

Restoring the Grand Jury

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Abstract: *In recent years, the grand jury has been overly criticized and underutilized. While many recent scholars have proposed reforms that would reinvigorate the grand jury, most of these reforms are ill-designed and unmoored to the historical purposes of the grand jury. Especially in an era of plea bargains, the grand jury has the potential to serve a crucial role in insuring popular legitimacy in the criminal justice system. While much of the existing rhetoric about the grand jury is wrong, some criticism of the institution is certainly due. As the United States has become more diverse, the grand jury has lost its role as “the voice of the community” and become instead a melting pot in which each community’s voice is lost amid a cacophony of voices from other communities. Since a grand jury functions by majority vote and is now generally drawn from the entire jurisdiction, the grand jury no longer serves as a counter-majoritarian force of the local community against central authority. The gradual homogenization of the grand jury may have had a particularly strong impact on minority communities where legitimacy issues are most serious. Ironically, it was well-intentioned efforts to insure diversity in criminal justice – through the rule that trial juries should be drawn from panels representing a “fair cross-section of the community” – that undermined the grand jury’s role when this rule was unthinkingly imported into the grand jury context. No jurisdiction is just one community, and no grand jury can serve its purpose of representing any community if it is drawn from all communities. The proper way to restore the grand jury is neither to manipulate grand jury evidentiary rules nor to adopt any other reforms that have been proposed in recent years, but instead to insure that the grand jury represents an actual community. Grand juries must be reconstituted so that each grand jury represents a neighborhood, an actual community of people who are concerned about local issues of criminal justice.*

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Introduction

The American criminal justice system has long suffered withering criticism related to race and discrimination. While such criticism tends to rise and fall with news cycles and specific incidents involving race, many communities have a low baseline of trust in the criminal justice system. For almost as long, the jury has figured prominently as part of the potential solution in addressing these difficult issues. The jury is a natural place to work to address such problems because it imbues criminal justice with a strong democratic element.¹

Jury service provides a concrete opportunity for meaningful participation by everyday citizens in one of the most important – and high stakes – activities of government.² And through their participation on juries, ordinary citizens become invested in criminal justice and government itself. Even those citizens who do not actually participate vest more trust in a system that operates in a manner consistent with their democratic ideals. Indeed, it is largely on citizen participation that the legitimacy of the American criminal justice system rests.

While tremendous attention has been devoted to the trial jury in addressing problems involving race, scarce attention has been devoted to the other important kind of jury, the grand jury. In light of the scarcity of trials in modern criminal justice, the lack of attention to the grand jury is unfortunate. The grand jury could play a significant role in restoring the legitimacy of American criminal justice, particularly in communities of color that lack trust in the criminal justice system.

Today, the grand jury draws mostly skepticism when it draws any attention at all. Though “enshrined” in the Fifth Amendment and hailed in Supreme Court opinions, it garners very little respect among legal academics or practitioners.³ The claim that the average grand jury would

¹ See *Miller-El v. Dretke*, 545 U.S. 231, 272-73 (2005) (Souter, J., concurring) (quoting Alexis de Tocqueville’s claim that the use of juries raises the people to the bench and invests them with the direction of society).

² See *Powers v. Ohio*, 499 U.S. 400, 406 (1991) (“The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system.” (citing *Duncan v. Louisiana*, 391 U.S. 145, 147-158 (1968))); *Branzburg v. Hayes*, 408 U.S. 665, 690 (1972) (“Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process.”).

³ Peter Aranella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 463, 474 (1980). See also Susan W. Brenner, *The Voice of the Community: A Case for Grand Jury Independence*, 3

indict “a ham sandwich,” is so commonplace that it has become cliché.⁴ Consistent with such criticism, critics have implicitly or explicitly urged abolition of the grand jury⁵ or, alternatively, have offered ambitious proposals for reform.⁶ These proposals range from staffing solutions, such

VA. J. SOC. POL’Y & L. 67, 123 (1995) (criticizing the grand jury and arguing for reform); R. Michael Cassidy, *Toward a More Independent Grand Jury: Recasting and Enforcing the Prosecutor’s Duty to Disclose Exculpatory Evidence*, 13 GEO. J. LEGAL ETHICS 361, 365 (2000) (noting “widespread view that this erosion of the grand jury’s ability to act as a check on prosecutorial power is beyond repair”); Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 323 (1995) (“In almost all cases, a criminal defendant would be just as well off without the grand jury as he is with it.”); David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L.J. 683, 689, 690, 716 (2006) (“Today, the grand jury’s role makes little sense . . .”).

⁴ See Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 51, n.70 (2002) (arguing that grand jury review represents, at best, “a modest screening power, a fact recognized by the familiar courthouse saying that a grand jury would indict a ham sandwich if the prosecutor asked it to do so.” (citing R. Michael Cassidy, *Toward a More Independent Grand Jury: Recasting and Enforcing the Prosecutor’s Duty to Disclose Exculpatory Evidence*, 13 GEO. J. LEGAL ETHICS 361, 361 (2000))). See also AKHIL AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 166 (1996) (noting that in the law school classroom, “the only thing said (typically) said about a grand jury is that a clever prosecutor could get it to indict a ham sandwich.”); Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 929 (2006) [hereinafter Bibas, *Transparency*]; Stephanos Bibas, *The Real-World Shift in Criminal Procedure*, 93 J. CRIM. L. & CRIMINOLOGY 789, 813 n.86 (2003) (citing *People v. Carter*, 566 N.E.2d 119, 124 (N.Y. 1990) (Titone, J. dissenting)); Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097 n.403 (2001) [hereinafter Bibas, *Judicial Fact-Finding*]; Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1, 4 (2004). Using a slight twist on the concept, other scholars have said that a “grand jury would indict a hamburger.” MARC L. MILLER & RONALD F. WRIGHT, *CRIMINAL PROCEDURES: PROSECUTION AND ADJUDICATION* 193 (2d ed. 2005).

⁵ See, e.g., William J. Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174 (1973). See also Brenner, *supra* note 3, at 123 (noting that one solution is to abolish the grand jury through constitutional amendment); Cassidy, *supra* note 3, at 365 (noting a “widespread view that this erosion of the grand jury’s ability to act as a check on prosecutorial power is beyond repair”); Leipold, *supra* note 3, at 323 (“In almost all cases, a criminal defendant would be just as well off without the grand jury as he is with it.”).

⁶ Ric Simmons, *Re-examining the Grand Jury System: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1, 22 (2002). See also MARVIN FRANKEL & GARY P. NAFTALIS, *THE GRAND JURY: AN INSTITUTION ON TRIAL* 123-126 (Hill & Wang 1977) (presenting an earlier proposal for counsel and transcripts); Cassidy, *supra* note 3, at 393-94 (proposing a reform that would require prosecutors to meet an ethical obligation not to distort the evidence or mislead the grand jury, which would indirectly require presentation of exculpatory evidence in many cases); Kuckes, *supra* note 4 (proposing reforms that would allow grand jury witnesses to bring counsel into the grand jury room with them when they testify and would allow them to have transcripts of their testimony).

as giving the grand jury administrative staff or independent legal counsel,⁷ to evidentiary and procedural reforms, such as allowing the suspect to testify, prohibiting the use of hearsay testimony, or forbidding resubmission of a case after a grand jury has initially declined to indict,⁸ or requiring prosecutors to offer more evidence in each case.⁹

Many of the grand jury reformers define the principal evil in modern American criminal justice to be the increased power of the prosecutor. Accordingly, they seek to change the balance of power between the prosecutor and the grand jury by empowering the grand jury to become a stronger check on the prosecutor or by making the indictment process more difficult for the prosecutor. But the critics' preoccupation with the growth in prosecutorial power has caused them to overlook the historical purpose of the grand jury. Indeed, the grand jury was created to deal with a more nuanced problem than the one that many academics now ask it to address.

Historically, the grand jury was heralded because of its ability to serve as a check by "the people" in the local community on laws imposed by a central government that was more distant from ordinary citizens.¹⁰ The grand jury was intended by the anti-federalists to be a check on federal authority. As the Supreme Court has looked increasingly toward originalist interpretations of the Constitution to determine constitutional meaning in cases involving criminal procedure,¹¹ the Court could use such an interpretive to restore life to the Fifth Amendment's grand jury requirement.

Today, grand juries rarely serve the purposes envisioned by the founders. One recent case vividly demonstrates the importance of this purpose. Following Hurricane Katrina, the Attorney General of Louisiana demanded prosecution of medical workers who had remained at a New

⁷ Akhil Amar, *Reinventing Juries: Ten Suggestions*, 28 U.C. DAVIS L. REV. 1169, 1185 (1995) (arguing that we should give the grand jury a staff). Professor Kuckes argues that the grand jury should be allowed to use the court, rather than the prosecutor, as its advisor. Kuckes, *supra* note 4, at 31, 65 ("give the grand jury an independent legal advisor, selected from outside of the prosecutor's office"). See also Brenner, *supra* note 3, at 124-28 (outlining the advantages of giving a grand jury independent legal counsel); Ovio C. Lewis, *The Grand Jury: A Critical Evaluation*, 13 AKRON L. REV. 33, 64-66 (1979) (noting that the grand jury needs additional resources such as independent legal counsel, investigators and clerical staff).

⁸ Simmons, *supra* note 6, at 19, 71.

⁹ Cassidy, *supra* note 3 (discussing the duty to disclose exculpatory evidence).

¹⁰ See generally AKHIL AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 83-85 (1998); AMAR, *supra* note 4.

¹¹ See, e.g., *Crawford v. Washington*, 541 U.S. 36, 42-43 (2004). See also DONALD DRIPPS, *SIXTH-AMENDMENT ORIGINALISM'S COLLISION COURSE WITH A RIGHT TO COUNSEL, WHAT'S TITANIC, WHAT'S ICEBERG?* (2007).

Orleans hospital with critically ill patients.¹² When numerous patients died at the hospital while awaiting rescue, the Attorney General focused blame on a surgeon and accused her of murdering some of the patients.¹³

When the local District Attorney moved slowly to press charges, the state Attorney General began an investigation and ordered a local grand jury from Orleans Parish to be empanelled to hear the charges.¹⁴ As the investigation went on, the local community support shifted toward the surgeon.¹⁵ In New Orleans, she became “something of a folk hero” for staying behind to help critically ill patients.¹⁶ While others had fled the oncoming storm, the surgeon had provided care for four days until all the surviving patients were evacuated in a “sweltering” hospital that had lost electricity and sometimes reached 110 degrees.¹⁷ Thirty-four critically ill patients died during the ordeal.¹⁸ Though prosecutors accused the surgeon of administering lethal doses of painkillers and sedatives, the Orleans Parish grand jury refused to issue indictments and instead returned “no bills.”¹⁹

Viewed from the outside, this New Orleans grand jury appears to have done exactly what the founders intended. It prevented an official exercising central state-wide authority (the state Attorney General) from using his power to charge a local citizen of a serious crime. Who better to make the decision to prosecute actions under such circumstances than other citizens from the same community where these unusual hardships were faced? It is this ability that ought to be restored.

When the proper purpose of the grand jury is viewed in context, it is clear that most of the existing reform proposals do nothing to restore the grand jury to its original role. In sum, this role is to serve as the representative of the views of the local community in criminal justice. To restore the grand jury to its original role, reformers must make a subtle but

¹² Adam Nossiter, *No Indictment in Katrina Deaths*, NEW YORK TIMES (July 25, 2007); Gwen Filosa, *Grand Jury Refuses to Indict Anna Pou*, [NEW ORLEANS] TIMES PICAYNE (July 25, 2007).

¹³ The Attorney General also identified two other medical workers, nurses, who were later offered immunity in exchange for their grand jury testimony. Filosa, *supra* note 12.

¹⁴ Nossiter, *supra* note 12.

¹⁵ Filosa, *supra* note 12 (noting that 1000 people had attended a rally in support of the doctor and the struggling medical system on the one year anniversary of the doctor’s arrest).

¹⁶ Nossiter, *supra* note 12.

¹⁷ Filosa, *supra* note 12.

¹⁸ *Id.*

¹⁹ *Id.* Afterward, the District Attorney expressed agreement with the grand jury, while the Attorney General, whose office had also been involved, criticized the grand jury. Nossiter, *supra* note 12.

important shift in focus. Reform proposals ought to be focused not so much on making the grand jury more independent of the prosecutor, but on making the grand jury *less* independent of the people in the local community. Such a shift would not only align the grand jury more closely with its original constitutional purpose, and serve all communities better, it might also have a particularly good effect in communities of color. It might help to restore the legitimacy of the criminal justice system in such communities by improving their democratic involvement in these important issues.

Though minority communities and the founding era's anti-federalists may seem like strange bedfellows in the post-civil rights era, they actually may have something in common: a mistrust of federal (prosecutorial) power and a belief that such power can be an instrument of abuse of local citizens.

Ironically, the grand jury may have lost its ability to serve in its constitutionally-envisioned role as community representative and protector of local communities precisely because of the manner in which federal courts have sought to insure diversity on juries. Under the current regime, diversity in the grand jury is sought by assembling a grand jury from a pool that represents "a fair cross-section of the community" within the entire jurisdiction. While this general principle may generally reflect good intentions, courts have interpreted this principle to presume that any given jurisdiction constitutes a single "community." In reality, each jurisdiction constitutes numerous communities that can be defined along many different lines.

In adopting the artificial notion that each jurisdiction is a single community and then attempting to assemble jury pools that mirror the diversity of the entire jurisdiction, courts dilute the representation of each of the communities and suffocate the grand jury's ability to represent any distinct community well. As a result, the jury pool, and ultimately the grand jury, may constitute a fair cross section *of a jurisdiction*, but most certainly does not represent a fair cross section *of any community*. Put differently, courts have interpreted the "cross-sectional ideal" in a manner that suffocates the "community ideal."

The unfortunate practical effects of such a regime are myriad. The district-wide grand jury that has the responsibility to review narcotics cases from the urban inner city or the violent crime case from the distant Indian reservation may have no residents from either of those communities serving as a member. For this reason, in a society that remains highly segregated, it may be far more important that each community is represented accurately and fairly in important local institutions of criminal

justice, than that each community have token membership in a jurisdiction-wide institution.

This article will argue for restoration of the grand jury's original role as an institution of local sovereignty that gives citizens of each community an opportunity to participate in criminal justice in a meaningful way. In accordance with the historical purpose of the grand jury, the grand jury's essential must be to express the will of the community about the prosecution of the law and, at least in some cases, to determine the legitimacy of applying a national law in the local community.

Part I of this article will place the grand jury in historical context, explaining the conventional narrative as to how it earned a hallowed place in the Bill of Rights, and in contemporary perspective, explaining what this narrative might mean about the proper role of the grand jury today. It will also explain the grand jury's role vis-à-vis the trial jury and explain why the grand jury may be far more useful than the trial jury in addressing the most pressing contemporary challenges in criminal justice. Part II will survey and evaluate the views of some of the leading critics of the grand jury and review their proposed reforms. Part III will further discuss the conventional criticism that the modern grand jury fails to serve as an adequate check on prosecutorial power and explain why this criticism misplaced. It will also discuss some of the other common analytical errors in recent works critical of grand juries. Part IV will explain the grand jury's more appropriate role as a barometer of legitimacy of criminal justice in each community and offer a theory as to why application of the Sixth Amendment's "fair cross-section" rule has produced such pernicious results in the grand jury context. Finally, Part V offers a proposal for a new "neighborhood grand jury" model, which could restore the grand jury to its historic role and help criminal justice achieve greater democratic legitimacy at the local level.

I. Establishing the Grand Jury: The Grand Jury in Context

A. Why Juries?

A citizen jury is a peculiar institution for making decisions. Why would a government choose to use a body of citizens, rather than a learned judge, or a panel of experts, for making a criminal justice decision? Reasons abound. One obvious purpose is to imbue criminal justice with a democratic element.²⁰ Learned Hand called the grand jury "the voice of

²⁰ *Spaziano v. Florida*, 468 U.S. 447, 487 n.33 (1984) (citing Stephen Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 63-65 (1980) (noting "the importance of a representative jury as an aid in assuring 'meaningful community participation'")).

the community,”²¹ and it has also been likened to “the pulse of the community.”²² Use of a jury gives “the community,” through ordinary citizens, a role in the provision of criminal justice.²³

This democratic role serves numerous valuable purposes.²⁴ First, opportunities for citizen participation further the legitimacy of the entire criminal justice system.²⁵ The theory is that having members of the community involved in the process assures their investment in the process and confidence in the outcomes.²⁶

The citizens’ familiarity with the system in turn breeds trust.²⁷ Tocqueville asserted that each citizen who serves on the jury feels invested in society and feels that he has a “share in the government.”²⁸ Tocqueville also suggested that juries are useful in educating the citizenry; citizens who

²¹ *In re Kittle*, 180 F. 946, 947 (C.C.N.Y. 1910).

²² Alfredo Garcia, *The Fifth Amendment: A Comprehensive and Historical Approach*, 29 U. TOL. L. REV. 209, 231 (1998).

²³ Simmons, *supra* note 6, at 74-75 (noting that “the grand jury provides the criminal justice system with a critical input of real-life experience, allowing the enforcement and application of criminal laws to undergo a regular review by ordinary citizens”). The grand jury is the first means of community input in the criminal justice system and is often the only such input in light of the fact that most indictments result in pleas rather than trials. *Id.* at 46.

²⁴ These purposes are no less important just because they are vague. Speaking of the grand jury’s cousin, the trial jury, Justice Scalia recently hailed it as “the spinal column of American democracy.” *Neder v. United States*, 527 U.S. 1, 30 (1999) (Scalia, J., concurring and dissenting). Scalia seems to use the metaphor as simply meaning that the jury trial right was “important” or “central.” He fails to elaborate further on the metaphor except to explain that the jury’s power is designed to counterbalance the power of judges. *See id.* at 32 (noting that “the Constitution does not trust judges to make determinations of criminal guilt.” (emphasis in original)).

²⁵ Ultimately, “citizen representatives in the jury system have input” into governance which “contributes to internal legitimacy” of the government and the criminal justice system. Ethan J. Leib & David L. Ponet, *Citizen Representation and the American Jury*, at 19 (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=904082. *See also* Simmons, *supra* note 6, at 70 (noting that the grand jury provides a sense of “procedural justice” that “enhances the legitimacy of the criminal justice system”).

²⁶ HARRY KALVEN & HANS ZEISEL, *THE AMERICAN JURY* 7-9 (1966) (arguing that the jury diffuses suspicion that might center on a judge and even “makes tolerable the stringency” of certain unpopular decisions).

²⁷ Ordinary anonymous citizens serving in part-time, episodic roles are more trustworthy because they offer less opportunity for corruption than identifiable full-time, long-serving government officials, such as judges. JEFFREY ABRAMSON, *WE, THE JURY* 32 (1994) (“A network of local juries rotating anonymous persons through its ranks was far more bribery-proof than standing panels of known judges.”).

²⁸ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 181-182 (Henry Steele Commager ed., Henry Reeve trans., 1946).

serve on a jury gain a better understanding of the governmental process.²⁹ Others have suggested that in addition to civic education, jury service works a moral transformation on the common citizen.³⁰ It creates a civic responsibility that “reinforces a vision of popularly-controlled political participation.”³¹

Use of a jury may also improve the quality of the outcome, for it has often been suggested that the numerous lay people on a jury, with varying talents and perspectives, collectively have a comparative advantage over a single judge in a range of areas, from reviewing facts and understanding human nature, to understanding the moral legitimacy of the law and expressing community morality.³² A jury may even have a better sense of justice than a judge does.³³

In sum, the democratic and populist elements of the jury may be critical in maintaining trust in the criminal justice system among the citizens.³⁴

²⁹ *Id.* (“I look upon [the jury] as one of the most efficacious means for the education of the people which society can employ.”).

³⁰ ABRAMSON, *supra* note 27, at 32-33 (citing claims made by the Anti-Federalists at the time of the nation’s founding). Indeed, there is some empirical evidence suggesting that ordinary citizens serve competently in jury service. See Leib & Ponet, *supra* note 25, at n.14 (citing studies).

³¹ Leib & Ponet, *supra* note 25, at 17.

³² See, e.g., Ring v. Arizona, 536 U.S. 584, 615 (2002) (Breyer, J., concurring) (stating that “jurors possess an important comparative advantage over judges [in being] more attuned to ‘the community’s moral sensibility’” (citing Spaziano v. Florida, 468 U.S. 447, 481 (1984) (Stevens, J., concurring in part and dissenting in part))). See also Teague v. Lane, 489 U.S. 288, 314 (1989) (holding that “the purpose of the jury is to guard against arbitrary abuses of power by interposing the commonsense judgment of the community between the State and the defendant”); Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (holding that “[t]he purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge”).

³³ Duncan v. Louisiana, 391 U.S. 145, 156 (1968) (noting the jury’s role as a safeguard against a compliant, biased, or eccentric judge and contrasting the jury’s “common-sense judgment” with the “more tutored but perhaps less sympathetic” judgment of a judge”). See also KALVEN & ZEISEL, *supra* note 26, at 106, 285 (characterizing the jury’s function as a guarantor of lenity and equity in dispensing justice).

³⁴ According to attorney George Harris, the “communitarian” functions of the jury work as “1) a vehicle for direct community participation in the criminal justice system; 2) a means by which the community is educated regarding the criminal justice system; and 3) a ritual by which the faith of the community in the administration of criminal justice is maintained.” George C. Harris, *The Communitarian Function of the Criminal Jury Trial and the Rights of the Accused*, 74 NEB. L. REV. 804, 807-08 (1995).

Indeed, history suggests that the grand jury has an even more specific purpose.

B. The Grand Jury in American Narrative

According to common accounts, grand juries became a part of the American legal system primarily because they played important political roles in key events in English and American history leading up to the drafting of the U.S. Constitution and the Bill of Rights.³⁵

In England in 1681, King Charles II sought an indictment for treason against Anthony Ashley Cooper, the First Earl of Shaftsbury, and one of his followers, Stephen Colledge, for speaking out against the King.³⁶ The Earl, a Protestant Whig, was a political opponent of the King. The King viewed his criticism as treasonous. The prosecution was, in turn, seen as a vindictive political act.

Grand juries in London, a city that was predominately Protestant Whig, twice refused to issue indictments, despite strong pressure from Crown authorities. After resisting the King's demands, the two grand juries were widely lauded for their courage.³⁷ Crown authorities later presented the case to a grand jury in Oxford, which was more sympathetic to the King, and an indictment soon issued. Nevertheless, the stubbornness of the London grand juries helped establish the reputation of grand juries as independent of the government.³⁸ As a result, the perception of the grand

³⁵ Most scholars credit the inclusion of the grand jury right in the Bill of Rights to certain events documented here. *See, e.g.*, Albert Alschuler & Andrew Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 869-876 (1994); 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, 6-12 (1996); Leipold, *supra* note 3, at 283-86; Susan M. Schiappa, *Preserving the Autonomy and Function of the Grand Jury: United States v. Williams*, 43 CATH. U. L. REV. 311, 328-31 (1993); Simmons, *supra* note 6, at 13.

³⁶ Leipold, *supra* note 3, at 281. *See also In re Russo*, 53 F.R.D. 564, 568 (C.D. Cal. 1971) ("These two cases are celebrated as establishing the grand jury as a bulwark against the oppression and despotism of the Crown."); GEORGE J. EDWARDS, *THE GRAND JURY: AN ESSAY* 30 (Lawbook Exchange 2004) (1906) (noting the Crown's failure "to coerce grand juries to its oppressive purpose").

³⁷ *Id.*

³⁸ However, subsequent to the two juries' failure to indict, the King moved Colledge's case to Oxford, where potential jurors had views more sympathetic to the King. Following a short trial which included Colledge's defense notes being turned over to the prosecution, Colledge was convicted and executed on August 31, 1681. *See* Helene E. Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 AM. CRIM. L. REV. 701, 716 (1972). Shaftesbury then fled the country, fearing a probable indictment from a second grand jury in his case. Thus, instead, of being symbolic of the grand juries' independence, Schwartz suggested that the Colledge

jury as a bulwark of citizens' liberty was widespread in England at the end of the seventeenth century, a time when English colonists were flooding into North America.³⁹

Meanwhile, in the colonies, the first American grand jury convened in Massachusetts in 1635 and grand juries spread to other colonies soon thereafter.⁴⁰ The early colonial grand juries worked independently and proactively, at least in part because the government was relatively weak and there was no police force to investigate accusations.⁴¹ The use of grand juries was common throughout the rest of the colonial period.

A notable and widely-followed case showcasing the protective power of the grand jury was the prosecution of John Peter Zenger in New York in 1734. Zenger, a newspaper publisher, angered the Royal Governor of New York by publishing an editorial critical of the Crown, leading the Governor, an appointee of the Crown, to seek a prosecution for seditious libel, a crime that prohibited criticism of public officials in a manner that would "threaten public tranquility" by bringing the government into disrepute.⁴²

Consistent with prevailing practice, the Crown presented its case to a grand jury in New York and sought an indictment. When the grand jury declined to issue the indictment, the Crown presented the case to a second grand jury, which also refused to indict. The Crown then bypassed the grand jury altogether and prosecuted Zenger on the basis of a charging instrument called an information which, unlike an indictment, was not the product of a grand jury. Following a jury trial, Zenger was acquitted of the offense. According to the historical accounts, the Crown's extraordinary efforts to bypass the grand jury in the Zenger case stoked widespread resentment in the colonies. The resulting acquittal by the trial jury resonated widely in the colonies, leaving a strong impression on colonial America of the importance of the role of juries in criminal justice.⁴³

and Shaftesbury cases are actually indicative of the grand juries' vulnerability to politics. *Id.*

³⁹ Leipold, *supra* note 3, at 283.

⁴⁰ Kadish, *supra* note 35, at 9.

⁴¹ See, e.g., Leipold, *supra* note 3, at 283 (noting that most colonial governments had little or no police force and it was grand juries that originated accusations)

⁴² See AMAR, *supra* note 10, at 84-85; Leipold, *supra* note 3, at 284-85; Eben Moglan, *Considering Zenger: Partisan Politics and the Legal Profession in Provincial New York*, 94 COLUM. L. REV. 1495, 1507 (1994).

⁴³ See JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY JOURNAL (Stanley Nider Katz, ed., 2d ed. 1972) (1963); Amar, *supra* note 10, at 84-85; Nancy J. King, *The American Criminal Jury*, 62 LAW & CONTEMP. PROBS. 41, 42 (1999); Simmons, *supra* note 6, at 7-13.

Emboldened by the outcomes of the Zenger proceedings, pre-Revolutionary American juries and grand juries “all but nullified the law of seditious libel in the colonies.”⁴⁴ As a result, the Zenger case helped to burnish the reputation of the grand jury. Together with the trial jury, the grand jury came to be viewed as a valuable shield against government oppression.

During the years leading up the Revolutionary War, public prosecutors appointed by the Crown sought to enforce unpopular British revenue laws in the colonies. In 1765, a grand jury in Boston refused to indict colonists who had incited riots against the notorious Stamp Act.⁴⁵ And in case after case, grand juries rejected the urging of prosecutors and refused to enforce what the grand juries saw as unjust and oppressive laws. The stubbornness of colonial grand juries had serious implications for British policies. Many British laws, such as the Stamp Act and other unpopular revenue measures, were rendered unenforceable in the colonies.⁴⁶

The grand jury’s reputation in the colonies as a shield against unjust laws was thus established by the time of the American Revolution. Inclusion of the grand jury in the Fifth Amendment seems to be based largely on widespread popular respect for the grand jury at the time of the founding.⁴⁷ The important role played by grand juries in the pre-Revolution era led, apparently with very little debate, to the adoption of the grand jury in the Bill of Rights.⁴⁸ The Fifth Amendment specifically provided that no person could be prosecuted for a felony without a grand jury indictment.⁴⁹

⁴⁴ Alschuler & Deiss, *supra* note 35, at 874.

⁴⁵ RICHARD D. YOUNGER, *THE PEOPLE’S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634-1941* at 28 (1963) (“In 1765, Boston [grand] jurors refused to indict the leaders of the Stamp Act riots, while in Williamsburg, Virginia, jurors assembled for the general court joined the mob that hanged the stamp master in effigy.” *See also* Roger Roots, *If It’s Not a Runaway, It’s Not a Real Grand Jury*, 33 CREIGHTON L. REV. 821, 832 (2000).

⁴⁶ K. Brent Tomer, *Ring Around the Grand Jury: Informing Grand Jurors of the Capital Consequences of Aggravating Facts*, 17 CAP. DEF. J. 61, 66 (2004) (“[Crown officials] quickly realized the futility of submitting unpopular indictments to Massachusetts grand juries.”).

⁴⁷ YOUNGER, *supra* note 45, at 44-46 (discussing state ratifying conventions in which grand juries were debated).

⁴⁸ Leipold, *supra* note 3, at 285.

⁴⁹ The Fifth Amendment guarantees the right to an indictment: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on 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 . . .” U.S. CONST. amend. V. This guarantee is incorporated into Rule 6 of the Federal Rules of Criminal Procedure, which sets forth the method for constituting a grand jury and applicable rules, such as the rule of secrecy. *See* FED. R. CRIM. P. 6(e)(2). A criminal defendant may waive the right to an indictment and

Grand juries were also adopted by many states, in one form or another.⁵⁰ In 1884, however, the Supreme Court pointedly declined, in *Hurtado v. California*, to hold that grand juries are essential to due process in state prosecutions.⁵¹

C. The Meaning of the Conventional Rhetoric and the Historical Narrative

This historical narrative, recounted widely by scholars,⁵² represents the conventional wisdom as to the historical justification for the American grand jury.⁵³ In the absence of any competing narrative, there is no reason to doubt the truth of this descriptive account.

If this narrative is accurate, however, it has several implications, particularly at a time when the Supreme Court is employing originalism in constitutional interpretation. While a defense of originalism is beyond the scope of this article, it is clear as a descriptive matter that the Supreme Court has used originalist methodology in a number of recent cases involving criminal procedure.⁵⁴ In *Crawford v. Washington*,⁵⁵ for example, the Court unabashedly – and unanimously – turned to the “historical background of the [Confrontation] Clause to understand its meaning.”⁵⁶ Likewise, leading scholars, across the political spectrum, have embraced originalism in some form or another.⁵⁷ A common tool of originalist interpretation is to identify the evil that the provision was intended, at the time of the founding, to address. By identifying such an evil, one can

allow the United States to proceed on the basis of a complaint or another charging instrument called an “information.” FED. R. CRIM. P. 7(b).

⁵⁰ See John F. Decker, *Legislating New Federalism: The Call for Grand Jury Reform in the States*, 58 OKLA. L. REV. 341, 345-347 (2005).

⁵¹ *Hurtado v. California*, 110 U.S. 516, 532 (1884). Akhil Amar implicitly offers a compelling argument that *Hurtado* is wrong. In the context of a broader argument about incorporation generally, he argues that “due process of law” is a phrase that may have meant, essentially, “by grand jury indictment,” which was roughly the construction the phrase had been given in English law. Amar, *supra* note 10, at 200-201.

⁵² See, e.g., Brenner, *supra* note 3; Leipold, *supra* note 3 at 284-87; Simmons, *supra* note 6.

⁵³ See Niki Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury*, 94 GEO. L. J. 1265, 1302 (2006) (“grand jury history is incomplete without a ritual tribute to the grand jury’s heroism in the famous prosecution of Peter Zenger[.]”).

⁵⁴ See generally Jed Rubenfeld, *The Paradigm-Case Method*, 115 YALE L. J. 1977, 1981-83 (2006).

⁵⁵ 541 U.S. 36 (2004).

⁵⁶ *Id.* at 24-43.

⁵⁷ See, e.g., AKHIL AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* (2005); JED RUBENFELD, *REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW* (2005).

determine the “core, specific original purpose” of the provision.⁵⁸ With respect to the grand jury, originalist methodology is not new. Judge Learned Hand once famously remarked: “We took the [grand jury] as we found it in our English inheritance, and he best serves the Constitution who most faithfully follows its historical significance.”⁵⁹

If one were inclined to use the originalist methodology to identify the constitutional purpose of the grand jury, one could draw several clear observations from the standard narrative. First, the evil that the grand jury sought to address was the exercise of distant power locally. Indeed, the grand jury came to us as an institution that was respected for its profound ability to protect local communities -- indeed, possibly rebellious ones -- from central governmental authority. It was, in essence, a local check on Crown authority. The obvious implication is that the grand jury was primarily deemed to be a check on higher governmental authority, such as that of the King, or thereafter the national (or perhaps state) legislature. In this respect, the grand jury clause might be viewed, like many of the other provisions in the Bill of Rights, as an anti-federalist check on federal power.

Second, in the paradigmatic cases commonly discussed in the historical narrative, the grand jury’s primary method for exercising its power was not rigorous review of facts, but nullification of validly-enacted laws. In other words, the grand jurors do not seem to have disagreed so much with the prosecutor’s presentations of the facts, but in the legislator’s right to impose such laws, or at least the prosecutor’s decision to enforce them in a given context. So, for example, the grand jurors in the Zenger case did not necessarily believe that Zenger was innocent of seditious libel, or in the tax protestor cases, that the protesters were being wrongly accused of protesting their taxes. Rather, the conventional narratives suggest that the grand juries simply disagreed with the substance of these laws. These grand juries felt, for example, that speech critical of the government, so-called “seditious libel,” ought not be illegal.⁶⁰ Likewise, taxes and duties that were imposed in the absence of proper democratic representation in Parliament were invalid (hence, the popular refrain, familiar today to school children and citizens of the District of Columbia, “no taxation without representation”).

In this respect, and several others, the grand jury presumably was meant to serve a far different role than the trial jury has come to serve.

⁵⁸ Rubinfeld, *supra* note 54, at 1982.

⁵⁹ *In re Kittle*, 180 F. 946, 947 (C.C. N.Y. 1910).

⁶⁰ *Cf.* U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech”).

D. Grand Juries vs. Trial Juries in Contemporary Policy

As racial problems have plagued criminal justice in the United States and filled deep reservoirs of mistrust in some communities, juries have served as a focal point for seeking to address issues of fairness and insuring the legitimacy of the system. In a long line of jury venire cases beginning with *Strauder v. West Virginia*,⁶¹ the Supreme Court has sought to insure that all voting citizens, not just white males, could serve on juries, or at least on the venires from which juries are selected.⁶² This line of cases culminated in a constitutional principle, found within the Sixth Amendment right to a jury trial, that a jury must be drawn from a venire that represents a “fair cross section of the community.”⁶³ In another line of cases that developed in the past twenty years, including *Batson v. Kentucky*,⁶⁴ *Powers v. Ohio*,⁶⁵ and *Georgia v. McCollum*,⁶⁶ the Supreme Court has sought to insure that members of the jury venire cannot be stricken from the jury, through the use of peremptory challenges, on account of their race.

Most of the attention, however, has focused on trial juries. While fair racial composition of the trial jury is minimally required to restore the legitimacy of criminal justice on racial issues, it seems anachronistic to focus so completely on the trial jury.⁶⁷ Two modern circumstances undermine the ability of trial juries to address issues of race in criminal justice: the dramatic increase in plea-bargaining and the prohibition of jury nullification by trial juries.

1. Plea Bargaining, Citizen Participation and the Grand Jury

⁶¹ 100 U.S. 303 (1879).

⁶² See generally RANDALL KENNEDY, RACE, CRIME AND THE LAW (1997) (surveying and criticizing the cases).

⁶³ For the federal system, this principle has been codified in the Jury Selection and Service Act, 28 U.S.C. § 1867.

⁶⁴ 476 U.S. 79 (1986). *Batson* held that a prosecutor’s peremptory challenges to all four potential African-American jurors violated the defendant’s Equal Protection rights because it “deprives the defendant of the protection against the arbitrary exercise of judicial or prosecutorial power, undermines public confidence in the judicial system, stimulates and perpetrates racial prejudices, and ignores the fact that a potential juror’s race has no relation to that juror’s fitness for jury service.” Mark W. Smith, *Remseur v. Beyer: The Third Circuit Upholds Race-Based Treatment of Prospective Grand Jurors*, 27 GA. L. REV. 621, 629-633 (1993).

⁶⁵ 499 U.S. 400 (1991) (holding that the criminal defendant does not have to be a member of the same racial group as the juror on whose behalf he raises equal protection claims).

⁶⁶ 505 U.S. 42 (1992) (holding that a criminal defendant’s racially discriminatory exercise of peremptory challenges may also be unconstitutional).

⁶⁷ See, e.g., Stephanos Bibas, *Plea Bargaining Outside of the Shadow of Trials*, 117 HARV. L. REV. 2463 (2004) (arguing that it makes no sense to design rules of criminal procedure around trials when plea-bargains are the norm).

Scholars have long encouraged greater citizen participation in criminal justice on the theory that it will increase the law's legitimacy and serve other important democratic values.⁶⁸ But, as numerous scholars including Stephanos Bibas and Ron Wright have recently lamented, the prevalence of plea-bargaining has decimated trials.⁶⁹ It has also robbed citizens of opportunities for direct participation in criminal justice.⁷⁰ Plea bargaining inhibits transparency, insuring that criminal justice is run behind closed doors by insiders (professionals: judges, prosecutors, defense attorneys, and law enforcement officials) and to the exclusion of outsiders (ordinary citizens and victims) who are left ill-informed about criminal justice.⁷¹ As a result, some of the most basic purposes of juries are lost: criminal law is deprived of the legitimacy that is served when ordinary citizens are directly involved in their implementation, and the valuable jury process of debating, enforcing and preserving societal norms rarely happens.⁷²

Some scholars are skeptical that there is any way to improve citizen participation.⁷³ Bibas has offered "partial solutions," suggesting that prosecutors "publicize accurate statistics" about the criminal justice system⁷⁴ and invite "citizen advocates" to "serve for two weeks at a time within prosecutor's offices, consulting on proposed charges and dispositions."⁷⁵ These efforts would give "citizens a voice in criminal justice procedure" and thereby "increase the system's legitimacy and respect in their eyes."⁷⁶ Likewise, Professor Angela Davis proposes the creation of "public information departments" within prosecutors' offices that would enhance public knowledge of the prosecutorial function⁷⁷ and a

⁶⁸ See, e.g., David Fontana, *Reforming the Administrative Procedure Act: Democracy Index Rulemaking*, 74 *FORDHAM L. REV.* 81, 103 (2005); Kuckes, *supra* note 53, at 1317; Jason Mazzone, *Justice and the Jury*, 72 *BROOK. L. REV.* 35, 54 (2006); Simmons, *supra* note 6; Jay Tidmarsh, *Pound's Century, and Ours*, 81 *NOTRE DAME L. REV.* 513, 582 (2006).

⁶⁹ Bibas, *supra* note 67, at 2466; Ronald M. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 *PENN. L. REV.* 79, 87-100 (2005) (in reducing trials, plea-bargaining distorts the criminal justice process). See also Nancy J. King, *The American Criminal Jury*, 62 *LAW & CONTEMP. PROBS.* 41, 59 (1999) (noting that only three to ten percent of felony cases go to trial).

⁷⁰ Bibas, *supra* note 67.

⁷¹ Stephanos Bibas, *Transparency and Participation in Criminal Justice*, 81 *N.Y.U. L. REV.* 911 (2006).

⁷² *Id.*, at 947-49 (arguing that citizen alienation from criminal justice clouds the law's substantive message and effectiveness and impairs legitimacy and trust). See also Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 *VA. L. REV.* 349, 362 (1997) (discussing the expressive impact of criminal laws).

⁷³ Bibas, *supra* note 71, at 952 ("A note of pessimism is in order.").

⁷⁴ *Id.* at 955.

⁷⁵ *Id.* at 959-60.

⁷⁶ *Id.*

⁷⁷ Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 *IOWA L. REV.* 393, 462 (2001).

“prosecution review board,” with a review function driven by affirmative complaints and random reviews of cases.⁷⁸

While the Bibas and Davis proposals might help at the margins in addressing the decline of citizen participation in criminal justice,⁷⁹ these scholars are overlooking a far more useful institution that is hiding in plain sight. While plea bargaining has rendered the trial jury all but irrelevant as a nexus for citizen participation, one need look only to the grand jury for an institution that can fill this citizen review role very effectively. In the federal system and in some state systems still, grand juries review nearly every felony offense. Unlike the new institutions proposed by Professors Bibas and Davis, which seem weak and easily marginalized, the grand jury is an existing institution with constitutional status in which citizens already serve. Moreover, rather than playing a mere advisory, informational or post hoc review role, the grand jury already exercises real institutional power. The citizens on a grand jury theoretically have great independence and they work in large teams.⁸⁰ If a significant goal is improving citizen participation, why ignore the grand jury?

2. Nullification

The prevailing legal principle that nullification by a trial jury is illegitimate means that a juror who abides by her oath may be required to ignore issues of racial justice that lie beneath the surface of a criminal prosecution. Theoretically, at least, the trial jury has the responsibility to adhere to a legal standard and to follow that legal standard as described by the court in jury instructions.⁸¹ Jurors take an oath in which they pledge to do just that.⁸² As a practical matter, the oath restricts the juror’s lawful authority to use her vote on guilt or acquittal to express her views on racial justice. Though a trial jury has the theoretical *power* to refuse to convict a

⁷⁸ The board would have the power to shed light on prosecutorial practices and recommend disciplinary actions of prosecutors. *Id.*

⁷⁹ Not even Bibas himself has much enthusiasm for his modest reform suggestions. See Bibas, *supra* note 71, at 958 (“One cannot be certain, but transparency might [improve thoughtful democratic influence over criminal justice.]”); *id.* at 960 (“The prognosis for major improvements in public information and participation, in short, is not great.”).

⁸⁰ See Bibas, *supra* note 71, at 960 (noting the difficulty in his theory of diffusing Tocquevillian educative benefits to more than a small fraction of the populace).

⁸¹ *Sparf v. United States*, 156 U.S. 51, 65 (1895) (noting that at trial it is the duty of the judge, not the jury, to determine the law).

⁸² Simmons, *supra* note 6, at 46-48 (noting that while “the grand jury exercises its own political, moral and social judgment[,]” trial jurors must convict if they find each of the elements beyond a reasonable doubt or otherwise would violate their sworn duties).

guilty person, it has no legally recognized right to do so.⁸³ Thus, trial jury nullification is generally considered an unlawful abuse of power and an especially pernicious one because it can erode the rule of law.⁸⁴

The question of nullification led to an intense debate in the late 1990s between two leading African American criminal law scholars over the propriety of nullification by trial jurors. Professor Paul Butler famously argued that black trial jurors should nullify the law in prosecutions of blacks for non-violent narcotics offenses, both to protest prosecutions of black offenders, and also to deny the criminal justice system the legitimacy it seeks by seating black jurors.⁸⁵ Professor Randall Kennedy strongly objected to this approach, arguing that nullification subverts the rule of law and, ultimately, the entire legal system.⁸⁶

Despite the intensity of this important legal debate, it related entirely to the trial jury, an institution that can be only marginally useful in addressing the underlying problem under any circumstances. In light of the rise of plea-bargaining and the sharp decline in jury trials, Butler and Kennedy might as well have been arguing about the proper placement of the proverbial deck chairs on the Titanic.

Unlike the trial jury, the grand jury reviews nearly every felony case, at least in the federal system and in those states that use the grand jury. And in contrast to nullification by the trial jury, which is of dubious legality and at best highly controversial, nullification by the grand jury is entirely lawful and, based on its heritage, apparently entirely legitimate. The Supreme Court has recently – and expressly – sanctioned the right of a grand jury to deny an indictment even where the evidence meets the legal standard of probable cause.⁸⁷ This grand jury’s right to refuse to indict a guilty suspect, sometimes labeled “grand jury nullification,” contrasts sharply with the responsibilities of the trial jury. Given that the grand jury may legitimately nullify the application of law in a particular case, why ignore the grand jury?

⁸³ King, *supra* note 69, at 50-53 (describing the debate as to whether trial jury nullification is a de facto power, or a right).

⁸⁴ See, e.g., *United States v. Dougherty*, 473 F.2d 1113, 1133 (D.C. Cir. 1972) (upholding the denial of a jury instruction on the “right of jury nullification” because, though it sometimes happens, its explicit sanction would risk “the ultimate logic of anarchy”).

⁸⁵ Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 *YALE L. J.* 677 (1995).

⁸⁶ See generally KENNEDY, *supra* note 62, at 301-310.

⁸⁷ *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986) (“[t]he grand jury is not bound to indict in every case where a conviction can be obtained” (quoting *United States v. Ciambrone*, 601 F.2d 616, 629 (2d Cir. 1979) (Friendly, J., dissenting))).

In sum, although developments in the area of plea bargaining and nullification have marginalized the regular citizen in criminal justice by minimizing opportunities to participate on trial juries and restricting the choices available, the answer to these developments is not simply to declare defeat or to construct weak ameliorative measures. Instead, those who are interested in retaining citizen involvement in criminal justice – and addressing problems of racial justice through citizen participation – should shift their focus from the trial jury to the grand jury. Indeed, because the grand jury is the gatekeeper to the criminal justice system and because the grand jury clearly has the power to nullify a racially-suspect law, the grand jury may offer a much better opportunity than the trial jury to effectuate norms of racial justice.

It is curious that scholars have virtually ignored the grand jury, especially in the context of the nullification debate. One reason may be that scholars tend to have little respect for the grand jury and few understand its traditional historical role.

II. Scholarly Criticism of the Modern Grand Jury and Leading Proposals for Reform

Scholars examining the grand jury tend to adopt the historical narrative recounted above as evidence of the grand jury’s important historical role in preventing oppression by the government. And by “the government,” they generally mean prosecutors.⁸⁸ The courts have hummed a similar tune, extolling the importance of the grand jury as a check on the prosecutor.⁸⁹ The attention on the prosecutor, however, may have blinded scholars to the more nuanced meaning of this historical narrative. Consider the conventional criticism of the grand jury and the proposals for reform.

A. Conventional Criticism of the Grand Jury

Despite the widespread belief that the grand jury’s role is to serve as a check on the prosecutor, the grand jury is widely criticized for failing to live up to this role. The criticism is reflected in a cliché common among academics and practitioners that a skillful prosecutor could convince a grand jury to indict “a ham sandwich.”⁹⁰ The idea animating the cliché, that the grand jury has utterly lost any independence from prosecutors,

⁸⁸ See generally Davis, *supra* note 77 (citing historical examples of prosecutorial abuses of power); Kuckes, *supra* note 53 (describing the unique dual responsibility of the grand jury to act as both prosecutor and judge).

⁸⁹ United States v. Cox, 342 F.2d 167, 190 (5th Cir. 1965) (Wisdom, J., concurring) (stating that grand juries “prevent harassment and intimidation and oppression through unjust prosecution”).

⁹⁰ See *supra* note 4.

resonates widely and has come to reflect the conventional wisdom.⁹¹ Indeed, the only phrase that appears in the literature almost as often as “ham sandwich” is “rubber stamp.”⁹² In a very real sense, the grand jury has become the laughing-stock of American criminal procedure.

Moreover, a gap has developed between courts and the academy as to the utility of the existing grand jury.⁹³ While judges continue to use image-laden rhetoric about the importance of the grand jury as a shield against the

⁹¹ See, e.g., Cassidy, *supra* note 3, at 365 (noting that “most legislators, as well as many practitioners and commentators, believe that the grand jury has lost its ability to act as a ‘shield’ by screening out unmeritorious charges.”).

⁹² The “rubber stamp” metaphor apparently originated even earlier than the “ham sandwich” and may have originated in the report of the Wickersham Commission, a blue-ribbon presidential commission appointed by President Herbert Hoover to study the criminal justice system. See generally Abraham Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1170-71 (1960) (citing the National Commission on Law Observance and Enforcement and quoting its report as stating that “under modern conditions the grand jury is seldom better than a rubber stamp of the prosecuting attorney”). However, the phrase has appeared regularly. See *Fields v. Soloff*, 920 F.2d 1114, 1118 (2d Cir. 1990) (noting criticism of grand juries: “Because the states are not required to utilize a grand jury before proceeding with a criminal prosecution, many, perceiving the institution as a mere rubber stamp for government charges, have eliminated it entirely.”). Some circuits have openly stated their disapproval of grand juries acting as rubber stamps for the prosecutor. See *United States v. Flomenhoft*, 714 F.2d 708, 712 (7th Cir. 1983) (noting that the grand jury may not become “a rubber stamp endorsing the wishes of a prosecutor as a result of the needless presentation of hearsay testimony in grand jury proceedings” (citing *United States v. Gallo*, 394 F. Supp. 310, 314 (D. Conn. 1975))); *United States v. Al Mudarris*, 695 F.2d 1182, 1188 (9th Cir. 1983) (“The government is on notice that this court will not brook behavior that degrades the grand jury into a rubber stamp, and the testing of the prosecutor’s evidence into an empty ritual.”); *United States v. Trass*, 644 F.2d 791, 793 (9th Cir. 1981) (“As an independent body the grand jury deserves respect. It should not be used as a rubber stamp.”). For criticisms of grand juries as rubber stamps for prosecutors, see Bibas, *Judicial Fact-Finding*, *supra* note 4, at 1171 (“But today, grand juries are rubber stamps.”); Brenner, *supra* note 3, at 67 (“Despite its auspicious origins, the federal grand jury has become little more than a rubber stamp, indiscriminately authorizing prosecutorial decisions.”); Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1747 (2000) (“In criminal matters, grand juries often serve, at best, as little more than a rubber stamp for the prosecutor and, at worst, as an accomplice in the abuse of power.”).

The “ham sandwich” phrase is frequently attributed to former New York Chief Judge Sol Wachtler. See, e.g., *Fletcher v. Graham*, 192 S.W. 3d 350, 369 n.3 (Ky. 2006) (noting that “the ‘indict a ham sandwich’ reference is attributable to former New York Chief Judge Sol Wachtler”); *United States v. Navarro-Vargas*, 408 F.3d 1184, 1195 (9th Cir. 2005) (citing *In re Grand Jury Subpoena of Stewart*, 144 Misc. 2d 1012, 545 N.Y.S.2d 974, 977 n.1 (N.Y. Sup. Ct. 1989) (“This skepticism was best summarized by the Chief Judge of this state in 1985 when he publicly stated that a Grand Jury would indict a ‘ham sandwich.’”, *aff’d as modified*, 156 A.D.2d 294, 548 N.Y.S.2d 679 (1989))). For use of the term by academics see note 4 *supra*.

⁹³ Leipold, *supra* note 3, at 269-272 (noting the gap).

prosecutor,⁹⁴ legal scholarship is replete with scornful language castigating it⁹⁵ and arguing for reform. Professor Andrew Leipold concludes, for example, that grand jurors, who are not law trained and have little experience weighing evidence, are simply incompetent to second-guess a prosecutor's decision to charge.⁹⁶ Likewise, Professor Niki Kuckes concludes that the grand jury is "not an independent institution in any meaningful sense" because it consists of a series of panels of citizens who serve in a part time role" and who "virtually never hear from any voice of legal authority other than the prosecutor."⁹⁷ Professor Angela Davis notes that the prosecutor "handles the calling and questioning of witnesses" and "essentially control[s]" the process.⁹⁸ Other scholars have made similar claims.⁹⁹ In sum, most everything said about the grand jury in modern academic literature reflects a particular understanding of the grand jury and its relation to the prosecutor, which nearly all view as a subservient relationship.

B. Existing Grand Jury Reform Proposals

Consistent with the widespread criticism, several commentators have suggested that the grand jury is an irreparable anachronism,¹⁰⁰ an artifact

⁹⁴ See, e.g., *Branzburg v. Hayes*, 408 U.S. 665, 686-87 (discussing the grand jury's role in "protecting citizens from unfounded prosecutions"). See also *Wood v. Georgia*, 370 U.S. 375, 390 (1962) (characterizing the grand jury "as a primary security to the innocent against hasty, malicious and oppressive prosecutions").

⁹⁵ Professor Niki Kuckes has noted the gap and has been highly critical of the courts for fraudulently endorsing the notion that grand juries are independent. She accuses the judiciary of marketing an expedient fiction of grand jury independence that helps courts to appear consistent with historical traditions while actually increasing prosecutorial power. See Kuckes, *supra* note 4. See also Brenner, *supra* note 3, at 67 (arguing that "grand juries' continued presence invidiously maintains the illusion of a community voice"). Professor Kuckes details the ways courts use the "fiction of grand jury independence," but she is somewhat unclear on the motives. Kuckes seems to assume that judges are complicit in the growth of prosecutorial power, but that growth in power has also treaded on judicial power. The point that she does not adequately address is, why is it desirable for the court to use the fiction to achieve these results? My reading of Professor Kuckes's excellent research leads me to believe that the fiction may be more of a "comforting fiction" than an expedient one. That is, the behavior of courts may reflect naive optimism, rather than malignancy. Kuckes seems to assume that judges are complicit in the growth of prosecutorial power, but that growth in power has also treaded on judicial power.

⁹⁶ Leipold, *supra* note 3, at 294-95.

⁹⁷ Kuckes, *supra* note 4, at 30.

⁹⁸ Davis, *supra* note 77, at 423.

⁹⁹ See, e.g., Bibas, *Transparency*, *supra* note 4, at 1, 20; Brenner, *supra* note 3, at 73; Cassidy, *supra* note 3, at 365; Roots, *supra* note 45, at 823; Simmons, *supra* note 6, at 32.

¹⁰⁰ See, e.g., William J. Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174, 178 (1973) ("the grand jury has ceased to function as an agency independent of prosecutorial influence"); Cassidy, *supra* note 3, at 365

that has outlived its usefulness and that should be abolished.¹⁰¹ Other scholars have, however, urged reforms that would reinvigorate the grand jury.¹⁰² These are briefly surveyed below.

1. Proposals to Improve the Grand Jury Through Staffing and Expertise

Some scholars have suggested strengthening the institutional status of the grand jury by improving its staff,¹⁰³ or its expertise,¹⁰⁴ or both.¹⁰⁵ Professors Amar and Lewis, for example, suggest that the grand jury should have its own administrative staff, and Lewis would include independent investigators.¹⁰⁶

Other scholars have focused on legal counsel. Professor Kuckes has argued that the grand jury needs legal counsel outside the prosecutor's office and suggests that the court could serve this role.¹⁰⁷ Likewise, Professor Susan Brenner argues that the grand jury should be given its own independent legal lawyer who would serve in that role for the duration of the term of the grand jury.¹⁰⁸ These proposals create an approach to grand jury reform that might collectively be called the "well-staffed grand jury."

(noting "widespread view that this erosion of the grand jury's ability to act as a check on prosecutorial power is beyond repair"); Leipold, *supra* note 3, at 323 ("In almost all cases, a criminal defendant would be just as well off without the grand jury as he is with it."); Sklansky & Yeazell, *supra* note 4, at 690 ("Today, the grand jury's role makes little sense. . .").

¹⁰¹ Brenner, *supra* note 3, at 123 (noting that one solution is to abolish the grand jury through constitutional amendment). *See also* FRANKEL & NAFTALIS, *supra* note 6, at 118 (citing the "powerful body of opinion that favors abolition of the grand jury"). The general debate has been occurring for a very long time. *See* EDWARDS, *supra* note 36, at 35 ("That the institution and its workings are open to criticism no one will question, but that the defects which are pointed out by [the grand jury's] critics are of such a nature as to justify its abolition cannot be so readily conceded.").

¹⁰² *See* Simmons, *supra* note 6, at 22. *See also* Cassidy, *supra* note 3, at 393-94 (suggesting that prosecutors be required to meet an ethical obligation not to distort the evidence or mislead the grand jury, which would indirectly require presentation of exculpatory evidence in many cases); Kuckes, *supra* note 4, at 65 (stating that grand jury witnesses should be allowed to bring counsel into the grand jury room when they are testifying and allowed to have transcripts of their testimony).

¹⁰³ Amar, *supra* note 7, at 1185 (proposing that the grand jury be given staff).

¹⁰⁴ Kuckes, *supra* note 4, at 31, 65 ("give the grand jury an independent legal advisor, selected from outside of the prosecutor's office").

¹⁰⁵ Brenner, *supra* note 3, at 124-28; Lewis, *supra* note 7, at 64-66 (noting that the grand jury needs additional resources such as independent legal counsel, investigators and clerical staff).

¹⁰⁶ Lewis, *supra* note 7, at 64-66.

¹⁰⁷ Kuckes, *supra* note 4, at 31, 65.

¹⁰⁸ Brenner, *supra* note 3, at 124-28.

Professor Andrew Leipold, who argues that the average grand jury simply is not competent to perform the complex tasks for which it is responsible,¹⁰⁹ takes a slightly different tack. He proposes that the grand jury be composed of lawyers, rather than laypersons.¹¹⁰ His proposal might be characterized as the “elite grand jury.”

2. “Information Empowerment” Proposals

Instead of focusing on grand jury staffing or qualifications, several scholars focus on improving the quantity of the information before the grand jury. To some of these scholars, the grand jury has an informational deficit vis-à-vis the prosecutor and the key to grand jury independence is to improve the quantity of the information on which they base their decision-making. Professor Ric Simmons, for example, proposes to eliminate resubmissions, that is, the prosecutor’s ability to present a case more than once. He argues that this would have the effect of encouraging the prosecutor to prepare and present the case fully and thoroughly the first time.¹¹¹ In addition to limiting resubmissions, Simmons favors adoption of a rule giving a suspect the right to testify before the grand jury.¹¹² Similarly, several commentators have proposed requiring the grand jury to be given access to any potentially exculpatory evidence available to prosecutors.¹¹³

Other scholars have suggested that the *quality* of the information before the grand jury must be improved. Most cases presented to the grand jury are presented through hearsay testimony offered by a single law enforcement agent. Some scholars find this process deficient and seek to improve the quality of evidence – and perhaps limit the quantity of evidence – before the grand jury by applying the rules of evidence.¹¹⁴

¹⁰⁹ Leipold, *supra* note 3, at 294-300.

¹¹⁰ Leipold is in good company. In the early Nineteenth Century, Jeremy Bentham had criticized the grand jury “as a miscellaneous company of men’ untrained in the law.” YOUNGER, *supra* note 45, at 56.

¹¹¹ Simmons, *supra* note 6, at 19, 71.

¹¹² *Id.* at 23, 71.

¹¹³ See Cassidy, *supra* note 3, at 366 (noting the duty to disclose exculpatory evidence); Kuckes, *supra* note 4, at 31, 65 (2004) (suggesting that prosecutors be required to provide “some quantum of exculpatory evidence to be presented”); Suzanne Roe Neely, Note, *Preserving Justice and Preventing Prejudice: Requiring Disclosure of Substantial Exculpatory Evidence to the Grand Jury*, 39 AM. CRIM. L. REV. 171 (2002). The Supreme Court rejected such a requirement in *U.S. v. Williams*, 504 U.S. 36, 53-54 (1992) (holding that an indictment may not be dismissed solely on the basis that the government failed to present substantial exculpatory evidence to the grand jury).

¹¹⁴ See, e.g., Aranella, *supra*, note 3 at 562. Several states appear to have included evidentiary rules as part of their grand jury proceedings. For example, Utah has limited the admission of hearsay to instances in which it would be admissible in preliminary hearings. Decker, *supra* note 50, at 394 n.455 (citing UTAH CODE ANN. § 77-10a-13 (4-5) (2002)). Decker also points out that National Association

Though applying the rules of evidence might seem to limit the information before the grand jury, proponents argue that quite the contrary result would be achieved by adapting the hearsay rule to the grand jury; it would force the prosecution to call a range of witnesses to testify and thereby provide a much richer and more textured presentation of the facts to the grand jury. As a result, these proposals might be grouped together as “information empowerment” approaches.

In a related vein, still others have argued more generally for the rules of evidence to be applied, including application of the exclusionary rule for illegally obtained evidence, in grand jury proceedings.¹¹⁵ This proposal might be called the “admissible evidence” reform.

Professor Peter Aranella provided the first comprehensive proposal to heighten the regulation of evidence before the grand jury in an effort to improve the reliability of evidence before the grand jury, and many of the other proposals seem like derivatives of various parts of his broad proposal.¹¹⁶ His more thorough approach also has an enforcement component; defendants would routinely receive transcripts of the case presented to the grand jury to screen for violations of the rules.¹¹⁷

While some of the arguments for reform are compelling, almost all of the leading reform proposals draw on the ham sandwich theme,¹¹⁸ and assert a primary purpose of empowering the grand jury to become more independent of the prosecutor, mostly by improving the technical expertise of the grand jury or the quality or quantity of the evidence it reviews. However, as explained further below, there is no pressing need for a well-staffed grand jury or an elite grand jury, or even any need to adopt any of the “information empowerment” or “admissible evidence” approaches. On the contrary, the grand jury must simply be restored to its original role and the way to do that is largely oriented toward insuring that the grand jury is properly constructed.

III. Reconsidering the Role of the Grand Jury as a Check on Prosecutorial Power

What is most striking about the prevailing criticisms and the leading reform proposals is that they seem entirely disconnected from the historical

of Defense Lawyers applauded New York’s application of evidentiary trial rules to grand jury proceedings. *Id.* For a discussion of various state evidentiary rules imposed on state grand juries see Brenner, *supra* note 3, at 83-86.

¹¹⁵ See, e.g., Gerald B. Lefcourt, *Curbing the Abuse of the Grand Jury*, 81 JUDICATURE 196, 197 (1998).

¹¹⁶ See Aranella, *supra* note 3, at 558-575.

¹¹⁷ *Id.* at 572-575.

¹¹⁸ See, e.g., *id.* at 474, 539 (using the “rubber stamp” metaphor).

narrative that is offered to justify the existence of the grand jury in the first place. Consider the common reasons for seeking to change the way the grand jury functions.

A. The Grand Jury as a Check on Runaway Prosecutorial Power

To many legal scholars, the American prosecutor has become public enemy number one because of the aggregation of power within that office. The grand jury is seen as the great hope for arresting this development. Consider, for example, one leading criminal proceduralist's criticism of the grand jury. Professor Angela Davis asserts that "[t]he purpose of the grand jury is to decide whether there is probable cause to believe the defendant committed the alleged offense."¹¹⁹ The grand jury should "serve as a protection for the accused and a check on the prosecutor's charging power[.]" But today, she argues, "this role is rarely fulfilled because of the prosecutor's control over the process." This statement reflects conventional wisdom and might have been made by any number of scholars.¹²⁰

This singular focus on the prosecutor in leading scholarly works seems somewhat inconsistent with the general purpose of the grand jury as suggested in the standard historical narrative of the grand jury. Professor Davis's approach ignores the traditional American narrative of the grand jury in at least two respects. First, the seventeenth and eighteenth century grand juries were lionized *not* for their rigorous review of facts or even their careful application of a legal standard to those facts. Rather, the praise heaped on the Shaftesbury and Zenger grand juries, as well as those that refused to apply the Stamp Act in the colonies, likely had little to do with rigorous review of facts or application of law. Indeed, Zenger was almost certainly guilty of seditious libel – he criticized the government no doubt in an effort to bring scorn upon it.¹²¹ Likewise, presumably the tax-protecting colonists did not seriously deny that they sought to disrupt the Stamp Act; they simply disagreed about the law's legitimacy. If the Shaftesbury and Zenger grand juries had viewed their roles in the same way narrow way that modern scholars view them, as mere reviewers of probable cause, then they

¹¹⁹ Davis, *supra* note 77, at 423.

¹²⁰ Another commentator, Michael Cassidy, has argued, for example, that the drafters of the Fifth Amendment sought to prevent two types of prosecutorial abuse through the grand jury. First, they sought to prevent a prosecutor from withholding evidence and, in effect, substituting his own will for the judgment of the grand jury. Second, they sought to prevent a prosecutor from pursuing an indictment not supported by probable cause in order to gain leverage over an individual. Cassidy, *supra* note 3, at 376 -77.

¹²¹ See also Leipold, *supra* note 3, at 309 (noting that "from outward appearances, [Zenger] was guilty as charged").

should have issued indictments. Likewise, if these grand juries merely viewed their role as carefully reviewing prosecution charging decisions for even-handedness, or non-arbitrariness, they may still have proceeded to indict.

But these grand juries had a different and in some ways, more robust, view of their role. They disagreed with the laws that the prosecutor was seeking to enforce and believed that they had the right to nullify these unfair laws.¹²² Indeed, these early grand juries simply refused to apply British laws that were unpopular locally. They effectively nullified general or national laws that the local community deemed unjust.

Indeed, this is the key lesson from the historical narrative. Despite widespread dissatisfaction with the modern grand jury's lack of independence from the prosecutor, it is the nullification power, not their rigorous scrutiny of facts, which earned these grand juries praise, and ultimately a place in the Bill of Rights.

It is worth noting again that the grand jury has never lost this power. The Supreme Court continues today to recognize the right of the grand jury to refuse to indict, even in cases in which the evidence is sufficient to establish a conviction beyond a reasonable doubt.¹²³ And unlike the trial jury, the grand jury can nullify the law without stigma. The American grand juries in the Zenger case and in the tax revenue cases were lionized for doing so.

The second, though less serious, problem reflected in these common approaches to the grand jury is that it asks the grand jury to cure a different problem than it was established to address. The historical narrative suggests that the grand jury is not so much a substantive check on the prosecutor's case against any specific individual, as a check on the *laws themselves*. One might well describe this as a check not so much on the prosecutor, but on the lawmaker.

Since the grand jury was admired for its ability to nullify the law, not for its rigorous scrutiny of the prosecutor's evidence in a particular case, almost all of the existing reform proposals seem ill-conceived. Almost all of the existing grand jury reform proposals are designed to improve the grand jury's ability to scrutinize the prosecutor's factual evidence, or improve the

¹²² Simmons, *supra* note 6, at 15, 23, 71 (“the most celebrated cases for which the grand jury gained its reputation . . . had nothing to do with deciding whether the amount of evidence presented met a given legal standard”).

¹²³ Vasquez v. Hillery, 474 U.S. 254, 263 (1986) (“[t]he grand jury is not bound to indict in every case where a conviction can be obtained” (quoting United States v. Ciambrone, 601 F.2d 616, 629 (2d Cir. 1979) (Friendly, J., dissenting))).

quality or quantity of facts that are before the grand jury, or improve the expertise of the citizens who serve on the grand jury. While these reforms might indeed have the effect of making indictments more difficult to obtain by the prosecutor, none seem in any way designed to bring back the aggressively-independent grand jury that was willing to nullify illegitimate *laws*.

Indeed, rigorous review of facts is the proper domain of the trial jury. Despite the strong implication of the ham sandwich rhetoric, the grand jury's screening or "shield" role is relatively new and it has never been very substantive. The grand jury has almost always been primarily an aid to law enforcement.¹²⁴

In early history, the grand jury did not have a prosecutor to guide it. Cases were prosecuted privately.¹²⁵ The modern approach, in which a public prosecutor brings the accusation to the grand jury, actually reins in the grand jury from its historical role. Early grand juries may not have indicted ham sandwiches, but they may well have occasionally indicted innocent citizens. Though many scholars are disappointed at the level of scrutiny that grand jurors apply to the cases brought to them by prosecutors, the grand jury's responsibility has been to evaluate the case presented by the prosecutor for "probable cause," which is hardly a rigorous standard.

Under this view, the respective roles of the grand jury and the trial jury are quite distinct. The grand jury's role is to review the law and to conduct only a nominal review of the facts.¹²⁶ While the probable cause standard ideally insures that there will be no gross errors, it is not nearly as rigorous as the "beyond a reasonable doubt" standard, which the trial jury uses. It is the trial jury that is supposed to accept the law as it is written and yet engage in a very rigorous review of the facts. The "beyond a reasonable doubt" standard at trial is designed to insure that an innocent person is not convicted.¹²⁷

The purpose of the grand jury, in contrast, is sometimes to insure that a *guilty* person is not convicted, at least if the local community disagrees with

¹²⁴ Roots, *supra* note 45, at 831 ("Crossing the Atlantic Ocean with the first English colonists, the notion of the grand jury as an indispensable arm of law enforcement became entrenched.").

¹²⁵ See, e.g., Allen Steinberg, *From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney and American Legal History*, 30 CRIME & DELINQ. 568, 570-75 (1984).

¹²⁶ See, e.g., Leipold, *supra* note 3, at 289 (criticizing many of the procedural reform proposals on the basis that the grand jury "need not – and should not – replicate a trial").

¹²⁷ See generally *In re Winship*, 397 U.S. 358, 363-364 (1970).

the content or application of the laws.¹²⁸ Indeed, the nullification power is a power that the law now affords to grand juries but seeks to deny to trial juries. This unquestionably legitimate power of nullification is one of the comparative advantages that the grand jury has over the trial jury.¹²⁹ Indeed, to a grand jury acting aggressively, the facts are sometimes irrelevant. This may be part of the reason that one detects a fair amount of ambivalence toward the grand jury by lawyers and judges.

While the trial engages in a pristine legal process with fair procedures and protections for the defendant, the grand jury reflects a more populist political influence, with fewer protections. As Judge Hand explained it, the grand jury is “the voice of the community and the only protection from [its] accusation is in the conscience of that tribunal[, which constitutes] an irresponsible utterance of the community at large, answerable only to the general body of citizens, from which [the grand jurors] come at random and with whom they are once again merged.”¹³⁰ This is not a particularly ringing endorsement. Hand clearly viewed the grand jury, in some senses, as a populist and lawless mob.

To be effective in the traditional sense that earned it enshrinement in the Fifth Amendment, however, the grand jury must be populist in nature. It need not be concerned with facts; rather it should scrutinize policy and law.¹³¹ It is this role that should be restored.

While the leading reform proposals may “improve” the grand jury in some senses, they do nothing to encourage the grand jury to exercise the kind of independence that helped to establish the constitutional grand jury in the first place. The grand jury attained its mythical status neither for being a careful lawyer, nor a rigorous fact-checker, but for being a rebellious law breaker that was willing to buck central authority.

¹²⁸ *United States v. Cox*, 342 F.2d 167, 189-90 (5th Cir. 1965) (Wisdom, J., concurring) (“the grand jury has the unchallengeable power to defend the innocent from government oppression by unjust prosecution. And it has the equally unchallengeable power to shield the guilty[.]”).

¹²⁹ Lest this point be overstated, note that some of the debates about jury nullification in the trial jury context have begun to seep into the grand jury context. In *United States v. Marcucci*, 299 F.3d 1156 (9th Cir. 2002), the defendants challenged the prosecutor’s failure to instruct the grand jury on its power of nullification. This issue echoes the longstanding debate in the trial jury and may cause the issues to merge to some degree. See also Gregory T. Fouts, Note, *Reading the Jurors Their Rights: The Continuing Question of Grand Jury Independence*, 79 IND. L.J. 323, 325 (2004) (criticizing the Marcucci court for refusing to require the instruction of grand jurors about their nullification right).

¹³⁰ *In re Kittle*, 180 F. 946, 947 (C.C. N.Y. 1910).

¹³¹ See Tomer, *supra* note 46 (suggesting that that grand jurors ought to be told of the capital ramifications of their actions, which reflects and appreciation for the distinctive political role of grand juries).

In a very real sense, those scholars who seek to use the grand jury to rein in prosecutorial power are simply aiming too low. They may well be blinded by antipathy for the prosecutor and that institution's increasing power in modern criminal law.¹³² But it is not prosecutors who make the laws that vest prosecutors with power. It is legislatures. The grand jury's ability to nullify a law is a negative power, not an affirmative one, but it can make a powerful political statement about the legitimacy of a law and can effectively render any law a dead letter.

If the historical basis for admiring the pre-Revolutionary grand jury was its willingness to nullify the Crown's seditious libel and the revenue laws, then the discussion about grand jury independence should have a decidedly different focus. The independence that should be encouraged is not so much independence from prosecutors, but independence from legislatures. In other words, the balance of power between the prosecutor and the grand jury is not the real news. The real tension is between the local grand jury and national or state lawmakers.

B. Common Errors in the Wrong Turn in Grand Jury Scholarship

It is remarkable how frequently scholars have parroted the standard historical narrative set forth above and then offered procedural reforms that seek to transform the grand jury into a far different institution than it was at the time of the founding.¹³³ For the most part, scholars have ignored the clear implications of the historical narrative, that is, that the shining purpose of the grand jury is to nullify a valid law, or perhaps to veto an invalid application of valid laws.¹³⁴ Many of them have done so by characterizing the nature of the role of the grand jury incorrectly, often leading them to create false descriptive accounts of the purpose of the grand jury. I discuss some of these below.

¹³² Some of the scholarship seems to blame the grand jury for ever broader prosecutorial power as though the grand jury was the source of the power. But it is, of course, the legislature, not the grand jury, that gives the prosecutor power.

¹³³ See, e.g., Simmons, *supra* note 6, at 8-12 (discussing Shaftesbury and Zenger cases); *id.* at 70-72 (suggesting reforms such as abolishing representation of cases by prosecutors and abolishing grand jury secrecy). See also Brenner, *supra* note 3, at 68-71, n.16 (citing the Zenger case); *id.* at 121-129 (suggesting reforms such as providing a grand jury counsel for federal grand juries and empanelling a regional grand jury to investigate government operations within its region).

¹³⁴ Leipold, *supra* note 3, at 307-08 ("This explanation of the grand jury's role may explain much of the folklore that surrounds the institution.").

1. Criminal Justice as a Contest Between the Prosecutor and Defendant

Many of the critics of prosecutorial power view the grand jury as an essentially neutral participant and focus their reform efforts on how to provide greater fairness between the defendant and the prosecutor (on the explicit premise that the grand jury has tilted too far toward the prosecutor).¹³⁵ This approach reflects a 1960s view of criminal justice, which pitted the prosecutor against the defendant in a battle over basic procedural ground rules. This approach reached its zenith, perhaps, in cases like *Gideon v. Wainwright*¹³⁶ and *Miranda v. Arizona*.¹³⁷ While it is natural, in an accusatorial and adversarial system, to see the process of justice as a competitive event between the prosecutor and the defendant and his counsel, this approach dramatically oversimplifies the interests at stake and elides the considerable nuance present in the process of criminal justice.

Indeed, our understanding of the criminal justice system, and its purposes, has become much more textured in recent years. Modern criminal procedure recognizes many legitimate institutional participants in the criminal justice system beyond the prosecutor and the defendant. The 1980s and 1990s, for example, saw the rise of the victim. The victims' rights movement and aggressive advocacy on behalf of the victim has made the victim a very real participant in the criminal justice system.¹³⁸ While the victim was always present in the background, some of the modern developments move the victim from a place in the back of the courtroom to a much more substantial institutional role in the disposition of criminal cases in front of the bar. Indeed, the victim now has a legally-protected role in criminal trials and sentencing.¹³⁹ The victim also must be consulted prior to disposition of cases outside trials.¹⁴⁰ At least one scholar has even suggested that victims ought to be given a *Gideon*-like right to counsel to

¹³⁵ See, e.g., Decker, *supra* note 50, at 343 (presenting “reform proposals that would more appropriately balance the States’ interests in investigating and bring charges against perpetrators of crimes versus the accused interests in being treated with dignity and respect[.]”)

¹³⁶ 372 U.S. 335 (1963).

¹³⁷ 384 U.S. 436 (1966).

¹³⁸ Paul Gewirtz, *Victims and Voyeurs at the Criminal Trial*, 90 NW. U. L. REV. 863, 868 (1996) (“no movement in criminal law has been more powerful in the past twenty years than the ‘victims’ rights’ movement, which has sought to enhance the place of the victim in the criminal trial process”).

¹³⁹ See generally The Crime Victims Rights Act, 18 U.S.C. § 3771(a)(2006) (setting forth a list of enumerated rights).

¹⁴⁰ The U.S. Attorneys Manual provides, for example, that in federal cases victims must be consulted regarding plea negotiations. U.S. ATTORNEYS’ MANUAL § 9-16.030. See also the Victim and Witness Protection Act of 1982, P.L. 97-291, § 6, 96 Stat. 1256.

represent them at trial. While the newly invigorated role of the victim is problematic in a variety of respects and therefore controversial,¹⁴¹ it cannot be ignored. Because the victim's interests are often different than, and often in conflict with, the interests of the prosecutor,¹⁴² the presence of the victim undermines the existence of a dualistic criminal justice universe that some scholars stubbornly continue to observe.

The Supreme Court has also worked aggressively in recent decades to increase (or perhaps restore) the status of the jury in the criminal justice system. In *Duncan v. Louisiana*, for example, the Court underscored the importance of "community participation in the determination of guilt or innocence."¹⁴³ Likewise, in *Williams v. Florida*, the Court highlighted "community participation" and the sense of "shared responsibility" that results from group decision-making.¹⁴⁴ These themes have grown even stronger in the last decade. In a very recent series of cases, the Supreme Court has re-asserted the importance of the jury in finding facts relevant to guilt and sentencing in criminal cases.¹⁴⁵ As a result of these cases, the jury is a force that must be reckoned with much more often in sentencing. Since much of the rhetoric about the jury suggests that the role of the citizen juror is to represent the public at large, and the community in particular, the increasing institutional role of juries at trial and in sentencing reflects the increasing status of the public and the community in criminal justice.

As a result of both the victim and jury developments, there are additional legitimate participants in the criminal justice system that represent interests other than those represented by the prosecutor and the defendant. The criminal case is no longer simply a battle between a prosecutor and a defendant in a neutral forum. It is much more nuanced. It involves a range of different institutional players, each with a different

¹⁴¹ See, e.g., Paul H. Robinson, *Should the Victims' Rights Movement Have Influence Over Criminal Law Formulation and Adjudication?*, 33 MCGEORGE L. REV. 749 (2002) (explaining problems related to the role of victims in criminal adjudication and suggesting that victims' roles should be limited to policy formulation).

¹⁴² See Tom Lininger, *Bearing the Cross*, 74 FORDHAM L. REV. 1353, 1398-1400 (2005) (recommending that victims in rape cases be represented by counsel at government expense).

¹⁴³ 391 U.S. 145, 155-56 (1968).

¹⁴⁴ 399 U.S. 78, 100 (1970).

¹⁴⁵ See *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."); *Ring v. Arizona*, 536 U.S. 584 (2002) (holding that the Sixth Amendment requires that the jury, rather than the judge, determine the presence of aggravating factors in a capital sentencing proceeding); *Blakely v. Washington*, 542 U.S. 296 (2004) (striking down a sentencing guidelines regime that conflicted with *Apprendi*'s holding); *United States v. Booker*, 543 U.S. 220 (2005) (applying the *Blakely* holding to the federal sentencing guidelines).

legitimate interest in the criminal justice system. Thus, it is utterly simplistic to assess the value of the grand jury solely as it relates to the balance of power between the prosecutor and the defendant.

As reflected in the rhetoric of judges that call the grand jury the “voice of the community” and in light of the common historical narrative about the purpose of the American grand jury, the grand jury is a peculiar institution with its own legitimate institutional purposes that can be considered on its own merits.

2. Independence as a Contest Between the Prosecutor and the Grand Jury

Other critics view the grand jury as a key institutional player, but overemphasize the importance of the balance of power between the grand jury and the prosecutor.¹⁴⁶ This approach also presents a false dichotomy and likewise fails to account for critically important actors.¹⁴⁷

The standard historical narrative suggests that the grand jury is an institution of local sovereignty designed to protect members of local communities from the local exercise of central (and perhaps distant) authority. By serving as a gate-keeping role for criminal prosecutions, the grand jury holds (and occasionally presumably should exercise), on behalf of the local community, a veto over national or statewide laws that the local community deems illegitimate.

While most recent critics are interested in the conflict (or lack thereof) between the grand jury and the prosecutor, this approach is too narrow. Although today’s prosecutor is very powerful, the prosecutor remains merely an agent of the legislature, with the responsibility to enforce laws not of the prosecutor’s own making. In that sense, the grand jury really stands between the accused and entire apparatus of the central government, not just between the accused and the prosecutor.

Likewise, the view of the grand jury merely as a protector of the accused is far too narrow. The grand jury is an agent of the local community, with the responsibility to provide local community input (and potentially a veto) on the law that the prosecutor seeks to enforce as an agent of the legislature. The grand jury not only has the interests of the defendant in mind, but also the interests of the community. The protection that the

¹⁴⁶ See Sections II.A. & B. *supra*.

¹⁴⁷ In an insightful article, Professor Niki Kuckes breaks out of these characterizations and focuses heavily on the grand jury’s democratic purposes. Kuckes, *supra* note 53. Professor Kuckes, however, creates her own false dichotomy that limits her analysis. See Section II.B.3 *infra*.

grand jury offers the defendant may be offered precisely because the defendant is a member of the community. Protecting each individual member of the community from over-reaching by the government is the best way to protect the entire community.

In this view, the prosecutor and the grand jury are merely representatives. The real parties in interest are the state or national legislature represented, in effect, by the prosecutor, and the local community, represented by the grand jury. As the prosecutor is effectively an agent of the legislature, the grand jury can be seen as an agent of the community and its job is to protect the community from unjust applications of the state or national laws.

If this is the proper light in which to view the grand jury, the question is not how to make the grand jury *more* independent of the *prosecutor*, but how to make the grand jury *less* independent of its *own community*. In other words, if there is a problem with the grand jury, it may be in the nature of an agency problem between the grand jury and the community it is theoretically constructed to represent.

Ideally, the grand jury is not simply a protector of the defendant or a tool of the prosecutor, but a representative of an equally important actor in the criminal justice system: the community. In this respect, the grand jury is a political actor that ought to be independent of “the government.”

3. Grand Jury as Executive, Judicial or Legislative Actor

The law is full of institutions that serve different roles to different observers. A prosecutor, for example, might say that the purpose of the trial jury is to measure trial evidence against a particular legal standard composed of the elements of an offense, through the lens of a particular burden of proof, the “beyond a reasonable doubt” standard. A political scientist, on the other hand, might say that the purpose of the jury is to enhance the involvement of the community in criminal justice. A constitutional law scholar might say that the jury serves as a check on both executive and judicial power. These purposes are distinct, yet none are necessarily inconsistent with one another. It is for that reason that it is misleading to limit the descriptive accounts of juries.

Another false dichotomy about the grand jury is created by Professor Niki Kuckes. In an article that is often very insightful, Professor Kuckes suggests that the Supreme Court has treated the grand jury at times as an a judicial actor and at other times as a prosecutor.¹⁴⁸ Using this duality as an explanatory device for the muddled nature of grand jury jurisprudence, she

¹⁴⁸ Kuckes, *supra* note 53.

makes a seductive argument that the path out of the confusion is to select only one of these roles for the grand jury and to stay true to it.¹⁴⁹ She then characterizes the grand jury as “a democratic force within the prosecutorial function” and concludes that the grand jury ought to be seen as a sort of “democratic prosecutor.”¹⁵⁰ To Kuckes, if the grand jury is a prosecutor, then it follows that a defendant ought to have greater procedural rights before the grand jury.¹⁵¹ Though this conclusion might be convenient for one who wishes to justify the enhancement of procedural rights for defendants, this conclusion is not very compelling, for several reasons outlined below.

The real insight in Kuckes’s work is the separation of powers approach that she suggests as a mode of analysis. In setting the question up as a “dilemma,” a binary decision between prosecution and adjudication, however, she may have oversimplified her quest. Our system of government recognizes at least three different roles with regard to the criminal laws. Indeed, the question ought to present a “trilemma.”

As for the prosecution role, while the grand jury’s job is to issue indictments in appropriate cases, its refusal to apply a law that is viewed as unjust is plainly not in the nature of an executive act. Indeed, it obstructs executive action. To the prosecutor, the grand jury is not really a partner, but an obligatory obstacle. The modern grand jury creates an opportunity to stop a prosecution, but is not likely to initiate one on its own. At least since the decline of the presentment, one cannot say that the grand jury is really an accuser.¹⁵² Unlike the prosecutor, the grand jury is an organic, independent body that does not report to any executive official. It is a somewhat passive body and its purpose is not to execute the law or enforce it. It thus seems unwise and inaccurate to characterize the grand jury’s function as executive in nature.

If the grand jury is not exercising an executive-prosecutive function, does it follow that the grand jury is better characterized as exercising a judicial role? Well, yes, perhaps, at least to the extent that it is ruling on probable cause. But while the grand jury nominally adjudicates for probable cause, it was not canonized for its ability to apply the law to facts. Indeed, when it acts in its heroic historical role, the grand jury is not usually

¹⁴⁹ *Id.* at 1299-1309.

¹⁵⁰ *Id.* at 1299. Though Professor Kuckes’ descriptive account is insightful and her analysis is compelling, her conclusion seems results driven, allowing her to cast the grand jury as an institution from which the defendant deserves additional procedural protections.

¹⁵¹ *Id.* at 1313.

¹⁵² Renee B. Lettow, Note, *Reviving Federal Grand Jury Presentments*, 103 YALE L.J. 1333 (1994) (explaining the demise of the investigative presentment and arguing for its revival).

applying law at all, but defying it. This would hardly seem to be a judicial action.

Under the three obvious options available for selection under an American model of governance, the elimination of the executive and the judicial role leaves one other obvious option: the legislative role. And this characterization fits better than one might expect.

The grand jury is a quasi-political body designed to exercise local popular sovereignty. Even Professor Kuckes recognizes the grand jury's "democratic" elements. Professor Kuckes characterizes the citizen participatory role of the grand jury as a "homeless theme" that runs through the jurisprudence.¹⁵³ That theme is homeless, however, only if one creates a false dichotomy that creates no place for it. Kuckes's false choice ignore the compelling purpose reflected in the historical narrative which suggests that the role of the grand jury was neither to prosecute, nor to adjudicate, but to serve a policy and lawmaking (or at least law-blocking) role.

In the traditional narrative, the grand jury is useful precisely because it makes important decisions about policy. In that respect it is neither adjudicative, nor prosecutorial, but legislative in nature. Indeed, its most vital role seems to have been to give the local community a voice, and really a veto, over the enforcement of a general law within the local community.¹⁵⁴

The obvious implication of the conventional historical narrative of the grand jury is that it was enshrined in the Bill of Rights for its ability to nullify unpopular laws or to block their application in the local community. Its job, in other words, was to serve as a local institution of popular sovereignty, as a local check on general laws. Making or nullifying law is neither a prosecutorial function nor an adjudicative function, but a political and legislative one.¹⁵⁵

In seeking to determine whether an actor is behaving in a legislative or an adjudicative capacity, we frequently look to factors such as whether there is an individualized determination, based on "adjudicative facts" or a

¹⁵³ Kuckes, *supra* note 53, at 1300.

¹⁵⁴ One of the best reform proposals suggests that grand juries ought to be told of the capital ramifications of their actions. *See* Tomer, *supra* note 46. Such a reform is particularly insightful because it credits the distinct political role of the grand jury.

¹⁵⁵ According to one Revolutionary era source, the grand jury is "a body of truth and power inferior to no one but the legislature itself." YOUNGER, *supra* note 45, at 41 (citing 1 THE MISCELLANEOUS ESSAYS AND OCCASIONAL WRITINGS OF FRANCIS HOPKINSON 229-235 (Phila. 1792)).

more generalized one, based on general, sometimes called “legislative” facts.¹⁵⁶ In the paradigmatic Zenger case, the grand jury likely was not making an individualized judgment about the facts related to Zenger’s guilt, but was operating at a policy level, expressing its view that seditious libel is not a crime that should be prosecuted. It was making its decision based on legislative facts. Thus, one can easily argue that the grand jury is better viewed as a political actor that exercises legislative power, though only negative, and not affirmative, legislative power.

The grand jury’s power is somewhat akin to the President’s veto power, though it is much narrower because the grand jury only works in specific cases and has only limited geographic jurisdiction. While likening the grand jury to the President might, at first blush, suggest that the grand jury is exercising an executive rather than a legislative role, the president’s veto power is not an executive power at all, but a limited legislative power.¹⁵⁷

Thinking about the grand jury as a legislative-like actor also offers terrific insight about its difference from the trial jury. The grand jury is a quasi-political institution. The trial jury, on the other hand, is a strictly legal institution; the trial jury *does* function like a judge and is required to follow the law. In constitutional separation of powers parlance, the trial jury, like the court that it is part of, ought to defer to the legislature as to the policy choices made in enacting laws. The grand jury, on the other hand, is not so bound. It has independent authority to reject the application of a given law in a given case.

Another distinction sometimes suggested is that trial juries and trial jurors are (temporarily, anyway) officers of the courts.¹⁵⁸ Grand juries, on the other hand, exercise an authority that is independent of the courts and

¹⁵⁶ For the constitutional distinction as it arises in the context of ordinary administrative law questions of due process, *compare*, for example, *Londoner v. Denver*, 210 U.S. 373, 385-86 (1908) (holding that an agency decision as to a tax on an individual taxpayer requires hearing) *with* *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441, 445 (1915) (holding that an agency decision that applies to all equally does not require a hearing).

¹⁵⁷ Most of the President’s power is executive, but when the president decides to exercise the veto, the President is participating in the legislative process. It is a very limited legislative power. *E.g.*, *INS v. Chadha*, 462 U.S. 919, 951 (1983); Vasan Kesavan & J. Gregory Sidak, *The Legislator-in-Chief*, 44 WM. & MARY L. REV. 1, 4-5 (2002).

¹⁵⁸ *U.S. v. Arredondo*, 349 F.3d 310, 318 (6th Cir. 2003) (“Jurors and veniremen are officers of the court. Their conduct is governed by a separate section of the federal contempt statute, 18 U.S.C. § 401(2) (prohibiting ‘misbehavior’ by a court officer), as well as the generally applicable contempt provision of 18 U.S.C. § 401(1).”). Consider also that prosecutors are also officers of the court, though the supervisory power of the court is somewhat limited due to separation of powers concerns.

not subject to judicial supervision.¹⁵⁹ These existing legal rules support the view of the grand jury of an institution that is neither prosecutorial, nor judicial, but more political or legislative in character.

C. The Deeper Ramifications of Grand Jury Nullification

To be fair, some critics may have downplayed the implications of the historical narrative that portrays the grand jury as a political institution because they are troubled by the principle of nullification. Professor Andrew Leipold, for example, has not ignored the historical evidence that nullification was the role of the grand jury; he just believes that such a purpose is dubious:

The danger in giving the power to nullify to a group of unelected, anonymous, and unaccountable citizens is that they are free to use that power in illegitimate ways, precisely because they are unaccountable. The power to nullify is, at least in the particular case, the power to frustrate the presumptive will of the electorate to enforce the criminal law when the evidence shows that a crime has occurred. Although nullification is case specific, and may not even be permanent as to that target, it can be a potent force for frustrating legitimate societal objectives.¹⁶⁰

While Professor Leipold raises a legitimate objection and one that causes serious consternation in the trial jury nullification context, the obvious implications of the historical narrative of the grand jury requires us to grapple with such a role. Indeed, if the historical narrative means anything, it may well mean that “frustrat[ing] the presumptive will of the electorate” is the most important job of the grand jury.

One might well think it strange that the constitutional founders, who created a new central government, would create a government institution that was mythologized precisely because of its ability to frustrate central government authority. The grand jury was perceived as a valiant and heroic institution when it was used to obstruct the power of the distant Crown. But when we ask for grand jury independence now, we are asking to have the grand jury obstruct laws enacted through a democratic process.

Presumably, laws that were made right here on American soil are less offensive than laws made in England. Indeed, the Federalists argued

¹⁵⁹ See *United States v. Williams*, 504 U.S. 36, 47 (1992) (asserting that “the grand jury is an institution separate from the courts” and over which the courts “do not preside” and have no “supervisory authority”).

¹⁶⁰ Leipold, *supra* note 3, at 309-310.

against the use of juries for just this reason.¹⁶¹ We might expect grand jurors to be less aggressive in nullifying laws that were enacted on their behalf by their own representatives. The political function is simply less compelling in this context. However, the anti-federalists feared power in general and it was for this reason that they insisted on the Bill of Rights.

One could wonder whether such a counter-majoritarian institution is necessary in a democratic society. And one might also wonder about the wisdom of the founders in creating such an institution. But they did create it. The irony of their action cannot have escaped the notice of the founders. Indeed, the institution is clearly consistent with the mistrust of central authority that is apparent throughout the Constitution and the Bill of Rights. This mistrust often extended to authority that was democratically elected.

When the grand jury has played a political role, it has stood against laws that are unpopular locally. That is the proper nature of grand juries. They serve to prioritize local policy preferences over national ones.

A context that might give one pause is the Civil War. Grand juries played a critical political role in this country before and after the Civil War. As Professor Leipold has noted, “Southern grand juries were quick to indict those involved in crimes related to abolition, and Northern grand juries were slow to indict those similarly accused.”¹⁶² Following the Civil War, Southerners used grand juries to prevent indictment of those who committed crimes against freed blacks, allowing crimes to go unpunished and successfully blocking a significant part of the Reconstruction agenda.¹⁶³ Those who yearn for greater grand jury independence may have doubts when informed of this behavioral pattern of Southern grand juries. Indeed, the counter-majoritarian nature of the grand jury can have troubling consequences.

Nevertheless, the obvious implication is that the power of a local grand jury to nullify the general laws enacted by the central government is legitimate and indeed is the reason that the grand jury requirement was retained in the Constitution. Such power, while troubling in certain instances, can provide the local community the sense of participation and investment in criminal justice that is necessary to assure local confidence in that system.

¹⁶¹ ABRAMSON, *supra* note 27, at 33 (noting that Federalists accused those who wanted to maintain the local jury of “fighting old battles” against the British crown; with democratic representation of local views in the legislature, Federalists thought juries were no longer necessary).

¹⁶² Leipold, *supra* note 3, at 286.

¹⁶³ Simmons, *supra* note 6, at 14, 19. *See also* Alschuler & Deiss, *supra* note 35, at 890-92.

IV. The Grand Jury as Barometer of Legitimacy

While conventional criticism of the grand jury in scholarship is ill-founded to the extent that most of it is entirely unmoored from the grand jury's original purpose and overly focused on the role of the grand jury vis-à-vis the prosecutor, criticism of the role of the grand jury in modern criminal justice may nevertheless be appropriate.

Whether one accepts the conventional wisdom that the grand jury should act more independently of the prosecutor, or the more nuanced view presented here that the grand jury's role is to represent the local community and thus act more independently of all the instruments of central authority, including the state or national legislature, a good deal of evidence suggests that the modern grand jury tends not to act very independently in either sense. The grand jury today rarely rebuffs a prosecutor on a request for an indictment and thus rarely nullifies the law. According to the literature, prosecutors achieve success rates above 99% in obtaining indictments from grand juries.¹⁶⁴

It is true that a high success rate for prosecutors seeking indictments is not necessarily problematic. It could reflect positively on the cases that prosecutors are choosing to bring to grand juries. Such statistics could reflect, for example, simply that communities are generally pleased with the laws being prosecuted and the local application of those laws. It could mean that the laws are legitimate in virtually every application and that the grand jury simply has not had an opportunity to use its powers of nullification.

On the other hand, the high indictment rate may reflect the failure of the grand jury to exercise properly its constitutionally-envisioned function of protecting local communities from the unfair application of locally unpopular laws enacted by a central authority, such as the state or national legislature. Or perhaps it means that prosecutors are reading grand juries well and declining to bring cases that would cause them to balk. Under the current regime, it is simply impossible to know which account is correct.

From another vantage point, however, it is easy to conclude that the grand jury is not living up to its constitutionally-envisioned role. For

¹⁶⁴ Fouts, *supra* note 129, at 329-30 ("In fiscal year 1984, for example, statistics show that federal grand juries returned to prosecutors 17,419 indictments, compared to sixty-eight no bills, a success rate of 99.6% in obtaining indictments." (citing STATISTICAL REPORT OF U.S. ATTORNEY'S OFFICE, FISCAL YEAR 1984 (Report 1-21) at 2)). Fouts also notes that in 2001, federal grand juries returned only twenty-one no bills. *Id.* at 330 (citing Federal Justice Statistics Resource Center, Federal Justice Statistics Database, <http://fjsrc.urban.org>).

decades, the American criminal justice system has suffered withering criticism related to race and discrimination. This criticism strikes directly at the legitimacy of the system.¹⁶⁵ The historical narrative suggests that the best way to find out what the community thinks about the legitimacy of a general law is to ask the local grand jury for an indictment to enforce it.

Return now to the debate in which the question of the community's recognition of the legitimacy of criminal justice arose in the context of the powder versus crack cocaine sentencing disparities. Professor Randall Kennedy argued that it was African American members of congress from predominantly African American Congressional districts that pushed for harsh penalties for the distribution of crack cocaine.¹⁶⁶ On this basis, Kennedy suggested that black communities supported such sentences and used this argument as a basis for undermining those who criticized the crack/powder disparity. Other scholars strongly disagreed.¹⁶⁷ Ultimately, the debate was inconclusive, however, because it is simply impossible to determine how much support punitive narcotics laws have had within the communities most ravaged with drugs and prosecutions.

What better way to find out what the community thinks and give effect to that popular will than by asking the community directly, through indictments sought from anonymous local grand juries? Although we can and perhaps should be troubled by jury nullification, grand jury nullification is more legitimate. The grand jury today may not be providing a definitive answer to questions like these however because it is not effectively representing the community it has the constitutionally-envisioned responsibility to represent.

A. A Theory of What Went Wrong With the Grand Jury

If citizen participation in the grand jury is designed at least partially to insure widespread confidence in criminal justice, then the legitimacy crisis in criminal justice in some communities reflects that the grand jury is not serving its constitutionally-envisioned function.

Why is today's grand jury refusing to address important issues of criminal justice policy? Theories abound. Professor Brenner, for example,

¹⁶⁵ Cf. Nancy J. King, *The Effects of Race Conscious Jury Selection on Public Confidence in the Fairness of Jury Proceedings: An Empirical Puzzle*, 31 AM. CRIM. L. REV. 1177 (1994) (arguing that race conscious jury selection techniques should be allowed despite equal protection concerns to the extent that they are used to address legitimacy issues in criminal justice related to race).

¹⁶⁶ KENNEDY, *supra* note 62, at 370-72.

¹⁶⁷ See, e.g., David Cole, *The Paradox of Race and Crime: A Comment on Randall Kennedy's "Politics of Distinction,"* 83 GEO. L.J. 2547, 2553 (1995); David Sklansky, *Cocaine, Race and Equal Protection*, 47 STAN. L. REV. 1283, 1300-01 (1995).

notes that as the laws have become more complex, jurors have been forced to rely much more on the prosecutor to understand them.¹⁶⁸ Leipold makes a similar, though slightly more nuanced point. He suggests that grand jurors are not effective in screening cases because “probable cause” is a vague and fluid standard best understood by people who have seen numerous cases and have internalized the “pattern recognition” of probable cause in actual cases.¹⁶⁹ These theories are not very compelling, however. It is hard to believe, for example, that today’s narcotics laws are any more complex than the laws applied by colonial grand juries, such as seditious libel or the Stamp Act. Likewise, probable cause is not difficult to understand; it is simply is a fairly low bar.¹⁷⁰

In her excellent book on prosecutors, *Arbitrary Justice*, Professor Davis makes several compelling arguments as to why grand juries fail to serve as an adequate check on prosecutors. First, the grand jury is institutionally weak: it is composed of “ordinary citizens without legal training[.]” Second, while the grand jury can call additional witnesses, the grand jurors “don’t usually know enough about the case to know which witnesses to call[.]” Third, “grand jurors don’t know the criminal statutes or how to apply them, so they must rely on the prosecutor[.]”¹⁷¹

Professor Davis raises the implication that a grand jury will indict a defendant even when the prosecutor is engaging in a racist prosecution. If that is so, the current grand jury is failing to serve its proper role. The grand jury was included within the Bill of Rights to guard against unfair laws and unfair applications of law. Thus, if such troubling prosecutions are happening, it must mean that there is something gravely wrong with the grand jury. What could it be?

I offer a theory. One obvious difference between the pre-Revolutionary grand juries and grand juries today is the inclusiveness of the juries and the diversity of the communities they represent. Early grand juries were far better at representing their communities than modern grand juries. In those times, the “community” was defined as white male property owners. Consistent with this definition of community, colonial and early American juries were composed entirely of white male property owners.¹⁷² These grand juries represented communities that were very homogeneous and

¹⁶⁸ Brenner, *supra* note 3, at 72-73 (“At worst, grand juries’ continued presence invidiously maintains the illusion of a community voice. This lulls corrective action and permits increased prosecutorial abuse.”)

¹⁶⁹ Leipold, *supra* note 3, at 300-302.

¹⁷⁰ See ANGELA DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 26 (Oxford 2007) (“Probable cause is the lowest legal standard on the legal spectrum” and “is easy to meet”).

¹⁷¹ *Id.*

¹⁷² Alschuler & Deiss, *supra* note 35, at 877-78.

exclusive, and in facing a common enemy abroad, these communities had political interests that were very closely aligned. In the years since, the American citizenry has become much more diverse and more diverse juries have come, to some degree, to reflect this diversity.¹⁷³

In other words, while the grand jury as a legal institution has changed slightly in the past two centuries, the grand jurors – and the political communities that they represent – have changed tremendously. In an increasingly diverse world, the average grand jury simply may no longer be composed of a community of people with common interests. It may well be that changes to the demographics of the grand jury, rather than the changes to the legal institution, explain the decline in grand jury independence. As the grand jury becomes more diverse, it is much less likely to represent a unified voice. A more diverse grand jury is likely to be more divided. An institution that is divided is weaker than one that is unified. In some senses, this change has the clear effect of shifting power from the grand jury to the government (the prosecutor and the legislature).

To say that the United States has become much more diverse, however, is not necessarily to say that communities have become more diverse. Individual communities in the United States have remained racially segregated and, within these segregated bounds, often very homogeneous. More about that momentarily. Ironically, the law's efforts to embrace diversity in criminal justice, and specifically in the context of the trial jury may have contributed to the weakening of the grand jury and its ability to serve its proper purpose.

B. The Failure of the Cross-Sectional Ideal

In nearly a century-and-a-half since the Civil War, the Supreme Court has repeatedly addressed problems related to racial composition of juries.¹⁷⁴ As the United States grew and became more diverse and as women and members of minorities groups earned the right to vote and serve on juries, courts worked to address the changing demographic circumstances. The legal principle that has emerged in this jurisprudence is that a defendant is entitled to a jury selected from a broader jury venire that fairly represents the entire community. The legal hook for this principle resides in the Sixth Amendment. Its guarantee of an “impartial” jury in a criminal trial has been interpreted to require that trial jurors be chosen from a venire that represents a “fair cross-section of the community.”¹⁷⁵

¹⁷³ *Id.* at 868.

¹⁷⁴ *See generally* KENNEDY, *supra* note 62 (surveying and criticizing the cases).

¹⁷⁵ *Duren v. Missouri*, 439 U.S. 357, 363-64 (1979); *Taylor v. Louisiana*, 419 U.S. 522, 530 (1978). *See generally* KENNEDY, *supra* note 62 (surveying and criticizing the “fair cross-section” cases).

In the context of a trial, the cross-section ideal can be very useful in assuring a fair jury to the defendant and for members of the various minority communities within the jurisdiction. At trial, most courts require a unanimous verdict to convict.¹⁷⁶ Thus, every vote counts. A single stubborn member of the jury can theoretically withhold a vote in favor of conviction, insuring that a minority community's voice has an opportunity to be heard in the process.

While the "fair cross section" principle seems sensible in the abstract, it has not produced satisfactory results in achieving ideal jury composition in practice for a variety of reasons. First, the rule has been enforced only in a very broad fashion.¹⁷⁷ Appellate courts have recognized that it is improbable or impossible for a court to achieve a jury venire that constitutes a perfect cross-section of the community. Because of the practical difficulties in obtaining a perfect cross-section, however, courts have accepted wide deviations from the perfect cross-section ideal. In some cases, these deviations have swallowed the ideal. In many cases, the courts have upheld jury venires that substantially failed to capture the racial diversity in the jurisdiction.¹⁷⁸ In the worst cases, the venires are grossly disproportionate to the racial demographics of a given jurisdiction, yet the venire meets the very low legal standard that the courts have defined.

Second, to some degree by necessity, the proportionality analysis is very crude. In an increasingly heterogeneous society, even a venire that is broadly representative in a macro or statistically significant sense may produce a jury that has no members who are racially or ethnically similar to the defendant. It may not contain a single member who speaks the same language as the defendant, especially if the defendant is from a small minority group. This dynamic that may well grow more pronounced as

¹⁷⁶ See *Patton v. United States*, 281 U.S. 276, 288 (1930) (holding that unanimity is one of the "essential elements" of a federal criminal jury trial); FED. R. CRIM. P. 31(a) (requiring unanimous verdict).

¹⁷⁷ Jeffrey S. Brand, *The Supreme Court, Equal Protection, and Jury Selection: Denying that Race Still Matters*, 1994 WIS. L. REV. 511 (criticizing the failure of the jurisprudence to achieve real inclusion of members of minority groups on juries).

¹⁷⁸ In evaluating jury venires in a fair cross-section analysis, the courts tend to measure the "absolute disparity" between the demographics of the jury venire and the demographics of the jurisdiction by simply subtracting the former from the latter. So, for example, if African Americans constitute ten percent of the population within the jurisdiction and make up only one percent of the population on the jury venire, then the "absolute disparity" is nine percent. Such a disparity might well be found constitutional. See, e.g., *United States v. Butler*, 611 F.2d 1066, 1069 (5th Cir. 1980) (holding an absolute disparity of less than ten percent to be constitutionally insignificant). As a result, juries are routinely found constitutional even if they dramatically fail to mirror the population of the jurisdiction.

society continues to become more diverse. As a result, in practice, the fair cross section ideal is more aspirational than actual.

This criticism is not new. In the vast legal literature on juries, numerous commentators have noted problems in achieving racially diverse juries.¹⁷⁹ Among the suggested solutions are to use race-conscious jury venire or panel selection techniques.¹⁸⁰ As our jurisprudence has grown ever more hostile to race-consciousness and affirmative action, however, such efforts are likely to fail.¹⁸¹ Moreover, as I argue below, the cross-sectional ideal may be failing to serve any useful purpose in the grand jury context.

C. The Particular Perniciousness of the Cross-Sectional Ideal in the Grand Jury Context

Since the cross-sectional ideal grew organically from the Sixth Amendment's guarantee of an impartial jury, it need not necessarily apply to the grand jury requirement, which arises out of the Fifth Amendment. Nevertheless, without any serious consideration of the ramifications of the effects of such a decision, the Supreme Court imported the fair cross-section ideal into the Fifth Amendment grand jury requirement in federal cases and into the Fourteenth Amendment conception of due process for state courts.¹⁸²

¹⁷⁹ *Id.* See also Hiroshi Fukurai, *Critical Evaluations of Hispanic Participation on the Grand Jury: Key-Man Selection, Jurymantering, Language, and Representative Quotas*, 5 TEX. HISP. J.L. & POL'Y 7, 11-12 (2001). See generally Albert W. Alschuler, *Racial Quotas and the Jury*, 44 DUKE L.J. 704 (1995); Nancy J. King, *Racial Jurymantering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707 (1993) (summarizing various proposals for race conscious jury selection and concluding that considerations of race should be permitted); Deborah A. Ramirez, *The Mixed Jury and the Ancient Custom of Trial by Jury De Medietate Linguae: A History and a Proposal for Change*, 74 B.U. L. REV. 777, 809-16 (1994) (examining problems inherent in connecting jury selection and race).

¹⁸⁰ Alschuler, *supra* note 179 (outlining several possible methods and citing strengths and weaknesses of each). See also King, *supra* note 179 (summarizing approaches).

¹⁸¹ King, *supra* note 179, at 734 (noting that race conscious jury selection policies are suspect for a variety of reasons under modern cases). Professor King's predictions seem to be bearing out. See also *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, Nos. 05-908, 05-915, 2007 WL 1836531, at *10 (U.S. June 28, 2007) (overturning a school integration plan that relied on racial classifications in efforts to fill slots for oversubscribed school, with Roberts, C.J., famously saying "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."); *Gratz v. Bollinger*, 539 U.S. 244, 246 (2003) (holding that a race-conscious school admissions policy was not sufficiently narrowly tailored to survive scrutiny).

¹⁸² See WAYNE R. LAFAVE & JEROLD H. ISRAEL, 4 CRIMINAL PROCEDURE § 15.4(d) (2d ed. 1999) (citing *Hobby v. United States*, 468 U.S. 339 (1984)). See also *Powers v. Ohio*, 499 U.S. 400, 409 (1991) (holding that the Equal Protection Clause bars a prosecutor from using peremptory challenges to exclude potential jury members solely on the basis

While in the trial jury, the fair cross section approach had positive, though limited, effects in fighting invidious discrimination, it has had less salutary affects in the grand jury context. One reason is that grand juries lack the unanimity requirement; they simply function by majority rule. While a lone holdout in a trial jury can prevent a conviction,¹⁸³ the dynamic is significantly different in a grand jury. In a grand jury, a lone dissenter, or even a plurality of dissenters, can be easily overcome by a majority of grand jurors, leading to the issuance of an indictment. Thus, the single juror from a distinct minority community has a lot less leverage to force discussion in the grand jury of issues of race, or other issues troubling to members of minority communities. As a result, the cross-sectional ideal is less useful in helping minority communities to address race in this context.

Second, when the fair cross-section ideal is applied to a state-, county-, or district-wide community, each minority community's minority status will be reflected in the grand jury. In that sense, the fair cross-section ideal seems *designed* to prevent any community from having a grand jury that fully represents it. In this way, the fair cross-section principal has transformed the grand jury from a counter-majoritarian institution to one that simply reinforces the power of the entrenched majority.

Moreover, a more diverse grand jury is likely to be more divided. Such a grand jury is less likely to serve its appropriate role. To express this notion in a manner consistent with the frustrations of so many scholars, such a grand jury is unlikely to serve as an effective check on the prosecutor.

While a grand jury may once have been seen as a counter-majoritarian force of local sovereignty against a state or national legislature, this is no longer true. But as jurisdictions grow and become more diverse, particularly in cities, the grand jury simply becomes a microcosm of the legislature, at best. At worst, it preserves the majoritarian structure of the legislature and prevents minorities from succeeding in exercising any influence in the evaluation of criminal laws.

In seeking to create a grand jury that constituted “a fair cross section of the community,” courts have emphasized the cross-sectional ideal at the expense of the community ideal. It is likely that the early grand jury was

of race); *U.S. v. Rodriguez-Lara*, 421 F.3d 932, 940 (9th Cir. 2005) (“The selection of a grand or petit jury in violation of either the equal protection or the fair cross-section guarantee is structural error that entitles a defendant to relief without a demonstration of prejudice.”)

¹⁸³ FED. R. CRIM. P. 31(a) (requiring a unanimous jury verdict). *See also* Ethan J. Leib, *Supermajoritarianism and the American Criminal Jury*, 33 HASTINGS CONST. L. Q. 141, 142 (2006) (discussing the widespread adherence to the jury-unanimity rule in state courts).

respected and deemed to be effective because it expressed the will of the local community. It was able to express that will, however, only because it was tightly connected to the community it represented.

Put differently, a grand jury that is designed to represent everyone actually represents no one. A grand jury that mirrors the legislature will fail to serve as any sort of check on legislative power. As diversity has flourished in the United States, the courts still operate under the fiction that each jurisdiction constitutes one “community.”

In reality, of course, any construction of “community” is artificial. No jurisdiction constitutes a single “community.” Each jurisdiction is an amalgamation of numerous communities, whether defined along geographic, occupational, social, religious, or other lines. In adopting the artificial notion that each jurisdiction is a single community and then acting on this notion by assembling jury pools that attempt to mirror the diversity of the entire jurisdiction, we dilute the representation of each of the communities and suffocate the grand jury’s ability to represent any community effectively.

In sum, by undermining the community voice, the fair cross-section principle undermines the purpose of grand juries as envisioned by the anti-federalists.

V. Restoring the Independence of the Grand Jury

To reframe questions about the grand jury’s effectiveness, one approach might be to treat the grand jury issue as a typical agency problem between the grand jury, as a quasi-political actor, and the community it is supposed to represent. The question is whether the agent’s interests align with those of the community, or, on the other hand, whether the interests should somehow be realigned. Thus, one approach to reform might be focused on how to make the grand jury less independent of the community it has the responsibility to represent and indeed more responsive to that community. But how can the agent’s interests be re-aligned to match those of the community it is constructed to represent? If the grand jury is failing to realize its potential in protecting local communities, how can we improve the performance of grand juries to insure that they are more effective in helping to preserve the legitimacy of criminal justice?

In the eras of the Zenger trial and protests of the Stamp Act, the interests of the community and its grand jury presumably were well-aligned. In each instance, the grand jury took actions that earned it praise from the local community. Early American grand juries represented communities that were smaller and much less diverse. Grand juries consisted of educated and propertied white males and they no doubt represented

similarly situated citizens quite well. Legally, women and minorities were non-entities; the grand jury likely was not expected to represent their interests. As jurisdictions grew larger and more diverse, they came to be composed of more and more communities. But instead of adding grand juries, grand juries remained static, defined by very broad geographic terms, not narrow community ones. As the world has become more diverse, the grand jury has thus failed to remain relevant.¹⁸⁴

The way to restore the “independence” of the grand jury, and really the essential purpose of the grand jury, is to recognize the grand jury’s political and representative nature and to restore the attributes that would allow it to maintain relevance. The insight offered by Professors Alschuler and Deiss that the grand jury’s “role in civic life declined” as its “composition became more democratic”¹⁸⁵ ought to be viewed as a profound tragedy. One way to restore the legitimacy of criminal justice is to return the grand jury to its role as a democratic institution of popular sovereignty.

To restore this role, we need not change the way the grand jury works; we merely need to change the way that the grand jury is constructed. If the grand jury is a quasi-political institution – an institution that emerged not so much as a substantive, but as a political check on the legislature and the prosecutor – it should be constructed in a manner that allows it to meet its quasi-political purpose. And given this quasi-political role, a grand jury must be constructed differently than a trial jury.

A. The “Neighborhood Grand Jury” or the “Grand Jury by Zip Code”

To make the grand jury more effective as a political institution, it is necessary to minimize the gap between the grand jury and the community it represents. Put another way, we need to solve the agency problem to align the interests of the grand jury more closely with the interests of the community it serves.

Though “propertied white males” was an artificial community, the grand jury presumably represented that constituency well. On the community’s

¹⁸⁴ A second factor was, perhaps, the prestige of the grand jury. In those early days, the “community” that the grand jury represented was an elite community composed of educated, white male, property owners and the grand juries were often created by asking leading or “key” members of the community to select the members. *See generally* SARA SUN BEALE, ET AL., GRAND JURY LAW AND PRACTICE § 3:6 (2d ed. 2004). Although the “key man” system of selecting jurors has not been struck down, it has been much more rigorously policed and grand juries now tend to be composed of ordinary citizens whose names are drawn from public roles, not “key” ones drawn from the community elite. *Id.*

¹⁸⁵ Alschuler & Deiss, *supra* note 35, at 890-92.

behalf, it nullified laws from the central government that were unpopular locally.¹⁸⁶ While no one would argue for a return to grand juries composed only of propertied white males, one who yearns for the return of the “independent” grand jury yearn ought to want a grand jury that better represents each community and that is much more tightly constructed. By giving community members a much more meaningful role in criminal justice, such a grand jury could help to restore the legitimacy of criminal justice in each community.

In an increasingly diverse society, opportunities for citizen participation ought to be enhanced, not minimized. With this in mind, one potential solution is to increase the number of grand juries and to “localize” them. In other words, the solution is not to provide different tools to the grand jury,¹⁸⁷ or even to insure through affirmative action that each grand jury has some number of minority members.¹⁸⁸ The solution is not, in other words, instrumental. It is political. The grand jury should be gerrymandered – not racially, but geographically.

Instead of a district-wide or county-wide grand jury, each jurisdiction should construct numerous “neighborhood grand juries” that represent much smaller constituencies and that are thus likely to be more closely aligned with the communities (or neighborhoods) that they represent. Consider perhaps a “grand jury by zip code” approach. A grand jury in each zip code would vastly expand the involvement of the local community in criminal justice. Another way to achieve the same ideal, using existing political boundaries, would be to choose small legislative districts, such as legislative House districts or city council districts.¹⁸⁹

A grand jury that is more localized could replicate the kind of community that existed when the Bill of Rights came into being and could meet the constitutionally-intended purposes of the grand jury requirement much better. Consider that the population of Boston on the eve of the American Revolution numbered approximately 15,000 residents,¹⁹⁰ a

¹⁸⁶ Such grand juries were often, at least in some places, selected by election. YOUNGER, *supra* note 45, at 28-29.

¹⁸⁷ See, e.g., Simmons, *supra* note 6, at 21 (proposing the elimination of hearsay evidence).

¹⁸⁸ See, e.g., King, *supra* note 179, at 767 (recognizing the importance of fairness in the jury selection process).

¹⁸⁹ For a not-very-different approach related to trial juries, see Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 VAND. L. REV. 353, 386 (1999) (arguing for the selection of jurors from legislative districts that have been further divided into “communities of interest.”).

¹⁹⁰ JACQUELINE BARBARA CARR, *AFTER THE SIEGE: A SOCIAL HISTORY OF BOSTON, 1775–1800* xv, 318 (2004). Cf. LAWRENCE W. KENNEDY, *PLANNING THE CITY UPON A HILL: BOSTON SINCE 1630* (1992) (claiming 16,000).

substantial percentage of whom were women and children and others who could not serve on a grand jury.

In a society that is far more numerous and much more diverse, we ask too much from a grand jury that is culled from an entire county or judicial district.¹⁹¹ The representation of each community is diluted to the point that the grand jury is effectively homogenized. Such a grand jury simply cannot serve the same role as the grand jury at the time of the founding which represented a modest-sized community of similarly-situated people.

B. The Advantages of Neighborhood Grand Juries

The neighborhood grand jury or grand-jury-by-zip-code approach offers numerous benefits consistent with all of the original virtues of the grand jury. Consider the virtues of jury service cited by the Supreme Court and commentators and how much more effectively they would be served by such an approach.

1. Expanded and Improved Educative Benefits of Jury Service

Consider the Tocquevillian educative benefits of jury service.¹⁹² A grand jury in each community would insure that far more citizens would be able to serve in a meaningful role in criminal justice. The educative value to the citizenry of the increased volume of citizen participation would be tremendous, but the substance of the education would be improved as well. Because members of the grand jury would be educated about crime in their own community, grand jury service might help motivate greater action in addressing crime. As the world we inhabit has become much more atomized, grand jury service would help to reconnect members of a community around a specific problem that is highly important to that community.¹⁹³

¹⁹¹ The 23 citizens that serve on a grand jury cannot serve as a counter-majoritarian force of local populism against the application of national or state-wide laws if they merely represent a homogenized microcosm of the same legislature that created those laws.

¹⁹² See, e.g., *Powers v. Ohio*, 499 U.S. 400, 406-07 (1991) (citing 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 334-337 (Schocken 1961): “I do not know whether the jury is useful to those who are in litigation; but I am certain it is highly beneficial to those who decide the litigation; and I look upon it as one of the most efficacious means for the education of the people which society can employ.”).

¹⁹³ For an idiosyncratic account of service on a federal grand jury in the Southern District of New York, see BLANCHE DAVIS BLANK, *THE NOT SO GRAND JURY: THE STORY OF THE FEDERAL GRAND JURY SYSTEM* (1993). Blank discusses the sharing of bags of candies and tins of cookies and pizzas among jurors. *Id.* at 18.

In contrast, while some form of education occurs under the current regime, it may often contribute more to misinformation than useful knowledge. In a very real sense, a grand juror becomes reasonably well-educated about specific crimes by virtue of reviewing indictments and hearing factual presentations about each one. A grand jury gains a sense of which crimes are prevalent and where crime is most serious.

When a grand jury is drawn from a county-wide venire, most of the members will routinely see crimes committed in neighborhoods not their own. Because members of grand jurors tend to see only felonies, they see only the worst actors and the most tragic events. In their ordinary roles as grand jurors, citizens rarely see any happy occurrences in those communities. As a result, grand jurors necessarily develop a warped view of those communities with the most crime, and this warping occurs no doubt most profoundly when the community is not their own. Communities would be far better served if members of their own community were becoming experts in the crime in their communities. Those citizens would be better situated – and better motivated – to work to address these problems, even after jury service has ended.

2. Improved Community Representation in Criminal Justice

A grand jury constructed from a single zip code or neighborhood would also be much more effective in providing the “voice” of the community, to borrow Judge Hand’s metaphor. Of course, the voice of the community may now have an accent or use a different language entirely, as the number of languages spoken in the United States has increased dramatically. To give the grand jury its intended purpose, each of those voices must be heard.

Any jurisdiction has multiple community voices. Legitimacy will be fully restored only when the criminal justice system can hear each of the substantial voices present in the jurisdiction.¹⁹⁴

¹⁹⁴ Thomas Jefferson once famously proposed that trial jurors be elected by voters from small districts, a proposal which would have had not entirely dissimilar effects. See, e.g., Daniel D. Blinka, *Jefferson and Juries: The Problem of Law, Reason, and Politics in the New Republic*, 48 AM J. OF L. HIST. 35, 100 (2005). Such a proposal is far more radical than the one proposed here, particularly in light of intervening developments with jury, such as particular constitutionalized selection requirements developed through interpretation of the Sixth Amendment. Jefferson was writing at a time when the jury had discretion to decide questions of law, a power that is now mostly denied it. *See id.* at 44-46 & 98-99.

3. Addressing of Mistrust in Government Provision of Criminal Justice

If the most serious legitimacy problems stem from a lack of trust in the government in certain quarters, the most effective way to address such mistrust, again to borrow from Tocqueville, is to give citizens from those communities a “share in government.”¹⁹⁵ If inclusion builds trust, then the criminal justice system ought to seek to maximize inclusion among those communities in which trust is lowest. Likewise, forcing members of the affected community to share the decision as to whether to indict will locate important decisions about law enforcement within the community itself. Members of such communities who serve on grand juries may come away with a fuller appreciation of the law enforcement function, possibly making them better citizens.

4. Heightened Legitimacy of Criminal Justice

If each of the virtues served by citizen participation is focused at bottom, on insuring legitimacy for the criminal justice system at the community level, then such legitimacy is likely to be improved by neighborhood grand juries. If no indictment could proceed until a grand jury chosen from that community issued it, the prosecution and law enforcement officials would necessarily serve less as a focal point for criticism. Restoring this local democratic element to criminal justice would make it seem more trustworthy to the community.

On the other hand, if the government treated a community unfairly, the grand jury would be well-situated to make its concerns known. While nullification is one potential option, nullification is a heavy club that need not be wielded very often. No prosecutor wants to walk away from a grand jury with a “no bill” – that constitutes failure. It would be in the interest of the prosecutor and law enforcement officials to listen to concerns by grand jurors and take steps to address those concerns. Indeed, prosecutors and law enforcement officials would presumably be motivated to do so.

5. Increased Power of Community Relative to the Prosecutor

¹⁹⁵ See *Powers*, 499 U.S. at 406-07 (citing 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 334-337 (Schocken 1961): “[T]he institution of the jury raises the people itself, or at least a class of citizens, to the bench of judicial authority [and] invests the people, or that class of citizens, with the direction of society. . . . The jury . . . invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards society; and the part which they take in the Government.”)

The neighborhood grand jury model would inevitably have some ramifications for prosecutorial power. As it stands, the grand jury often covers such broad jurisdiction that the grand jury does not likely feel much investment in the community where the crime occurred. Each grand juror is likely to have different interests and none is likely to necessarily have a very strong interest as to any given case. Indeed, some may feel simply inconvenienced by being required to serve. These circumstances heighten the power of the prosecutor and law enforcement officials who may know more than any single grand juror about the community in which the crime occurred.

A grand jury drawn entirely from one community is more likely to know as much, collectively at least, about the neighborhood as the prosecutor and law enforcement agents. Moreover, such a grand jury is likely to be even more concerned about crime and criminal justice policy in that neighborhood. It is also more likely to be united around these important concerns. Unless the prosecutor resides in the same neighborhood as the grand jurors, she may be viewed with greater skepticism. As a result, the prosecutor may be less likely to make the grand jury her “handmaiden,” to borrow a term from Professor Kuckes.¹⁹⁶ Indeed, one clear way to change the balance of power between the grand jury and the prosecutor is to tighten up the grand jury and strengthen its internal bond.

6. A Colorblind Solution to Racial Problems in Criminal Justice

To many scholars, the most damning criticisms of criminal justice have centered on problems of race. To address such problems, many scholars have focused on solutions designed to achieve racially-balanced or racially-representative juries.¹⁹⁷ The solution sketched out here avoids controversial strategies such as affirmative action based on race yet yields some of the same benefits that those strategies might produce. As others have demonstrated, racial problems do not necessarily require explicit race-conscious solutions.¹⁹⁸ In an era of a “color-blind” Constitution,¹⁹⁹ this may be an advantage.

¹⁹⁶ Kuckes, *supra* note 4, at 2.

¹⁹⁷ See Alschuler, *supra* note 179; King, *supra* note 179.

¹⁹⁸ Consider the so-called Texas ten-percent plan extolled particularly by Professor Gerald Torres as a “work-around” for the *Hopwood* decision restricting affirmative action at the University of Texas. In seeking to achieve greater diversity, the University of Texas offered admission not on the basis of race, but on the basis of status in the top ten percent of the class at any public high school in Texas. Though this approach did not address race explicitly, it nevertheless had the effect of producing a more racially-balanced class. See LANI GUINIER & GERALD TORRES, *THE MINER’S CANARY* 69-73 (2002).

¹⁹⁹ David H. Getches, *Beyond Indian Law: The Rehnquist Court’s Pursuit of States’ Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 360 (2001).

C. Potential Disadvantages of Neighborhood Grand Juries

The neighborhood grand jury poses some risks that may be troubling in some contexts. To the extent that the purpose here is to free the community, as represented by the grand jury, to prefer its own normative policy judgments over national ones, one could imagine certain circumstances in which the grand jury will behave in a manner inconsistent with rule-of-law values. For example, a grand jury may be less protective of a suspect who is from outside the local community, and therefore it might be more inclined to issue an unwarranted indictment. Or, on the other hand, a grand jury may be too protective of the member of the community, and thereby decline to issue a righteous indictment. One might characterize these problems, respectively, as the “false positive” and the “false negative.”

1. The False Positive

Consider first the risk of the false positive. Imagine, for example, the African-American man arrested while passing through a predominantly white suburban neighborhood who is falsely accused of a burglary. Having his indictment presented for review before grand jurors drawn from the same white suburban community may not leave the defendant feeling that the grand jury served as a significant procedural protection. Nevertheless, while one could imagine such an unfortunate occurrence happening, it might not be a serious problem, for several reasons.

First, the prosecutor must bring the case. Generally, a prosecutor is the initiator and presents the case to the grand jury. Even if the grand jury initiates an indictment on its own motion, however, the indictment will not be prosecuted unless the prosecutor decides to proceed. Thus, a prosecution requires agreement between a prosecutor and the grand jury. While the prosecutorial review function may provide only a limited protection to a defendant in such circumstances, a prosecutor is presumably unlikely to bring a case in which he is unlikely to prevail at trial.

Moreover, the prosecutor will face a much higher standard of proof before a trial jury that will likely be more diverse. The reasonable doubt standard and the Sixth Amendment “fair cross section of the community” principle are designed to provide protection to a defendant. While the fair cross section requirement has been erroneously applied to grand juries, the principle is an important procedural protection in trial juries. The need to win a unanimous verdict at trial will provide some disincentive to the prosecutor to bring a weak case; it will also provide a fail-safe protection to the defendant, at the procedural step where such protection can best be provided.

As a criticism of the neighborhood grand jury proposal, the so-called “false positive” also fails for a more basic reason. Most scholars do not feel that the existing grand jury is very protective of an innocent defendant in any case. Those who hew to the “ham sandwich” metaphor would be hard-pressed to complain about a grand jury that was too ready to indict. Grand juries already indict in more than 99% of cases. Since commentators expect the grand jury to rubber stamp any indictment presented to it, a defendant would likely be in little worse position under this proposal. In that sense, this proposal leaves the average criminal suspect no worse than under the existing regime.

2. The False Negative

Some will be far more troubled by the so-called false negative, that is, the grand jury’s refusal to indict an obviously guilty defendant. This is the nullification question and it can present some problems primarily related to rule-of-law concerns.

In some cases, a false negative may reflect a nullification of a national law because the local community elevates its own cultural standards over the behavioral standard set by state or national law. Indeed, the neighborhood grand jury could help address the difficult issues raised by the controversial notion of a “cultural defense.”²⁰⁰ If the neighborhood grand jury can effectively screen a case through its own community’s cultural lens, then the need for a cultural defense at trial may be lessened.

In many cases, the so-called “false negative” will constitute a community veto of a criminal prosecution of an offender in the community. Since the grand jury represents the same community that will presumably have to live with the offender in its midst if there is no prosecution, the grand jury’s refusal to indict will reflect a profound statement by the community and the grand jury will bear accountability for that decision.²⁰¹ Indeed, if the suspect is truly blameworthy, it is the members of the community,

²⁰⁰ Some of the difficult issues related to cultural defenses are set forth in Elaine Chiu, *Culture as Justification, Not Excuse*, 43 AM. CRIM. L. REV. 1317, 1320-21 (2006).

²⁰¹ Some scholars suggest that nullification, in the jury context, is useless as a political protest because it is an ambiguous act; the jury could have acquitted for a variety of reasons. See, e.g., KENNEDY, *supra* note 62, at 301; Andrew Liepold, *The Dangers of Race-Based Jury Nullification: A Response to Professor Butler*, 44 UCLA L. REV. 109, 122 n.52 (1996). For nullification to be effective as a protest, however, it is really only prosecutors and law enforcement who need to hear the message. If a grand jury refuses to indict, a prosecutor will make it his business to find out why. Thus, as a protest, nullification is likely to be highly effective with the appropriate audience.

including the grand jury, who will bear the consequences of the release of that suspect back into the community.

The false negative will not always involve a suspect from the same community, however. Consider a slightly different example than the one presented in the last section: an African-American man walking through a predominantly-white suburban neighborhood is assaulted by two racially-prejudiced white men; the prejudiced and provincial grand jury from the neighborhood refuses to indict. The neighborhood grand jury proposal is troubling in this circumstance because it might be seen to provide legal legitimacy to racial violence, or at least shield such violence from justice. This may be the strongest objection to the neighborhood grand jury proposal.

If this troubling tableau sounds familiar, however, it is because it generally reflects actual circumstances that have occurred under the *existing* grand jury and criminal justice regime. It generally reflects the facts of the murder of Emmitt Till, a young black man from Chicago who was visiting the South, though it was the trial jury, not the grand jury, which was the villain in that case.²⁰² In the South during the civil rights era, there were dozens of cases involving homicides of African Americans in which indictments were handed down, but trial juries failed to convict.²⁰³ In recent years, federal and state prosecutors have re-instituted prosecutions against some of the suspects in those cases.²⁰⁴

The failure of the criminal justice system to provide justice to black crime victims in the South in the 1960s reveals some of the limits of using the criminal justice system to achieve social change, or even to support those who are seeking positive change. That it was rarely the grand jury that posed the problem in those cases, though, is telling. The question is whether we would merely shift the nullification function from the trial jury to the grand jury through the neighborhood grand jury proposal.

In most respects, the neighborhood grand jury model would likely have little ill effects. While it is generally true that racial prejudices may generally be stronger in individual localized communities, many of the most shocking cases of injustice in the South in the 1960s involved violent acts done in African-American neighborhoods, in homes and churches. In those cases, a neighborhood grand jury may have been even more responsive than the existing grand juries were.

²⁰² See Margaret M. Russell, *Reopening the Emmitt Till Case: Lessons and Challenges for Critical Race Lawyering*, 73 *FORDHAM L. REV.* 2101, 2117-20 (2005).

²⁰³ Anthony Alfieri, *Retrying Race*, 101 *MICH. L. REV.* 1141, 1159-66 (2003).

²⁰⁴ See *id.*

But what about outside minority communities? Since grand juries tended to behave responsibly in the South in the 1950s and 60s, we can be reasonably sure that neighborhood grand juries would be responsible today. First, no criminal prosecution is ever instituted unless a prosecutor investigates the case and presents it to the grand jury. If a prosecutor could get an existing grand jury to “indict a ham sandwich,” surely she can use her persuasive powers in some fashion in the neighborhood grand jury. Prosecutors can cloak themselves in moral authority, and frequently do. We can expect that the prosecutor who stands before the grand jury will encourage the grand jury to do “the right thing,” even in cases in which community prejudices run high. Indeed, increasing the trust between the prosecutor and the community is one of the benefits of the neighborhood grand jury proposal.

Furthermore, the general impact of a false negative is weak. The grand jury’s ability to guard and preserve community norms of criminal justice is, in some senses, very limited and easily circumscribed. The only real action available to the grand jury is obstruction. A determined prosecutor may present the same case to the same grand jury again in the future²⁰⁵ or to a succeeding grand jury in hopes of obtaining an indictment.

If community grand juries are unwilling to indict in such cases, and justice fails to materialize for the victims of such offenses, the recent prosecutions in the South remind us that no one may be able to remain beyond the reach of law and justice forever. While a defendant may be effectively insulated from prosecution for a violent act temporarily, such protection could vanish as the racial demographics of the neighborhood change. In other words, the defendant will remain potentially subject to “retrospective justice,”²⁰⁶ such as that which has happened in the South in recent years.

Judging from the conventional historical narrative of the grand jury, however, the power of nullification seems to be the true *raison d’être* of the grand jury. While nullification undermines the rule of law,²⁰⁷ and can be used for purposes that people outside the community would call illegitimate, the very existence of the grand jury suggests that a felony may

²⁰⁵ United States v. Thompson, 251 U.S. 407, 413 (1920); Kuckes, *supra* note 4, at 32 (“The federal prosecutor is entirely free . . . to seek approval of the same indictment from a different panel.”); *id.* at 49 (“even if the grand jurors disagree with the prosecutor about whether to indict, the prosecutor can always have the last word”).

²⁰⁶ The term is borrowed from Margaret M. Russell, *Cleansing Moments and Retrospective Justice*, 101 MICH. L. REV. 1225, 1227 (2003), who discusses the propriety of prosecuting old cases of racial violence, such as the murderer of Medgar Evers.

²⁰⁷ See, e.g., Leipold, *supra* note 3, at 309-10.

not be prosecuted legitimately in any community until the local community effectively approves it through issuance of a grand jury indictment. In other words, while a criminal law exists formally when the state or national legislature enacts it, it is not enforceable until the local community approves its application in any particular case. While this model occasionally will produce an unfortunate result, it is a fundamental component of the American model of justice that it is not the community that one should fear. It is the authority of government officials that pose the most risk. Indeed, the remedy for problems related to discrimination in the South was to increase the role of the jury, and thereby the community, in criminal justice, just as suggested here.²⁰⁸

Does the neighborhood grand jury model potentially dilute the rule of law by increasing the uncertainty of what will happen in the grand jury? Absolutely. But it does not dilute the rule of law any more than the principle that a law can only be enforced if a violation can be proved “beyond a reasonable doubt” and with a unanimous jury verdict. The effect of both procedural rules is to sacrifice rule of law values for other equally-important values, such as the presumption of innocence and the moral legitimacy that follows from relative certainty that punishment is deserved.

In general, the neighborhood grand jury, will be guided by a prosecutor, and presumably will follow the law in most cases. While occasionally a grand jury may behave in a dysfunctional fashion or act for illegitimate reasons, the system must be designed to function in a manner that works well in the vast majority of cases, not in the highly unusual cases. In most cases, if succeeding grand juries refuse to indict, then that refusal may well be a righteous manifestation of popular sovereignty.

3. Costs

The neighborhood grand jury will increase the costs of criminal justice. It will generally increase transaction costs by (presumably) requiring a greater number of grand juries to be assembled, ultimately increasing the number of citizens involved in criminal justice on an episodic basis. Though this will increase the costs of criminal justice, it is the price to be paid for the benefits to be obtained above. A cost/benefit analysis is difficult to perform. What is “legitimacy” worth?

²⁰⁸ See, e.g., Nancy J. King, *Duncan v. Louisiana: How Bigotry in the Bayou Led to Federal Regulation of State Juries*, in *CRIMINAL PROCEDURE STORIES* (Carol Steiker ed., 2006) (explaining the development of the application of the Sixth Amendment to require juries in state proceedings and the broader context of *Duncan v. Louisiana*)

One particularly troubling ramification about the increased costs, however, relates to who might bear some of the costs. Citizens in communities or neighborhoods in which crime rates are higher may well bear a higher average burden of jury duty. Such a neighborhood will not be able to spread grand jury service across the whole jurisdiction, but will be required to have each crime presented to the grand jury in the neighborhood. While these costs are thus higher, the benefits may well offset those costs. If the educative benefits of jury service are real, then the benefits of grand jury service may also be real.

D. The Neighborhood Grand Jury vis-à-vis Other Reforms

If the justification for the neighborhood grand jury is legitimate, then most of the other proposals for grand jury reform are wide of the mark. If the grand jury is intended to serve a political or policy function, not a factual or adjudicative function, then the grand jury does not necessarily need to be presented with facts in a more formalized fashion in each individual case.²⁰⁹ Likewise, constructing the grand jury entirely of lawyers with special expertise, as Professor Leipold has suggested,²¹⁰ would be counter-productive because it would undermine the populist nature of the institution. Indeed, the real value of the grand jury is in representing local interests, not in offering specialized expertise. After all, a judge could provide much more specialized expertise than a jury.²¹¹ Indeed, if Professor Leipold's argument is correct, then perhaps members of Congress and state legislators should also be required to be attorneys. That cannot be so.

On the other hand, some proposals for reform are consistent with the quasi-political nature of the grand jury and ought to be reconsidered. Perhaps the grand jury ought to be informed, for example, about the range of punishment that might apply in any given case.²¹² If the grand jury has the right to consider the fairness of the laws, then this may be a relevant consideration.

²⁰⁹ See, e.g., Simmons, *supra* note 6, at 24 (offering the suspect the right to testify).

²¹⁰ Leipold, *supra* note 3, at (stating that the primary cause of the grand jury's failure to effectively screen prosecutorial decisions is the jurors' lack of competence to perform their task).

²¹¹ This is why judicial review of prosecutorial charges, through the information and preliminary hearing process, cannot achieve the same level of legitimacy that a grand jury can offer. Simmons, *supra* note 6, at 76 (grand jury provides the criminal justice system with a critical input of real-life experience and thereby helps to provide legitimacy).

²¹² See Tomer, *supra* note 46, at 88.

CONCLUSION

The grand jury has the potential to help restore greater legitimacy to criminal justice in the United States. It must first be restored itself, however, so that it will be able to serve, as it once did, as the voice of the community.

Since criminal justice is a local endeavor with primarily local effects, the local community must be involved much more substantially in its processes. Citizen participation in criminal justice must be fostered, but not in a way that dilutes diversity and drowns the voices of minority communities. The grand jury ought to be an institution where local communities can make themselves heard.

The grand jury indeed requires reform, though in the way it is constructed, not necessarily in the way it functions. In a highly segregated society, the grand jury should not reflect a much diluted diversity based on the entire jurisdiction and should instead be constructed so that it carefully represents a real community. The most expedient way to match the grand jury to the community is to dramatically decrease the geographical scope of the community from which the grand jury is drawn.

Each neighborhood community should have a grand jury that can be its voice in criminal justice and exercise the powers that the founders likely intended when they chose to retain the grand jury in the first instance. Indeed, if this argument is correct, and if the grand jury is considered a meaningful institution, then it may well be that *Hurtado v. California* ought to be reconsidered.²¹³ Perhaps the neighborhood grand jury ought to be incorporated into the Fourteenth Amendment as a federal requirement of legitimacy in the distribution of criminal justice in the United States.

²¹³ Decker, *supra* note 50, notes that two of the key justifications for that decision are no longer consistent with federal constitutional law.