DEALING WITH PROSECUTORIAL DISCRETION: SOME POSSIBILITIES

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I. INTRODUCTION

Many people today believe that the extent of prosecutorial discretion presents a problem—or perhaps, more accurately, two related problems. First, because of the statutory multiplication of related offenses, prosecutors in Michigan can take a single criminal act and obtain a conviction for multiple offenses. For example, if the defendant is a convicted felon, the single criminal act of robbery involving the taking of a motorbike through a threat to use a firearm can result in a conviction of four separate offenses: carjacking, armed robbery, felon-in-possession of a firearm, and possession of a firearm during the commission of a felony (felony-firearm).[1] The prosecutor's ability to multiply charges gives the prosecutor an arguably undue advantage in the plea-bargaining process, since the prosecutor can give the appearance of leniency by offering to drop one or more charges in return for a guilty plea to one charge.

The second, and related, problem is that the prosecutor has substantial control over the ultimate punishment even in the absence of a plea bargain. By choosing a particular crime to charge, the prosecutor can determine the potential maximum sentence, and, in some instances, the minimum as well. For instance, felon in possession in Michigan carries a maximum punishment of five years imprisonment,[2] but by adding the charge of possession of a firearm during the commission of a felony (felony-firearm), the prosecutor can make certain that the ultimate sentence will be two years longer than it would be for a conviction of felon in possession alone, since the punishment for felony-firearm is, by

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1. People v. Campbell, No. 320557, 2015 WL 4988632 (Mich. Ct. App. Aug. 20, 2015), *judgment vacated in part, appeal denied in part*, 876 N.W.2d 818 (2016).

2. MICH. COMP. LAWS ANN. § 750.224(f) (West 1986).

statute, to be served consecutively to the punishment for the underlying felony.[3]

A partial solution to the problem would be a simplification of the criminal code, which would involve a substantial reduction in the number of overlapping offenses.[4] For example, there is no reason to have a separate offense of carjacking in Michigan[5] when the code already punishes robbery[6] and armed robbery,[7] as indicated above.

A statutory elimination of mandatory minimum sentences would also be useful. In regard to the latter, the Michigan Supreme Court in *People v. Lockridge*[8] recently held that Michigan's sentencing guidelines, which set the minimum sentencing range for all felony offenses, are no longer mandatory and are instead advisory. In form, at least, most crimes now do not carry mandatory minimum sentences. It is unclear whether, or the extent to which, the pre-*Lockridge* scheme will be altered in fact, given the *Lockridge* requirement that the sentencing guidelines be scored and considered at sentencing.

A thorough revision of the criminal code would be a huge undertaking, but one that should be attempted someday. In the meantime, a more direct effort to reduce unwarranted prosecutorial discretion would require less of a statutory change, although it would present political difficulties.

II. LOOKING ABROAD: THE FRENCH APPROACH

In France, a low level judge, the *juge d'instruction*, has a "primary duty [to] conduct [] neutral investigations."[9] This judge's investigative powers include the power to weigh evidence and decide "whether to send a suspect for trial."[10] Thus, the decision to select a particular offense to charge is made by a judge. The *juge d'instruction* has been criticized in France; indeed, in 2009, then-President Sarkozy expressed an intention to change the system so that all investigations would be carried out by

3. MICH. COMP. LAWS ANN. § 750.227(b) (West 2015).

4. For an example of such simplification, see MODEL PENAL CODE (Am. Law Inst., Proposed Official Draft 1962).

5. MICH. COMP. LAWS ANN. § 750.529(a) (West 2004).

6. *Id.* § 750.530.

7. *Id.* § 750.529.

8. People v. Lockridge, 870 N.W.2d 502 (Mich. 2015).

9. Gene D. Cohen, *A Judge's Perspective: Comparing the Investigating Grand Jury With the French System of Criminal Investigations: A Judge's Perspective and Commentary*, 13 TEMP. INT'L & COMP. L. J. 87, 96 (1999).

10. E-mail from Bruno Monteil, Press and Commc'ns. Office, Embassy of France in the U.S. to author (June 19, 2015) (on file with author).

public prosecutors, with the *juge d'instruction* merely overseeing their work. Sarkozy's proposal was later withdrawn, however.[11]

Some have advocated the adoption of such a system in the U.S.;[12] others have opposed this, questioning the feasibility of such an adoption.[13] One underlying difficulty, of course, is that the French and American legal traditions are so different, with the U.S. basing its system of criminal justice on the adversarial system, whereas the French system is accusatorial. In addition, French judges are essentially part of the civil service and, for the most part, are graduates of the *École Nationale de la Magistrature*, the French school for judges.[14] Thus, they are not popularly elected or appointed by a politician, but receive training directly related to the responsibilities they will assume as judges. Do these differences present an insurmountable problem?

III. THE MICHIGAN ONE-MAN GRAND JURY

As it happens, Michigan already has an institution that, in some respects, resembles the *juge d'instruction*—the so-called "one-man grand jury," created by statute in 1917.[15] As the informal name suggests, the one-man grand jury performs the functions traditionally performed by a citizen-grand jury; that is, it calls witnesses to testify in secret and "indicts"[16] a defendant if the judge-grand juror finds that a crime and has been committed and that there is probable cause to believe that the defendant committed it. A defendant indicted by a traditional grand jury

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11. *Id.*

12. LLOYD L. WEINREB, DENIAL OF JUSTICE 123–25 (The Free Press 1977). An analysis of Weinreb's proposal is found in Robert P. Davidow, *Review: Lloyd L. Weinreb, Denial of Justice*, 56 TEX. L. REV. 329 (1978); *see also* Cohen, *supra* note 9, at 104–05.

13. Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?* 78 CALIF. L. REV. 542, 667–68 (1990).

14. *See* Robert P. Davidow, *Beyond Merit Selection: Judicial Careers Through Merit Promotion*, 12 TEX. TECH L. REV. 851, 855–57 (1981).

15. *See* MICH. COMP. LAWS. ANN. §§ 767.3, 767.4 (West 2016) (present statutory authority on the one-man grand jury); *see also* Robert G. Scigliano, *Inquisitorial Proceedings and Separation of Functions: The Case of the Michigan One-Man Grand Jury*, 38 U. DET. L.J. 882, 886–89 (1960) (recounting the history of the one-man grand jury).

16. MICH. COMP. LAWS. ANN. § 767.4 (West 2016) (giving the judge-grand juror the power to "cause the apprehension of such person [as to whom the judge finds probable cause to suspect that the person in question has committed an offense] by proper process."); People v. Jenkins, 624 N.W.2d 457, 461 (Mich. Ct. App. 2000) (referring to a defendant as having been "indicted" by the one-man grand jury).

is not entitled to have a preliminary examination following indictment,[17] but a defendant "indicted" by a one-man grand jury is entitled to such an examination.[18]

The Michigan one-man grand jury has a checkered past. In a case decided in 1948, *In re Oliver*, the U.S. Supreme Court held that a judge-grand juror could not, consistently with the requirements of due process, find a person guilty of contempt in secret.[19] In a 1955 case, *In re Murchison*, the U.S. Supreme Court held that it was a violation of due process for the same judge-grand juror who had cited a person for contempt in secret, to try the contempt charge in a later public hearing.[20] The present one-man grand jury statute has corrected these deficiencies.[21]

There remains, however, a potential constitutional problem resulting from a claim that giving a judge the power to investigate and bring charges violates the principle of separation of powers. This does not seem to be an issue under Michigan law, since the Michigan Supreme Court has held that a one-man grand jury exercises judicial powers.[22] Rather, it has been suggested, on the basis of *Lo-Ji Sales v. New York*,[23] that there is a federal separation-of-powers issue.

In *Lo-Ji Sales*, a local justice first issued a warrant to search an "adult" bookstore based on a finding that two reels of film that had been previously purchased by the police were obscene.[24] Instead of waiting for the police to search for and seize more copies of these films, the justice accompanied the police to the bookstore where many items not mentioned in the original warrant were examined by the justice and seized.[25] After the search, the items seized were listed retroactively on the warrant.[26] The U.S. Supreme Court found that the search and seizure of items not listed in the original warrant violated the Fourth

17. People v. Glass, 627 N.W.2d 261, 283 (Mich. 2001).
18. MICH. COMP. LAWS. ANN. § 767.4 (West 2016).
19. *In re* Oliver, 333 U.S. 257 (1948).
20. *In re* Murchison, 349 U.S. 133 (1955).
21. MICH. COMP. LAWS. ANN. § 767.4 (West 2016):
> The judge conducting the inquiry under section 3 [MCLA 767.3] shall be disqualified from acting as the examining magistrate in connection with the hearing on the complaint or indictment, or from presiding at any trial arising therefrom, or from hearing any motion to dismiss or quash any complaint or indictment, or from hearing any charge of contempt under section 5[.]

Id.
22. *In re* Slattery, 17 N.W.2d 251 (Mich. 1945).
23. Lo-Ji Sales v. New York, 442 U.S. 319 (1979).
24. *Id.* at 321.
25. *Id.* at 321–22.
26. *Id.* at 324.

Amendment, finding them "reminiscent of the general warrant or writ of assistance of the 18th century against which the Fourth Amendment was intended to protect."[27] The Court also found another Fourth Amendment violation: the justice was not a neutral and detached judicial officer.[28] Said the Court: "He [the justice] allowed himself to become a member, if not the leader, of the search party which was essentially a police operation. . . . he was not acting as a judicial officer, but as an adjunct law enforcement officer."[29]

If it were so inclined, the Court could easily distinguish the situation in *Lo-Ji Sales* from the situation under the Michigan one-man grand jury statute, since the Michigan statute does not explicitly authorize the judge-grand juror to become an adjunct of the police. Calling and listening to witnesses are what courts do all the time. There is no reason why the judge-grand juror cannot, as a formal matter, be neutral and detached. As a practical matter, neutrality and detachment may depend, in part, on the way in which the judges are selected. Of course, that is true of judges generally. If judges are popularly elected, or appointed by the governor with a requirement that they face retention elections, for example, they may, even today, wish to avoid appearing soft on crime.[30]

I have proposed a method of judicial selection that involves neither popular election nor gubernatorial appointment. I would have a broadly representative nominating commission nominate a relatively large number of nominees, with final selection by lot from among the nominees (by analogy to the way we select jurors).[31] Despite apparent novelty, selection by lot has an ancient lineage; it was the method by which *dikasts*, officials with judicial duties, were selected in Athens in the fourth and fifth centuries B.C.E.[32]

Many years ago, an attorney representing a defendant who had been "indicted" by a judge-grand juror (a circuit judge) maintained that due process should invalidate the practice of having another circuit judge

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27. *Id.* at 325.

28. *Id.* at 327.

29. *Id.* at 327.

30. Although nationally and in Michigan, for example, there is some support for reducing prison populations (*see, e.g.*, Michael S. Schmidt, *U.S. to Begin Freeing 6,000 From Prisons*, N.Y. TIMES (Oct. 7, 2015); Rebecca U. Thorpe, *Republicans and Democrats support sentencing reform. This is what stands in their way*, WASH. POST, (Oct. 5, 2015)), it is also true that there remains opposition to this movement among some legislators. *See, e.g.*, Carl Hulse, *'Willie Horton' Haunts Efforts on Crime Laws*, N.Y. TIMES, Jan. 5, 2016, at A15.

31. Robert P. Davidow, *Judicial Selection in Michigan: A Fresh Approach*, 58 WAYNE L. REV. 313 (2012) (advocating the adoption of this approach to judicial selection).

32. *Id.* at 322.

conduct the trial.[33] The attorney claimed that the trial judge would be unduly influenced by the fact that the trial judge and judge-grand juror were colleagues, not in the position of superior and inferior judges.[34] There is little reason to think that such an objection would succeed constitutionally today. Nevertheless, it might be desirable, as a matter of policy,[35] to grant the powers of the one-man grand jury to an inferior court judge, a district court judge in Michigan. Creating a disparity in rank between the judge-grand juror and the judge who presides at trial would have the advantage of contributing to the creation of a career judicial track, with lower court judges aspiring to become higher court judges. Elsewhere, I have argued in favor of the creation of such a career path, in part because it is not clear that spending years as an advocate is the best preparation for becoming a judge.[36]

IV. CONCLUSION

Legislative reduction in the number of overlapping criminal offenses may somewhat limit unwarranted prosecutorial discretion. This would be a long-term project. Failing that, it might be possible to revise the one-man grand jury statute as follows: the judge-grand juror would be given the power to decide what the appropriate charge or charges should be when there was the possibility of multiple charges arising out of a single event, for example. To make this decision, the judge-grand juror would have the power to subpoena witnesses and hear testimony in secret in the usual courtroom setting. Persons named in a criminal complaint could apply to the judge-grand juror for a review of the charges. Additionally, a prosecutor could apply to the judge-grand juror for pre-clearance of intended charges. In either case, the defendant would be entitled, as is presently the case, to a preliminary examination before another judge. Thus, the judge-grand juror would ultimately not determine the existence or absence of probable cause. The judge-grand juror would be a district court judge, and inferior in rank to the trial judge, the latter of whom would not be in the position of having to evaluate the work of a

33. My father, the late Larry S. Davidow, a Michigan lawyer for 70 years, made this argument to me. I do not know whether he ever made this argument in an oral presentation in court or in an appellate brief.

34. *Id.*

35. Telephone Interview with Deborah Hunt, Clerk, U.S. Court of Appeals, 6th Circuit (Jan. 7, 2016) (from which one can infer an analogy from the practice of the Sixth Circuit, which does not assign a district court judge to handle a case from the district court from which the judge comes).

36. Davidow, *supra* note 14, at 854.

colleague—perhaps a desirable situation even if not constitutionally required.

The probability of passage of such a revision of the one-man grand jury statute is low. Change is often resisted. I assume that many prosecutors, among others, would vigorously oppose such a change. As everyone knows, it often happens that people with power are reluctant to give it up. Nevertheless, given the problems with virtually unfettered prosecutorial discretion in the selection of criminal charges, I believe that the effort to appropriately amend the Michigan one-man grand jury statute would be a worthwhile undertaking.