

Grand Jury

Roger A. Fairfax, Jr.*

The grand jury has come under fire as an outmoded relic that provides little, if any, protection to the accused. Often criticized as the complete captive of the prosecutor, the grand jury has a proud history and uncertain modern practical role. This chapter explores the leading critiques of the grand jury and proposals for its reform. After considering the grand jury's history, constitutional purpose, operation, and perceived shortcomings, the chapter makes several policy recommendations for how we might enhance the grand jury's utility in our modern criminal justice system.

INTRODUCTION

A grand jury is a lay body, typically numbering between 12 and 23 persons, called upon to determine whether there is sufficient evidence supporting allegations against an accused. In many jurisdictions, the government is powerless to force a defendant to stand trial unless a grand jury first returns an indictment. The grand jury also has significant authority to compel sworn testimony and the production of tangible evidence. As such, the grand jury is a powerful tool used by law enforcement to investigate crime.

In theory, the grand jury's dual role of "sword" (as a potent investigative tool to combat crime) and "shield" (as an ostensible protector of defendants' rights) should make it a celebrated feature of our criminal justice system, particularly when one considers the grand jury's proud heritage as an organ of popular representation in the administration of criminal justice, and, more broadly, as a "bulwark of liberty."¹ However, today's grand jury is widely criticized as a vestige of a time before professional prosecutors and additional safeguards were available to filter meritless allegations. Also, many critics believe that the grand jury's "shield" role has all but receded

* Jeffrey & Martha Kohn Senior Associate Dean for Academic Affairs and Research Professor of Law, George Washington University Law School. Special thanks to Albert Alschuler, Kami Chavis, Andrea Dennis, Cara Drinan, Kris Henning, Renee Hutchins, Sherri Lee Keene, Michael Pinard, Ellen Podgor, and Yolanda Vazquez for feedback on this chapter, which was prepared for the Academy for Justice conference on criminal justice reform.

1. United States v. Mandujano, 425 U.S. 564, 589 (1976) (Brennan, J., concurring); United States v. Dionisio, 410 U.S. 1, 17 (1973).

and has given rise to an era in which the grand juries rarely, if ever, refuse to consent to the prosecutor's proposed charges. What remains, many argue, is simply an investigative tool of the prosecutor masquerading as a protection for the defendant. Therefore, the argument goes, the grand jury needs to be significantly reformed, if not abolished altogether.

I. THE GRAND JURY'S HISTORICAL AND CONSTITUTIONAL ROLES

A. HISTORY OF THE GRAND JURY

Perceptions of the modern grand jury's value are bound up with its historical role. The grand jury, which is "rooted in long centuries of Anglo-American history,"² has a history stretching back to ancient Athens.³ However, the roots of what we recognize today as the grand jury can be found in the 14th century when, during Edward III's reign, a 24-person accusing jury was established.⁴ This development completed the evolution of the two-tier, grand and petit jury system with which we are familiar today.⁵ However, this early grand jury, like the grand jury of today, was perceived as a mechanism for the Crown to ferret out wrongdoing among the subjects rather than as a safeguard for the people against the power of the monarchy.

The grand jury began to earn its reputation as a protection for the accused over the next few centuries, as grand-jury indictment became a prerequisite for criminal prosecution and after high-profile instances of English grand juries refusing attempts to prosecute religious rivals of the monarchy.⁶ In the 18th century, American colonial grand juries followed suit, using their power to frustrate the Crown's prosecutions as a form of resistance to, and protest of,

2. United States v. Williams, 504 U.S. 36, 47 (1992) (quoting Hannah v. Larche, 363 U.S. 420, 490 (1960) (Frankfurter, J., concurring in result)).

3. See GEORGE J. EDWARDS, *THE GRAND JURY: AN ESSAY* 1 (1906); Roger A. Fairfax, Jr., *The Jurisdictional Heritage of the Grand Jury Clause*, 91 MINN. L. REV. 398, 408 (2006) [hereinafter Fairfax, *Jurisdictional Heritage*].

4. EDWARDS, *supra* note 3, at 2.

5. For more on the antecedents of the modern grand jury, see *id.* at 2-7; Fairfax, *Jurisdictional Heritage*, *supra* note 3, at 408-09 n.39 (noting antecedents of the grand jury found during the reign of Henry II); Ric Simmons, *Re-examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1, 4-5 (2002).

6. See Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design*, 93 CORNELL L. REV. 703, 721-22 (2008) [hereinafter Fairfax, *Grand Jury Discretion*]; Fairfax, *Jurisdictional Heritage*, *supra* note 3, at 408-09; see also EDWARDS, *supra* note 3, at 28-30; Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. U. L. REV. 1, 9 (1996).

monarchical rule.⁷ The grand jury in the American colonies also became a feature of everyday civic life, “overseeing community infrastructure and public works projects, taxing and spending, and appointments of individuals to local office.”⁸

The level of respect accorded the grand jury by the Founding generation led to the inclusion of the right to grand-jury indictment in the Bill of Rights.⁹ The Fifth Amendment to the Constitution provides that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.”¹⁰

The grand jury continued to figure prominently into the political and legal development of the young republic, with charges to grand juries becoming a popular means of disseminating political messages and educating a growing population on principles of democratic government.¹¹ The grand jury also inserted itself into a number of the legal and political controversies of the day, with grand jurors using their discretion to frustrate (or facilitate) proposed prosecutions under the Alien and Sedition Acts, Fugitive Slave Act, and criminal laws passed during the Reconstruction era.¹²

7. See Fairfax, *Grand Jury Discretion*, *supra* note 6, at 722; Fairfax, *Jurisdictional Heritage*, *supra* note 3, at 409-410.

8. Fairfax, *Jurisdictional Heritage*, *supra* note 3, at 410 n.45; see also LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 221-23 (1999); Roger A. Fairfax, Jr., *Grand Jury: Toward a Functional Makeover of the Ancient Bulwark of Liberty*, 19 WM. & MARY BILL OF RIGHTS J. 339, 346 (2010) [hereinafter Fairfax, *Grand Jury Innovation*]; Simmons, *supra* note 5, at 4-5 & n.8.

9. See Fairfax, *Jurisdictional Heritage*, *supra* note 3, at 410-12.

10. U.S. CONST. amend. V. Although the right to grand jury indictment was not included in the text of the original Constitution as was the right to jury trial, see U.S. CONST. art. III, § 2 (“In all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury.”); there was a reference to grand jury indictment in the provision of Article I relating to impeachment. See U.S. CONST. art. I, § 3, cl. 7 (“Judgement in cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgement, and Punishment, according to Law.”). This further underscores the notion that the grand jury was ingrained in the fabric of American law at the time.

11. See, e.g., Michael Daly Hawkins, *Honoring the Voice of the Citizen: Breathing Life into the Grand Jury Requirement*, in GRAND JURY 2.0: MODERN PERSPECTIVES ON THE GRAND JURY 119 (Roger A. Fairfax, Jr. ed., 2011); *Justice William Paterson’s Charge to the Lyon Grand Jury, U.S. Circuit Court for the District of Vermont, October 3, 1798*, in BRUCE A. RAGSDALE, THE SEDITION ACT TRIALS 52 (Fed. Jud. Ctr. 2005), <https://www.fjc.gov/sites/default/files/trials/seditionacts.pdf>.

12. See RICHARD YOUNGER, THE PEOPLE’S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634-1941, at 49-52, 103-05, 118-33 (1963); Fairfax, *Grand Jury Discretion*, *supra* note 6, at 722.

However, in 1884, the U.S. Supreme Court held that the Grand Jury Clause of the Fifth Amendment did not restrain the states from dispensing with grand-jury indictment as the exclusive means of initiating criminal proceedings.¹³ Therefore, by the time the Supreme Court's project of selective incorporation was completed nearly a century later, the grand jury stood as one of the only criminal procedural rights not incorporated to apply to the states.¹⁴ Nevertheless, the American grand jury survived early 20th-century attempts to abolish it in the wake of the abolition of the grand jury in England during the interwar years.¹⁵ It is still required as a matter of constitutional command in federal criminal cases, and, today, about half of the states require grand-jury indictment as a prerequisite to felony prosecution.¹⁶

B. THE GRAND JURY'S CONSTITUTIONAL ROLE

Contrary to popular opinion, the grand jury is not merely an adjunct of the court or a tool of the prosecutor. Rather, the grand jury "is a constitutional fixture in its own right. In fact, the whole theory of its function is that it belongs to no branch of the institutional Government, serving as kind of a buffer or referee between the Government and the people."¹⁷

Perhaps the most significant constitutional role the grand jury plays is that of check on the government's power to bring criminal charges against a defendant. The Supreme Court "has often recognized the grand jury's singular role in finding the probable cause necessary to initiate a prosecution for a

13. See *Hurtado v. California*, 110 U.S. 516 (1884). The grand jury would also play a significant role in many of the political episodes and skirmishes throughout the twentieth century, including the fights against political corruption, the regulation of industry, Jim Crow entrenchment, and terrorism. See, e.g., Sara Sun Beale & James E. Felman, *Enlisting and Deploying Federal Grand Juries in the War on Terrorism*, in *GRAND JURY 2.0*, *supra* note 11, at 3-23.

14. See, e.g., *McDonald v. City of Chicago*, 561 U.S. 742 (2010); ROGER A. FAIRFAX, JR., *ADJUDICATORY CRIMINAL PROCEDURE: CASES, STATUTES, AND MATERIALS* 7 & n.2 (2017) (noting only the Sixth Amendment's right to jury verdict unanimity and the Eighth Amendment's Excessive Fines Clause).

15. See Fairfax, *Grand Jury Innovation*, *supra* note 8, at 346; Fairfax, *Jurisdictional Heritage*, *supra* note 3, at 428-30.

16. See SARA SUN BEALE ET AL., *GRAND JURY LAW AND PRACTICE* § 1:1 (2d ed. 2015).

17. *United States v. Williams*, 504 U.S. 36, 47 (1992). For more on how the grand jury serves as a check on the three branches of government, see Fairfax, *Grand Jury Discretion*, *supra* note 6, at 726-29.

serious crime.”¹⁸ Indeed, the grand jury’s determination of probable cause has preclusive effect for purposes of weighing the evidence in the early stages of a criminal case.¹⁹ The fact that federal prosecutions (and prosecutions in states that require grand-jury indictment) cannot proceed without the consent of the grand jury has prompted some to refer to the grand jury as a “shield” for would-be defendants.²⁰ On the other hand, the grand jury also has earned the nickname of “sword” because of its potent power to gather evidence and compel sworn testimony on behalf of the prosecutor’s investigation of crime.²¹

II. THE OPERATION OF THE GRAND JURY

A. SUBPOENA POWER

The aforementioned “sword” moniker derives primarily from the grand jury’s subpoena power. The authority of the grand jury to subpoena evidence is tremendously broad and has nearly unlimited reach. This extends to witness testimony and documentary and tangible evidence.²² As the Supreme Court has noted, the grand jury has the right to “every man’s evidence.”²³ However, this right is subject to valid constitutional, common law, and statutory privileges.²⁴ In the case of the Fifth Amendment privilege against self-incrimination, prosecutors can provide immunity to the witness in order to compel testimony.²⁵

18. *Kaley v. United States*, 134 S. Ct. 1090 (2014). For a discussion of the evolution of the probable cause standard for grand jury indictments, see Niki Kuckes, *Retelling Grand Jury History*, in GRAND JURY 2.0, *supra* note 11, at 142-47; Fairfax, *Grand Jury Discretion*, *supra* note 6, at 720-21.

19. *See Kaley v. United States*, 134 S. Ct. 1090, 1098 (2014) (“The grand jury gets to say—without any review, oversight, or second-guessing—whether probable cause exists to think a person committed a crime.”).

20. *See, e.g.*, Andrew Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 263 (1995). However, as discussed below, many bemoan the fact that grand juries rarely refuse to return indictments. *See, e.g.*, *United States v. Navarro-Vargas*, 408 F.3d 1184, 1195-96 (9th Cir. 2005) (Hawkins, J., dissenting).

21. *See, e.g.*, Leipold, *supra* note 20, at 263.

22. *See, e.g.*, BEALE ET AL., *supra* note 16, § 6:3.

23. *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)).

24. Among these privileges are the common law privileges recognized by Federal Rule of Evidence 501, including the attorney-client privilege and the spousal privilege. *See* FED. R. EVID. 501.

25. *See, e.g.*, 18 U.S.C. § 6001 *et seq.*

However, there are some limits to the grand jury's subpoena power. First, although the government is given a wide berth with regard to the subject matter of grand-jury subpoenas, subpoenas can be challenged on the grounds that they are unreasonable or oppressive.²⁶ Also, the grand jury has no power to enforce its own subpoenas; it must rely on the court to do so.²⁷ Courts will use both civil contempt and criminal contempt to encourage compliance with subpoenas.²⁸ Furthermore, there are sometimes statutory or regulatory limitations placed on the purpose or subject-matter scope of grand-jury subpoenas.²⁹

B. SECRECY

Another salient feature of the grand jury's operation is its secrecy. Virtually everyone associated with the grand-jury process—typically except the witnesses themselves—is forbidden from disclosing any “matter occurring before the grand jury.”³⁰ Matters occurring before the grand jury include not only testimony, but also evidence presented and other information related to grand-jury proceedings.³¹ The secrecy rule is enforced through the court's contempt power.³²

Secrecy serves a number of important purposes. First, it protects witnesses who testify before the grand jury from intimidation or retaliation.³³ The secret nature of grand-jury proceedings also guards against external pressure on the grand jurors themselves, who might become subject to attempts to influence their deliberations.³⁴ In addition, grand-jury secrecy helps to protect the reputations of those who are investigated for criminal activity but ultimately exonerated, and to minimize the chances that a target of an investigation will be tipped off and attempt to flee justice.³⁵

26. See *United States v. R. Enterprises*, 498 U.S. 292 (1991).

27. See FED. R. CIV. P. 17(g); U.S. ATTORNEYS' MANUAL § 9-11.140.

28. See 18 U.S.C. § 401; 18 U.S.C. § 1826; FED. R. CRIM. P. 42; U.S. ATTORNEYS' MANUAL § 9-11.140.

29. For example, federal grand jury subpoenas may not be used for the purpose of gathering evidence in a civil case, or for locating fugitives. See, e.g., *In re Archuleta*, 432 F. Supp. 583 (S.D.N.Y. 1977); U.S. ATTORNEYS' MANUAL § 9-11.120.

30. FED. R. CRIM. P. 6(e)(2); see also PAUL S. DIAMOND, *FEDERAL GRAND JURY PRACTICE AND PROCEDURE* § 10.01(B) (4th ed. 2001).

31. See, e.g., *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 600 (D.C. Cir. 1999).

32. See FED. R. CRIM. P. 6(e)(7).

33. See BEALE ET AL., *supra* note 16, § 5:1; Daniel C. Richman, *Grand Jury Secrecy: Plugging the Leaks in an Empty Bucket*, 36 AM. CRIM. L. REV. 339, 352-53 (1999).

34. See *United States v. Navarro-Vargas*, 408 F.3d 1184, 1201 (9th Cir. 2005).

35. See *Fairfax, Grand Jury Discretion*, *supra* note 6, at 748.

C. DELIBERATION AND VOTING

After completion of the presentation of evidence to the grand jury, the prosecutor, who serves as the legal adviser to the grand jury,³⁶ typically gives legal instructions to the grand jurors.³⁷ The grand jurors will then have the opportunity to deliberate and vote in private.³⁸ The standard governing grand-jury proceedings is whether there is probable cause to believe the accused committed the offense or offenses in the proposed indictment. If a majority of the grand jurors vote in favor, the grand jury returns what is often referred to as a “true bill.”³⁹ If the grand jury declines to vote in favor of indictment, the prosecutor is free to bring the charges before another grand jury, as the Double Jeopardy Clause does not apply to grand-jury indictments.⁴⁰

III. GRAND-JURY CRITIQUES

The grand jury is perhaps the most criticized of all the mechanisms of criminal adjudication. The critiques are many, but they generally fall into three categories: ineffectiveness as a probable-cause filter, redundancy as a check on prosecutorial discretion, and lack of fairness to defendants and witnesses.

A. INEFFECTIVENESS AS A PROBABLE-CAUSE FILTER

The most common indictment against the grand jury is the claim that it is merely a rubber stamp for prosecutorial decisions to charge a defendant with a crime.⁴¹ Although much of the criticism is likely grounded more in anecdote than in empirical analysis, there are some who have made a convincing case that the grand jury rarely rejects charges lodged by the prosecutor.⁴² Indeed, the statistics on the federal level bear out this notion; in a recent year, federal grand juries

36. See, e.g., AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.5(a) [hereinafter ABA PROSECUTION FUNCTION]; BEALE ET AL., *supra* note 16, § 4:15; Kristin Henning, *Status, Race, and the Rule of Law in the Grand Jury*, 58 HOW. L.J. 833, 841 (2015).

37. See BEALE ET AL., *supra* note 16, § 4:15.

38. See FED. R. CRIM. P. 6(d)(2).

39. See, e.g., SUSAN BRENNER & LORI SHAW, FEDERAL GRAND JURY: A GUIDE TO LAW AND PRACTICE § 5:20 (2d ed. 2016).

40. See *United States v. Williams*, 504 U.S. 36, 49 (1992). However, the U.S. Department of Justice has an internal policy requiring high-level approval before a line attorney may resubmit previously rejected charges to the grand jury. See U.S. ATTORNEYS' MANUAL § 9-11.120.

41. See, e.g., *United States v. Navarro-Vargas*, 408 F.3d 1184, 1195-96 (9th Cir. 2005); Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 926 (2006); Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 323 (1995).

42. See, e.g., Andrew D. Leipold, *Prosecutorial Charging Practices and Grand Jury Screening: Some Empirical Observations*, in GRAND JURY 2.0, *supra* note 11, at 195-222.

rejected indictments in only eleven of over 160,000 cases.⁴³ Assuming this pattern maintains in state grand-jury practice, it seems to paint a fairly bleak portrait of the grand jury's effectiveness as a probable-cause filter. Given the rarity of indictment declination, it is natural to question what value the grand jury adds.

However, there are reasonable explanations for the high rate of indictment. First, it must be remembered that the probable-cause standard employed by grand juries is a relatively modest threshold to meet compared to the proof-beyond-a-reasonable-doubt standard required at trial.⁴⁴ Furthermore, the prosecutor in the grand jury is unencumbered by evidentiary rules, fully free to use hearsay evidence and other evidence that would be inadmissible at trial.⁴⁵ In addition, prosecutors have the ability to poll the grand jury informally to obtain an indication of how the grand jurors perceive the strengths and weaknesses of the case before requesting that the grand jurors vote on an indictment. If there are issues that would jeopardize obtaining a probable-cause finding, the prosecutor could present additional evidence to fill any gaps, or could simply choose not to request a vote. Either way, the statistics would not reflect a declination by the grand jury.⁴⁶

B. REDUNDANCY AS A CHECK ON PROSECUTORIAL DISCRETION

Another set of criticisms relate to the changed context within which the grand jury operates. The American grand jury came of age during an era before the public prosecutor became a regular feature of our criminal justice

43. See, e.g., MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL JUSTICE STATISTICS 2010—STATISTICAL TABLES 12 (2013) (showing that grand juries refused indictments in only eleven of the more than 160,000 federal cases prosecuted in 2010); Ben Casselman, *It's Incredibly Rare for a Grand Jury to do what Ferguson's Just Did*, FIVE THIRTY EIGHT (Nov. 24, 2014), <https://fivethirtyeight.com/datalab/ferguson-michael-brown-indictment-darren-wilson/> (discussing same).

44. See, e.g., Kuckes, *supra* note 18; William Ortman, *Probable Cause Revisited*, 68 STAN. L. REV. 511 (2016).

45. See *Costello v. United States*, 350 U.S. 359 (1956).

46. See, e.g., Kevin Washburn, *Restoring the Grand Jury*, 76 FORDHAM L. REV. 2333, 2370 & n.179 (2008); Peter J. Henning, *Prosecutorial Misconduct in Grand Jury Investigations*, 51 S.C. L. REV. 1, 5 & n.24 (1999). Many guilty pleas, of course, involve the waiver of indictment as part of the plea bargain. See Roger A. Fairfax, Jr., *Thinking Outside the Jury Box: Deploying the Grand Jury in the Guilty Plea Process*, 57 WM. & MARY L. REV. 1395 (2016) [hereinafter Fairfax, *Deploying the Grand Jury*]; see also Fairfax, *Grand Jury Innovation*, *supra* note 8, at 342-43 (noting that statistics also show that nearly all grand-jury indictments are followed by a conviction, either at trial or, more typically, as the result of a guilty plea); *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (“[C]riminal justice today is for the most part a system of pleas, not a system of trials.”).

system.⁴⁷ As late as the mid-1800s, private citizens were permitted to lodge and prosecute criminal charges against others without a public prosecutor to determine whether those charges were supported by the evidence or were in the interests of justice.⁴⁸ The grand jury, which was responsible for screening those allegations, undoubtedly served as a safeguard against private manipulation of the criminal process for improper purposes.⁴⁹

Today, however, the office of the public prosecutor is firmly established in the United States. Prosecutors are held accountable through either supervision by elected officials, or through election at the ballot box.⁵⁰ Furthermore, prosecutors have access to training and are expected to adhere to ethical and professional norms and standards.⁵¹ In addition, there are other mechanisms available for the vetting of criminal allegations, such as the preliminary hearing in which a judge determines whether there is probable cause to support the charges the government seeks to bring.⁵²

These are all valid observations, but they ignore that fact the grand jury represents a *community* perspective on whether charges are appropriate in a given case.⁵³ This is the same reason that, constitutional command aside, the jury trial is deemed to provide the popular perspective that enhances the administration of justice.⁵⁴ Indeed, the grand jury's finding of probable cause is conclusive in the criminal process; once a grand jury finds probable cause, no other judicial finding is necessary for any purpose.⁵⁵ The additional respect

47. See, e.g., Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 411, 422-23 & n.33 (2009).

48. See, e.g., Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 292-93 (1989).

49. See ALLEN STEINBERG, *THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800-1880*, at 64 (1989); Fairfax, *Grand Jury Innovation*, *supra* note 8, at 344-45.

50. Most prosecutors in the United States are elected. See, e.g., ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2007); Michael J. Ellis, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528 (2012); Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581 (2009). For a discussion of the prosecutorial environment, see Ronald F. Wright, "Prosecutor Institutions and Incentives," in the present Volume.

51. See, e.g., AM. BAR ASS'N, *MODEL RULES OF PROFESSIONAL CONDUCT* 3.8; AM. BAR ASS'N, *MODEL CODE OF PROFESSIONAL RESPONSIBILITY*, DISCIPLINARY RULE 7-103. See generally ABA PROSECUTION FUNCTION, *supra* note 36.

52. See, e.g., *Hurtado v. California*, 110 U.S. 516 (1884).

53. See Fairfax, *Grand Jury Discretion*, *supra* note 6, at 759-61.

54. See, e.g., Roger A. Fairfax, Jr., *Harmless Error and the Institutional Significance of the Jury*, 76 FORDHAM L. REV. 2027 (2008).

55. See, e.g., *Kaley v. United States*, 134 S. Ct. 1090 (2014).

the law affords the grand jury's probable-cause finding is at least some evidence of the importance of having community participation in the criminal process, particularly in a system where jury trials are rare.⁵⁶

C. LACK OF FAIRNESS TO TARGETS AND WITNESSES

Other criticisms relate to the notion that the grand-jury process treats targets and witnesses unfairly. Among the concerns raised on the part of witnesses are the lack of counsel in the grand-jury room and the inability of witnesses to obtain a transcript of their testimony.⁵⁷ As for targets of grand-jury investigations, critics have pointed toward the lack of the right to testify before the grand jury, the lack of a prohibition on the prosecutor's introduction to the grand jury of inadmissible evidence, and the lack of a requirement that the prosecutor present any exculpatory evidence before the grand jury.

1. Witnesses

(a) Counsel in the grand-jury room: With regard to counsel in the grand-jury room, the central argument is that witnesses are better protected when counsel can be present during questioning. In the absence of such a right, the witness generally must recognize when he or she is in need of legal advice, ask the prosecutor to pause the proceeding, leave the grand-jury room to consult with counsel, and then return to either answer the question (or assert privilege). As one might imagine, this could be a difficult and disruptive process, even assuming a lay witness would know when legal advice should be sought before answering a question. However, an objection to having counsel accompany the witness is that it would transform the grand jury into something akin to an adversarial proceeding.⁵⁸ In addition, there is the concern that permitting defense counsel to be present would undermine the secrecy of the proceedings.⁵⁹

(b) Disclosure of witness transcripts: Secrecy is also the concern at the heart of objections to releasing to witnesses their grand-jury transcripts. Although grand-jury witnesses are permitted to disclose the substance of their testimony,⁶⁰ the transcripts themselves are treated as confidential grand-jury

56. See, e.g., Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 *YALE L.J.* 1097, 1150 (2001) ("Our world is no longer one of trials, but of guilty pleas."); see also Roger A. Fairfax, Jr., *Batson's Grand Jury DNA*, 97 *IOWA L. REV.* 1511, 1530 (2012).

57. See NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *FEDERAL GRAND JURY REFORM REPORT & BILL OF RIGHTS* (2000) [hereinafter *NACDL, GRAND JURY BILL OF RIGHTS*]; AM. BAR ASS'N, *GRAND JURY POLICY AND MODEL ACT* (1982).

58. See *NACDL, GRAND JURY BILL OF RIGHTS*, *supra* note 57; N.Y. CRIM. PROC. L. §§ 190.25, 190.52.

59. See *NACDL, GRAND JURY BILL OF RIGHTS*, *supra* note 57.

60. See, e.g., FED. R. CRIM. P. 6(e)(2)(B).

material. Arguably, it would benefit witnesses to have those transcripts, in part, so that they may be better prepared for, and avoid perjury in, future testimony. However, there still exists the serious concern that witnesses could be coerced to disclose their transcripts to those against whom they testified. This would not only pose a problem of witness intimidation, but it also could undermine the integrity of the proceedings.

2. Targets

(a) Defendant's right to testify before the grand jury: Typically, a target of a grand-jury investigation has no right to testify before the grand jury.⁶¹ The main concern with such a right is not that more defendants will testify before grand juries; indeed, most prosecutors would relish the opportunity to question the target in the grand jury. Rather, it is that, if the defendant has the right to testify, the prosecutor would need to notify the target that he or she is, in fact, a target. Such notification could lead to flight, destruction of evidence, or witness intimidation. However, this concern can be addressed by limiting the right to testify to cases in which the target already is aware of the grand-jury proceeding and makes a formal request to testify.⁶²

(b) Prohibition on the use of inadmissible evidence in the grand jury: Some have criticized the fact that prosecutors are permitted to introduce inadmissible evidence before the grand jury.⁶³ In the grand jury, prosecutors are permitted to introduce hearsay evidence and evidence that would be suppressed at trial due to constitutional violations.⁶⁴ If prosecutors were required to refrain from introducing such evidence, there would undoubtedly be clear cases in which the prosecutor would know that a court would be almost certain to suppress a piece of evidence. (For example, a confession coerced by physical abuse.) However, query how closer admissibility calls would be resolved. Would the question be committed to a judge or magistrate, or would we simply rely on the good-faith prediction of the prosecutor? If the former, satellite litigation would be created, thus consuming resources and undermining the preliminary nature of grand-jury proceedings. If the latter, there would be a question of whether the rule would be enforceable in practice.

61. New York State is a prominent exception. See N.Y. CRIM. PROC. L. § 190.50; William Glaberson, *New Trend Before Grand Juries: Meet the Accused*, N.Y. TIMES (Jun. 20, 2004).

62. For example, the target could become aware of the investigation either because a witness has disclosed the investigation, or because a criminal complaint already has been filed against the individual. See N.Y. CRIM. PROC. L. § 190.50; see also ABA PROSECUTION FUNCTION, *supra* note 36, § 3-4.6(g).

63. See NACDL, GRAND JURY BILL OF RIGHTS, *supra* note 57.

64. See *Costello v. United States*, 350 U.S. 359 (1956).

(c) Requirement of disclosure of exculpatory evidence to the grand jury:

Critics have bemoaned the lack of a rule requiring that the prosecutor disclose exonerating evidence to the grand jury before they return an indictment.⁶⁵ The U.S. Supreme Court has held that a prosecutor need not present such evidence to the grand jury.⁶⁶ Part of the Court's rationale was that the grand jury is not meant to be a trial-like proceeding.⁶⁷ The Court's ruling, however, does not preclude jurisdictions from adopting their own requirement that prosecutors disclose exonerating evidence to the grand jury. In fact, the U.S. Department of Justice adopted a rule requiring federal prosecutors to disclose such evidence to the grand jury.⁶⁸ Several states have provisions requiring disclosure of exonerating evidence under certain circumstances,⁶⁹ and professional prosecutorial standards also call for such disclosure.⁷⁰

RECOMMENDATIONS

In the wake of grand-jury decisions not to indict in recent high-profile cases involving police killings of unarmed African-Americans, the grand jury has been placed under a microscope.⁷¹ One byproduct of this renewed scrutiny was a set of proposals for drastically altering the grand jury as we know it. Some advocated stripping the grand jury of its secrecy.⁷² Others insisted that judges be installed in the grand jury to supervise the proceedings.⁷³ Many even

65. See NACDL, GRAND JURY BILL OF RIGHTS, *supra* note 57.

66. See *United States v. Williams*, 504 U.S. 36 (1992).

67. See *id.*

68. See U.S. ATTORNEYS' MANUAL § 9-11.233.

69. See, e.g., Ali Lombardo, *The Grand Jury and Exculpatory Evidence: Should the Prosecutor Be Required to Disclose Exculpatory Evidence to the Grand Jury?*, 48 CLEVELAND ST. L. REV. 829, 842-57 (2000).

70. See ABA PROSECUTION FUNCTION, *supra* note 36, § 3-4.6(e). For a discussion of disclosure standards, see Darryl K. Brown, "Discovery," in the present Volume.

71. See, e.g., Roger A. Fairfax, Jr., *The Grand Jury and Police Violence Against Black Men, in* POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT (Angela J. Davis ed., 2017); Roger A. Fairfax, Jr., *Should the American Grand Jury Survive Ferguson?*, 58 HOW. L.J. 825 (2015).

72. See, e.g., JONATHAN LIPPMAN, ACCESS TO JUSTICE: MAKING THE IDEAL A REALITY, THE STATE OF THE JUDICIARY 2015, at 3-4 (2015); Brad Schrade, *Grand Jury Privilege Curtailed for Ga. Officers in Shooting Cases*, ATLANTA JOURNAL-CONSTITUTION (Apr. 26, 2016); *Bill on Grand Jury Reform a Welcome Move Toward Transparency*, STATEN ISLAND ADVANCE (Dec. 8, 2014).

73. See, e.g., LIPPMAN, *supra* note 72, at 2-4; *A Judge's Idea for Grand Jury Reform*, N.Y. TIMES (Feb. 19, 2015).

called for the outright abolition of the grand jury.⁷⁴ These are understandable responses to the outrage generated by tragic events such as those that took place in Ferguson and Staten Island.⁷⁵ It is not surprising that the grand jury would receive the blame for the outcomes in those and other cases.⁷⁶ However, as a general matter, many of these reform or abolition proposals, though well meaning, are ultimately misguided.⁷⁷

Nevertheless, there are opportunities to improve the grand jury and harness its untapped potential. Below are several policy recommendations worth considering for the improvement of the grand-jury process in the United States.

1. Enhancing the grand jury's filter and community-voice functions.

As discussed above, the grand jury's high rate of indictment may not be a sign of its complete incompetence as a probable-cause filter. In addition, the grand jury can offer a valuable community perspective on charging and enforcement practices. Therefore, jurisdictions should consider improvements to how grand jurors are educated regarding their role in evaluating the appropriateness of proposed charges.⁷⁸

74. See, e.g., Jason Hancock, *Missouri Lawmaker Wants to Abolish Grand Jury System*, KANSAS CITY STAR (Jan. 19, 2015); Rachel Van Cleave, *Time to Abolish the 'Inquisitorial' Grand Jury System*, THE RECORDER (Dec. 31, 2014); James C. Harrington, *Abolish Grand Jury System*, SAN ANTONIO EXPRESS-NEWS (Dec. 21, 2014); George E. Curry, *U.S. Should Abolish Grand Jury System*, PHILA. TRIBUNE (Dec. 10, 2014); LaDoris Hazzard Cordell, *Grand Juries Should Be Abolished*, SLATE (Dec. 9, 2014); Caleb Pilgrim, *Let's Abolish the Grand Jury System*, NEW HAVEN REGISTER (Dec. 9, 2014).

75. See, e.g., J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2015); Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer is Not Indicted*, N.Y. TIMES (Nov. 24, 2014). President Barack Obama established a task force on 21st-century policing in the wake of these cases. See Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 840 (2017); see also PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING (2015).

76. See, e.g., Fairfax, *Should the American Grand Jury Survive Ferguson*, *supra* note 71.

77. See, e.g., Roger A. Fairfax, Jr., *Time for U.S. to Junk Grand Juries? Evidence Shows System Needs Mending, Not Ending*, ORLANDO SENTINEL (Dec. 26, 2014). Many of the very real obstacles that can frustrate grand jury indictments in cases against law enforcement can be addressed by mechanisms to ensure the independence of the prosecutor handling the case. It is this, rather than radical reform or abolition of the grand jury that may lead to more frequent indictments in these types of cases. See, e.g., Roger A. Fairfax, Jr., *The Grand Jury's Role in the Prosecution of Unjustified Police Killings—Challenges and Solutions*, 52 HARV. CIV. RTS.-CIV. LIB. L. REV. 397 (2017) [hereinafter Fairfax, *Grand Jury Role*].

78. See Fairfax, *Grand Jury Discretion*, *supra* note 6, at 761.

2. **Affording the defendant the right to testify in the grand jury.** Although secrecy concerns may discourage the presence of counsel for witnesses in the grand-jury room and disclosure of witness transcripts,⁷⁹ jurisdictions should consider establishing the right of grand-jury targets to testify before the grand jury when the investigation is known to the target.⁸⁰ In addition, targets, like all grand-jury witnesses, should receive *Miranda*-like warnings before testifying.⁸¹
3. **Requiring the disclosure of exculpatory evidence to the grand jury.** Although there may be practical concerns with a prohibition on the introduction of inadmissible evidence in the grand jury, jurisdictions should adopt a clear policy requiring prosecutors to disclose exculpatory evidence to the grand jury.⁸²
4. **Legal instructions to the grand jury should be made on the record and disclosed to the defendant.** When a prosecutor instructs a grand jury on the controlling legal standards in a case, these instructions should be made on the record and made available as a matter of course to the indicted defendant(s) upon request.⁸³
5. **Making a legal adviser available to the grand jury.** Jurisdictions should consider establishing a dedicated legal adviser, independent of the prosecutor, available for consultation by the grand jury.⁸⁴
6. **Enhance use of grand-jury reports.** Jurisdictions should establish or revive the ability of grand juries to investigate and issue reports on matters of general concern, including official corruption and misconduct.⁸⁵

79. See Part IV.C, *supra*.

80. See *id*.

81. See, e.g., NACDL, GRAND JURY BILL OF RIGHTS, *supra* note 57. For a discussion of questioning by law enforcement, see Richard A. Leo, "Interrogation and Confessions," in Volume 2 of the present Report.

82. See Part IV.C, *supra*.

83. See, e.g., NACDL, GRAND JURY BILL OF RIGHTS, *supra* note 57; Fairfax, *Grand Jury Role*, *supra* note 77; Benjamin E. Rosenberg, *A Proposed Addition to the Federal Rules of Criminal Procedure Requiring the Disclosure of the Prosecutor's Legal Instructions to the Grand Jury*, 38 AM. CRIM. L. REV. 1443 (2001).

84. See, e.g., Thaddeus Hoffmeister, *The Grand Jury Legal Advisor: Resurrecting the Grand Jury's Shield*, 98 J. CRIM. L. & CRIMINOLOGY 1171 (2008); see also Susan W. Brenner, *Grand Jurors Speak*, in GRAND JURY 2.0, *supra* note 11.

85. See Fairfax, *Grand Jury Innovation*, *supra* note 8, at 342-44; see also 18 U.S.C. § 3331; BEALE ET AL., *supra* note 16, § 2:2.

-
7. **Utilize the grand jury beyond the accusing and screening functions.** More generally, jurisdictions should endeavor to utilize the grand jury for other functions related to the administration of criminal justice, including as a resource for community input in the guilty-plea process,⁸⁶ sentencing and deferred prosecution agreements,⁸⁷ and prosecutorial priorities and regulation.⁸⁸

86. See Fairfax, *Deploying the Grand Jury*, *supra* note 46; Fairfax, *Grand Jury Innovation*, *supra* note 8, at 354-57; cf. Laura I. Appelman, *The Plea Jury*, 85 IND. L.J. 731, 748 (2010).

87. See Fairfax, *Grand Jury Innovation*, *supra* note 8, at 357-60.

88. See *id.* at 364-68; see also Adriaan Lanni, *Implementing the Neighborhood Grand Jury*, in GRAND JURY 2.0, *supra* note 11, at 184-86.