

Boston College Law School
Digital Commons @ Boston College Law School

Boston College Law School Faculty Papers


1-1-2016

Article 32 Hearings: A Road Map for Grand Jury Reform

Claire P. Donohue

Boston College Law School, donohucl@bc.edu

Follow this and additional works at: <https://lawdigitalcommons.bc.edu/lspf>

 Part of the [Civil Rights and Discrimination Commons](#), [Courts Commons](#), [Criminal Law Commons](#), [Criminal Procedure Commons](#), [Law and Race Commons](#), and the [Law Enforcement and Corrections Commons](#)

Recommended Citation

Claire P. Donohue. "Article 32 Hearings: A Road Map for Grand Jury Reform." *Howard Law Journal* 59, no.2 (2016): 469-484.

This Article is brought to you for free and open access by Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law School Faculty Papers by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

ESSAY

Article 32 Hearings: A Road Map for Grand Jury Reform

CLAIRE P. DONOHUE*

INTRODUCTION

In late 2014, two grand juries, one in New York and one in Missouri, declined to return indictments against white police officers, Daniel Pantaleo and Darren Wilson, for killing unarmed black men, Eric Garner and Michael Brown. Since that time, seemingly countless accounts of police violence against black civilians have come to light.¹ The racial overtones and implications for race relations between the public and the police are obvious. What is equally obvious for many in the legal community and beyond, is the need to renew calls for grand jury reform.² With the public on high alert, with people's confidence in criminal justice system so low, with the accused being members of the same executive branch that is obligated to examine the case, surely the need for transparency of process is clear.³ California recently addressed the quagmire by outlawing the use of grand juries in

* Director of the Domestic Violence Clinic, Practitioner in Residence at American University Washington College of Law.

1. See, e.g., *In Depth: Protest over Police Violence*, CBS NEWS, <http://www.cbsnews.com/feature/protests-over-police-violence> (last updated Nov. 29, 2015) (referencing allegations in Cleveland and Cincinnati, OH; Baltimore, MD; Waller County and Arlington, TX).

2. See, e.g., Andrew E. Taslitz & Stephen E. Henderson, *Reforming the Grand Jury to Protect Privacy in Third Party Records*, 64 AM. U. L. REV. 195, 197 (2014); The Editorial Board, *A Judge's Idea for Grand Jury Reform*, N.Y. TIMES (Feb. 19, 2015), <http://www.nytimes.com/2015/02/19/opinion/a-judges-idea-for-grand-jury-reform.html>.

3. See Tracy Kaplan, *California Bans Grand Juries in Fatal Shootings by Police*, SAN JOSE MERCURY NEWS (Aug. 15, 2015), http://www.mercurynews.com/crime-courts/cj_28621966/gov-brown-oks-nations-1st-ban-grand-juries (stating that beyond the Ferguson and Staten Island cases, “[c]alls for transparency also have come amid national concerns about disparate treatment of blacks and other racial minorities when encounters with cops turned deadly in Baltimore, Cincinnati and South Carolina”).

cases involving fatal shootings by police,⁴ but for those states that had or have grand juries, the calls for transparency focus, by default, on the ex post release of grand jury transcripts. And indeed, in Ferguson Missouri, the grand jury transcripts were eventually released in the name of transparency.⁵ Meanwhile the legal battle over the release of records in the Daniel Pantaleo proceedings in New York waged on for some time and resulted in only preliminary release of limited information.⁶

Release of records in the Ferguson case revealed a process startling to those with an insider's knowledge of the grand jury proceedings. The breadth and detail of the evidence before the grand jury was in stark contrast to the typical 'less is more' approach of prosecutors.⁷ Similarly, the preliminary release of limited information in New York revealed a grand jury proceeding that far and away exceeded the practiced norms.⁸ Many were left to conclude that the prosecutors invested themselves in achieving no-bill decisions and that the grand juries returned the decision that was expected of them, just as grand juries typically return indictment after indictment, because prosecutors request the indictments (never mind that the requests are often based on nothing more than a second or third hand report by a government agent).⁹

The stubborn insistence that grand jury secrecy protects civil liberties seems amiss in the light of widespread public distrust of policing and the criminal justice system.¹⁰ And yet, even the release of records in Missouri only provided an imperfect, incomplete solution: it is diffi-

4. *Id.*

5. *But see* Benjamin Weiser, *Mixed Motives Seen in Prosecutor's Decision to Release Ferguson Grand Jury Materials*, N.Y. TIMES (Nov. 25, 2014), http://www.nytimes.com/2014/11/26/us/mixed-motives-seen-in-prosecutors-decision-to-release-ferguson-grand-jury-materials.html?_r=0 (addressing "mixed motives" for the release of the grand jury transcripts).

6. Then, in March 2015, a judge decided that the grand jury transcripts would not be released. Associated Press, *Judge Won't Release Grand Jury Testimony in Eric Garner's Chokehold Death*, PIX 11 (Mar. 20, 2015), <http://pix11.com/2015/03/19/judge-wont-release-nyc-chokehold-death-grand-jury-testimony/>.

7. *See* Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1, 13 (2004); *see also* *Ferguson Grand Jury Transcripts Show Widely Varying Witness Testimony*, WALL ST. J. (Nov. 25, 2014), <http://www.wsj.com/articles/ferguson-grand-jury-transcripts-show-widely-varying-witness-testimony-1416948406>.

8. Kuckes, *supra* note 7, at 13.

9. *Id.* at 21.

10. *See, e.g.,* Sara Levy, *The Patriot Act Grand Jury Disclosure Exception: A Proposal for Reconciling Civil Liberty and Law Enforcement Concerns*, 5 CHI.-KENT J. INT'L & COMP. L. 2, section D (2005) (offering an overview of the policies underlying grand jury secrecy); *see also* Mark Kadish, *Behind the Locked Door of American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. U. L. REV. 1, 12 (1996) (discussing the history behind grand jury secrecy).

cult to fully contextualize or understand what was done when one looks at one proceeding in a vacuum without access to other grand jury transcripts. Moreover, ex-post access and transparency is just a first step in inspiring the systemic reforms that would serve as a prophylactic against inconsistent or biased grand jury procedures.

As scholars and practitioners continue to debate the shape and form that grand jury reform might take, and specifically tackle the question of whether or how grand juries might be more transparent, they would be advised to consider the military counterpart to the grand jury, namely Article 32 Investigations. Part I of this paper gives a brief overview of the grand jury system as an “accusatory” body. Part II describes Article 32 Investigations and Part III suggests grand jury reforms for open hearings and defense participation that are in line with aspects of Article 32 proceedings.

I. GRAND JURIES

As is the case with much of our jurisprudence, the United States took its lead from English Common law in defining grand juries. In 18th century-England the grand jury sat “only to hear evidence on behalf of the prosecution[,] for the finding of an indictment is only in the nature of an enquiry or accusation, which is afterwards to be tried and determined.”¹¹ Accordingly, in early American courts the grand jury was charged to examine “upon what foundation [the charge] is made.”¹² “As a consequence, neither in this country nor in England has the suspect under investigation by the grand jury ever been thought to have a right to testify or to have exculpatory evidence presented.”¹³

In steadfastly holding that only a bare minimum is required for grand jury examination of a charge, the court has not only declined to extend technical evidentiary protections (e.g. protection against hearsay evidence) to an accused, but has gone beyond this to afford grand juries the same deference it offers prosecutors under their charging

11. See 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 300 (1769); 2 M. HALE, HISTORY OF THE PLEAS OF THE CROWN 157 (1st Am. ed. 1847); see also *United States v. Williams*, 504 U.S. 36, 51 (1992).

12. *Republica v. Shaffer*, 1 U.S. 236 (1788); see also *Williams*, 504 U.S. at 51 (discussing history of grand juries); F. WHARTON, CRIMINAL PLEADING AND PRACTICE § 360, pp. 248–249 (8th ed. 1880).

13. *Williams*, 504 U.S. at 51.

powers.¹⁴ In *United States v. Costello*, for example, the court did not just rule that hearsay rules were inapplicable to grand juries, it held more broadly that “[a]n indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more.”¹⁵

So while the Supreme Court tells us that the grand jury has an historic role “as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor,”¹⁶ it also seems inclined to conflate the roles of the grand jury with the role of the prosecutor. Historically, for example, because the grand jury was essentially signing off on an allegation or certain set of allegations, the prosecution was then required to try the exact charge returned by the grand jury.¹⁷ But modern rules and procedures have drifted even from this constraint.¹⁸ In *United States v. Miller*, for example, the Court held that Miller could be convicted of a different offense, one based on evidence that was less than that put before the grand jury. The court argued that the evidence before the grand jury was “surplusage.”¹⁹ Indeed, “[l]eaving aside, for a moment, the Court’s rhetoric suggesting that the grand jury is a ‘neutral’ decisionmaker like a magistrate judge, the vision of grand jury indictment that emerges from the Court’s decisions does not resemble a judicial process, but rather prosecutorial decisionmaking.”²⁰ In a very real sense the grand jury has always been an “accusatory not adjudicatory” body.²¹

Increasingly, modern grand juries are convened and operated not as an independent entity meant to test prosecutors, but rather as an extension of that office.²² The courts continue to insist on the legal fiction²³ of independence between grand juries and prosecutors even as their opinions (essentially) reason that the grand jury has

14. Niki Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury*, 94 GEO L. J. 1265, 1305 (2006).

15. See *Costello v. United States*, 350 U.S. 359, 409 (1956).

16. See *United States v. Dionisio*, 410 U.S. 1, 17 (1973). Yet in that same case the court acknowledges that the grand jury may not always serve that role.

17. ROBERT O. DAWSON, DEORGE E. DIX, FRANK W. MILLER, & RAYMOND I. PARANAS, PROSECUTION AND ADJUDICATION 695 (5th ed. 2000).

18. See *id.*

19. See *id.* at 696; see, e.g., *United States v. Miller*, 471 U.S. 130, 136 (1985).

20. See Kuckes, *supra* note 14, at 1305.

21. See *United States v. Williams*, 504 U.S. 36, 51 (1992).

22. See Taslitz, *supra* note 2, at 207 (stating that nobody informs grand jurors of their full power or independence).

23. See Kuckes, *supra* note 7.

prosecutorial charging power, and they eradicate any difference of institutional perspective between the grand jury and the prosecutor. Add to all of this, that the dance between prosecutors and grand juries is almost entirely out of the public purview.²⁴ Yet public outcry over the Daniel Pantaleo and Darren Wilson grand juries show one very real consequence of the lack of transparency and clear objectivity: public distrust. Military Article 32 Investigations provide for procedures that would remedy this public distrust, most notably: 1) the public nature of the proceedings; and 2) the ability of the defense to be present and participate meaningfully.

II. ARTICLE 32 INVESTIGATIONS

The right to grand juries as secured by the Fifth Amendment of the constitution is inapplicable to the Armed Forces: “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, *except* in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger. . .” (emphasis added).²⁵ Instead the Uniform Code of Military Justice outlines a distinct process known as Article 32 Investigations, often called an Article 32 Hearing.²⁶ An accused is entitled to an Article 32 Hearing, but may waive the requirement.²⁷ Article 32 Hearings are meant to be “thorough and impartial” reviews of charges, before those charges are presented to a general court martial.²⁸ The purpose of the investigation is to provide “inquiry as to the truth of the matter set forth in the charges, consideration of the form of the charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline.”²⁹

24. See, e.g., MO REV. STAT. §§ 540.130.1; 540.310.1(2014) (provisions against disclosure).

25. U.S. CONST. AMEND. 5.

26. 10 U.S.C. § 832 (2012).

27. *Id.*

28. *Id.*; see also, e.g., Michelle Tan, *Bergdahl Charged With Desertion, Faces Article 32*, ARMY TIMES (Mar. 25, 2015), <http://www.armytimes.com/story/military/2015/03/25/bowe-bergdahl-army-decision-next-steps/70436058/>; Andrew Tilgham, *Army, Bergdahl Could Face Court Martial*, MILITARY TIMES (Jan. 27, 2015), <http://www.militarytimes.com/story/military/pentagon/2014/12/22/army-sgt-bowe-bergdahl-could-face-court-martial/20771723/>.

29. 10 U.S.C. § 832 (2012).

The requirement for formalized, thorough pretrial investigations was first codified in the Articles of War in 1920.³⁰ The statutory requirement for Article 32 Hearings specifically followed two “substantive legislative changes and was formalized in The Uniform Code for Military Justice in 1958.³¹ From its earliest inception and until its ratification, the proponents of Article 32 Hearings maintained that “the armed services can point to [Article 32 Hearings] with pride as exceeding any comparable protection in civilian life.”³²

Article 32 Hearings are often compared to preliminary hearings and grand juries proceedings, because it, like they, has a screening function. The additional functions, of Article 32 Hearings, however, highlight stark differences from grand jury proceedings, and differences from preliminary hearings as well.³³ Article 32 Hearings serve four purposes: 1) protect the accused from baseless charges; 2) provide the adjudicating body with evidence to determine whether to refer the charges to trial by court martial; 3) provide the convening authority with information to determine a range of dispositions for a case being referred to trial by court martial; and 4) to provide the defense with discovery.³⁴ Notably, only the first three are statutory purposes, and the latter, defense discovery, is a collateral, yet recognized and protected interest.³⁵

As shall be discussed in more detail below, Article 32 Hearings allow the defense to be present and participate meaningfully, including by presenting evidence.³⁶ Moreover, the proceedings supply the convening authority with information concerning possible dispositions and serve as a means of discovery for the defense.³⁷ As such “it is far

30. Article of War 70, § 1, ch. 2, 41 Stat. 759, 802 (1920), as amended. See also 62 Stat. 604, 633, 639, 642 (1948); Lieutenant Colonel William Murphy, *The Formal Pretrial Investigation*, 12 MIL. L. REV. 1, 1 (1961).

31. 10 U.S.C. §§ 801–934 (1958); see also Murphy, *supra* note 30, at 1.

32. See Murphy, *supra* note 30, at 2.

33. “Insofar as the Article 32 investigation is an inquiry into the facts surrounding the charges against the accused, and thus an important pretrial screening device, it is functionally similar to both the preliminary hearing and grand jury. It is, however, a unique hybrid, and dissimilar in large part to both civilian proceedings.” *Chapter 9 The Article 32 Investigation*, 3, Report of the Washington Headquarters Services, http://responsesystemspanel.whs.mil/Public/docs/meetings/Sub_Committee/20140107_CSS/Materials/MRE/CH9_Art32Investigations_20120418.pdf (2014) (hereinafter *Chapter 9*).

34. *Chapter 9*, *supra* note 33, at 1.

35. Major Larry A. Gaydos, *Comprehensive Guide to Military Pretrial Investigation*, 111 MIL. L. REV. 49 (1986).

36. *Id.*

37. *Chapter 9*, *supra* note 33, at 3.

broader in scope than is the normal preliminary hearing.”³⁸ As compared to the grand jury system: “the grand jury is a secret proceeding that deprives a testifying accused [of various rights of confrontation]. Consequently, the Article 32 investigation is far more protective of the accused than is any analogous civilian proceeding.”³⁹

There are important procedural safeguards for an accused in an Article 32 Hearing. First, a prosecutor is not permitted to advise or assist the judicial officer. In *United State v. Payne*, the court held that ex parte conversations between the Article 32 Hearing investigating officer and the prosecutor violated the investigator’s role as a judicial officer.⁴⁰ The reasoning in *Payne* provides an important perspective on Article 32 Hearings: the investigator, the juror if you will, is considered a judicial officer on the preceding who is adjudicating the “truth of the matter set forth in the charges.”⁴¹ It follows then that conversations with the investigator would be inappropriate ex parte communications.⁴² Contrast grand jury proceedings, where the prosecutor is not only permitted, but often statutorily tasked,⁴³ to work with jurors as an “accusatory body.”⁴⁴ Secondly, the defendant is present at the Article 32 Hearing with a lawyer.⁴⁵ While this is not unique to Article 32 Hearings alone and is, in fact, allowed by some states in grand jury proceedings; the Article 32 Hearings take the presence of a represented defendant one step further by allowing the defense to cross examine witnesses,⁴⁶ call their own witnesses, and present their own evidence.⁴⁷ Also, the defense is permitted to present argument to the judicial officer about what charges may be appropriate or what potential dispositions, short of court martial,⁴⁸ may be appropriate.⁴⁹

38. *Id.*

39. *Id.* at 3–4.

40. *United States v. Payne*, 3 M.J. 354, 356 (C.M.A. 1977) (holding, however, that the impropriety did not prejudice the appellant).

41. 10 U.S.C. § 832 (2012).

42. *See Payne*, 3 M.J. at 356.

43. MO. REV. STAT. § 540.130 (2014) (stating “[w]henver required by any grand jury, it shall be the duty of the prosecuting or circuit attorney in the county, or in a city not within a county, to attend them for the purpose of examining witnesses in their presence, or giving them advice upon any legal matter”) (emphasis added).

44. *United States v. Williams*, 504 U.S. 36, 37 (1992).

45. *United States v. Mickel*, 26 C.M.R. 104, 106 (C.M.A. 1958) (holding that failure to provide qualified counsel at an Article 32 Hearing constituted reversible error).

46. 10 U.S.C. § 832 (2012). The amendment.

47. 10 U.S.C. § 832 (2012). *See generally* *United States v. Ledbetter*, 2 M.J. 37 (C.M.A. 1976) (discussing defendant’s right to order appearance of a witness).

48. The equivalent of a bill or indictment.

49. 10 U.S.C. § 832 (2012) (amended section effective one year after December 26, 2013).

There are also several important provisions to secure the integrity and solemnity of the hearings. The hearings will follow an investigation by military law enforcement, a commander, or a regulatory investigation.⁵⁰ Secondly, the hearings are before a designated investigating officer. This individual is selected and may serve on a temporary basis or as a permanent installation.⁵¹ As of the most recent amendment, the investigation officer must, barring exigencies, be a Judge Advocate.⁵² Again, as with *Payne*, one can see the perspective that if an Article 32 Hearing is to serve as a shield to false accusations or overcharges, then the investigator (the grand juror) must be fit to adjudicate the matter before her. Moreover, the Article 32 Hearings are open hearings, so public in fact, that when the press was denied access to a hearing, ABC sued.⁵³ ABC won the case, resulting in a proclamation that: “[t]oday we make it clear that, absent ‘cause shown that outweighs the value of openness,’ the military accused is likewise entitled to a public Article 32 investigative hearing.”⁵⁴

III. ROADMAP FOR GRAND JURY REFORM

Many question whether the grand jury legitimately investigates and screens pretrial matters or whether they serve as a rubber stamp for a prosecutor’s office.⁵⁵ Indeed, the concerns are so fixed and longstanding that even law school texts apprise aspiring attorneys of the long list of “concerns that can be raised as to the ability of the grand jury to function effectively [including] its dependence upon the prosecution for information, investigatory assistance, and legal advice, and the potential difficulty which lay jurors may experience in resolving the sometimes complex legal issues that even probable cause determinations raise.”⁵⁶ Many of the attributes of the Article 32 Hearing correct for these concerns. This is particularly true for cases such as *Brown and Garner*, where there is an obvious critique that the needs

50. See, e.g. Tan, *supra* note, 28 (indicating that the “extensive” Army investigation into Bergdahl’s conduct lasted six months and was then “reviewed thoroughly” by a commanding general before the matter was advanced to an Article 32 Hearing).

51. 10 U.S.C. § 832 (2012) (amended section effective one year after December 26, 2013).

52. *Id.*

53. ABC, Inc. v. Powell, 47 M.J. 363 (C.A.A.F. 1997).

54. *Id.* at 365. The ABC case was not extended to allow public access to documents filed in a court martial. See Center for Constitutional Rights v. United States, 72 M.J. 126 (C.A.A.F. 2013).

55. See, e.g., Levy, *supra* note 10, at n.27 (offering scholarly accounts from as early as the 30s, 60s, and 70s, that characterize the grand jury system as a rubber stamp).

56. DAWSON ET AL., *supra* note 17, at 695.

of certain types or classes of victims are undermined by an opaque, prosecutor-driven, grand jury system.

It is also particularly logical to import aspects of the Article 32 Hearing into the grand jury system when one considers the potential conflict of interest that a prosecutor's office faces in proceeding against an officer who has been accused of a crime.⁵⁷ When a prosecutor is faced with a law enforcement officer having been accused of a crime, they are faced with 'one of their own' having been accused of a crime. This, no doubt, inspires any number of reactions ranging from "no it can't be; not Officer so-and-so" to "we cannot have bad people doing our good and important work." It is likely that this range of reactions mirrors the reactions of military members faced with the realization that 'one of *their* own' has been accused of a crime. Accusations are personal if they are made against someone that the prosecutor or commander knows well, something that is incredibly common at the county level or where a military outfit is working and/or living closely with one another.⁵⁸ Some accusations are vile, worrisome, public relations nightmare.⁵⁹ Some accusations are maddening if they are for conduct that has been insidious and yet know within the institutional walls.⁶⁰ Whatever the reaction, accusations often hit close to home and create a conflict of interest, one best managed with care and transparency.

Article 32 Hearings provide a good example of a system that is more even handed, and certainly more transparent, than the grand jury system. The grand jury system as it operates in most states amounts to one long ex parte conversation between the prosecutor and the grand jury members; this fact is most acute where the defense is not permitted in the proceedings.⁶¹ And even where the defense is permitted to be present, they are not permitted to present evidence or

57. *Local Criminal Prosecution*, HUMAN RIGHTS WATCH (June 1998), <http://www.hrw.org/legacy/reports98/police/uspo31.htm>.

58. *See id.*

59. Sarah Hagen, *Cop Accused of Sexually Assaulting a 2-year Old*, USA TODAY (Mar. 20, 2015), <http://www.usatoday.com/story/news/nation/2015/03/19/police-child-sex-assault/25041091/>; Kellan Howell, *13 Cops Indicted After Participating in Undercover Drug Trafficking Scheme*, WASH. TIMES (Apr. 30, 2015), <http://www.washingtontimes.com/news/2015/apr/30/13-police-officers-indicted-after-participating-in/>.

60. Helene Cooper, *Pentagon Study Finds 50% Increase in Reports of Military Sexual Assaults*, N.Y. TIMES (May 1, 2014), <http://www.nytimes.com/2014/05/02/us/military-sex-assault-report.html>.

61. Taslitz & Henderson, *supra* note 2, at 207 (stating "social science research demonstrates that an awareness that one will need to justify her actions to a third party reduces the chance of error").

cross examine witnesses. The portrayal of evidence in grand juries is entirely one sided and therefore skewed. Prosecutors, for example, can chose not to present exculpatory evidence, or they can choose to present illegally obtained evidence.⁶² Prosecutors' decision to control presentation of evidence in this way has an obvious result: in federal cases, grand juries indict 99% of the cases before them.⁶³

That is, unless of course, the prosecution feels independently motivated to present evidence in favor of the defense as they notably did in the Wilson (Ferguson) and Pantaleo (New York City) cases.⁶⁴ The trouble, of course, is that barring any prosecutorial misconduct, the prosecution is not required to rebut itself and indeed, rarely does so.⁶⁵ This notion that the prosecution will pick and choose which cases require meritorious fleshing out and which cases only require a cursory presentation of evidence is deeply offensive to notions of equal protection and due process. Several Article 32 Hearing-style reforms would correct for these shortcomings in the grand jury system.

A. Open Hearings

The notion of open proceedings is logical given the myriad of studies that affirm that decision making is improved when it is undertaken in public view.⁶⁶ In grand jury proceedings examining police misconduct, one can easily see why scrutiny in public view makes good sense. Under current laws and norms, the grand jury rubber stamps the whims of the prosecution and, if forced to review the matter, the court rubber stamps the decisions of grand juries.⁶⁷ The robotic nature of grand jury indictments, coupled with secret proceedings, has damaging social costs.⁶⁸ This is dramatically evident when

62. See *United States v. Williams*, 504 U.S. 36, 52 (1992) (allowing that prosecution need not present exculpatory evidence and that illegally obtained evidence can come before the grand jury); see also *United States v. Calandra*, 414 U.S. 338, 355 (1974) (declining to extend the protection of the exclusionary rule).

63. See Thaddeus Hoffmeister, *The Grand Jury Legal Advisor: Resurrecting the Grand Jury's Shield*, 98 J. CRIM. L. & CRIMINOLOGY 1171, 1776 (2008).

64. See Darren Lenard Hutchinson, '*Continually Reminded of their Inferior Position*': *Social Dominance, Implicit Bias, Criminality, and Race*, 46 WASH. U. J. L. & POL'Y 23, 113 (2014).

65. The prosecution could indict a ham sandwich. See Hoffmeister, *supra* note 53, at 1776 (2008); see also *Costello v. United States*, 350 U.S. 359, 409 (1956); *Williams*, 504 U.S. at 52.

66. See Taslitz & Henderson, *supra* note 2, at 204.

67. No judge is present during grand jury proceedings, disclosure of the proceedings is limited, and the grounds for challenging the outcome of grand juries are very narrow. See *Costello*, 350 U.S. at 409, FED. R. CRIM. PRO. 6(e); see also Taslitz & Henderson, *supra* note 2, at 208.

68. *Id.* at 219; *Police Nationwide Brace for Protests After Ferguson*, CBS News (Nov. 14, 2014, 12:43 PM), <http://www.cbsnews.com/news/ferguson-missouri-police-nationwide-brace-for-protests-after-grand-jury-decision/>.

there is an allegation of police misconduct. In such cases, the public view can all too easily see that the system of rubber stamping seems to rubber stamp police misconduct.⁶⁹ Transparency seems particularly important and obvious when it comes to scrutinizing police, because as with any governmental agency that is allowed (indeed *invited*) to exercise its will against citizens, public accountability is an important restraint on that agency.⁷⁰

Beyond the desire for public accountability for police, is the sense that public hearings would elevate public accountability for prosecutors. Codified grand jury transparency, like the transparency required in Article 32 Hearings, would produce a better result than the ad hoc, reactionary transparency that follows public outcry. As stated earlier, release of the transcripts in Ferguson and the limited release of documents in New York revealed a disconcerting approach: the prosecutor had operated outside of institutional and legal norms and offered an abundance of exculpatory evidence before the grand jury.⁷¹ A grand jury decision not to indict after such a robust presentation of evidence might not have been so troubling if it were not for the fact that a similarly measured presentation of evidence rarely seems available to most defendants, notably men of color. Yet the ability of advocates to make the equal protection arguments and due process objections in the face of inconsistent practices is stymied by the fact that most grand jury proceedings are in secret and seemingly judgment proof.⁷² How then can there be any public accountability for the prosecution?

Lastly, the same studies that show public decision making reduces the chance of poor decision making, would support the notion that

69. Grand jury secrecy is seen as part of the web of police secrecy. Al Baker & J. David Goodman, *New Challenges to Secrecy That Protects Police Files*, N.Y. TIMES (Feb. 4, 2015), <http://www.nytimes.com/2015/02/05/nyregion/new-challenges-to-secrecy-that-protects-police-files.html>.

70. See, e.g., Marianne F. Kies, Note, *Policing the Police: Freedom of the Press, The Right to Privacy, and Civilian Recordings of Police Activity*, 80 GEO. WASH. L. REV. 274, 301–02 (2011) (discussing civilian recordings of police misconduct); see Charlotte Dennett, *The Freedom of Information Versus Government Secrecy: A Vermont Lawyer Sues the CIA*, 31 VT. B.J. 20, 22 (2005) (discussing government secrecy and the Freedom of Information Act and stating the view that “secrecy removes accountability”); Taslitz & Henderson, *supra* note 2, at 204.

71. See Hoffmeister, *supra* note 63, at 1209 (discussing “trial stage” protections regarding exculpatory evidence and noting that “the prosecutor is not required to provide exculpatory information to the grand jury and can obtain an indictment simply by relying on hearsay statements”).

72. See *id.* at 1196–97 (noting that “starting with *Costello v. United States*, [the courts] have become increasingly reluctant to apply their supervisory power to activities occurring within the grand jury room.” And in recent years courts have “continued to limit the instances in which the supervisory power could be employed in the context of grand juries”).

grand jurors should hear evidence and report their decision in public view.⁷³ Of course one wants to keep a grand jury free from public opinion and pressures just as it wants to keep a petite jury free from such pressures; and secret deliberations may make sense for grand juries just as it makes sense for petite juries.⁷⁴ Requiring, however, that the hearings themselves be secret seems inapposite to the suggestion that grand juries should be free from control and manipulation, because the very secrecy of their proceedings makes them vulnerable to pressure and control from the prosecution.⁷⁵ The prosecutor is, after all, the puppet master of the grand jury proceedings; she: directs the order and manner of evidence; requests subpoenas and drafts charges; convenes the grand jury and excuses them; and advises them throughout.⁷⁶ Open hearings would insure that the prosecutor tempers her role with deliberation; and a sense that their proceedings are in public view would encourage grand juries to be engaged, thoughtful recipients of evidence.

B. Defense Present & Participates

The fair and effective participation of a criminal defendant, as permissible in Article 32 Hearings, would also address many aspects of the public's frustration with the grand jury system. Procedural justice theory and the associated research makes the clear link between participation and a sense of justice. Procedural justice is not a jurisprudence that advocates from a procedural due process perspective, rather it advocates a way of thinking about justice that "resolve[s] conflicts in such a way as to bind up the social fabric and encourage continuation of a productive exchange between individuals."⁷⁷

73. See Taslitz & Henderson, *supra* note 2, at 204.

74. See Kadish, *supra* note 10, at 2; Levy, *supra* note 10.

75. See Hoffmeister, *supra* note 63 at 1198-99 (discussing how the court claims to be protecting grand jury independence "by both limiting and obfuscating the application of the supervisory authority," but arguing that the court's decisions that "indirectly decreased grand juror independence," because "there is little to prevent the executive branch from completely controlling the grand jury and usurping its powers").

76. See *id.* at 1183-84 (noting the role of the prosecutor as the director of the grand jury proceeding, but also as the gatekeeper of information to the grand jury." "The prosecutor determines the order of the evidence, requests that the court issue subpoenas, questions the witnesses, and drafts the charges. In addition, during their eighteen months of service, grand jurors meet at the discretion of the prosecutor. Most importantly, at least for the purposes of this Article, the prosecutor provides legal advice to the grand juror").

77. See E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 27 (1988).

Procedural justice research indicates that people have a greater sense that a given authority is “moral and legitimate” if the procedures employed by that authority appear fair; for example: “allowing a person to state their views, ensuring that their perspective is taken seriously, and demonstrating that officials maintain an open mind about this person and their case.”⁷⁸ This sense of participation and fairness inspires a person’s “sense of self-worth and, in turn, his degree of compliance, even when [compliance] conflicts with immediate self-interest.”⁷⁹ As executed, grand juries are clearly not procedurally fair from the defense perspective; but one wonders if, moreover, they appear unfair from the public perspective. Consider the aftermath of the Michael Brown and Eric Garner cases and the public call for justice via a public vetting of the incidents in question.⁸⁰ Arguably the public’s concerns could have been eliminated or at least assuaged if the roles and procedures of those participating in the grand jury process appeared clearly defined and logically fair.

Under current formations the prosecutor alone is allowed in the room with grand juries to control the presentation of evidence and moreover, to advise grand juries.⁸¹ When a prosecutor provides exculpatory evidence, despite practice norms not to,⁸² a given defendant’s defense attorney might stand up and cheer, but the very inconsistency of the practice is troubling to the legal community and the public generally. Now imagine if Darren Wilson and Daniel Pantaleo’s defense attorneys had been participating in the grand jury proceedings, as they would have been in an Article 32 Hearing. Surely *they* would have provided the rigorous defense of Wilson and Pantaleo that (instead) the prosecutors did in these cases. Had the defense attorneys presented evidence, cross examined witnesses, and otherwise presented a defense, one could credit those efforts as being consistent with the duty and role of a defense attorney. The public did not—could not—credit the prosecutors for acting in a manner consistent with their

78. See Deborah Epstein, *Procedural Justice: Tempering the State’s Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1846 (2002).

79. See *id.*

80. See, e.g., Greg Botelho, *Michael Brown Shooting: What to Expect, What to Know as Grand Jury Takes Place*, CNN (Aug. 20, 2014), <http://www.cnn.com/2014/08/20/justice/missouri-shooting-grand-jury/index.html>.

81. See, e.g., MO REV. STAT. §540.130.1 (August 2014) (stating “[w]henver required by any grand jury, it shall be the duty of the prosecuting or circuit attorney in the county, or in a city not within a county, to attend them for the purpose of examining witnesses in their presence, or giving them advice upon any legal matter”).

82. See *United States v. Williams*, 504 U.S. 36, 52 (1992); *Calandra*, 414 U.S. at 355.

roles when they acted as they did in the Wilson and Pantaleo grand juries. Relatedly, having defense participation eliminates conflicts of interest where the prosecutor is asked to present evidence against one of “its own.”

Allowing meaningful participation of defendants and defense counsel in grand juries would visually and literally provide for the presentation of two sides of a given event; thus it would affirm a sense that a grand jury will and should have an open mind about a case before them. Moreover, it would allow an individual defendant to feel some sense of control and participation.⁸³ A lack of control, in contrast, has been shown to cause emotional numbness; this numbness can foreclose the possibility of meaningful healing or make an ultimate victory seem hollow, because the passion for justice and closure has been replaced by detachment.⁸⁴ The fatigue and strain of emotion laden litigation—particularly for the litigant, but for the public as well—provides a breeding ground for self-doubt, and self-loathing.⁸⁵ Control and participation go a long way to ward off these emotional reactions to the stress and conflict inherent in litigation, which, in turn, would increase the likelihood of parties’ acceptance of the outcome.⁸⁶ To the extent that members of the public identify with a given defendant or victim, they might be vicariously affirmed by a grand jury process that has a measured approach and clear roles. It would follow then that the public’s reactions would be less fraught and more compliant if they could understand and credit the system.⁸⁷

CONCLUSION

In the current climate, grand jury reform seems more appropriate than ever to calm the rising tide of public distrust and the creeping sense of the injustice of the status quo. Ham-sandwich indictments appear to be the norm for non-police offenders, with prosecutors suc-

83. See Epstein, *supra* note 78, 1877–78.

84. See Thomas Gutheil et al., , *Preventing “Critogenic” Harms: Minimizing Emotional Injury From Civil Litigation*, 28 J. PSYCHIATRY & L. 5, 11 (2000).

85. See *id.* The article cited here discusses the realities of this emotional fall out in the context of civil litigation, yet one can imagine that the manifestations are only more extreme in criminal context where the situation is so much more fraught. See, e.g., Abbe Smith, *The Difference In Criminal Defense and the Difference it Makes*, 11 WASH. U. J.L. & POL’Y 83 (2003) (discussing the difficulty of establishing a trusting attorney client relationship in the context of the charged criminal litigation atmosphere).

86. See Epstein, *supra* note 78, at 1878, 1892.

87. See *id.*

cessfully indicting the vast majority of the time.⁸⁸ This is particularly troubling for the African American community who suffer higher incidents of arrests.⁸⁹ In juxtaposition, there are the recent non-indictments of police offenders, which have led some to conclude that excessive police force has been “effectively decriminalized.”⁹⁰ The data suggests there is a problem. Public outcry suggests there is a problem. The difficulty is in exploring or investigating the problem when the grand jury process is shrouded in secrecy.

In contrast, several years ago in the course of its open and participatory Article 32 Hearings, the press and some members of the military began to notice that victims of sexual assault fared poorly during the pretrial investigative system.⁹¹ Soon there was a rising concern that victims of sexual assault, were marginalized or ignored by the military justice system, possibly due to a conscious or subconscious desire to turn a blind eye to the reality of sexual violence in the ranks.⁹² The military began to investigate the problem and, thereafter, undertook dramatic reform of its Article 32 Hearings. In answer, the statute governing Article 32 Hearings was overhauled to speak to the interest of the victims. Whereas at one time a commissioned officer could have acted as the investigating officer for an Article 32 Hearing, now the individual must be a lawyer.⁹³ A sexual assault victim his or

88. See, e.g., MARK MOTIVANS, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., *Federal Justice Statistics Table* (2013), <http://www.bjs.gov/content/pub/pdf/fjs10st.pdf> (citing the statistic that in 162,000 federal case grand juries only declined to indict 11 times).

89. See, e.g., BRIAN A. REAVES, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., *Felony Defendant in Large Urban Counties, 2009 - Statistics Tables* (2013), <http://www.bjs.gov/content/pub/pdf/fdluc09.pdf> (2015) (stating “[b]lack males accounted for more than half (55%) of defendants age 17 or younger. Among defendants age 40 or older, 37% were black males, 28% were white males, and 16% were Hispanic males”).

90. See Nicole Smith Furtell, *The Cost of Silence: Rethinking Grand Jury Secrecy in cases of Lethal Police Force*, 2 WORKING PAPER (2015) (on file with the Author).

91. See, e.g., Ruth Marcus, *In Navy Rape Case Defense Goes Wild*, WASH. POST (Sept. 5, 2013), https://www.washingtonpost.com/opinions/ruth-marcus-in-navy-rape-case-defense-lawyers-go-wild/2013/09/05/2c729520-1647-11e3-a2ec-b47e45e6f8ef_story.html; *Twice Betrayed*, SAN ANTONIO EXPRESS NEWS, <http://www.mysanantonio.com/twice-betrayed> (last visited Nov. 29, 2015); see also David Vergun, *Legislation Changes UCMJ for Victims of Sexual Assault*, U.S. ARMY (Jan. 7, 2015) http://www.army.mil/article/140807/Legislation_changes_UCMJ_for_victims_of_sexual_assault/.

92. LINDSAY ROSENTHAL & LAWRENCE KORB, CENTER FOR AMERICAN PROGRESS, *Twice Betrayed Bringing Justice to the U.S. Military's Sexual Assault Problem* (Nov. 2013), <https://www.americanprogress.org/wp-content/uploads/2013/11/MilitarySexualAssaultsReport.pdf>; STEPHEN PRESTON, DEP'T OF DEF., *The Military Justice System's Response to Unrestricted Reports of Sexual Assault* (Oct. 30, 2014) http://sapr.mil/public/docs/reports/FY14_POTUS/FY14_DoD_Report_to_POTUS_Annex_4_OGC.pdf.

93. 10 U.S.C. § 832 (2012) (amended section effective one year after December 26, 2013).

herself is represented by a lawyer.⁹⁴ Also, a victim cannot be compelled to testify and is now free to submit a sworn statement instead.⁹⁵ The investigating officer must prepare a report concerning jurisdiction and probable cause for charges as well as the “effect of evidence of [an] uncharged offense.”⁹⁶

Just as the military undertook change to protect a class of victims previously not served well by its charging mechanisms, so too should the civilian system consider reform. Leaving aside whether grand juries could or should ever be reformed to provide police-victims special proceedings as sexual assault victims enjoy special proceedings in Article 32 Hearings, the civilian system should at least consider reform that would increase transparency and clear division of roles. These aspects of the Article 32 Hearings are important procedural safeguards for an accused and for victims. Moreover, the degree of equality and transparency with Article 32 Hearings elevates the procedural justice the proceeding provides.

The civilian system should be reformed to require open hearings. It should also allow defense participation in order to delineate clear roles that align with public expectations and address potential conflicts of interest. Such change seems long overdue. To ignore the need for such changes seems not only unfair, but (nowadays) dangerous.

94. *Id.*

95. *Id.*

96. *Id.*