was charged by information with committing manslaughter in the first degree. Key to the decision was whether an 1870 amendment to the state's constitution, which changed language requiring grand jury indictment in criminal matters to "'[n]o person shall be held to answer for a criminal offense without due process of law,'"[74] could survive constitutional scrutiny. The following year, state law was amended to permit prosecutions on information.[75] Counsel for Rowan claimed that "due process of law" meant that the charge must be by grand jury.[76]

Conceding that the constitutional amendment had, as its sole purpose, an end to the requirement that all indictments be by grand jury, the court then forged ahead into an examination of whether "due process of law" and "the law of the land" required no less than employment of the grand jury system.[77] The Fourteenth Amendment was not, the court reasoned, designed to "confine the states to a particular mode of procedure in judicial proceedings and prohibit them from

69. The court had explored the question of whether "due process" and the "law of the land" had the same meaning as early as *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1855), 13 years prior to the ratification of the Fourteenth Amendment.

70. 110 U.S. 516 (1884).

71. Rowan v. State, 30 Wis. 129 (1872).

72. BEALE ET AL., *supra* note 1, § 1:5.

73. 30 Wis. 129 (1872).

74. Rowan v. State, 30 Wis. 129, 144 (1872) (quoting WIS. CONST. art. I, § 8).

75. *Rowan*, 30 Wis. at 144.

76. *Id.*

77. *Id.* at 145-49.

prosecuting for felonies by information, instead of by indictment, if they chose to abolish the grand jury system."[78] The court concluded that the words "due process of law" "do not mean nor have the effect to limit the powers of the state governments to prosecutions for crimes by indictments."[79] The court stressed that as legal science progresses, and the people desire to abolish the grand jury system, "there is nothing in our state constitution as it now stands, and nothing in the 14th Amendment to the Constitution of the United States, which prevents them from doing so."[80]

California followed suit within the decade. In *Kalloch v. Superior Court*,[81] the facts focused squarely on a murder complaint filed in San Francisco. The chief justice noted that the proceeding by information, as a substitute for the ordinary indictment, "is a creature of the new Constitution, sec. 8, art. I, . . .that 'offenses heretofore required to be prosecuted by indictment shall be prosecuted by information . . . or by indictment . . . as may be prescribed by law.'"[82] Indeed, in 1880 the California Legislature approved an act formulating a process for such charge by information.[83]

In *Kalloch*, the defendant charged that the California scheme was in conflict with the Fourteenth Amendment's prohibition against abridgement of the privileges and immunities of citizens of the United States and deprived them of due process of law.[84] The California Chief Justice noted that the American people repeated and reenacted the guarantee of due process of law in both state and national fundamental law. What that expression means, Chief Justice Morrison, added, was best defined by Justice Curtis of the United States Supreme Court in *Den v. Murray*, as including a complaint, a defendant, a Judge, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings.[85] This expression usually means "the law of the land."[86]

However, Chief Justice Morrison was quick to add, there is clear authority for the proposition that "the Legislature has the right to take away a particular form of remedy, and give a new one."[87] He

78. *Id.* at 149.
79. *Id.*
80. *Id.*
81. 56 Cal. 229 (1880).
82. Kalloch v. Superior Court, 56 Cal. 229, 233 (1880) (quoting CAL. CONST. art. I, § 8).
83. *Kalloch*, 56 Cal. at 233-34.
84. *Id.* at 237 (citing U.S. CONST. amend. XIV, § 1).
85. *Id.* at 238. *Kalloch* cites *Den v. Murray*, 59 U.S. (18 How.) 272 (1855), a case which is the same as *Murray's Lessee*. *Id.*
86. *Kalloch*, 56 Cal. at 238.
87. *Id.* at 239 (citing People *ex rel* Witherbee v. Board of Supervisors, 70 N.Y. 228, 234 (1877)).

appeared to be persuaded by Thomas Cooley's logic that the accusation may be made by a grand jury, or without one.[88] Morrison assessed the case law following the Civil War from states such as Wisconsin, which had recently decided that the object of the Fourteenth Amendment was not to "'confine the States to a particular mode of procedure in judicial proceedings, and prohibit them from prosecuting for felonies by information instead of by indictment, if they chose to abolish the Grand Jury system.'"[89]

The position of the California court was not without controversy. As *Hurtado* would demonstrate, a vocal, critical opposition existed as to the meaning of the due process clause and the necessity for preserving the right to indictment by grand jury at the state level.[90]

One body of law insisted that the original Bill of Rights' due process clause guaranteed certain specific liberties in the context of a criminal prosecution. The problem with these rights—however they may be defined or limited in the context of federal procedures—is that they had not been held to apply to the states.[91] In fact, the Supreme Court had ruled that the Bill of Rights applied exclusively to the national government.[92] In 1868 the Fourteenth Amendment was ratified.[93] Did its due process clause incorporate all guarantees of the Bill of Rights as against a state's interference of personal liberty?[94]

Assume, for the sake of this argument, that the term "due process of law" means "the law of the land," as it was understood after the time of Magna Carta in England. What is the law of the land? More precisely, did it mean that no one could be held answerable for a crime, other than a misdemeanor, unless by grand jury indictment?[95]

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88. COOLEY, *supra* note 38, at 436.

89. *Kalloch*, 56 Cal. at 240 (quoting Rowan v. State, 30 Wis. 129, 149 (1872)).

90. Hurtado v. California, 110 U.S. 516, 538 (1884) (Harlan, J., dissenting).

91. See the debate over incorporation in *Adamson v. California*, 332 U.S. 46, 68 (1947) (Black, J., dissenting), and Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949). *See also* LEONARD W. LEVY, JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY 136 (1972). The scholarly materials on this debate are collected in BERGER, *supra* note 8, at 5.

92. Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833). *Gitlow v. New York*, 268 U.S. 652 (1925) was the first incorporation case and involved the First Amendment.

93. U.S. CONST. amend. XIV.

94. *See* Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929 (1965). Judge Friendly argues that there is no historical support for the proposition that the Fourteenth Amendment misrepresented the Fourth, Fifth, and Sixth Amendments to curb state abuses.

95. *See* WILLIAM SHARP MCKECHNIE, MAGNA CARTA, 120-26 (1905) (assessing the value of the document in, and to, the evolution of the English constitutional system). "Magna Carta has thus been truly said to enumerate 'the reign of law' or 'rule of law.'" *Id.* at 124. The author, while crediting the grand jury to the Norman Conquest, and, later to King Henry II, points to Chapter 38 of the Magna Carta as insisting on the necessity of accusation by such a jury; "non. . .sine testibus fidelibus ad hoc inductis. . . ." *Id.* at 158.

Or did due process as understood in the United States federal practice guarantee certain elements of a fair trial, but not the method by which a defendant was brought to court?[96]

The state courts struggled with these concerns as the respective jurisdictions altered their constitutions after the Civil War to eliminate the need for grand jury indictment. The innovation was at least, in part, a product of the jurisprudence of Thomas M. Cooley, a renowned constitutional scholar. His treatise, *A Treatise on the Constitutional Limitations*, first completed in 1868, discussed the due process protections and declared that the accusation of a person may be made by grand jury or without one.[97]

There were, of course, other factors that contributed to changes in the bills of rights of the states and the interpretations of the jurisdictions' highest tribunals upholding the new doctrines. The nineteenth century, Lawrence M. Friedman wrote, was a time during which virtually every American state expended "tremendous political energy" on state constitution-making.[98] Friedman observed that the second half of the nineteenth century saw evidence of reform in the grand jury system as it had originally been utilized in the states. As early as 1851, Indiana's "constitution provided that '[t]he general assembly may modify or abolish the grand-jury system.'"[99] Friedman attributed the final victory of the forces favoring restriction of the grand jury process to "an unmistakable undercurrent of concern about 'efficiency' and other code words for crime control."[100] Critics castigated states that retained the system at the end of the century.

It is understandable that states such as Wisconsin and California were swept up in this enthusiasm for modernity and efficiency. Opting for indictment by information expressed faith in democratic institutions, a writer in the *Harvard Law Review* averred, for "where the prosecuting officer is elected by the people, there is no danger of abuse of the power of proceeding by information."[101]

It is little wonder, then, that Nebraska's constitutional convention of 1871 was captured by this movement. Moreover, as Christian G. Fritz explained, "[v]irtually all conventions were influenced by earlier constitutions, constitutional experience, practice, and interpreta-

96. *See* Adamson v. California, 332 U.S. 46, 68 (1947) (Black, J., dissenting), *overruled in part by* Malloy v. Hogan, 378 U.S. 1 (1964).

97. *See* COOLEY, *supra* note 38, at 436.

98. Lawrence M. Friedman, *State Constitutions and Criminal Justice in the Late Nineteenth Century*, 53 ALB. L. REV. 265, 266 (1989).

99. Friedman, 53 ALB. L. REV. at 272 (citing IND. CONST. of 1851, art. VII, § 17).

100. *Id.* (citing D. BODENHAMER, THE PURSUIT OF JUSTICE: CRIME AND LAW IN ANTEBELLUM INDIANA 66-70 (1986)).

101. Amasa M. Eaton, *Recent State Constitutions*, 6 HARV. L. REV. 53, 64 (1892).

tions."[102] Fritz explained that textual borrowing was facilitated by the production and dissemination of easily transportable compendiums of state constitutions.[103] These compilations were "present in nearly every nineteenth-century constitutional convention."[104]

It remained for the United States Supreme Court to determine whether states were free to adopt innovations of this nature. Whether the Supreme Court would merely restate the law as it had been announced with respect to the application of the Fifth Amendment to the states in *Barron v. Baltimore*,[105] or whether it would regard the Fourteenth Amendment as requiring a more exhaustive, closer examination were questions finally resolved in *Hurtado*.

Hurtado afforded the United States Supreme Court the chance to resolve the question whether presentment or indictment by grand jury, as known to the common law of England, is essential to the due process of law. Justice Matthews, writing for the majority, acknowledged the question to be "one of grave and serious import,"[106] involving "a consideration of what additional restrictions upon the legislative policy of the States has been imposed by the Fourteenth Amendment to the Constitution of the United States."[107]

Justice Matthews noted that California's highest court had concluded that prosecution by information did not deprive a defendant of any "immunity or protection to which he [was] entitled under the law."[108] In turn, California had cited with approval a Wisconsin analysis of the Fourteenth Amendment.[109] Its design, the Wisconsin court stated emphatically, "was not to confine the states to a particular mode of procedure . . . [nor] prohibit them from prosecuting for felonies by information, instead of by indictment, if they chose to abolish the grand jury system."[110]

The Wisconsin justices ruled that the due process clause did not freeze states in their ability to develop administration and remedial proceedings. Thus, "if the people of the state find it wise and expedient to abolish the grand jury and prosecute all crimes by informative, there is nothing in our state constitution as it now stands, and nothing

102. Christian G. Fritz, *The American Constitutional Tradition Revisited: Preliminary Observations on State Constitutions: Making in the Nineteenth-Century West*, 25 RUTGERS L.J. 945, 975 (1994).

103. Fritz, 25 RUTGERS L.J. at 976.

104. *Id.*

105. 32 U.S. (7 Pet.) 243 (1833).

106. Hurtado v. California, 110 U.S. 516, 519-20 (1884).

107. *Hurtado*, 110 U.S. at 519-20.

108. *Id.*

109. *Id. See* Rowan v. State, 30 Wis. 129, 132 (1872).

110. *Rowan*, 30 Wis. at 149.

in the 14th [A]mendment to the [C]onstitution of the United States, which prevents them from doing so."[111]

Justice Matthews acknowledged the other side of the argument, advanced stunningly by Justice Harlan in his dissent, that due process "is equivalent to the law of the land as found in . . . [the] Magna Charta . . . ."[112] Under this doctrine, "due process" "has acquired a fixed, definite, and technical meaning, that it refers to and includes, not only general principles of public liberty and private right," but the very institutions incorporated into the American constitutions.[113] These limit the ability of the state, especially as it works to oppress the people.[114] The grand jury is a central element of the peoples' liberty against arbitrary government, so this proposition states.[115]

Matthews' rejoinder is brilliant and comprehensive. Reaching into the dusty recesses of history, he reasoned that the "flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law."[116] Moreover, "there is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age . . . we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms."[117]

Matthews again turned to state doctrine, defining due process, wherein the Mississippi court ruled that the principle does not demand that the laws existing at any point of time shall be irrepealable or that any forms of remedies shall necessarily continue. He concluded that due process of law does not demand that prisoners be indicted by grand jury. Rather, the state is free to experiment with new methods of bringing charges consistent with the notion that a fair trial will result from this preliminary form of procedure.[118]

The great Justice Harlan's dissent was a remarkably thorough analysis of both history and precedent.[119] But while he went to considerable length to demonstrate that "the law of the land" as understood in early American and English law included the right to an indictment by grand jury, he ignored the post-Civil War development, fostered by Cooley, resulting in the alteration of state constitutions

111. *Id.*
112. *Compare Hurtado*, 110 U.S. at 528 *with id.* at 538, 552, 556 (Harlan, J., dissenting).
113. *Id.* at 539-41 (Harlan, J., dissenting).
114. *Id.* at 549 (Harlan, J., dissenting).
115. *Id.* (Harlan, J., dissenting).
116. *Id.* at 530.
117. *Id.* at 531.
118. *Id.* at 535.
119. *Id.* at 538-58 (Harlan, J., dissenting).

such as the new Nebraska document.[120] Justice Harlan argued that the similarity between the Fifth and Fourteenth Amendment—the latter of which, after all, was ratified fewer than 20 years before *Hurtado* was decided — "was not accidental, but evinces a purpose to impose upon the States the same restrictions, in respect of proceedings involving life, liberty and property, which had been imposed upon the general government."[121] Simply stated, Harlan wrote, the term "due process of law" within the meaning of the Constitution, "does not import one thing with reference to the powers of the States, and another with reference to the powers of the general government."[122]

Both the majority and dissent looked to *Murray's Lessee v. Hoboken*[123] for authority and guidance as to the meaning of due process. Justice Curtis' lengthy and exhaustive opinion in the *Hoboken* case had nothing to do with the criminal process contours of the construct. Rather, he insisted that the Constitution itself must be examined to see whether a process is in conflict with any of its provisions.[124] That was not enough for Justice Curtis, nor for Justice Harlan in *Hurtado*. Curtis continued: "[I]f not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute laws of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."[125]

To Matthews this was not the final word, but only a beginning, for his majority had explored the exceptions to the requirement of grand jury indictment through English usage.[126] He took some refuge in other decisions, particularly Justice Bradley's decision in *Missouri v. Lewis*[127] in 1879, urging that the Fourteenth Amendment "does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies."[128] Great diversity, Bradley de-

120. *See* COOLEY, *supra* note 38, at 436. *Compare* NEB. CONST. of 1875, art. I, § 10 *with* NEB. CONST. of 1866, art I, § 8 (cited at *Hurtado*, 110 U.S. at 557 (Harlan, J., dissenting)).

121. COOLEY, *supra* note 38, at 175. *See Hurtado*, 110 U.S. at 556-58 (Harlan, J., dissenting). He noted that even Cooley acknowledged that for centuries the requirement of grand jury indictment could not be ignored even by Parliament. *Id.* at 556 (Harlan, J., dissenting).

122. *Hurtado*, 110 U.S. at 541 (Harlan, J., dissenting).

123. 59 U.S. (18 How.) 272 (1855).

124. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 274, 277 (1855).

125. *Murray's Lessee*, 59 U.S. (18 How.) at 277.

126. *Hurtado*, 110 U.S. at 521-28.

127. 101 U.S. 22 (1879).

128. *Hurtado*, 110 U.S. at 535 (citations omitted).

clared, may exist in "[s]tates separated only by an imaginary line."[129] He went so far as to reason that trial by jury was not mandated for the states by the amendment and, broadly, "[e]ach State prescribes its own modes of judicial proceeding."[130]

Harlan, on the other hand, insisted that usage, right up to and including the time of the writing of the American Constitution demanded that the grand jury alone could arraign one, as Erskine has stated.[131] This was, he reasoned, black letter law as evidenced by Blackstone's Commentaries.[132] When the Fourteenth Amendment was adopted, he noted, not only the Bill of Rights, but the fundamental law of "twenty-seven States expressly forbade criminal prosecutions, by information, for capital cases."[133] In the other ten states, prosecution by information was "impliedly forbidden."[134] Among the 27 states cited by Justice Harlan was the newly admitted Nebraska, operating under its pre-1875 constitution.[135]

Within a short time following the adoption of the 1885 statute, the Nebraska Supreme Court heard *Miller v. State*,[136] an appeal from a conviction on charges of first degree murder. The defendant was sentenced to death by hanging and assigned as error, among many other claims, that the trial court failed to grant his plea in abatement based on the absence of an indictment against him by a grand jury.[137]

Justice Norval gave short shrift to the argument, noting that the power to prosecute on information was conferred by the Nebraska statutes.[138] Moreover, he reasoned that the power to provide for such method of charging was conferred on the legislature by section 10 of the Nebraska Bill of Rights.[139] There was no discussion of the scope or requirement of the federal Constitution in the Norval opinion.[140] He merely set out the language of the Nebraska Constitution and quickly—within the same paragraph—added that information prosecutions do not offend the Constitution.[141]

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129. Missouri v. Lewis, 101 U.S. 22, 31 (1879).
130. *Lewis*, 101 U.S. at 31.
131. *Hurtado*, 110 U.S. at 543 (Harlan, J., dissenting).
132. *Id.* at 544 (Harlan, J., dissenting).
133. *Id.* at 557 (Harlan, J., dissenting).
134. *Id.* (Harlan, J., dissenting).
135. *Id.* (Harlan, J., dissenting).
136. 29 Neb. 437, 45 N.W. 451 (1890).
137. Miller v. State, 29 Neb. 437, 439-40, 45 N.W. 451, 451-52 (1890), *overruled by* Whitcomb v. State, 102 Neb. 236, 166 N.W. 553 (1918).
138. *Miller*, 29 Neb. at 439-40, 45 N.W. at 452.
139. *Id.* at 440, 45 N.W. at 452.
140. *See generally id.* at 439-47, 45 N.W. at 451-54 (failing to discuss the federal Constitution).
141. *Miller*, 29 Neb. at 440, 45 N.W. at 452.

In 1897, the Nebraska Supreme Court addressed extensively the question of the constitutionality of indictment by information, rather than by grand jury, in *Bolln v. State*.[142] The case involved an information filed by the Douglas County Attorney against Henry Bolln, who had served as both city treasurer of Omaha and treasurer for the board of education. He was charged with embezzlement.[143] Bolln's lawyer filed a motion to quash arguing that there was no authority vested in the prosecutor to file an information for a felony class crime.[144] He claimed the procedure of circumventing the grand jury was in contravention of both the Nebraska[145] and United States Constitutions.[146] The three-person Nebraska Supreme Court was not prepared to adopt the doctrine of incorporation of federal rights via the Fourteenth Amendment as against exercises of powers of the states.[147]

The case was appealed to the Supreme Court of the United States.[148] In an opinion by Justice Brown, the Court declared that it had "repeatedly held that the first eight amendments to the constitution applied only to the Federal courts, and it certainly could never have been intended that these amendments should be imposed upon Nebraska . . . ."[149] The Court emphasized that "the Fourteenth Amendment was not intended to curtail the powers of the States to so amend their laws as to make them conform to the wishes of their citizens, to changed views of administration, or to the exigencies of their social life."[150] Local inhabitants understand their own needs, the Court added, and since each jurisdiction had the power to alter its own fundamental law, "it is scarcely possible that any evil which might be occasioned by an improvident amendment would not be readily redressed."[151]

The plaintiff in error made another argument that Nebraska was admitted to the Union on the condition that it adopt the federal Constitution.[152] Thus, he argued, Nebraska was not free to abandon the grand jury system any more than the United States would be. In fact, the constitutional convention in Nebraska adjourned without taking

142. 51 Neb. 581, 71 N.W. 444 (1897), *aff'd.*, 176 U.S. 83 (1900).
143. Bolln v. State, 51 Neb. 581, 583, 71 N.W. 444, 444 (1897).
144. *Bolln*, 51 Neb. at 583-84, 71 N.W. at 444.
145. NEB. CONST. art. I, § 10. *See id.* § 3 (Nebraska's Due Process Clause).
146. U.S. CONST. amend. V.
147. *Bolln*, 51 Neb. at 584-86, 71 N.W. at 444-45.
148. Bolln v. Nebraska, 176 U.S. 83 (1900).
149. *Bolln*, 176 U.S. at 85, 88.
150. *Id.* at 88.
151. *Id.* at 89.
152. *Id.* at 86 (quoting Act of Apr. 19, 1864, ch. 59, § 4, 13 Stat. 47, 48).

action on that apparent condition.[153] When the legislature formed a constitution in 1866, no such condition was included in the document.[154]

The Court insisted that there were no "special" conditions of adopting the federal Bill of Rights appended to the admission of Nebraska to the Union in 1867.[155] Rather, the state came into the federation "upon an equal footing with the original States . . . ."[156] Any notion that Nebraska or any other state is prevented from altering its own constitution, while other states are not so prevented, "is so repugnant to the theory of their equality under the Constitution, that it cannot be entertained even if Congress had power to make such discrimination."[157]

THE GRAND JURY IN CONTEMPORARY NEBRASKA

The 90th legislature was a watershed term for the alteration of Nebraska's grand jury law. In the first session, Senator Ernie Chambers of Omaha introduced Legislative Bill 676[158] which not only established new notification procedures for cases in which individuals died while being apprehended or while in the custody of either law enforcement officers or detention personnel,[159] but also required district courts to call a grand jury to investigate such cases certified by coroners as to the cause of death.[160] The Judiciary Committee scheduled a hearing on the bill for February 27, 1987, and seven individuals, including Senator Chambers, appeared in its favor.[161] No one opposed the bill, although the executive director of the Nebraska County Attorneys Association appeared as a neutral witness.[162] Senator Chambers related the history of an incident in Omaha in which a young man in custody had died.[163] Confusion reigned as to what hap-

153. *Id.*
154. *Id.* at 87.
155. *Id.* at 87-88.
156. *Id.* (quoting Act of Feb. 9, 1867, ch. 59, § 4, 13 Stat. 47, 48).
157. *Id.* at 89.
158. LB 676, 90th Leg., 1st Sess. (Neb. 1987).
159. Neb. LB 676 §§ 1-2.
160. Neb. LB 676 § 2.
161. *Hearing on LB 676 Before the Committee on Judiciary*, 90th Leg., 1st Sess. 17 (Neb. 1987) [hereinafter *Hearing LB 676*]. Other supporters of the bill were Jerry Prazan, registered lobbyist for the City of Omaha; Fred Conley, Omaha City Counsel member; Jess Brown, Jr., Pastor of Bethel African Methodist Espicopal Church of Omaha and President of the Omaha Interdenominational Ministerial Relations Board; Helen Saunders, pastor of Christ-Love Unity Church; George H. Dillard, executor director for the Urban League of Nebraska; A. B. "Buddy" Hogan, president of the Omaha chapter of the National Association for the Advancement of Colored People.; *See also id.* at 1 (Committee Statement).
162. *Hearing LB 676*, *supra* note 161, at 27.
163. *Id.* at 18.

pened to the man, the officers who investigated being unsure about the cause of injuries the decedent had received.[164] Chambers surmised that a political dispute between the mayor of the city and the police chief placed the chief in a position of realizing that if he publicly criticized his officers, "he ran the risk of additional hostility from the officers."[165]

"A grand jury petition was circulated . . . [and more than] 14,000 valid signatures had to be obtained[,]" Chambers stated.[166] He said that although 3,000 signatures were declared invalid, sufficient signatures were obtained to call a grand jury.[167] This, he noted, demonstrated the amount of concern in the community.[168] It united the community, he declared, "in opposition to some extent to the police division and the system because such an effort as this had to be undertaken merely to have a third party investigate."[169] Chambers also acknowledged that there was an alternative, that is, to have the Attorney General "undertake an inquiry into the case using the investigative abilities of the State Patrol."[170]

The registered lobbyist for the City of Omaha spoke in support of the bill, indicating that it was brought to Chambers by the city.[171] The proposal, he stated, is essentially an attempt "to get a third party to look into any . . . wrongdoing in . . . the event that a citizen dies in the course of apprehension or custody[.]"[172] City Council member Fred Conley of Omaha also spoke in favor of the proposal.[173] He criticized the current requirements and the needed time for impanelling a grand jury, pointing to the ninety-day signature acquisition drive, the thirty-day validation period and the fifteen-day period of review by the presiding judge of the district court.[174] Others who addressed the Judiciary Committee included the president of the Human Relations Board of Omaha, the executive director of the Urban League of Nebraska, the president of the Nebraska Branch of the National Association for the Advancement of Colored People and pastors of local churches.[175] On March 11, the Committee advanced the bill to Gen-

164. *Id.*
165. *Id.*
166. *Id.*
167. *See id.* The legislative bill states that sufficient signatures were obtained to initiate a grand jury. *Id.*
168. *Hearing LB 676*, *supra* note 161, at 18.
169. *Id.*
170. *Id.* at 18-19.
171. *Id.* at 19.
172. *Id.*
173. *Id.* at 20.
174. *Id.* at 21.
175. *Id.* at 22-27.

eral File.[176] No member voted against Legislative Bill 676, although one member was absent and not voting.[177] The bill was held over until the second session of the 90th Legislature and was passed and approved by the Governor on February 10, 1988.[178]

The 1988 and 1999 amendments to the state's grand jury legislation were obviously not the first legislative changes of a scheme which had existed from the beginning of statehood, but which evolved throughout the 124 years from the adoption of the 1875 constitution. Ninety years ago, the grand jury statute was simple. It provided that "[u]nless otherwise ordered in writing by the Court or a Judge thereof, a Grand Jury shall be drawn and summoned in the manner provided by law, on the first day of the first regular term of the District Court in each county in this state."[179] A slight alteration was enacted into law during the following decade.[180] It vested in the district courts the power to call grand juries not only at the time prescribed in the earlier statute but also "at such times and upon such notice as the district court may deem necessary."[181] More than sixty years ago, the legislature adopted a sweeping change to the law to alter the judiciary's exclusive control of the grand jury system.[182] The 1939 session opposed this new language involving citizens' petitions for grand jury investigations:

> [The district courts] shall call a grand jury in each case upon the petition of the qualified electors of said county of the number of not less than two per cent of the total vote cast for the office of governor in said county at the last general election held therein.[183]

In Douglas County, this meant that the valid signatures of 1224 voters in the 1942 gubernatorial election could trigger the call for a grand jury to investigate some wrong or political corruption which the judges had chosen to ignore.[184] Twenty years later, the lawmakers amended the percentage of voters' signatures necessary to validate a peti-

176. *Executive Session: Hearing on LB 676 Before the Judiciary Committee*, 90th Leg., 1st Sess. 2 (Neb. Mar. 11, 1987).

177. *Id.* (voting Aye: Senators Ashford, Chambers, Chizek (chair), Korshoj, McFarland, Nelson, and Pirsch. Absent: Senator Conway).

178. Act of Feb. 10, 1988, LB 676, 1988 Neb. Laws 573 (providing that a grand jury shall be called whenever a person dies in the custody of Nebraska law enforcement officers).

179. Act of Apr. 3, 1909, ch. 171, 1909 Neb. Laws 591, § 1 (providing that grand jury shall be drawn on the first day of the regular term of the District Court of each county).

180. Act of April 11, 1917, ch. 148, 1917 Neb. Laws 333-34, §§ 1-2.

181. *Id.* ch. 148, 1917 Neb. Laws at 333-34, §§ 1-2.

182. Act of June 10, 1939, ch. 18, LB 372, 1939 Neb. Laws 97, 111, § 19 (providing rules for determining the number of candidates for grand jury service that must be called).

183. *Id.* ch. 18, 1939 Neb. Laws at 97, 111, § 19.

184. CLERK OF THE NEBRASKA LEGISLATURE, NEBRASKA BLUE BOOK 408 (1942).

tion.[185] The 1959 law also added a provision specifying the contents of a petition.[186]

In 1969, Legislative Bill 785 was enacted which doubled the number of signatures necessary to initiate the grand jury process.[187] That session of the unicameral added language setting out the procedure for calling a grand jury by petition[188] and added a significant section which chipped away at any judicial reluctance to act upon the citizen request for action.[189] It stated that the county clerk or election commissioner "shall, within thirty days from receipt of such petitions, determine the number of valid signatures . . . and certify his findings . . . to the presiding judge . . . ."[190] The presiding judge was required, within fifteen days, to examine the petitions and determine whether the requisite number existed and whether the formal requirements as to the form of the petition had been satisfied.[191] The judge's determination was to be made considering only the certificate from the clerk or election commissioner and his own personal examination of the form of the petitions.[192] The statute forbade the judge to consider any additional evidence.[193] The statute mandated that no petitioner should be required to testify or otherwise present evidence relating to the allegations in the petitions.[194] If the judge made affirmative determinations, the statute required the jurist to call a grand jury "forthwith."[195] The statute then empowered the clerk of the district court to "immediately" call a grand jury "pursuant to law, notwithstanding the fact that the presiding judge . . . failed to determine sufficiency of the petitions and did not call the grand jury . . . ."[196] In a final undercutting of the exclusive power of the local judges over the grand jury process, the lawmakers provided that if the presiding judge or the clerk failed "to call a grand jury, the petitioners may file an

185. Act of May 4, 1959, ch. 118, LB 449, 1959 Neb. Laws 449-50, § 1 (providing rules for determining the number of candidates for grand jury service that must be called).

186. NEB. REV. STAT. § 29-1401.01 (Reissue 1995).

187. Act of May 28, 1969, ch. 238, LB 312, 1969 Neb. Laws 874-75, § 1 (providing rules for determining the number of candidates for grand jury service that must be called).

188. *Id.* ch. 238, 1969 Neb. Laws at 874-75, § 1.

189. *Id.* ch. 238, 1969 Neb. Laws at 874-78, §§ 1, 3.

190. *Id.* ch. 238, 1969 Neb. Laws at 877, § 3.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* The Act of May 28, 1969 stated that no additional evidence should be considered and no petitioner should be required to testify. *Id.*

195. *Id.* ch. 238, 1969 Neb. Laws at 874-75, § 1.

196. *Id.* ch. 238, 1969 Neb. Laws at 877-78, § 3.

immediate request with the Chief Justice of the Supreme Court . . . [to] review the petitions and certifications and call a grand jury."[197]

During the 1999 legislative session, Senator Chambers, the author of the law requiring grand jury investigations of deaths occurring during an arrest or in the custody of law enforcement officers, proposed two bills to refine the modern use of the grand jury. Legislative Bill 72 would require the alternate jurors in any such proceedings to sit with the grand jurors and participate in all proceedings to the same extent as the regular panel members.[198] They would not take part in deliberations unless one of the regular grand jurors was excused and the alternate took his or her place.[199]

The second proposal, Legislative Bill 73, was designed to restructure Nebraska Revised Statute section 29-1401 into four separate subsections.[200] The first dealt with calling a grand jury.[201] Another provision dealt with the petition process. The signatures of ten percent of the registered voters of the county who had voted for Governor in the preceding general election would be required.[202] This section also presented the petition form and the process for certification to the district court.[203] The final subsection referred to the summoning of a grand jury in cases of death during custody or detention,[204] but added new and controversial language which would:

1. Require the Nebraska State Patrol to conduct an investigation into the death;
2. Require that the court appoint a special prosecutor, rather than have the matter handled by the county attorney; and
3. Necessitate the impaneling of the grand jury within thirty days unless the district court extended the time upon a showing of a compelling reason for the delay.[205]

197. *Id.*

198. Act of Mar. 30, 1999, LB 72, 1999 Neb. Laws 115. *See Introducer's Statement of Intent: Hearing on LB 72 Before the Judiciary Committee*, 96th Leg., 1st Sess. 1 (Neb. 1999).

199. *Introducer's Statement of Intent: Hearing on LB 72 Before the Judiciary Committee*, 96th Leg., 1st Sess. 1 (Neb. 1999).

200. LB 73, 96th Leg., 1st Sess. (Neb. 1999).

201. Neb. LB 73 § 2(1).

202. *Id.*

203. *Id.* The new subsection (3) continued in house the requirement that a petition to be valid must be signed by "not less than ten percent of the registered voters from the office of Governor in such county at the most recent general election held for such office." *Id.* In Douglas County, 131,263 votes were cast for Governor in 1998. CLERK OF THE NEBRASKA LEGISLATURE, NEBRASKA BLUE BOOK 1004 (1998-99).

204. Neb. LB 73 § 2(4).

205. *Id.*

The bills were scheduled for hearing by the Judiciary Committee on January 21. No witness opposed Legislative Bill 72.[206] Several police officials appeared in opposition to Legislative Bill 73.[207] The committee adopted an amendment requiring law enforcement officers, in the jurisdiction in which the death occurred, to investigate.[208] The amendment charged the officials to treat the case as an on-going investigation until the appointment of the special prosecutor.[209] At that time, all materials and evidence would be transferred to him or her.[210] The committee draft also would require the special prosecutor to have five years experience in criminal litigation, including felony cases.[211] The special prosecutor would be required to appoint three law enforcement officers, from jurisdictions other than the one in which the death occurred, who would have the responsibility to examine the evidence and report their findings to the special prosecutor.[212]

Senator Chambers incorporated the key provisions of Legislative Bill 73 into Legislative Bill 72, and the integrated proposal virtually flew through the Unicameral's processes.[213] The bill was approved by Governor Johanns less than two months after Senator Chambers introduced it.[214] On final reading, the bill received 43 "yes" votes, two "no" votes and four "present, not voting" ballots.[215] Since the bill contained the Emergency Clause and received more than a two-thirds vote, it became law when the governor signed it on March 31, 1999.[216]

CONCLUSION

When Nebraska was admitted to the Union, its constitution required felons to be indicted by grand juries. This followed the example

206. *Change provisions relating to alternate jurors in grand jury proceedings: Hearing on LB 72 Before the Judiciary Committee*, 96th Leg., 1st Sess. 1 (Neb. Jan. 21, 1999).

207. *Id.* The opponents included the chief of the Omaha Police Department, two other Omaha Police Department officials, a Nebraska Sheriffs Association representative, a Lincoln Police Union representative, a Nebraska Fraternal Order of Police representative and two representatives of county official groups. *Id.*

208. *Change procedures relating to certain grand juries: Hearing on LB 73 Before the Judiciary Committee*, 96th Leg., 1st Sess. 2 (Neb. Jan. 21, 1999). *See also* 1999 NEB. LEGIS. J., 96th Leg., 1st Sess. 759 (1999).

209. *Change procedures relating to certain grand juries: Hearing on LB 73 Before the Judiciary Committee*, 96th Leg., 1st Sess. 2 (Neb. Jan. 21, 1999).

210. *Id.*

211. *Id.*

212. *Id.*

213. LB 72, 96th Leg., 1st Sess., Third Reading (Neb. 1999). *See* 1999 NEB. LEGIS. J., 96th Leg., 1st Sess. 1064 (1999). Final Reading was followed by a vote of 43 aye, 2 nay, and 4 not voting on March 22, 1999. The Act was signed by the President of the Legislature on March 25, 1999, and approved by the Governor on March 30, 1999. *Id.* at 1216,1220, 1289.

214. 1999 NEB. LEGIS. J. at 1289.

215. *Id.*

216. *Id. See* NEB. CONST. art. III, § 27.

established under the federal Constitution, although it varied from the emerging pattern of state constitutional and statutory rejection of the ancient custom in favor of charging by information.

Within a very few years of Nebraska's admission, members of a constitutional convention were engaged in a heated debate over whether the new state, too, should all but abandon grand jury indictments. The draft constitution of 1871, and the 1875 document which was closely modeled on it, embraced the system that a growing number of states had adopted over the previous quarter century. It was only a decade until the Legislature specifically authorized charging by information. For almost one hundred years following that innovation, while the Legislature tinkered with the processes by which grand juries could be called, the custom continued to favor charging by local county attorneys.

A series of volatile encounters between law enforcement personnel and citizens in the late 1980s and the 1990s was the impetus for reexamination of whether the grand jury system would be a tool to give the people confidence in the objectivity and fairness of investigations arising from the death of a citizen, whether suspect or prisoner, at the hand of police personnel. The tenacity and skill of Senator Ernie Chambers of Omaha played key roles in the adoption of the statutes of the new legislation requiring resort to the ancient citizen panel in the 90th and 96th Legislatures.

In the 1870s, some representatives at the constitutional conventions adhered to the view that the empowerment of single prosecutors to investigate and charge could result in tyranny and abuse. Others expressed the view that grand juries were secret and arbitrary bodies which could be ruinous to their targets. However, in the hand of skilled and experienced criminal attorneys, the modern legislatures appeared to believe, grand jury investigations would restore confidence of the people in the fairness of the criminal justice system. The use of independent police investigation and the appointment of special prosecutors are the key tools the law makers have employed to assure the achievement of the laudable goals for restoring use of the grand jury system in cases of death at the hands of the constable.

APPENDIX

Nebraska's grand jury statute is disarmingly simple.[217] It describes the situations in which such a body may be called,[218] along with the form and procedure for employing a public application for a grand jury.[219] The statute reserves the right to prosecute by information.[220] The statute also provides for the appointment and oath of the "foreman" and for the members.[221] It directs the judge in the manner of charging and instructing the jurors once they are properly convened.[222] The statute further describes the duties of the grand jury and directs it in its operations, reporting requirements, the building of its record and other management functions.[223] The role of the county

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217. NEB. REV. STAT. §§ 29-1401 to -1420 (Reissue 1995). The statute makes no mention of the tumultuous debate which resulted in the adoption of adoption of prosecution by information. *Id.* Its 20 sections (NEB. REV. STAT. §§ 29-1401 to -1420) contain only a handful of subsections. *See, e.g.*, NEB. REV. STAT. §§ 29-1401.01 and 29-1401.02 (outlining the form, requirements and procedure for the calling of a grand jury by petition).

218. NEB. REV. STAT. § 29-1401 (Reissue 1995). "District courts are . . . vested with power to call grand juries." *Id.* A grand jury must be called when a proper petition has been submitted by voters of the judicial district. *Id.* A grand jury must be called where the county coroner certifies that an individual died "while being apprehended or while in custody of a law enforcement officer or detention personnel." *Id.* A grand jury may be called as the district court may direct. *Id.*

219. NEB. REV. STAT. §§ 29-1401.01 to -1401.02 (Reissue 1995). Section 1401.01 prescribes the form of the petition to a district court by voters and requires that the petition set out the alleged illegal acts or other matters which might come before the body. *Id.* § 29-1401.01. The statute does not require the petition to contain allegations of corruption or nonfeasance on the part of the elected county attorney. *See generally id.* The petition must contain the signatures of not less than ten percent of the total vote cast for the office of Governor in the county of the most recent general election held for such office. *Id.* Section 1401.02 prescribes the process for filing the petition and organizing the grand jury. *Id.* § 29-1401.02. The county clerk or election commission is required to verify the signatures and has 30 days from filing to accomplish this. *Id.* § 29-1401.02(2)-(3). The presiding district court judge must then examine the petitions within 15 days and determine whether they contain the valid number of signatures and whether the formal requirements of the petition are met. *Id.* § 29-1401.02(4) This does not disclose evidence other than on the face of the petition. *Id.* § 29-1401.02(5). If the statutory requirements are met, the judge must call a grand jury. *Id.* § 29-1401.02(6). In the event the judge fails either to certify the validity of the petition or call a grand jury, the clerk of the district court shall call one. *Id.* § 29-1401.02(7). If the local officials fail to act, the petitioner may file a request with the Chief Justice (or, in his absence, a judge of the Supreme Court of Nebraska) who shall determine the sufficiency and order the district court clerk to call a grand jury. *Id.* at § 29-1401.02(8).

220. NEB. REV. STAT. § 29-1402 (Reissue 1995).

221. NEB. REV. STAT. §§ 29-1403 to -1405 (Reissue 1995).

222. NEB. REV. STAT. § 29-1406 (Reissue 1995). Historically, grand juries are comprised of up to 23 persons. GEORGE J. EDWARDS, JR., THE GRAND JURY 45 (1906). Section 1406(2)(e) states that an affirmative vote of 12 or more is needed to determine whether or not there is probable cause to indict. *Id.* § 29-1406(2)(e).

223. NEB. REV. STAT. § 29-1407 (Reissue 1995). Section 1407.01 provides that proceedings and testimony shall be recorded by a certified reporter and the notes must be preserved and filed with the court. *Id.* § 29-1407.01(1). The court must approve the release or destruction of the notes. *Id.* Witnesses are entitled to access of their own

attorney is outlined and the process for naming a special prosecutor is set out.[224] How witnesses are called[225] and what constitutional protections are due them are what next appear in the law.[226]

The statute then speaks of the process for obtaining evidence from witnesses.[227] The law proceeds to exempt from appearance by a witness or of his or her production of "books, papers, documents, or other

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testimony, or other documents relating to that testimony. *Id.* § 29-1407.01(2). Before a witness must testify, he or she may examine and copy any statement that witness has previously made relating to the subject matter under inquiry. *Id.* § 29-1407.01(3).

224. NEB. REV. STAT. § 29-1408 (Reissue 1995). Section 1408 provides that the county attorney is allowed to appear before the body to inform and advise it and to interrogate witnesses. *Id.* No one but the jurors may remain in the room when deliberations are undertaken or interrogating done. *Id.* The foreman may ask the Governor, upon a determination of the district bench that investigation of county officials needs to be done, in which case a special prosecutor is named, under this circumstance the county attorney is excluded except as a called witness. *Id.*

225. NEB. REV. STAT. § 29-1409 (Reissue 1995). The clerk of the court in which the grand jury must have subpoenas and other process upon determination of the grand jury that it needs evidence. *Id.*

226. *Id.* § 29-1409. When the prosecutor determines that a rights advisement is necessary, the subpoena will contain language notifying the witness of his or her self-incrimination right to counsel and right to representation should the witness be indigent. *Id.* The section also directs that a witness not advised according to the provisions "shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he or she testifies or any evidence he or she produces," and no such evidence or testimony shall be used against such witness, except for perjury. *Id.*

227. NEB. REV. STAT. § 29-1410 (Reissue 1995). The witness is placed under oath or affirmation by the clerk. *Id.* Section 1410.01 permits any person to approach the prosecutor or the grand jury seeking to testify. *Id.* § 29-1410.01. If he or she is refused the opportunity to do so, a record of the denial must be make and the potential witness may apply to the court for a hearing on the denial. *Id.* The court may find that the person should appear and allow such testimony in the interests of justice. *Id.* Section 1411 restates the right of a witness to invoke the privilege against self-incrimination and guarantees immunity on non-appearance. NEB. REV. STAT. § 29-1411(1) (Reissue 1995). Subsection two of section 1411 guarantees the presence of counsel for the witness in the jury room during the witness interrogation. *Id.* § 29-1411(2). Counsel may not make arguments, objections, or address the grand jury, and must take an oath of secrecy. *Id.* Upon a showing that such counsel was disruptive, the lawyer may be required to remain outside when advising the witness. *Id.* No attorney may provide counsel to more than one witness in the same investigation unless the jury permits such multiple representation. *Id.* Subsection three of section 1411 requires the court to be given written notice when a witness refuses to answer, including the question and the reason. *Id.* § 29-1411(3). The court then must "determine whether the witness is bound to answer or not," and the grand jury must be informed of the decision. *Id.* Section 1412 is the process for compelling compliance by a witness, including a contempt of court finding, which may involve a fine or imprisonment. NEB. REV. STAT. § 29-1412(1)(a) (Reissue 1995). The enforcement may continue for the duration of the witness' refusal, but it may not "exceed the term of the grand jury," or its extension, but in any event, six months. *Id.* The witness may seek judicial review of the contempt order. NEB. REV. STAT § 29-1412(1)(b) (Reissue 1995). No witness once confined or fined may again be subject to these penalties "for refusal to testify or provide" information. NEB. REV. STAT. § 29-1412(2) (Reissue 1995).

objects" where any one of five findings is made about the subpoena,[228] which is the subject of a hearing before the presiding judge or the judge who issued the subpoena in the first place.[229]

A process is established for filling vacancies on a grand jury.[230] Certain prohibitions against disclosure are set[231] out as well as the process by which indictments may be found.[232] One final section of the statute prescribes the method for trying the charges brought by any indictment[233] and the circumstances under which a report of the grand jury may be made public,[234] or under which a court may transfer evidence uncovered by the grand jury to a court "in another county or jurisdiction."[235]

228. NEB. REV. STAT. § 29-1412.01 (Reissue 1995). The five findings are: (1) a primary purpose or effect of the compulsion is securing testimony for trial where the defendant has already been charged; (2) "[c]ompliance with the subpoena would be" unconscionable or offensive; (3) harassment of the witness is the primary purpose of the subpoena; (4) "[t]he witness has already been confined or fined" for a refusal to testify; and (5) "[t]he witness has not been advised of his or her rights as specified in" the grand jury laws. *Id.*

229. NEB. REV. STAT. § 29-1412.01 (Reissue). The hearing may be "before the court which issued" the subpoena or "a court having jurisdiction under" the grand jury statute. *Id.*

230. NEB. REV. STAT. § 29-1413 (Reissue 1995).

231. NEB. REV. STAT. § 29-1414 (Reissue 1995). Grand jurors are forbidden to disclose the existence of an indictment of anyone out in "custody or under bail, except by the issuing of process, until the indictment is filed and the case docketed." *Id.* The prohibition also applies to officers of the court. *Id.* Section 1415 bars disclosure by a grand juror of his or hers or any other members' notes. NEB. REV. STAT. § 29-1415 (Reissue 1995). The prohibition extends to opinions expressed by grand jurors. *Id.*

232. NEB. REV. STAT. § 29-1416 (Reissue 1995). Section 1416 states that "twelve of the grand jurors must concur in the finding of an indictment;" when one is found, the foreman must endorse on it the words, "A true bill" and sign it. *Id.* § 29-1416(1). When the body has not returned a true bill, it may not reinvestigate the same transaction absent the discovery of additional relevant evidence. *Id.* § 29-1416(2). Section 1417 permits a grand jury examination of the county jail and a report on its condition. NEB. REV. STAT. § 29-1417 (Reissue 1995). Section 1418 outlines the steps for filing an indictment and the process for dismissing of an indictment if probable cause did not exist. NEB. REV. STAT. § 29-1418 (Reissue 1995).

233. NEB. REV. STAT. § 29-1419 (Reissue 1995). This provides for speedy disposal of indictments, the safekeeping of undisposed of indictments at the end of a court term, and the procedure for trying matters investigated by special prosecutors appointed by the Governor. *Id.*

234. NEB. REV. STAT. § 29-1420(1) (Reissue 1995). The report must "not be made public except when" filed "or when required by statute or" unless the district court finds the report will exonerate a person who has requested such release. *Id.*

235. NEB. REV. STAT. § 29-1420(2) (Reissue 1995). Upon good cause shown, the court may transfer any evidence gathered "that offenses have been committed in" the jurisdiction to which the evidence is transferred. *Id.*