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The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury

Niki Kuckes
Roger Williams University School of Law

ARTICLE

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NIKI KUCKES*

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* Associate Professor of Law, Roger Williams University School of Law. B.A., Cornell University; J.D., Yale Law School. In writing this Article, I benefited from the helpful comments offered by the Roger Williams Law School faculty, which helped refine my conceptual thesis about the federal grand jury. I am particularly appreciative for the thoughtful insights, suggestions, and ideas provided to me over a several-year period by Ian Ayres, Kevin Clermont, Steve Clymer, Andrew Horwitz, Peter Margulies, Ellen Saideman, and David Zlotnick. Thanks also to my diligent research assistant, Jason Van Volkenburgh.

INTRODUCTION

The constitutional function served by grand jury indictment is remarkably unsettled, particularly considering that the grand jury predates the Constitution as a fixture in the federal criminal process.[1] As a constitutional matter, of course, the approval of a grand jury made up of local citizens is required to initiate any serious federal criminal case.[2] The function served by having citizens review criminal charges, however, is not so clear. Within the adversary process, the federal grand jury occupies an uneasy middle ground, operating in the zone between prosecutorial and judicial action. Unlike the petit jury, whose role at trial clearly falls within the impartial and passive function of judging,[3] the grand jury's role in reviewing criminal charges is hard to define. Indictment could be thought of as part of the prosecutorial function of zealously asserting criminal charges, or it could be seen instead as part of the judicial function of neutrally reviewing the evidence to determine if criminal charges are warranted. These are very different functions, which logically should lead to very different grand jury rules. Though it might seem reasonable to assume that the courts have long since agreed on the grand jury's role, this is true only on the most superficial level.

The problem is that the Supreme Court has not chosen a single vision to

1. Costello v. United States, 350 U.S. 359, 362 (1956) ("The grand jury is an English institution, brought to this country by the early colonists and incorporated in the Constitution by the Founders.").

2. *See* U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . .").

3. *See, e.g.*, Gray v. Mississippi, 481 U.S. 648, 668 (1987) (noting the defendant's right at trial to "an impartial adjudicator, be it judge or jury").

explain the constitutional function of grand jury indictment. Instead, it has repeated historic lore that the indicting grand jury acts in the dual roles of a "body of accusers" pursuing criminal wrongdoing, and a "protector of citizens" guarding against overreaching in the criminal process.[4] In the classic paradigm, the grand jury is a "sword and a shield," which at once pursues and protects citizens.[5] These are ambitious and contradictory tasks. They seem to combine in one body the two responsibilities that Professor Packer famously characterized as the perpetually competing goals of the American criminal system—our desire for effective law enforcement and our competing desire for protection of individual rights.[6] Not surprisingly, the grand jury has been accused of suffering from "institutional schizophrenia" by virtue of its dual roles.[7]

The Supreme Court has not undertaken the ambitious task of integrating these dual roles into a single model of grand jury indictment. Instead, it has developed separate lines of authority that characterize grand jury indictment quite differently, depending on the context. For some purposes, the Court describes the grand jury's indictment function as judicial, but for others, it treats the same function as prosecutorial. This mixed approach results in contradictory doctrines. The Court allows an indictment to strip defendants of judicial hearing rights on the ground that grand jury approval of criminal charges is equivalent to judicial review of those charges.[8] At the same time, however, the Court refuses to attach to grand jury proceedings protections normally associated with

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4. United States v. Calandra, 414 U.S. 338, 343 (1974); *see also, e.g.*, United States v. Williams, 504 U.S. 36, 51 (1992) (noting the grand jury's "twin historical responsibilities, i.e., bringing to trial those who may be justly accused and shielding the innocent from unfounded accusation and prosecution"); United States v. Sells Eng'g, Inc., 463 U.S. 418, 424 (1983) (noting that the grand jury's dual function is to "ferret out crimes deserving of prosecution" and to "screen out charges not warranting prosecution"); United States v. Dionisio, 410 U.S. 1, 16–17 (1973) (stating that the grand jury's "mission is to clear the innocent, no less than to bring to trial those who may be guilty"). The grand jury's dual goals of pursuing the guilty and protecting the innocent are no less than the aim of the criminal law itself. *See* Berger v. United States, 295 U.S. 78, 88 (1935) (discussing the "twofold aim" of the law "that guilt shall not escape or innocence suffer").

5. *See, e.g.*, United States v. Cox, 342 F.2d 167, 186 n.1 (5th Cir. 1965) (Wisdom, J., concurring) ("'The Grand Jury is both a sword and a shield—a sword because it is the terror of criminals, a shield because it is the protection of the innocent against unjust prosecution.'" (quoting SECTION OF JUDICIAL ADMIN., AM. BAR ASS'N, FEDERAL GRAND JURY HANDBOOK 8 (1959))).

6. *See* Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 5 (1964) (identifying "two separate value systems that compete for attention in the operation of the criminal process"). The grand jury's dual tasks of accusing and protecting closely mirror Professor Packer's competing models: the crime control model, which considers that "repression of criminal conduct is by far the most important function to be served by the criminal process," *id.* at 9; and the due process model, the goal of which is "preventing official oppression of the individual," *id.* at 16.

7. *See* Hawkins v. Superior Court, 586 P.2d 916, 920 (Cal. 1978) (noting that, in one of its two roles, the grand jury is a law enforcement agency that participates in the "prosecutorial task of discovering criminal conduct and the perpetrators thereof; putting on its other hat, the grand jury is expected to be a neutral body, protective of the individual against prosecutorial abuses. It seems self-evident that to the extent it succeeds at one function it must fail at the other.").

8. *See, e.g.*, Gerstein v. Pugh, 420 U.S. 103, 118 n.19 (1975) (noting that grand jury indictment substitutes for judicial review of probable cause); FED. R. CRIM. P. 5.1(a)(2) (mandating that indicted defendants lose the right to preliminary hearing before a magistrate judge).

the judicial process, on the premise that indictment is a prosecutorial rather than judicial function.[9] Thus, while the federal rules ostensibly provide for an adversary hearing at which a judge examines the prosecutor's evidence, a defendant charged by the grand jury receives instead a secret, one-sided review process administered by the prosecutor.[10] The ironic result is that the defendant charged without grand jury review has more extensive procedural rights than a defendant granted his supposedly essential constitutional "right" to be charged by the grand jury. These odd results are possible because Supreme Court doctrine rationalizes that the federal grand jury is both (or perhaps, alternatively) judicial and prosecutorial—roles normally incompatible within the adversary process.[11]

Perhaps it should not be surprising, therefore, that federal judges are in heated disagreement over a question one might reasonably assume had long been settled: how to explain to grand jurors when to charge a crime.[12] The conceptual ambiguity inherent in the Supreme Court's mixed grand jury model lies at the heart of an ongoing debate about how to explain to grand jurors their constitutional role. This debate centers on the general instructions to grand jurors, known as the Model Charge, delivered by a judge when a new grand jury panel is convened.[13] The Model Charge is closer to a history lecture or welcome speech than to the jury "instructions" typically litigated in the trial context,[14] yet its wording has sparked serious disagreement among federal judges. The issue centers directly on the problematic, yet very basic, question of what grand jurors are actually supposed to decide when they vote to indict.

On one side, some judges argue that the grand jury's role in considering an indictment is limited to reviewing the prosecutor's evidence for probable cause

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9. *See, e.g.*, *Williams*, 504 U.S. at 51 (noting that grand jury is "accusatory" rather than "adjudicatory," and thus hears only the government's evidence); Costello v. United States, 350 U.S. 359, 363 (1956) (holding that a grand jury indictment, like a prosecutor's charge, is enough to call for trial, even if based on hearsay evidence).

10. In the federal system, although the rules provide for an adversary hearing before a magistrate judge, an indicted defendant has no such right. FED. R. CRIM. P. 5.1(a)(2); *cf., e.g.*, *Hawkins*, 586 P.2d at 921 (stating that "a defendant charged by indictment is seriously disadvantaged" compared to a defendant charged by the prosecutor and granted a preliminary examination).

11. *See infra* note 37.

12. *See* United States v. Navarro-Vargas (*Navarro-Vargas II*), 408 F.3d 1184 (9th Cir. 2005) (en banc), *cert. denied*, 126 S. Ct. 736 (2005); United States v. Navarro-Vargas (*Navarro-Vargas I*), 367 F.3d 896 (9th Cir.), *vacated*, 382 F.3d 920 (9th Cir. 2004) (granting hearing en banc); United States v. Marcucci, 299 F.3d 1156 (9th Cir. 2002).

13. Introductory instructions for the federal grand jury were standardized by the Judicial Conference's 1978 publication of its "Model Grand Jury Charge," which is widely used by the federal courts. *See* 1 SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 4:5 (2d ed. 2002) (reprinting Model Charge); *see also id.* § 4:3 (noting that in federal practice, "the court ordinarily gives the [Model Charge] instructions to the grand jurors at the beginning of their term").

14. *See id.* § 4:3 (stating that the Model Charge "deals with general matters such as the history of the grand jury, the role of the grand jury in the criminal justice process, and the grand jury's relationship with the court and the United States Attorney's office"). The Model Charge is distinct from any case-specific instructions that may be given to grand jurors by the prosecutor in seeking a particular indictment.

that the defendant committed the crime to be charged.[15] This model suggests a limited role of grand jury action, akin to the role of a magistrate judge who reviews the prosecutor's evidence at a preliminary hearing—a judicial model of grand jury indictment. On the other side, some judges argue with equal force that the grand jury has the far wider decisional scope of a federal prosecutor.[16] In this competing model, the grand jury may properly consider not only the sufficiency of the evidence, but also the wisdom of the prosecution, community priorities, the relative culpability of the accused, and a host of other discretionary factors—a prosecutorial model.[17] These are very different conceptual frameworks.

Underlying the entire debate is an intriguing divergence of views. In the judicial model, the grand jury's role is narrowly cabined, and any injection of community values in refusing to indict amounts to "jury nullification,"[18] a pejorative term applied to a trial jury that refuses to convict in the face of clear evidence of guilt.[19] In the prosecutorial model, when the grand jury refuses to indict despite the sufficiency of the evidence, it performs a critical discretionary role by injecting community values into federal prosecutions, thereby fulfilling the grand jury's essential constitutional role.[20] The very virtue of the grand jury process perceived by the prosecutorial model—the democratization of the

15. This is the position taken by the Model Charge, which all three majority opinions upheld as constitutional. *See Navarro-Vargas II*, 408 F.3d at 1186; *Navarro-Vargas I*, 367 F.3d at 898; *Marcucci*, 299 F.3d at 1164.

16. This position is taken by a large group of dissenting judges, led by Ninth Circuit Judges Michael Daly Hawkins and Alex Kozinski (Clinton and Reagan appointees, respectively), who would hold the Model Charge unconstitutional. *See Navarro-Vargas II*, 408 F.3d at 1209–17 (Hawkins, J., joined by Pregerson, Wardlaw, W. Fletcher, & Berzon, JJ., dissenting); *Navarro-Vargas I*, 367 F.3d at 899–903 (Kozinski, J., dissenting in part); *Marcucci*, 299 F.3d at 1166–73 (Hawkins, J., dissenting).

17. *See, e.g.*, U.S. DEP'T OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION § 9-27.220 (2000), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.220 (discussing discretionary grounds for commencing or declining prosecution).

18. *See Navarro-Vargas II*, 408 F.3d at 1203 & n.25 (discussing dangers of "jury nullification," of "invitations to lawlessness," and of jury "caprice").

19. While jury nullification has frequently been the subject of debate, controversy reached a peak when Professor Paul Butler suggested that African-American trial jurors should "nullify" certain prosecutions of African-American defendants by refusing to convict despite evidence of guilt. *See* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995). Not surprisingly, this proposal provoked significant criticism, as has the doctrine of jury nullification more generally. *See generally* Kaimipono David Wenger & David A. Hoffman, *Nullificatory Juries*, 2003 WIS. L. REV. 1115, 1116 n.10 (gathering jury nullification literature). In the trial context, however, jury nullification is criticized as the trial jury's invalid exercise of a power it possesses as a practical matter. *See, e.g.*, Steckler v. United States, 7 F.2d 59, 60 (2d Cir. 1925) (noting that a trial jury's acquittal in the face of sufficient evidence reflects "their assumption of a power which they had no right to exercise, but to which they were disposed through lenity"). As this Article argues below, however, such criticisms do not readily apply to grand juries, which have the valid power to decline prosecution even on meritorious criminal charges. *See infra* note 92.

20. *See Navarro-Vargas II*, 408 F.3d at 1217 (Hawkins, J., dissenting) ("[The grand jury plays a key role in dispensing] justice-guided discretion and compassion-based mercy."); *Navarro-Vargas I*, 367 F.3d at 902 (Kozinski, J., dissenting in part) ("[The grand jury] interposes the local community's values on prosecutorial decisions.").

federal criminal charging process through meaningful citizen participation—is perceived by the judicial model as its primary vice. Both sides can readily find support for their views in Supreme Court doctrine, reflecting the jumbled body of grand jury precedents.

That the question of the federal grand jury's basic conceptual role should remain unsettled is remarkable. That there should be heated debate over grand jury instructions used with little question for twenty-five years is no less so. This Article uses this debate to illuminate and suggest a resolution to the conceptual problem of the grand jury's role. Rejecting the Court's current mixed model, this Article proposes to recognize expressly that the federal grand jury serves as a democratic force within the prosecution function—what this Article terms a "democratic prosecutor"[21]—rather than playing roles both judicial and prosecutorial in nature. This simple shift would provide a critical conceptual adjustment from which other important rules would flow, resulting in a more meaningful and rational pretrial process. By recognizing that the proper wording of the grand jury instructions cannot be determined without a deeper understanding of the grand jury's role in the criminal process, it is possible to reach a very basic resolution that rationalizes a confusing body of Supreme Court doctrine.

Part I places the Model Charge debate in its larger context by introducing the basic doctrinal ambiguity revealed by recent litigation over the standard federal grand jury instructions. It argues that this debate is simply one illustration of the Supreme Court's problematic conceptual approach, in which grand jury indictment is alternatively defined as judicial for certain purposes and prosecutorial for others. This inconsistency creates a dilemma because it fails to provide a clear conceptual approach to grand jury indictment, as needed to guide judicial decisionmaking. Part II finds a solution in the insightful decisions of the dissenters in the Model Charge litigation. It argues that viewing grand jury indictment as a democratic decision within the prosecutorial function provides a better way to understand the classic "sword-shield" paradigm, and best explains the grand jury's constitutional role. Finally, Part III explores the implications of viewing the grand jury as a "democratic prosecutor." While this approach

21. In using the term "democratic," this Article refers to direct citizen participation in the criminal justice process (here, by having grand jurors, selected at random from the community, review criminal charges). One could also view charging by federal prosecutors as "democratic" in the sense that prosecutors are ultimately accountable to a federal executive official appointed by the President, who is elected by the citizenry (indirectly, at least). *See, e.g.*, *Navarro-Vargas II*, 408 F.3d at 1203 (noting that the President or Attorney General is "answerable for his judgment" not to enforce the laws). The virtue of grand jury indictment traditionally emphasized by the courts, however, has been the benefit of allowing a direct citizen voice (however imperfect) in the criminal charging process. *See, e.g.*, Wood v. Georgia, 370 U.S. 375, 391 (1962) ("The administration of the law is not the problem of the judge or prosecuting attorney alone, but necessitates the active cooperation of an enlightened public."); Stirone v. United States, 361 U.S. 212, 218 (1960) ("The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge."). The term "democratic" is used in this Article in this sense—to denote decisionmaking by citizens, rather than by government officials.

resonates with the majority of the Supreme Court's grand jury rules, it requires abandoning the questionable premise that the grand jury can act at once in prosecutorial and judicial capacities.

I. THE CONCEPTUAL DILEMMA: IS THE FEDERAL GRAND JURY PROSECUTORIAL OR JUDICIAL?

The debate over the wording of the Model Charge highlights a fundamental problem in grand jury doctrine: The Supreme Court has not clearly explained the conceptual function served by the grand jury when it indicts. Instead, the Court has endorsed competing lines of authority, one of which treats the grand jury's indictment decision as prosecutorial in nature, while the other treats indictment as judicial. This makes it hard to resolve even elementary grand jury disputes—such as what to tell grand jurors about indictment. The real issue is not simply what the grand jury should be *told* in its orientation lecture but what the grand jury may *do*—namely, the powers and place of the grand jury in the federal system. The grand jury instructions provide a symbolic hook for a deeper theoretical issue.

We begin below with a discussion of the federal grand jury's confusing mix of judicial and prosecutorial features, before laying out the Court's competing lines of authority that frame the conceptual dilemma of grand jury indictment.

A. THE GRAND JURY'S CONTRADICTORY COMBINATION OF JUDICIAL AND PROSECUTORIAL POWERS

The grand jury is a legacy—some might say a relic—of English history that long predates the adoption of the Constitution.[22] The grand jury, as a preconstitutional institution, carries with it a certain historical ambiguity.[23] Since the very inception of the grand jury—or more specifically, since grand and petit juries were assigned separate functions within the trial process in thirteenth century

22. *See* 1 BEALE ET AL., *supra* note 13, § 1:1 ("The American grand jury is a direct descendant of an English institution whose history can be traced for more than 900 years.").

23. From the historic roots of the British system that created the grand jury, for example, also arose the tradition that grand jury indictment was followed by a trial by ordeal, a method of adjudicating guilt fundamentally alien to modern sensibilities:

> The body of the country are the accusers. Their accusation is practically equivalent to a conviction, subject to the chance of a favorable termination of the ordeal by water. If the ordeal fails, the accused person loses his foot and his hand. If it succeeds, he is nevertheless to be banished. Accusation, therefore, was equivalent to banishment, at least.
>
> When we add to this that the primitive grand jury heard no witnesses in support of the truth of the charges to be preferred, but . . . indicted upon common fame and general suspicion, we shall be ready to acknowledge that it is better not to go too far back into antiquity for the best securities for our "ancient liberties."

Hurtado v. California, 110 U.S. 516, 530 (1884) (internal quotation marks and citation omitted) (holding that grand jury indictment is not an essential element of due process applicable to the states).

England—doctrinal conflict has persisted over the grand jury's role.[24] This conceptual problem carries over into modern grand jury doctrine.

The grand jury's practical role is well established (one might even say entrenched). As a constitutional matter, the grand jury must approve all serious criminal charges to be asserted in the federal courts.[25] To inform its charging decision, the grand jury is also granted considerable investigative powers.[26] The outcome of the grand jury's review process, assuming it approves the charges proposed by the prosecutor, is an "indictment," a body of criminal charges issued by the grand jury that initiates the judicial process and frames the accusation upon which the criminal case proceeds.[27] These facts are clear. What is not clear, however, is how the grand jury's role in indicting relates, conceptually, to the roles of two other key players in the criminal justice system: the prosecutor and the judge.

Courts have struggled to make sense of the grand jury's conceptual role because it seems to combine contradictory qualities of prosecutorial and judicial power. The grand jury's powers emanate from the court—it is summoned and instructed by the court,[28] and it may be discharged at the pleasure of the court.[29] It borrows the court's subpoena power to conduct its investigations and is dependent on the court to enforce its subpoenas.[30] Its indictments are returned to the court and mark the beginning of the court's legal process.[31] Yet at the same time, like a prosecutor, the grand jury investigates and charges. Its operations are largely controlled by the prosecutor, who determines the matters the grand jury will investigate, the evidence it will seek, and the charges it will

24. In Barbara Shapiro's thorough and insightful work, she lays out the perennial debates that have surrounded the grand jury's decisionmaking process, both in England and in America, since the thirteenth-century split between the grand jury, which charges crimes, and the trial jury, which adjudicates them. *See* BARBARA J. SHAPIRO, *The Grand Jury and the Instability of Legal Doctrine*, *in* "BEYOND REASONABLE DOUBT" AND "PROBABLE CAUSE" (1991). She posits a recurrent historic struggle between those who would enhance the grand jury's operation by instilling "judicial" rules, which leads to the criticism that the grand jury duplicates the functions of the trial jury, and those who would treat the grand jury as a minimal "accusatory" threshold, which leads to the criticism that the grand jury cannot fulfill its duty to protect individual rights. *See id.* This Article argues that the very same dynamic is still at play in modern Supreme Court grand jury doctrine.

25. *See* U.S. CONST. amend. V. The grand jury clause has been read to require indictment for all federal criminal charges punishable by death or a prison term over a year. *See* FED. R. CRIM. P. 7(a).

26. *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665, 688 (1972) ("Because [the grand jury's] task is to inquire into the existence of possible criminal conduct and to return only well-founded indictments, its investigative powers are necessarily broad.").

27. *See, e.g.*, LESTER BERNHARDT ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL § 224 (1947) ("An indictment is a formal accusation in writing made by a grand jury under oath and presented to a competent court, charging a person with a crime and stating its nature.").

28. *See* FED. R. CRIM. P. 6(a)(1).

29. *See id.* 6(g).

30. The grand jury has no independent subpoena power, but issues its subpoenas in the name of the court, which are subject to judicial enforcement. *See id.* 17(c); United States v. Calandra, 414 U.S. 338, 346 n.4 (1974).

31. FED. R. CIV. P. 6(f) (indictments are returned to the court); Kirby v. Illinois, 406 U.S. 682, 689 (1972) (noting that grand jury indictment marks the "initiation of judicial criminal proceedings").

consider.[32] To the extent grand jurors have questions about their role, the prosecutor serves as their legal adviser.[33]

Equally important, the function played by grand jury indictment is ambiguous because the grand jury's charging role can be viewed as either prosecutorial or judicial in nature. When the grand jury indicts, this can either be viewed as asserting a criminal charge, in the manner of a prosecutor, or reviewing a criminal charge, in the manner of a judge. In the first vision, the grand jury plays a zealous and active law enforcement role comparable to that of the prosecutor as a party to criminal litigation. But in the competing vision, the grand jury plays a neutral and passive role comparable to the judge as an umpire. These are very different ways to think of the grand jury's indictment role. The classic characterization of the grand jury as a "sword and a shield"[34] fails to explain which of these visions is correct because it can readily be understood to encompass both prosecutorial and judicial elements.[35]

If read in this manner, however, grand jury indictment presents yet another conceptual problem by combining judicial and prosecutorial roles that are normally kept separate within the adversary process.[36] A basic premise of the American justice system is that the prosecutorial and judicial roles in a case are incompatible functions.[37] Commentators have observed the contradiction inher-

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32. *See, e.g.*, United States v. Pabian, 704 F.2d 1533, 1536 (11th Cir. 1983) ("The prosecutor initiates the grand jury procedure, draws up the indictment, decides which witnesses to call and examines those witnesses who do appear."); United States v. Ciambrone, 601 F.2d 616, 622 (2d Cir. 1979) (noting that the grand jury is dependent on the United States Attorney to "present to it such evidence as it needs for its performance of its function and to furnish it with controlling legal principles"); United States v. Chanen, 549 F.2d 1306, 1312 (9th Cir. 1977) ("The prosecutor conducts the examination of the witnesses and otherwise determines what evidence to present before the grand jury.").

33. *See, e.g.*, United States v. Sells Eng'g, Inc., 463 U.S. 418, 430 (1983) (noting that the prosecutor "advises the lay jury on the applicable law").

34. *See* 1 BEALE ET AL., *supra* note 13, § 1:7 ("A colorful metaphor is used to describe [the grand jury's] dual functions: the grand jury acts as both shield and sword.").

35. Justice Frankfurter, among others, observed the danger of using a metaphoric phrase as shorthand for a legal concept because it can mask the courts' failure clearly to define the concept's meaning. He observed that a phrase may begin life as a "literary expression," but "its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, undiscriminatingly used to express different and sometimes contradictory ideas." Tiller v. Atl. Coastline R.R., 318 U.S. 54, 68 (1943) (Frankfurter, J., concurring); *see also, e.g.*, Michael Boudin, *Antitrust Doctrine and the Sway of Metaphor*, 75 GEO. L.J. 395, 407 (1986) ("Even where the metaphor is understood as a comparison, questions about which similarities are being asserted—and what their significance is—are often left to the reader's imagination to answer."); David M. Zlotnick, *Battered Women & Justice Scalia*, 41 ARIZ. L. REV. 847, 859 (1999) ("[M]etaphors allow judges to create new law without explicit acknowledgment or setting precise boundaries.").

36. *See, e.g.*, Hawkins v. Superior Court, 586 P.2d 916, 920 (Cal. 1978) ("[The grand jury] is expected to serve two distinct and largely inconsistent functions—accuser and impartial factfinder.").

37. *See, e.g.*, Mayberry v. Pennsylvania, 400 U.S. 455, 465 (1971) (prosecuting judges may not serve as trial judges over their own charges); United States v. Morton Salt Co., 338 U.S. 632, 640–41 (1950) ("[The judicial] function is disinterested and dispassionate adjudication, unmixed with any concern as to the success of either prosecution or defense."); Tumey v. Ohio, 273 U.S. 510, 534 (1927) (holding that due process is violated when the judge serves in "inconsistent positions, one partisan and

ent in assigning one body both the duty of making criminal accusations and of reviewing the merit of its own accusations.[38] Not surprisingly, this complex intertwining of judicial and prosecutorial attributes has made the grand jury a conceptual puzzle for the courts.

For many years, for example, the courts could not determine where to place the grand jury within the tripartite governmental framework. Many courts saw the grand jury as an "arm of the judicial branch" created, administered, and supervised by the courts[39]—a definition suggested by a number of early Supreme Court decisions.[40] Other courts saw it as part of the Executive Branch because of the prosecutorial nature of its core functions and the reality that the grand jury is controlled and dominated by the prosecutor.[41] Yet others saw the grand jury as belonging in neither branch, but rather reflecting a "constitutional fixture in its own right" not assigned to any branch of government.[42] The fight was an important one because it directly addressed the degree to which the courts could regulate grand jury proceedings.[43] The Supreme Court finally finessed this issue in *United States v. Williams* when it decided that the grand jury is *neither* in the Executive *nor* the Judicial Branches of government, but in fact "belongs to no branch of the institutional government."[44]

But *Williams* left open as many questions as it answered. Even if we put the grand jury in its "own" branch of government—whatever that may mean—this

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the other judicial"); *cf.* United States v. Cox, 342 F.2d 167, 192 (5th Cir. 1965) (en banc) (Wisdom, J., concurring) ("The functions of prosecutor and judge are incompatible.").

38. *See, e.g.*, Peter Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 463, 570 (1980) ("We simply cannot expect the same grand jurors who have spent months ferreting out criminal activity to suddenly shift roles and exercise their protective function.").

39. *See, e.g.*, Standley v. U.S. Dep't of Justice, 835 F.2d 216, 218 (9th Cir. 1987) ("A grand jury is an arm of the judicial branch of government."); Nixon v. Sirica, 487 F.2d 700, 788–89 (D.C. Cir. 1973) (Wilkey, J., dissenting) ("When the grand jury functions, it functions within the recognized tripartite division of powers as an arm of the Judicial Branch."); Falter v. United States, 23 F.2d 420, 425 (2d Cir. 1928) ("[A] grand jury is neither an officer nor an agent of the United States, but a part of the court.").

40. *See, e.g.*, Levine v. United States, 362 U.S. 610, 617 (1960) ("[The] grand jury is an arm of the court."); Brown v. United States, 359 U.S. 41, 49 (1959) ("[The grand jury is] an appendage of the court."); Blair v. United States, 250 U.S. 273, 280 (1919) ("[The grand jury powers are] incidents of the judicial power of the United States.").

41. *See, e.g.*, *In re* Grand Jury Proceedings, 486 F.2d 85, 90 (3d Cir. 1973) (stating that grand juries are "for all practical purposes an investigative and prosecutorial arm of the executive branch of government").

42. *See, e.g.*, United States v. Eisenberg, 711 F.2d 959, 964 (11th Cir. 1983) ("The grand jury is a unique body and is not a part of either the executive or judicial branch."); United States v. Udziela, 671 F.2d 995, 999 (7th Cir. 1982) ("[T]he grand jury is a constitutional fixture in its own right, belonging to neither the executive nor the judicial branch . . . ."); United States v. Leverage Funding Sys. Inc., 637 F.2d 645, 649 (9th Cir. 1980) ("The federal grand jury is an independent institution not relegated to a position within any of the three branches of government.").

43. *See, e.g.*, *In re* Grand Jury Subpoena to Cent. States, 225 F. Supp. 923, 925 (N.D. Ill. 1964) (stating that, unlike the federal prosecutor's office, the "grand jury, being part and parcel of the judicial branch of government, is subject to a supervisory power in the courts").

44. United States v. Williams, 504 U.S. 36, 47 (1992) ("[The grand jury] is a constitutional fixture in its own right.") (internal quotation marks and citations omitted).

does not explain the function it serves within the criminal process. The *Williams* Court refused to allow courts to impose trial-type rules within the grand jury's indictment process, on the ground that it is an "accusatory" rather than a judicial proceeding.[45] But in the same breath, the Court perpetuated the classic paradigm that, by indicting, the grand jurors are not merely accusing the defendant but simultaneously "shielding the innocent from unfounded accusation and prosecution."[46] Whether the grand jury is reviewing an accusation, or making an accusation, remains unclear after *Williams* (and if the grand jury is reviewing the accusation in some manner other than the neutral role of a judge, that role also remains unclear). While the Supreme Court in *Williams* placed the grand jury firmly outside both the Judicial and Executive branches, it perpetuated the idea that the grand jury shares "twin" functions of a sort normally deemed incompatible in the adversary system.[47]

The Model Charge litigation is the natural heir to the *Williams* decision because it perpetuates and reflects this confusion over the grand jury's function. Indeed, the Model Charge litigation captures the essence of this conceptual problem because the grand jury cannot possibly be instructed without making sense of what it means to say that the grand jury both "accuses" and "protects." Below, we turn to the competing lines of Supreme Court authority that frame such grand jury disputes.

B. THE SUPREME COURT'S MIXED CONCEPTUAL APPROACH TO GRAND JURY INDICTMENT

The broader problem, illustrated by the Model Charge debate, is that within the Supreme Court's decisions lie contradictory themes about the nature of grand jury action that suggest very different answers to any given question about the grand jury's powers. Frequently, the grand jury's role is described as "judicial," at other times as "accusatorial," and yet elsewhere as "inquisitorial"—a role that departs entirely from the adversarial model.[48] Each of these labels carries important consequences for the powers of the grand jury and the weight to be given its decisions. These divergent labels reflect underlying debates about what the rules are and should be with respect to grand jury proceedings.

Before proceeding further into the premise of this Article—the dichotomy

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45. *Id.* at 51 (concluding that requiring prosecutors to make balanced indictment presentations that include both incriminating and exculpatory evidence would transform the grand jury "from an accusatory to an adjudicatory body").

46. *Id.*

47. *See, e.g.*, Hawkins v. Superior Court, 586 P.2d 916, 920 (Cal. 1978) ("Almost all observers of the system conclude that this conflict of roles has prevented the grand jury from being objective, generally to the detriment of indicted defendants.").

48. *Compare, e.g.*, Hale v. Henkel, 201 U.S. 43, 66 (1906) (explaining that the grand jury conducts a "judicial inquiry"), *with Williams*, 504 U.S. at 51 (declaring that the grand jury's role is "accusatory" not "adjudicatory"), *and* Blair v. United States, 250 U.S. 273, 282 (1919) (stating that the grand jury is a "grand inquest").

between the Supreme Court's competing prosecutorial and judicial conceptions of the grand jury—it is useful to put to rest one model of grand jury action that could potentially provide a rationale for grand jury indictment entirely outside the American adversary model. The Court has regularly suggested that the grand jury is an "inquisitorial" body.[49] This suggests a potential conception of grand jury indictment that departs entirely from the premises of the adversarial system.[50] It is worth exploring because, if feasible, such a conceptual vision would eliminate the need to label the grand jury's role as *either* judicial *or* prosecutorial.

Analogizing the grand jury to the role of a judicial official in an inquisitorial system could rationalize assigning grand jurors both the prosecutorial responsibility to investigate and frame criminal charges and the judicial responsibility to ensure that the criminal charges are fair and appropriate. In contrast to the adversarial premise that the judicial and prosecutorial functions should be separated, the inquisitorial model contemplates an active judicial officer who wears "many hats."[51] In the inquisitorial tradition, one actor (usually a judicial official) takes an active role in the pretrial criminal process in investigating, reviewing the sufficiency of the evidence, and framing the charges, a combination of judicial and prosecutorial roles that could potentially serve as a valid conceptual model for the grand jury's mixed indictment function.[52]

This is not the sense, however, in which the Court has referred to the grand

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49. *See, e.g.*, United States v. Calandra, 414 U.S. 338, 343 (1974) (the grand jury is "a grand inquest, a body with powers of investigation and inquisition"); United States v. Dionisio, 410 U.S. 1, 13 n.12 (1973) (same); Branzburg v. Hayes, 408 U.S. 665, 688 (1972) (same); *Blair*, 250 U.S. at 282 (same).

50. *See* 1 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 1.4(c) (2d ed. 1999) (noting that the adversary character of the American criminal justice system stands "in sharp contrast to the 'inquisitorial' or 'nonadversary' system that prevails in continental Europe").

51. *See* Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 COLUM. L. REV. 1289, 1303–04 & n.68 (1997) (discussing how in inquisitorial processes, the decisionmaker may wear "three hats," serving as investigator, advocate, and judge); *see also, e.g.*, McNeil v. Wisconsin, 501 U.S. 171, 181 n.2 (1991) (noting that in an inquisitorial system, a judge "conducts the factual and legal investigation himself"); BERNARD SCHWARTZ, ADMINISTRATIVE LAW §§ 5.27–.29, at 285 (3d ed. 1991) ("The outstanding contrast of inquisitorial procedure as compared with the adversary type familiar to the common lawyer is the assumption by the judge of an active role.").

52. One could envision a two-stage system that combined a (truly) inquisitorial pretrial investigation with an adversarial trial process. It might look like this: (1) in the pretrial process, a judicial officer (or the grand jury acting as such) would actively direct a comprehensive and balanced pretrial investigation, with input from the prosecutor and the suspect, culminating in the magistrate's formulation of criminal charges; and (2) the trial process would follow, in the form of an adversary, party-driven trial before a neutral judge (or trial jury), much like our present trial system. Combining a truly inquisitorial pretrial stage with an adversary trial stage, however, would undoubtedly raise cries that the defendant had the unfair balance of advantage, both receiving the benefit from a balanced and open investigation, and the benefit of an accusatorial trial in which the government bears the burden. As others have observed, the American one-sided pretrial process, in which the prosecutor has a monopoly on the compulsory power to gather evidence during an investigation, can be seen as a counterbalance to the extensive accusatorial protections for the defendant that attach at trial, which require the prosecutor to shoulder the entire burden of proof. *See, e.g.*, 1 LAFAVE ET AL., *supra* note 50, § 1.4(d) ("Some argue that the accusatorial process [in which the government bears the burden of proof at trial] also seeks to

jury as "inquisitorial." The Supreme Court has never seen the indicting grand jury in this light, nor would it be likely to endorse a true inquisitorial model of grand jury decisionmaking. In an inquisitorial system, it is because the "inquisitor" is affirmatively charged to investigate fully *both* sides of the case that she is trusted to investigate, charge, and judge.[53] The grand jury lacks this balanced mission and active role.[54] The grand jury's mission is not to determine the truth by developing the evidence for the prosecution and for the defense, as in an inquisitorial investigation, but to gather evidence to help the prosecutor prepare her case for trial.[55] It is more accurate to say that the grand jury's prosecution-driven secret indictment process is "pre-adversary" than to call it "inquisitorial." The Court has simply defined the grand jury as "inquisitorial" in the narrower sense that the grand jury's broad power to open an investigation merely upon suspicion is to be distinguished from the court's evidence-gathering powers, which require a specific case or controversy.[56]

In fact, the "sword-shield" paradigm is not used to suggest an analogy entirely outside of the adversary system (as intriguing as this might be), but simply as a shorthand for the Court's version of grand jury history. The principal conceptual approach used by the Supreme Court to decide grand jury challenges is not a functional analysis of grand jury action, but a simplified historic description that rationalizes the Court's decisions as preserving the grand jury as it historically operated.[57] It is important to recognize that notwithstanding the Court's insistence that it is simply following "historic" practice, in fact, the Court is adopting a selective and iconic version of grand jury history that stands for a particular vision of the grand jury's role.

Grand jury decisions tend to begin with a ritualized recital of the grand jury's deep roots in Anglo-American history.[58] These historic discursions frequently

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respond to a governmental capacity to gather and preserve evidence that far exceeds the capacity of the defense.").

53. *See id.* § 1.4(c) (noting that a judicial officer who directs an inquisitorial investigation is responsible to "collect all relevant evidence (both incriminating and exculpatory)").

54. *See, e.g.*, United States v. Williams, 504 U.S. 36, 51 (1992) (discussing the fact that grand jury only hears prosecutor's evidence).

55. *See, e.g.*, 1 LAFAVE ET AL., *supra* note 50, § 1.4(c) n.94 (noting that in the American adversary system, in contrast to inquisitorial systems, "there is no judicial officer assigned to obtaining all available evidence, both incriminating and exculpatory").

56. *See, e.g.*, United States v. Morton Salt Co., 338 U.S. 632, 642 (1950) (contrasting the "judicial power" to get evidence, which requires a case or controversy, with the "power of inquisition," held by the grand jury, which may investigate merely on suspicion that the law is being violated); 1 LAFAVE ET AL., *supra* note 50, § 1.4(c) n.94 (stating that the Supreme Court's characterization of investigatory stage as "inquisitorial" flows from the government's ability to gather evidence "without first going before a magistrate and establishing its investigatory right in an adversary proceeding").

57. *See, e.g.*, Costello v. United States, 350 U.S. 359, 362 (1956) ("There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor.").

58. *See, e.g.*, *Williams*, 504 U.S. at 46 (describing the grand jury as "'[r]ooted in long centuries of Anglo-American history'" (quoting Hannah v. Larche, 363 U.S. 420, 490 (1960) (Frankfurter, J., concurring))); United States v. Mandujano, 425 U.S. 564, 571 (1976) ("The grand jury is an integral part of our constitutional heritage which was brought to this country with the common law."); United

combine, in one breath, the grand jury's historic role as a "shield" against arbitrary prosecutions, its broad inquisitional powers of investigation, its importance to law enforcement, and its dual responsibilities of accusing the guilty and protecting the innocent.[59] These discussions, however, contain very little analysis that could explain, in some meaningful way, how the grand jury is thought to accomplish these conflicting goals. Grand jury decisions are frequently grounded on what Justice Brennan criticized as a "talismanic invocation of the role of the grand jury in our constitutional system."[60] As he aptly suggested, a "more discriminating analysis" may be called for.[61]

The Court's "historic" approach is not a true history—which would reveal a far more nuanced and ambiguous grand jury tradition—but an underlying conceptual choice. As Barbara Shapiro has convincingly demonstrated, grand jury history in both the United States and England has been marked by recurrent competition between proponents of a vision of grand jury indictment as a meaningful judicial procedure that approximates a trial and proponents of a vision of grand jury indictment as a narrow accusatorial procedure that serves a minimal screening function.[62] The Supreme Court's modern grand jury decisions have clearly come down on the side of an accusatory model.[63] At the same time, however, the Court has refused, or has been unable, to disclaim a competing vision of grand jury indictment in which the grand jury's indictment process stands in for the pretrial screening of criminal charges by a judge.

This Article argues that the Court's superficially historical approach to grand jury indictment has served to mask the development of two inconsistent lines of authority—one that treats the grand jury's indictment decision as judicial, and another that treats the grand jury's indictment process as prosecutorial—each of which is used to justify different sets of rules with respect to the grand jury process. These competing models are laid out below before turning to the

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States v. Calandra, 414 U.S. 338, 342–43 (1974) ("The institution of the grand jury is deeply rooted in Anglo-American history.").

59. *See, e.g.*, *Williams*, 504 U.S. at 47–52 (emphasizing the grand jury's responsibilities of "bringing to trial those who may be justly accused and shielding the innocent from unfounded accusation and prosecution" and its broad power "to investigate criminal wrongdoing"); *Mandujano*, 425 U.S. at 571–73 (noting the grand jury's role as a "barrier to reckless or unfounded charges," its substantial investigative powers, its mission to "determine whether to make a presentment or return an indictment," and its law enforcement role); *Calandra*, 414 U.S. at 343 (noting the grand jury's "historic functions" as a "body of accusers," its "essential role" as a "protector of citizens against arbitrary and oppressive governmental action," its "powers of investigation and inquisition," and its "special role in insuring fair and effective law enforcement").

60. *Mandujano*, 425 U.S. at 590 (Brennan, J., concurring in the judgment); *id.* at 593–94 (objecting to the Court's refusal to require warnings of the right to remain silent when "a putative or *de facto* defendant is called to testify under judicial compulsion before a grand jury").

61. *Id.* at 590 (calling for a more "subtle and flexible mode of constitutional analysis").

62. *See* SHAPIRO, *supra* note 24, at 45 ("[The grand jury debate] veers between a two-trial position, in which both grand and petit jury do virtually the same thing, and an accusation position, in which the grand jury is a mere formal device for registering an accusation that triggers a trial.").

63. *See, e.g.*, *id.* at 109 (noting that the Supreme Court's decision in Costello v. United States, 350 U.S. 359 (1956), rested on a broad "vision of the grand jury as an accusatory body").

contradictions and uncertainty created by the Court's current mixed approach to grand jury analysis.

We begin with the judicial model, because this is the model reflected in the wording of the Model Charge.

1. The Judicial Model of Grand Jury Indictment

One way to explain what the grand jury is doing when it issues indictments is to compare the grand jury's function to the role a judge plays in the early stages of a criminal case. The classic analogy, relied upon in this line of cases, compares the grand jury's indictment decision to the review traditionally conducted by a judicial magistrate at a preliminary hearing to ensure that criminal charges are supported by evidence.[64] This analogy suggests a narrow role for the grand jury since a judge may not question the wisdom of a prosecution, but simply assesses its legal sufficiency.[65] This is the vision embodied in the Model Charge—the idea that the beginning and end of grand jury review is simply to decide whether the prosecutor's evidence demonstrates probable cause to believe the defendant committed the federal crimes alleged.[66] This posits a very limited role for grand jurors in the criminal charging process.

This way of understanding the grand jury's indictment function will be termed the "judicial model" of grand jury indictment. In the line of Supreme Court authorities endorsing a judicial model of indictment, two themes emerge. First, the cases suggest that the grand jury screens for improper criminal

64. *See, e.g.*, 1 BEALE ET AL., *supra* note 13, § 1:7 (noting that the grand jury's function in reviewing an indictment is to "determine whether there is sufficient evidentiary support to justify holding the accused for trial on each charge," a function "similar to that performed by a judicial officer at a preliminary hearing"); 1 LAFAVE ET AL., *supra* note 50, § 1.3(m) ("As in the case of a magistrate at the preliminary hearing, the primary function of the grand jury is to determine whether there is sufficient evidence to justify a trial on the charge sought by the prosecution."); Samuel Dash, *The Indicting Grand Jury: A Critical Stage?*, 10 AM. CRIM. L. REV. 807, 808 (1972) ("[T]he preliminary hearing and the indicting grand jury . . . perform the same function.").

65. *See, e.g.*, 4 LAFAVE ET AL., *supra* note 50, § 14.3(a) (noting that courts have rejected the idea that it would be permissible "for the magistrate to consider factors other than the technical sufficiency of the evidence," such as the likelihood of conviction at trial or "the availability of civil remedies that the magistrate views as more appropriate for resolving disputes of this type"); *see also, e.g.*, United States v. Snyder, 235 F.3d 42, 51 (1st Cir. 2000) ("[A] federal judge may not interfere with the government's prosecutorial decisions solely to vindicate his subjective view of the wisdom of a given enforcement strategy."); United States v. Various Articles of Merch., 230 F.3d 649, 654 (3d Cir. 2000) ("It is for the prosecutors, not the courts, to select those laws under which the Government brings actions.").

66. The Model Charge informs grand jurors that their "task" in indicting is to determine whether the government's evidence is sufficient to show "that there is probable cause to believe that the accused is guilty of the offense charged against him." *See* 1 BEALE ET AL., *supra* note 13, § 4:5. Part of this task, of course, is to reject indictments that are not supported by probable cause. *Id.* More problematically, however, the court also instructs grand jurors that "you should vote to indict" if the evidence is sufficiently strong to warrant the belief that the accused is "probably guilty" of the crime charged. *Id.* The narrow scope of the grand jury's indictment decision is reinforced by the court's further instruction that grand jurors "cannot judge the wisdom of the criminal laws enacted by Congress," nor should they be "concerned about punishment in the event of conviction." *Id.*

prosecutions by applying a legal standard.[67] In these cases, the grand jury's indictment decision is seen as a nondiscretionary legal determination: Either the evidence is sufficient to show probable cause that the defendant committed the offense, and the grand jurors should indict, or the evidence is insufficient, and the grand jurors should return a "no true bill"—but these are the only choices.[68] The grand jury's role in indicting, in this model, is to conduct a legal review, not to make discretionary enforcement decisions.

The second, and equally important, theme in the judicial model is that the grand jury's indictment is expressly treated as a *judicial* determination, rather than a mere criminal accusation. The judicial model sees no legally significant difference between the grand jury's indictment review and the neutral and independent determination of probable cause made by a judge at a pretrial hearing.[69] In this model, grand jury indictment commands the weight and import of a judicial pretrial decision, rather than the limited deference due to a prosecutor's partisan assessment of probable cause. This judicial analogy forms a clear theme in the Supreme Court's grand jury decisions.

At times, the Court has expressed this conceptual understanding by explicitly characterizing the grand jury's inquiry as "judicial."[70] At other times, without explicitly labeling the grand jury, the Court has articulated a vision of the grand jury's indictment process that involves reviewing the prosecutor's evidence for probable cause in the manner of a judicial magistrate.[71] Perhaps most striking,

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67. Professor Leipold argues that entrusting citizen grand jurors to make a "legal determination" is the primary flaw in the grand jury process. Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 304 (1995).

68. *See, e.g.*, Bracy v. United States, 435 U.S. 1301, 1302 (1978) (Rehnquist, J., denying stay) (noting that the grand jury's role in reviewing criminal charges against a defendant is "only to determine whether there is probable cause to believe them true, so as to require him to stand his trial"); United States v. Udziela, 671 F.2d 995, 1000 (7th Cir. 1982) (quoting *Bracy*'s statement that grand jury "only" determines probable cause); United States v. Sears, Roebuck & Co., 719 F.2d 1386, 1393 (9th Cir. 1981) (explaining that the grand jury "acts only to make a preliminary determination whether there is probable cause to believe [the defendant is] guilty of a crime"); United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1975) ("The role of the grand jury is restricted to a finding as to whether or not there is probable cause to believe that an offense has been committed.").

69. *See, e.g.*, Gannett Co. v. DePasquale, 443 U.S. 368, 395 n.* (1979) (Burger, C.J., concurring) (noting that the preliminary examination "is only a preliminary inquiry, whether there be sufficient ground to commit the prisoner for trial" and that "[t]he proceeding before the grand jury is precisely of the same nature") (citation and internal quotation marks omitted).

70. *See, e.g.*, Levine v. United States, 362 U.S. 610, 617 (1960) (grand jury proceedings constitute "a judicial inquiry"); Cobbledick v. United States, 309 U.S. 323, 327 (1940) ("The proceeding before a grand jury constitutes 'a judicial inquiry' of the most ancient lineage." (citation omitted)); Hale v. Henkel, 201 U.S. 43, 66 (1906) (grand jury proceeding is a "judicial inquiry").

71. *See, e.g.*, United States v. R. Enters. Inc., 498 U.S. 292, 297 (1991) (noting that the grand jury's function is to "ascertain whether probable cause exists"); United States v. Mechanik, 475 U.S. 66, 67 (1986) (discussing, in dictum, that a grand jury indictment determines "that there was probable cause to charge the defendants with the offenses"); Beavers v. Henkel, 194 U.S. 73, 84 (1904) ("[The grand] jury is a body known to the common law, to which is committed the duty of inquiring whether there be probable cause to believe the defendant guilty of the offense charged."). Interestingly, while the Court has often said that the grand jury determines probable cause, it is hard to find a clear articulation in Supreme Court precedents of the view that the grand jury *only* determines probable cause (lower court

however, is a line of authority discussed below in which the Court has held that the grand jury's indictment satisfies both constitutional and statutory requirements for "judicial" review of the basis for the government's charges.

The idea that a judge should screen the prosecutor's criminal charges at the outset of a criminal case to ensure that they have a valid factual basis is a premise fundamental to several important doctrines of criminal procedure.[72] While judicial screening of criminal charges is not constitutionally required as a matter of due process simply to justify the initiation of the criminal process,[73] judicial review is required by the Fourth Amendment to support certain pretrial measures, including the defendant's arrest and her detention in prison pending trial.[74] Equally important—in the federal system, as well as in most state systems—both statutes and rules recognize an institution known as a "preliminary examination," a judicial proceeding consciously designed to provide adversary testing of the merit of criminal charges at the outset of a criminal case.[75]

The logical implication of viewing the grand jury's indictment as "judicial" is that no judicial proceedings to review the government's evidence should be necessary following indictment. Courts reason that grand jury action "duplicates" evidentiary screening by the court, and that providing for two such

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precedents to this effect are noted *supra* note 68). The principle that the grand jury does *not* only determine probable cause is much more clearly articulated in Supreme Court precedents, although not reflected in the Model Charge. *See infra* note 89.

72. The grand jury's indictment process is viewed as one of a number of "screening" mechanisms in the criminal process designed to weed out improper accusations by reviewing the government's evidence. *See, e.g.*, 1 LAFAVE ET AL., *supra* note 50, § 1.4(f) ("The goal of minimizing the risk of erroneous accusations is advanced primarily through the various screening procedures of the criminal justice process.").

73. *See* Lem Woon v. Oregon, 229 U.S. 586, 590 (1913) (holding that due process does not require a preliminary judicial review as a predicate for instituting criminal charges).

74. *See, e.g.*, Gerstein v. Pugh, 420 U.S. 103, 126 (1975) (holding that "judicial determination" of probable cause is required to justify restraint of liberty pending trial); Coolidge v. New Hampshire, 403 U.S. 443, 449–53 (1971) (holding that the Fourth Amendment requires a "judicial" determination of probable cause to support issuance of arrest warrant and noting that the prosecutor's judgment will not suffice). While such proceedings may be conducted ex parte, the Court has given additional content to the requirement that probable cause be determined by the "neutral and detached magistrate" by insisting that the government provide the magistrate with sufficient information to allow her to make an independent judgment. *See* Giordenello v. United States, 357 U.S. 480, 485–87 (1958) (stating that the magistrate must be able to "judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause").

75. *See* 18 U.S.C. § 3060(a) (2000); FED. R. CRIM. P. 5(c) (providing for a preliminary examination to determine "whether there is probable cause to believe that an offense has been committed and that the arrested person has committed it"). *See generally* 4 LAFAVE ET AL., *supra* note 50, § 14.2(b) ("[F]ederal law has for many years granted to the felony defendant a right to a preliminary hearing."). While far less formal than a trial, in its modern incarnation, a preliminary examination is a judicial proceeding attended by a number of trial-type procedural rights, such as the right to counsel, the right to call witnesses, the right to cross-examine the government's witnesses, the right to a neutral decision maker, and the right to appeal. *See* 1 CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 85 (3d ed. 1999) (discussing procedural rights at preliminary examination); *see also, e.g.*, FED. R. CRIM. P. 5.1 (describing procedure).

reviews would be wasteful and repetitive.[76] This Article posits that the premise of duplication is false and that grand jury indictment and the preliminary hearing are not substitutes, but serve entirely different functions (one prosecutorial, the other judicial). Under the Court's current model, however, the doctrine of duplication is a powerful and widely accepted premise that fundamentally shapes the criminal pretrial process. Consistent with this premise, grand jury indictment eliminates the defendant's rights to pretrial judicial review of the basis for the government's charges.

Grand jury indictment alone compels the issuance of an arrest warrant without the judicial review of the underlying facts that would normally be required.[77] By the same token, a defendant who has been indicted is not entitled to the ex parte review by a judge that normally follows a warrantless arrest when the government seeks to detain the defendant.[78] Grand jury indictment also eliminates the defendant's more substantial right to an adversary preliminary examination, at which the judicial magistrate reviews the government's evidence for probable cause.[79] Taking advantage of this doctrine, federal prosecutors routinely time grand jury indictments so as to bypass the adversary preliminary hearing,[80] even though some courts have frowned upon this practice.[81]

Pretrial proceedings before a judge may still be necessary in a federal case, for example, to determine how the defendant will plead, set bail, or rule on a

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76. *See, e.g.*, United States v. Aranda-Hernandez, 95 F.3d 977, 980 (10th Cir. 1996) ("[The] judicial determination of probable cause may be in the form of a preliminary examination or it may be in the form of an indictment; both are not required."); Sciortino v. Zampano, 385 F.2d 132, 133 (2d Cir. 1967) (concluding that the return of a grand jury "indictment, which establishes probable cause, eliminates the need for a preliminary examination"); *cf.* People v. Franklin, 398 N.E.2d 1071, 1074 (Ill. App. Ct. 1980) (noting that both grand jury indictment and a preliminary examination "serve the function of determining probable cause and to require a repetition of this function by initiating post-indictment preliminary hearings would be an empty formality").

77. *See Ex parte* United States, 287 U.S. 241, 250 (1932) (holding that a district court lacks discretion to refuse to issue arrest warrant after grand jury indicts); Charles A. Thompson, *The Fourth Amendment Function of the Grand Jury*, 37 OHIO ST. L.J. 727, 729 (1976) ("[T]he decision to indict operates as a [F]ourth [A]mendment probable cause determination to arrest or detain in custody . . . .").

78. *See Gerstein*, 420 U.S. at 118 n.19 (grand jury indictment substitutes for neutral judicial review normally required by the Fourth Amendment to support extended restraint of defendant's liberty).

79. *See* 18 U.S.C. § 3060(e) (2000) (stating that no preliminary examination is held if a grand jury indictment is returned); FED. R. CRIM. P. 5.1(a)(2) (a preliminary hearing is not required if the defendant is indicted); United States v. Simon, 510 F. Supp. 232, 235 (E.D. Pa. 1981) ("Once a federal grand jury has indicted a defendant, probable cause is established, and the defendant is no longer entitled to a preliminary hearing.").

80. *See* 4 LAFAVE ET AL., *supra* note 50, § 14.2(b) ("Where a grand jury sits daily and can promptly dispose of submitted cases, the U.S. Attorney may regularly moot scheduled preliminary hearings by obtaining prior indictments. Various U.S. Attorneys have been able to perfect this practice to the point where there are no more than two or three preliminary hearings for every hundred felony defendants processed."). Preliminary examinations are held in less than one of five federal criminal cases. *See id.* § 1.3(*l*) n.195 ("The federal system . . . [uses] the grand-jury-bypass so regularly that preliminary hearings are held in less than 20% of the felony cases filed in the district court.").

81. *See, e.g.*, United States v. Quinn, 357 F. Supp. 1348, 1350 (N.D. Ga. 1973) (stating that the government's ability to bypass preliminary examination "does nothing to encourage respect for law").

government request for preventative detention.[82] But the grand jury's indictment forecloses judicial consideration of the most critical issue—the factual basis for the criminal charges.[83] As a result, most federal criminal cases proceed without meaningful screening by a federal judge to assess the sufficiency of the evidence supporting the government's criminal charges.[84] By using a judicial model of grand jury indictment, the Court can at once streamline the criminal process by minimizing the defendant's pretrial rights and avoid the potential for unseemly conflict between the grand jury and the court.

Given the Supreme Court's strong endorsement of the principle that the grand jury's indictment amounts to a "judicial" determination of probable cause, one might expect an accompanying conclusion that the defendant's rights during the grand jury's indictment process should approximate those attached to a judicial proceeding.[85] This is not so. While the judicial model is used by the courts to determine the weight given a grand jury indictment, the Court has used a distinctly different model of grand jury action—a prosecutorial model—when framing the rules that apply within the grand jury. This competing model is examined below.

2. The Prosecutorial Model of Grand Jury Indictment

A different way to explain what the grand jury is doing when it issues indictments is to analogize to the role a prosecutor plays in bringing criminal charges. As often as it has applied a judicial model, the Court has conceived of the grand jury's indictment role quite differently. In these cases, rejecting an analogy to the role of a judge, the Court has defined the grand jury's role instead as a discretionary decision to bring criminal charges, akin to the charging decision made by a prosecutor.[86] This analogy, which will be termed the

82. Preventative detention occurs when the defendant is detained pending trial not simply to ensure his appearance at trial, but to prevent danger to the community. *See* United States v. Salerno, 481 U.S. 739, 750–55 (1987) (upholding and describing federal preventative detention).

83. For example, when the government seeks preventative detention, the defendant's "dangerousness" is determined in an adversary proceeding attended by "numerous procedural safeguards." *Id.* at 750. With respect to the separate statutory requirement for "probable cause," however, the prosecutor simply submits the grand jury's indictment to prove that there is a valid basis for the criminal charges. *See, e.g.*, United States v. Suppa, 799 F.2d 115, 118–19 (3d Cir. 1986) (stating that a grand jury indictment alone establishes the element of probable cause for preventative detention).

84. *See* Arenella, *supra* note 38, at 484 ("Except for the prosecutor, the grand jury is the only significant sieve through which most federal prosecutions must pass after the defendant's initial appearance.").

85. Without completely transforming the grand jury process, for example, rules might be imposed to regulate the quality of the evidence upon which the grand jury acts, or to give the defendant rights short of a full adversary process. *See generally id.* at 539–75 (proposing reforms to the grand jury process to remedy weakness of grand jury review without turning its ex parte inquiry into a full-fledged adversarial hearing).

86. *See, e.g.*, United States v. Williams, 504 U.S. 36, 51 (1992) (noting that grand jury is an accusatory body, not an adjudicatory body); *see also, e.g.*, Chen v. Mayflower Transit, Inc., 315 F. Supp. 2d 886, 923 (N.D. Ill. 2004) ("[A]n indictment is nothing but an allegation of a prosecutor, with the review . . . of a grand jury. It is not a judicial decision . . . and itself proves nothing.").

"prosecutorial model" of grand jury indictment, is the model advocated by the dissenters in the Model Charge litigation.[87] A prosecutorial model of grand jury indictment has been a critical ground upon which the Supreme Court has rested rulings that the grand jury process may not be regulated in the manner of a judicial proceeding. Grand jury indictment may be judicial in weight, but it is rendered under the very limited procedural regulation that is distinctive of prosecutorial decisionmaking.

Like the judicial model, the prosecutorial model can be seen as encompassing two themes which contrast directly with the themes expressed in the cases endorsing a judicial model. First, in the prosecutorial lines of authority, the Court characterizes the grand jury's indictment decision as a discretionary judgment rather than a legal determination.[88] In these cases, grand jury indictment is not simply viewed as an up-or-down vote on probable cause, but rather as broadly encompassing whether to charge a federal crime, whom to charge, and for what.[89] Here, the Court sees the grand jury's indictment decision as a complex and multifaceted decision, rather than a narrow application of a legal standard to the evidence.

Second, an equally important theme expressed in cases endorsing a prosecutorial model is that the grand jury is not bound to indict even if probable cause exists. In this model, the grand jury, like the prosecutor, has the rightful power not only to prosecute, but also to decline prosecution.[90] It is well established

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87. The dissenting judges in the Model Charge litigation would analogize the grand jury's role to the broad-based discretion of the prosecutor. *See* United States v. Navarro-Vargas (*Navarro-Vargas II*), 408 F.3d 1184, 1213 (9th Cir. 2005) (Hawkins, J., dissenting); United States v. Navarro-Vargas (*Navarro-Vargas I*), 367 F.3d 896, 900 (9th Cir. 2004) (Kozinski, J., dissenting in part).

88. The discretionary nature of the prosecutor's charging decision is undisputed. *See, e.g.*, United States v. Lovasco, 431 U.S. 783, 794 (1977) ("The decision to file criminal charges, with the awesome consequences it entails, requires consideration of a wide range of factors in addition to the strength of the Government's case, in order to determine whether prosecution would be in the public interest."); Wayne R. LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532, 532 (1970) ("One of the most striking features of the American system of criminal justice is the broad range of largely uncontrolled discretion exercised by the prosecutor.").

89. The most elaborate statement of this proposition is in the Supreme Court's decision in *Vasquez v. Hillery*, 474 U.S. 254 (1986), striking down a racially discriminatory method of selecting grand jurors. The classic statement from *Vasquez* is that:

> The grand jury does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not. In the hands of the grand jury lies the power to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a non-capital offense .... Moreover, the grand jury is not bound to indict in every case where a conviction can be obtained.

Id. at 263 (internal quotation marks omitted); *see also, e.g.*, *In re* Report and Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to the House of Representatives, 370 F. Supp. 1219, 1222 (D.D.C. 1974) ("The grand jury holds broad power over the terms of charges it returns.").

90. The prosecutor's power to decline prosecution, despite evidence of criminal conduct, is well established. *See, e.g.*, AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-3.9(b) (3d ed. 1993) (recognizing that the "prosecutor is not obliged to present all charges which the evidence might support" and in some circumstances may "decline to

that prosecutors may properly consider discretionary factors in their charging decisions, such as enforcement priorities, preference for an alternative judicial forum, the relative gravity of the offense, the excessive criminal sentence attached, and so on.[91] In the prosecutorial lines of grand jury authority, the Supreme Court and lower courts recognize that the grand jury may similarly refuse to indict, despite the existence of probable cause.[92] This combination of themes forms a strong conceptual model used by the courts to decide certain types of grand jury challenges.

Some of these courts have explicitly characterized the grand jury's indictment function as "prosecutorial."[93] More often, the Supreme Court has expressed this idea somewhat more subtly by emphasizing that the grand jury's function is "accusatory" rather than "adjudicatory."[94] Whatever the terminology used, in a

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prosecute, notwithstanding that evidence may exist which would support a conviction"); LaFave, *supra* note 88, at 532 (stating that a prosecutor has the discretion "not to prosecute an individual notwithstanding sufficient evidence to meet the legal requirements for commencing a prosecution").

91. Prosecutors are allowed, in effect, to "second-guess" the wisdom of congressional laws, both by selecting enforcement priorities and by downgrading the charges levied. *See, e.g.*, 1 LAFAVE ET AL., *supra* note 50, § 1.3(h) (prosecutors may reduce charges where, for example, they determine that "the penalty for the higher charges is too severe for the nature of the crime" or that the offense is viewed as "clearly overgraded legislatively"); *see also, e.g.*, Wayte v. United States, 470 U.S. 598, 607 (1985) (prosecutor may take into account such factors as "general deterrence value" and the government's "enforcement priorities" in deciding whether to bring criminal charges, factors "not readily susceptible to the kind of analysis the courts are competent to undertake").

92. *See Vasquez*, 474 U.S. at 263 ("[T]he grand jury is not bound to indict in every case where a conviction can be obtained." (citation omitted)); Gaither v. United States, 413 F.2d 1061, 1066 (D.C. Cir. 1969) ("[T]he decision to charge at all, is entirely up to the grand jury—subject to its popular veto, as it were."); United States v. Cox, 342 F.2d 167, 190 (5th Cir. 1965) (Wisdom, J., concurring) (stating that a grand jury has the "unchallengeable power to shield the guilty, should the whims of the jurors or their conscious or subconscious response to community pressures induce twelve or more jurors to give sanctuary to the guilty"); United States v. Asdrubal-Herrera, 470 F. Supp. 939, 942 (N.D. Ill. 1979) ("Just as a prosecutor can, in the exercise of discretion, decline prosecution in the first instance, a grand jury can return a true bill or a no bill as they deem fit."); *In re* Jordan, 439 F. Supp. 199, 204 (S.D. W. Va. 1977) (concluding that the grand jury may "for whatever reason, refuse to honor the prosecutor's request [to indict] even in light of proof of probable cause"); 4 LAFAVE ET AL., *supra* note 50, § 15.2(g) ("The grand jury retains its complete independence in refusing to indict. This includes the authority to refuse to indict even where the evidence presented clearly met the quantum of proof needed for indictment."). *See generally* K. Brent Tomer, *Ring Around the Grand Jury: Informing Grand Jurors of the Capital Consequences of Aggravating Facts*, 17 CAP. DEF. J. 61, 75–78 (2004) (describing grand jury's power to reject valid indictments); Gregory T. Fouts, Note, *Reading the Jurors Their Rights: The Continuing Question of Grand Jury Independence*, 79 IND. L.J. 323, 330–34 (2004) (same).

93. *See, e.g.*, United States v. Bruce, 394 F.3d 1215, 1231 (9th Cir. 2005) (stating that the grand jury "is part of the prosecutorial process"); United States v. Martino, 825 F.2d 754, 761 (3d Cir. 1987) (stating that the grand jury is "for all practical purposes an investigative and prosecutorial arm of the executive branch of government" (citation omitted)); *Cox*, 342 F.2d at 188 (Wisdom, J., concurring) ("In finding an indictment, the grand jury is playing the role of a prosecutor."); United States v. Cleary, 265 F.2d 459, 461 (2d Cir. 1959) ("Basically, the grand jury is a law enforcement agency."). The Supreme Court itself has expressly acknowledged that the grand jury's historic antecedents served in a "prosecutorial" role. *See* Butterworth v. Smith, 494 U.S. 624, 629 (1990).

94. *See* United States v. Williams, 504 U.S. 36, 51 (1992); *see also, e.g.*, United States v. Calandra, 414 U.S. 338, 343–44 (1974) (stating that the grand jury proceeding "is not an adversary hearing in which the guilt or innocence of the accused is adjudicated").

series of cases over the last half-century, the Court has endorsed a strongly prosecutorial model—and rejected a judicial model—when considering the procedural rules that govern grand jury indictment. Although some view the grand jury as prosecutorial because of the practical fact that its citizen members tend to be dominated by prosecutors,[95] the most insightful observations are functional in nature: It is because the grand jury serves accusatory and investigative functions that a prosecutorial analogy is more apt.[96] The grand jury is like a prosecutor insofar as it provides a different method of charging crimes.[97] And if the grand jury's function, like a prosecutor, is to charge crimes, the logical conclusion is that, like a prosecutor, the grand jury should have discretion in exercising this function.

The most explicit picture of a prosecutorial grand jury is the Supreme Court's decision in *Vasquez v. Hillery*.[98] The *Vasquez* case explicitly rejects a model of grand jury indictment as an up-or-down vote on probable cause.[99] It espouses instead an alternative vision of grand jury indictment as a nuanced assessment that encompasses a wide variety of factors, even extending to the power to refuse to indict although a conviction can be obtained.[100] This oft-cited description of the grand jury's broad discretionary powers is diametrically opposed to the competing view, espoused with equal force in other lines of Court authority, that the grand jury merely substitutes for the judicial magistrate's narrow sufficiency review. The *Vasquez* conception of a federal grand jury with broad, discretionary charging authority has been reiterated by the Court in more recent decisions.[101]

While the *Vasquez* debate is thought-provoking, more influential in shaping grand jury doctrine are the numerous cases in which the Supreme Court has

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95. *See, e.g.*, MARVIN E. FRANKEL & GARY P. NAFTALIS, THE GRAND JURY: AN INSTITUTION ON TRIAL 100 (1977) ("The contemporary grand jury investigates only those whom the prosecutor asks to be investigated, and by and large indicts those whom the prosecutor wants to be indicted."). There is extensive literature on the grand jury's tendency to become a "rubber stamp" for the prosecutor's charging decisions. *See, e.g.*, Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1, 9 n.46 (2004) (sampling from numerous articles that conclude that the modern grand jury cannot exercise independent judgment).

96. *See, e.g.*, Butz v. Economou, 438 U.S. 478, 510 (1978) ("[T]he public prosecutor, in deciding whether a particular prosecution shall be instituted or followed up, performs much the same function as a grand jury." (citation omitted)).

97. *See, e.g.*, *Williams*, 504 U.S. at 51 (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES *300 (1769) ("[T]he finding of an indictment is only in the nature of an accusation, which is afterwards to be tried and determined"); 1 LAFAVE ET AL., *supra* note 50, § 1.3(n) ("Like the indictment, the information is a charging instrument which replaces the complaint, but it is issued by the prosecutor rather than the grand jury.").

98. 474 U.S. 254 (1986).

99. *Id.*

100. *See supra* note 89 (quoting *Vasquez*'s classic statement of the grand jury's role).

101. *See, e.g.*, Campbell v. Louisiana, 523 U.S. 392, 399 (1998) ("The grand jury . . . controls not only the initial decision to indict, but also significant decisions such as how many counts to charge and whether to charge a greater or lesser offense, including the important decision to charge a capital crime.").

used what is clearly a prosecutorial model to limit the defendant's rights in the grand jury indictment process. Viewing the grand jury as prosecutorial rather than judicial leads to the natural conclusion that the adversarial protections that come into play in a judicial proceeding have no place within the grand jury process.[102] Beginning with the Court's seminal decision in *Costello v. United States*,[103] which rejected the application of hearsay rules in grand jury proceedings, the Court has consistently applied a prosecutorial model to shape grand jury rules. In *Costello*, the Court expressly compared the grand jury's role to that of a prosecutor in concluding that the charging decisions of both actors should not be judicially regulated.[104]

This is a powerful and far-reaching doctrine. If the grand jury's charging powers are best compared to the discretionary powers of a federal prosecutor, it follows that courts can neither review the basis for the grand jury's decision to charge federal crimes,[105] nor develop rules that govern the grand jury's process in the manner that a judicial proceeding might be regulated.[106] The Supreme Court has used a prosecutorial model to justify adopting both of these broad rules, which serve to insulate the grand jury's secret deliberations from both judicial and public scrutiny.

Under *Costello*'s prosecutorial rationale, the courts have rejected defense requests to apply a variety of trial-type protections within the grand jury setting. When defendants argued in *United States v. Calandra*, for example, that the exclusionary rule applicable at trial should be extended to the grand jury, the Court used a consciously prosecutorial model to reject such a proposition: The grand jury can use illegally seized evidence, the Court held, because its indictment review is not a proceeding to "adjudicate guilt or innocence," but simply an "accusatorial" function that should not be impeded by trial restrictions.[107] In the Court's most recent foray into an exposition on grand jury powers, the

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102. It is established that due process rights do not attach within the prosecutor's accusatory decisionmaking process. *See, e.g.*, Cox v. United States, 473 F.2d 334, 336 (4th Cir. 1973) ("[T]he due process clause [sic] . . . has traditionally been limited to judicial and quasi-judicial proceedings. It has never been held applicable to the processes of prosecutorial decision-making."); United States v. Bland, 472 F.2d 1329, 1337 (D.C. Cir. 1973) ("We cannot accept the hitherto unaccepted argument that due process requires an adversary hearing before the prosecutor can exercise his age-old function of deciding what charge to bring against whom. Grave consequences have always flowed from this, but never has a hearing been required.").

103. United States v. Costello, 350 U.S. 359 (1956).

104. *Id.* at 409 ("An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by a prosecutor, . . . is enough to call for trial of the charge on the merits.").

105. *See, e.g.*, United States v. Bruce, 394 F.3d 1215, 1231 (9th Cir. 2005) (holding that a court may not "presume to correct the decisions of the grand jury" by altering the statutory sections charged "any more than [a court] can, except through [its] judgments, correct the prosecutorial decisions of the executive").

106. *See* United States v. Williams, 504 U.S. 36, 50 (1992) ("[A]ny power federal courts may have to fashion, on their own initiative, rules of grand jury procedure is a very limited one, not remotely comparable to the power they maintain over their own proceedings.").

107. *See* 414 U.S. 338, 349 (1974) (stating that grand jury proceedings are "unimpeded by the evidentiary and procedural restrictions applicable to a criminal trial").

Williams decision, it relied on the same rationale—that the grand jury's function is "accusatory" rather than "adjudicatory"—to conclude that the prosecutor should have no obligation to disclose exculpatory evidence to the grand jury.[108] Although a prosecutor may not constitutionally obtain a conviction at trial without disclosing exculpatory evidence,[109] the *Williams* Court held that the courts cannot extend a similar requirement to the grand jury's indictment process.[110]

The net effect of this body of rulings is that the grand jury's indictment review bears no resemblance to any recognized judicial proceeding.[111] Not only are the rules of evidence inapplicable, but there is no requirement that the grand jury act on any evidence that bears some indicia of reliability.[112] The grand jury may act on the basis of "tips" and "rumors," as well as jurors' own "personal knowledge."[113] The grand jurors may consider hearsay,[114] illegally seized evidence,[115] evidence obtained in violation of constitutional privileges,[116] and even newspaper reports.[117] There is no right to counsel in grand jury proceedings[118] and, if counsel is retained, she may not accompany a witness into the grand jury room.[119] A grand jury target has no right to know the substance of the grand jury's proceedings,[120] let alone a right to present exculpatory evidence or

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108. *See Williams*, 504 U.S. at 51 ("[R]equiring the prosecutor to present exculpatory as well as inculpatory evidence would alter the grand jury's historic role, transforming it from an accusatory to an adjudicatory body.").

109. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that due process requires that a defendant be provided upon request with favorable evidence material to his guilt or punishment).

110. *See Williams*, 504 U.S. at 51.

111. *See, e.g.*, Hawkins v. Superior Court, 586 P.2d 916, 918 (Cal. 1978) (noting the "remarkable lack of even the most basic rights" within the grand jury process).

112. *See, e.g.*, Costello v. United States, 350 U.S. 359, 364 (1956) (Burton, J., concurring) (objecting to the "breadth of the declarations made by the Court" and arguing that grand jury indictments should be subject to dismissal where "it is shown that the grand jury had before it no substantial or rationally persuasive evidence upon which to base its indictment").

113. *See* Branzburg v. Hayes, 408 U.S. 665, 701–02 (1972) (noting that a grand jury investigation may be "triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors").

114. *See Costello*, 350 U.S. at 363.

115. *See* United States v. Calandra, 414 U.S. 338, 349–50 (1974) (holding that a grand jury indictment is not invalidated by reliance on evidence seized in violation of the Fourth Amendment bar on illegal search and seizure).

116. *See* United States v. Lawn, 355 U.S. 339, 349–59 (1958) (holding that a grand jury indictment is not invalidated even if the grand jury relied on information elicited in violation of the defendant's Fifth Amendment privilege against self-incrimination).

117. *See* Wood v. Georgia, 370 U.S. 375, 390–91 (1962) (finding it improper to punish an individual who issued a news release critical of an ongoing grand jury investigation, which grand jurors read); Beck v. Washington, 369 U.S. 541, 548 (1962) (finding it proper not to dismiss an indictment even though the trial judge did not instruct the grand jury to disregard news reports with prejudicial information about the defendant).

118. *See* United States v. Williams, 504 U.S. 36, 49 (1992) ("We have twice suggested, though not held, that the Sixth Amendment right to counsel does not attach when an individual is summoned to appear before a grand jury, even if he is the subject of the investigation.").

119. *See* FED. R. CRIM. P. 6(d) (limiting persons who may be present in grand jury room).

120. *See id.* 6(e) (stating that matters occurring before the grand jury are secret).

argument during its indictment deliberation.[121] Although the grand jury's approval of criminal charges forecloses the defendant from obtaining a preliminary hearing,[122] the grand jury's rejection of charges does not foreclose the prosecutor from resubmitting those charges to a new grand jury—no principle of double jeopardy attaches to the grand jury's decision.[123] Although the grand jury's indictment is deemed "judicial" in status, the process by which the grand jury decides whether to indict bears a striking resemblance to the very minimal regulation of a prosecutor's charging decision.

Given the centrality of the prosecutorial model in shaping the contours of the rules under which the grand jury operates, it is interesting that the judicial model has emerged as the dominant model of grand jury indictment expressed in the Model Charge. It is striking that the *Vasquez* line of authority finds no expression in the Model Charge.[124] On the other hand, too openly embracing broad discretionary powers for federal grand jurors tends to create controversy. As faith in the professionalism of federal prosecutors has increased, judges have openly expressed their fear of vesting excessive power over law enforcement in a body of unrestrained citizens.[125] But this argument, too, may be seen as an aspect of the prosecutorial model—the question of how to divide prosecutorial discretion between governmental officials and citizen grand jurors (a question to which this Article will later return).

In sum, the Supreme Court's decisions support competing conceptions of grand jury indictment as, alternatively, prosecutorial or judicial. On one view (termed the judicial model), the Court suggests that the grand jury is narrowly tasked to determine whether the evidence shows "probable cause" that the defendant committed the crimes, in the manner of a judicial magistrate reviewing criminal charges. On a competing view (termed the prosecutorial model), the Court suggests instead that the grand jury's role is much broader, including such factors as the desirability of enforcement and local community sentiment, in the manner of a prosecutor asserting criminal charges. While either model, standing alone, might provide a valid conceptual model for deciding grand jury challenges, the problem is that Supreme Court precedents provide support for *both* models. The problematic results created by this mixed doctrinal approach are considered below, before returning to the solution suggested by the thoughtful decisions of the dissenters in the Model Charge litigation.

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121. *See Williams*, 504 U.S. at 52 ("[N]either 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.").

122. *See* FED. R. CRIM. P. 5(c).

123. *See Williams*, 504 U.S. at 49 ("The Double Jeopardy Clause of the Fifth Amendment does not bar a grand jury from returning an indictment when a prior grand jury has refused to do so.").

124. *See, e.g.*, 4 LAFAVE ET AL., *supra* note 50, § 15.2(g) n.189 (Supp. 2006) (noting that appellate courts have frequently noted the grand jury's power to nullify).

125. *See, e.g.*, United States v. Cox, 342 F.2d 167, 196 (5th Cir. 1965) ("[T]he very least demands of justice require that the discretion to prosecute be lodged with a person or agency insulated from local prejudices and parochial pressures.").

C. PROBLEMS WITH THE SUPREME COURT'S MIXED CONCEPTUAL APPROACH

Before undertaking the task of rethinking the Court's current conceptual approach to grand jury indictment, one might reasonably ask why this task is necessary. Stepping back for a moment from the landscape of the Supreme Court's grand jury rulings as a whole, the overriding message is that "grand jury proceedings need not be perfect."[126] They are, after all, simply a preliminary to the main adversarial event—the criminal trial.[127] The Court's current mixed-model approach to grand jury indictment is a flexible doctrine that allows the grand jury to serve a number of important practical functions in the federal system.

Viewing the grand jury as a law enforcement body protects the broad scope of its investigative subpoenas and allows the grand jury to work hand-in-hand with federal prosecutors to uncover evidence of crime. Many consider the federal grand jury's most critical modern role to be that of an investigative law enforcement body.[128] At the same time, viewing the grand jury's screening function as "judicial" allows the government to fulfill its constitutional obligation to charge serious federal crimes by grand jury indictment while minimizing the cost of preliminary hearings.[129] These practical needs are all advanced by the Court's current, ambiguous grand jury model, suggesting that one resolution to the Model Charge debate is not to undertake a conceptual definition of the grand jury, but simply to consider, on a pragmatic level, the optimal wording of grand jury instructions.

It is hard to justify such an approach, however, not simply because it is conceptually unsatisfying, but because ultimately it is unlikely to be successful. The Court's current mixed-model approach is a failure, even on a pragmatic level, because it leads to recurrent litigation and uncertainty over the federal grand jury process. It creates two problems: the perception of inequity and the lack of judicial guidance, both of which are explored in greater detail below.

1. Perceived Inequities in Grand Jury Doctrine

The Fifth Amendment itself provides very little guidance on the role of the

126. United States v. Udziela, 671 F.2d 995, 1001 (7th Cir. 1982).

127. This is a recurrent theme in the Court's grand jury precedents. *See, e.g.*, Costello v. United States, 350 U.S. 359, 364 (1956) ("In a trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict. Defendants are not entitled, however, to a [grand jury] rule which would result in interminable delay but add nothing to the assurance of a fair trial.").

128. *See, e.g.*, *In re* Grand Jury Proceedings, 4 F. Supp. 283, 284 (E.D. Pa. 1933) ("The inquisitorial power of the grand jury is the most valuable function which it possesses today and, far more than any supposed protection it gives to the accused, justifies its survival as an institution. As an engine of discovery against organized and far-reaching crime, it has no counterpart.").

129. *See, e.g.*, State v. Robinson, 417 A.2d 953, 962 (Del. Super. Ct. 1980) ("[T]he indictment-without-preliminary hearing procedure . . . is rationally related to the State's interest in obtaining a pretrial determination of probable cause without unnecessarily taxing the State's limited criminal justice administrative resources . . . .").

federal grand jury.[130] At the same time, questions and conflicts inevitably arise in the grand jury setting, which the federal courts have struggled to answer.[131] Judicial rulings have played the central role in defining the federal grand jury's powers and procedures because, unlike many state systems, the federal grand jury is subject to limited regulation by statute or rule.[132] This has left the federal grand jury's functions to be articulated on an ad hoc, case-by-case basis that is particularly unsuited to the goal of developing a rational, comprehensive system of pretrial criminal procedure.

Grand jury rules developed by the courts tend to present defendants repeatedly with real or apparent "catch-22" situations. A defendant indicted by the grand jury has no right to a judicial preliminary hearing, on the ground that the grand jury indictment is a judicial determination.[133] Yet the same defendant has no right to be heard before the grand jury, on the ground that the grand jury's determination is not judicial but accusatory.[134] While the Court insists that the primary purpose of grand jury indictment is to protect the interests of the defendant,[135] the government is the primary beneficiary of the grand jury's powers to gather secret evidence to convict the defendant at trial.[136] While the prosecutor is allowed to act as an "advocate" before the grand jury, representing the government's interest in obtaining an indictment,[137] the defendant is not allowed to advocate his own interests in the process, on the ground that the indictment process is "non-adversary."[138] A prosecutor seeking an indictment is

130. The Fifth Amendment does not, for example, "prescribe[] the kind of evidence upon which grand juries must act." *Costello*, 350 U.S. at 362. Nor does the Fifth Amendment even specify that a standard of "probable cause" applies within the indictment process. *See* U.S. CONST. amend. V.

131. *See, e.g.*, United States v. Cox, 342 F.2d 167, 186 (5th Cir. 1965) (Wisdom, J., concurring) ("Confusion reigns as to just what a [federal] grand jury can do.").

132. Congress has never adopted a comprehensive statute governing the grand jury's operation. *See* United States v. Briggs, 514 F.2d 794, 800 (5th Cir. 1975) ("Neither the Constitution, federal statutes, nor the Federal Rules of Criminal Procedure define the functions or powers of the grand jury. Its powers have been delineated by the courts."); Note, *Powers of Federal Grand Juries*, 4 STAN. L. REV. 68, 68 (1951) ("From 1789 to the present, Congress has made no definitive statement concerning grand jury powers.").

133. *See* FED. R. CRIM. P. 5.1(a)(2) (stating that no preliminary hearing is required if the defendant has been indicted); *see also, e.g.*, Crump v. Anderson, 352 F.2d 649, 652 (D.C. Cir. 1965) ("[O]ur federal courts have uniformly held that there is no necessity for a preliminary hearing after a grand jury has returned an indictment.").

134. *See, e.g.*, United States v. Williams, 504 U.S. 36, 51 (1992) (finding that because a grand jury proceeding is merely "accusatory," it has "always been thought sufficient to hear only the prosecutor's side").

135. *See, e.g.*, United States v. Mandujano, 425 U.S. 564, 571 (1976) ("[T]he grand jury continues to function as a barrier to reckless or unfounded charges. . . . Its historic office has been to provide a shield against arbitrary or oppressive action . . . .").

136. *See, e.g.*, United States v. Lovasco, 431 U.S. 783, 791 (1977) (finding that the government need not seek indictment as soon as the evidence demonstrates probable cause, but may continue to build a case for trial).

137. *See, e.g.*, 4 LAFAVE ET AL., *supra* note 50, § 15.2(e) (explaining that the prosecutor serves as government's "advocate in presenting its case to the grand jury").

138. *See, e.g.*, 1 BEALE ET AL., *supra* note 13, § 4:19 ("The federal courts . . . still follow the traditional rule that the accused has no right to testify before the grand jury or to insist that the grand

granted absolute immunity and cannot be civilly sued for his actions before the grand jury, on the ground that the grand jury is an integral part of the judicial proceedings in a criminal prosecution.[139] Yet the same grand jury proceeding is not a critical stage in a criminal prosecution when it comes to the question whether a putative defendant is entitled to counsel.[140] The grand jury is treated differently for different purposes, with divergent and often contradictory results.

Nowhere are the problematic results of the Court's mixed model of grand jury indictment more striking than in the disparity between two proceedings the Court has chosen to treat as legal equivalents—the adversary preliminary hearing process in which the magistrate judge finds probable cause, and the secret ex parte grand jury process in which the grand jury is said to make the same probable cause determination. It is here that the troubling consequences of treating grand jury indictment as both prosecutorial and judicial come home to roost. For while the results of both proceedings are treated as a "judicial" probable cause determination, it is readily apparent that the grand jury's prosecutorial proceeding does not begin to provide the protections of a judicial hearing.[141] While the preliminary examination is a limited proceeding not designed to determine the defendant's ultimate guilt or innocence, it is a meaningful judicial stage in the criminal process.[142] This leads to evident inequities when the Court insists that grand jury indictment and the preliminary hearing are functional equivalents.

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jury hear other evidence favorable to him. The traditional rule reflects the grand jury's development as an inquisitorial rather than an adversarial institution . . . .").

139. *See, e.g.*, Buckley v. Fitzsimmons, 509 U.S. 259, 270–73 (1993) (finding that absolute immunity extends to all acts by the prosecutor "intimately associated with the judicial phase of the criminal process," which includes grand jury presentation); Burns v. Reed, 500 U.S. 478, 489–91 (1991) (finding that prosecutor has absolute immunity in conducting government's case before the grand jury because it performs a "judicial function").

140. *Mandujano*, 425 U.S. at 581 (finding that because "no criminal proceedings had been instituted," the Sixth Amendment right to counsel did not come into play in the grand jury proceedings); *see also* Conn v. Gabbert, 526 U.S. 286, 292 (1999) ("A grand jury witness has no constitutional right to have counsel present during the grand jury proceeding." (citing *Mandujano*, 425 U.S. at 581)).

141. Historically, the preliminary examination was prosecutorial rather than judicial in nature. *See, e.g.*, 1 LAFAVE ET AL., *supra* note 50, § 1.5(c) n.155 (noting that the historic tradition was for justices of the peace to use the preliminary examination to interrogate the accused). Over time, however, the proceeding evolved into an expressly "judicial" proceeding designed to protect the defendant. *See, e.g.*, Wood v. United States, 128 F.2d 265, 271 (D.C. Cir. 1942) ("In subject matter and function, the [preliminary examination] hearing is judicial."); F.W. MAITLAND, JUSTICE AND POLICE 129 (London, MacMillan 1885) ("This preliminary examination of accused persons has gradually assumed a very judicial form . . . ."); Note, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 YALE L.J. 1000, 1039–40 (1964) (noting far-reaching British reforms in 1848 that had the effect of "judicializing the magistrate's proceeding"). *See generally* FED. R. CRIM. P. 5.1 (describing extensive procedural protections attending preliminary examination).

142. *See, e.g.*, *Wood*, 128 F.2d at 270 ("While [the preliminary examination] does not have finality for deciding guilt or innocence, it has that quality for the immediate purpose."); *id.* at 275 ("[T]he [preliminary examination] performs a judicial though limited function."); *see also* Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 12 (1986) (finding a public right of access to preliminary hearings, which "because of [their] extensive scope . . . [are] often the final and most important step in the criminal proceeding").

In *Coleman v. Alabama*, for example, the Court recognized a right to counsel in a preliminary examination, finding the process to be a "critical stage" in a criminal prosecution.[143] The irony was not lost on Chief Justice Burger, who decried the absurdity of extending the right to counsel to the preliminary examination when "the Constitution itself does not permit the assistance of counsel at the decidedly more 'critical' grand jury inquiry."[144] A similar outcry was raised by Justice Stevens in the *Press-Enterprise* case when the Court ruled that preliminary examinations must be open public proceedings, even though grand jury proceedings may properly be closed to the public.[145] Noting that the two proceedings are "functionally identical," he complained that the Court's logic should apply with equal force to the grand jury's indictment process.[146] Perceptions of an unfair disparity between the ex parte grand jury process and the adversary preliminary examination have been so strong that California courts at one point actually declared it unconstitutional to deprive indicted defendants of the "substantial" right to a preliminary examination.[147]

The point here is not that the preliminary hearing provides a "better" method of screening criminal charges than grand jury indictment. This may well be true in some cases (particularly those involving legally weak charges), though not in others (such as those involving sufficient evidence but unduly harsh charges). The more fundamental point of this Article is that the two proceedings are different—one is a judicial process, while the other is an exercise of prosecutorial discretion. By perpetuating two competing conceptual models, one prosecutorial and one judicial, the Court creates the contradictory result that grand jury action is deemed "judicial" in effect, yet carries none of the procedural rights that normally characterize judicial action. The evident unfairness of this ex-

143. 399 U.S. 1, 8–10 (1970) (finding adversary preliminary examination procedure provided by statute to be a critical stage in a criminal prosecution at which the accused was entitled to counsel, even though the purpose of the hearing was not to try the defendant but simply to determine whether the charges are supported by probable cause).

144. *Id.* at 25 (Burger, C.J., dissenting).

145. *Press-Enterprise Co.*, 478 U.S. at 8–10 (holding that while the proper function of the grand jury system requires secrecy, preliminary examination is a proceeding that requires public access).

146. *Id.* at 26 (Stevens, J., dissenting) ("The obvious defect in the Court's approach is that its reasoning applies to the traditionally secret grand jury with as much force as it applies to California preliminary hearings.").

147. *See* Hawkins v. Superior Court, 586 P.2d 916, 922 (Cal. 1978) ("[T]he denial of a postindictment preliminary hearing deprived defendants herein of equal protection of the laws guaranteed by . . . the California Constitution."). Similarly, in the Michigan courts, rather than confront the "serious questions of equal protection and due process" presented by denying preliminary examinations to indicted defendants, the Michigan Supreme Court used its inherent power to grant preliminary examinations to all felony defendants. *See* People v. Duncan, 201 N.W.2d 629, 635 (Mich. 1972), *overruled in part by* People v. Glass, 627 N.W.2d 261, 269–70 (Mich. 2001) (holding that the decision in *Duncan* exceeded the court's rulemaking authority). Similar equal protection arguments have failed in federal court challenges because of the more limited scope for the prosecutor's discretion in choosing a charging method. *See, e.g.*, United States v. Shober, 489 F. Supp. 393, 401 (E.D. Pa. 1979) (finding rationale of *Hawkins* inapplicable in federal system). The *Hawkins* decision itself was later overturned by voter referendum. *See* Raven v. Deukmejian, 801 P.2d 1077, 1084 (Cal. 1990) (describing Proposition 115's restriction on postindictment preliminary hearings).

change has been noted by judges and defendants alike.

2. The Battle Between Judicial and Prosecutorial Analogies

While the appearance of unfairness is a problem in itself, the Court's "sword-shield" model is marked by another equally significant problem: It fails to provide a meaningful way to analyze any given grand jury challenge. Federal courts must answer basic questions about the rules that should apply to grand jury proceedings. The answers to these questions depend on whether the grand jury's indictment process is compared to the role of a prosecutor or to the role of a judge. This problem is readily illustrated by several examples of specific grand jury issues, beyond the Model Charge litigation itself: the harmless error puzzle and the problem of defining grand juror "bias."

The puzzle of harmless error provides a potent example of the problem of advancing competing judicial and prosecutorial models of grand jury indictment—sometimes the models may suggest different answers to the same question. The Supreme Court has repeatedly struggled to explain whether or not errors in the grand jury's charging process become irrelevant (or "harmless") if the defendant is convicted after a fair trial. Depending on the model of grand jury action it has applied, the Court has come down on both sides of this issue. The problem relates directly to how one views the grand jury's indictment decision, as prosecutorial or judicial.

The harmless error puzzle was posed directly by Justice Jackson in dissent in a 1950 grand jury decision in which the defendant challenged the racial makeup of the grand jury: Why, Justice Jackson asked, should defendants be entitled to have their convictions set aside on the ground that the grand jury that charged them was improperly constituted?[148] He reasoned that if the grand jury sits only to determine probable cause and if the trial jury after hearing the evidence found the defendant guilty, then it "hardly lies in the mouth of the defendant . . . to say that his indictment is attributable to prejudice."[149] In these circumstances, he argued, it is "frivolous" to contend that "any grand jury, however constituted, could have done its duty in any way other than to indict."[150]

While his view did not command any other votes at the time, Justice Jackson's query has since been hailed as "unanswerable" and "prescient" by a handful of Justices in more recent decisions.[151] In *Vasquez v. Hillery*, however, Justice Marshall offered a compelling answer to Justice Jackson: "The grand

148. Cassell v. Texas, 339 U.S. 282, 298 (1950) (Jackson, J., dissenting).

149. *Id.* at 302.

150. *Id.*; *see also, e.g.*, Campbell v. Louisiana, 523 U.S. 392, 407 (1998) (Scalia, J., dissenting) ("It would be to no avail to suggest that the alleged discrimination in grand jury selection could have caused an indictment improperly to be rendered, because the petit jury's verdict conclusively establishes that no reasonable grand jury could have failed to indict petitioner.").

151. *See* Vasquez v. Hillery, 474 U.S. 254, 271 (1986) (Powell, J., dissenting) (stating that Justice Jackson's opinion in *Cassell*, 339 U.S. at 298, was "typically prescient"); Rose v. Mitchell, 443 U.S. 545, 575 (1979) (Stewart, J., concurring in the judgment) ("I think the time has come to acknowledge that Mr. Justice Jackson's question is unanswerable . . . .").

jury does not determine only that probable cause exists or that it does not."[152] Justice Jackson's analysis was built on a false premise. Instead, the grand jury has the broad discretionary power to shape criminal charges, and indeed, need not indict at all even if a conviction can be obtained.[153] Thus, the mere fact that the grand jury's probable cause determination is "confirmed in hindsight" does not mean that the illegal composition of the grand jury "did not impermissibly infect the framing of the indictment and, consequently, the nature or very existence of the proceedings to come."[154]

The harmless error argument reflects a direct battle between the prosecutorial and judicial conceptions of grand jury indictment. Justice Jackson's model is a judicial model. He posits that the grand jury has the narrow review function of a judge—a binary decision in which either probable cause exists, and prosecution may proceed, or probable cause is lacking, and prosecution may not. A judicial magistrate cannot refuse to allow prosecution because, for example, she questions the wisdom of the prosecution, or feels the charges will be hard to prove at trial.[155] If the grand jury plays the same limited role, it is indeed difficult to understand how a conviction after a fair trial does not vindicate the grand jury's conclusion that the defendant was probably guilty. Any flaws in the process by which it reached that conclusion would seem irrelevant.

Justice Marshall's answer shifts to a prosecutorial model. In his vision, an indictment decision cannot be proved "right" or "wrong" in the manner of a legal determination, but rather is a subtle and multifaceted decision requiring the exercise of discretion. If the charging process was unfair, the defendant may be harmed even if she received a fair trial. The grand jury might have returned different charges or declined to prosecute at all. In this view, a narrow focus on conviction misses the mark. The point is not whether the trial was fair, but whether the defendant would have been charged at all, or for the same crimes, had the charging decision been made properly.

What is striking about the battle of analogies as it relates to the puzzle of harmless error is that the Court has reached diametrically opposing conclusions depending on the model it has applied. In *Vasquez*, a race discrimination case, the Court used a prosecutorial analogy to conclude that the grand jury composition harmed the defendant even though he was fairly convicted.[156] But in grand jury challenges involving claims other than invidious discrimination, the Court has come down on the opposite side of the scale. The general rule, adopted by

152. *Vasquez*, 474 U.S. at 263.

153. *Id.*

154. *Id.*; *see also, e.g.*, *Campbell*, 523 U.S. at 398–99 (concluding that discrimination in the composition of the grand jury is not harmless because the grand jury controls the content of the charges, as well as the decision whether to charge at all).

155. *See, e.g.*, 4 LAFAVE ET AL., *supra* note 50, § 14.3(a) (explaining that it is not the function of the magistrate at a preliminary hearing to "determine the wisdom of the prosecuting attorney's decision to file" or to second-guess the strength of the case for trial).

156. *See Vasquez*, 474 U.S. at 263–64.

the Supreme Court in *United States v. Mechanik*, is that the defendant's conviction wipes the slate clean with respect to errors in the grand jury process.[157] These lines of authority simply cannot be reconciled by suggesting that *Vasquez* involves the special category of race.[158] The determinative factor in these harmless error cases is not how one characterizes the grand jury error, but how one characterizes the grand jury process. The prosecutorial and judicial analogies are directly at war.

A similar competition of analogies emerges with respect to another interesting issue in grand jury litigation: How to define the "bias" that should disqualify grand jurors. Although we may expect grand jurors to be in a state of "unbiased equipoise,"[159] determining what factors should bar grand jurors from making an indictment decision is not self-evident. Again, the answer depends largely on whether one thinks of grand jurors as fulfilling a judicial function, like judges or trial jurors, or fulfilling an accusatorial function, like prosecutors. This is a critical distinction.[160]

Strict bias rules apply to judicial officials (including trial juries) to protect the adversary premise that cases will be decided on information submitted by the parties without prejudgment for one party or the other.[161] A judicial official may be disqualified not only by her own financial interests, but also by more subtle factors such as an institutional interest in the outcome,[162] responsibilities to law enforcement,[163] a prior advocacy role in the same matter,[164] or exposure to

157. 475 U.S. 66, 70 (1986) (finding the trial jury's guilty verdict renders harmless any error in the grand jury's charging process).

158. While the Court in *Mechanik* sought to limit its earlier *Vasquez* ruling to the "special problem of racial discrimination," *id.* at 70 n.1, as the Model Charge litigation reflects, the *Vasquez* logic provides a general description of grand jury action equally applicable to any grand jury challenge.

159. *See* United States v. Wells, 163 F. 313, 329 (D. Idaho 1908) (requiring resubmission of indictment where prosecutor's "exaggerated partisanship" before the grand jury threatened the neutrality of their decisionmaking). The Supreme Court has repeatedly emphasized that the grand jury must be "unbiased." *See, e.g.*, Lawn v. United States, 355 U.S. 339, 349 (1958) (noting that the grand jury clause requires a "nonbiased grand jury"); Costello v. United States, 350 U.S. 359, 363 (1956) (holding that an indictment is valid if "returned by a legally constituted and unbiased grand jury").

160. *See, e.g.*, Concrete Pipe and Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 618 (1993) (noting that the rigid neutrality requirements applied to government officials performing judicial functions are not applied to officials performing prosecutorial functions).

161. *See, e.g.*, Patterson v. Colorado, 205 U.S. 454, 462 (1907) ("The theory of our [judicial] system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."). While the Sixth Amendment requires an "impartial" trial jury, the Fifth Amendment contains no similar restriction with respect to the grand jury. *Compare* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . an *impartial* jury . . . .") (emphasis added), *with* U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury . . . .").

162. *See, e.g.*, Tumey v. Ohio, 273 U.S. 510, 534 (1927) (holding that the Mayor's institutional interest in city budget disqualified him from judging prosecution designed to increase city revenues).

163. *See, e.g.*, Ward v. Vill. of Monroeville, 409 U.S. 57, 58 (1972) (holding that a criminal trial before mayor with responsibilities for law enforcement deprived defendant of due process right to a "disinterested and impartial judicial officer"); Coolidge v. New Hampshire, 403 U.S. 443, 450 (1971)

information outside the trial record.[165] As a judge, she should be free from any pressures that would induce the average person not to "hold the balance nice, clear and true between the state and the accused."[166]

Prosecutors need not be insulated from the same pressures. As a party to the case, the prosecutor is expected to have a certain bias that we would not permit a judge.[167] A prosecutor is not "neutral" as between her desire for a guilty or a not guilty verdict at trial, or in the grand jury context, between the return of an indictment or a no-true-bill. She should not discriminate invidiously in the exercise of her discretion or act on improper motives, such as vindictiveness or personal financial interest, but she may, and should, bring zeal to her role as an arm of law enforcement.[168]

A recurrent grand jury battle has centered on whether a prosecutorial or judicial notion of "bias" should be applied to grand jurors. Many courts have held that the impartiality requirements applicable to trial jurors should not apply to grand jurors, given the grand jury's very different function as "purely an accusatory body"—a prosecutorial notion of the grand jury's function.[169] However, other courts, relying on the competing idea that the grand jury protects citizens, have argued that the strict bias rules applicable to trial jurors should apply here as well.[170] Notably, when the Supreme Court had the chance to take a stand, the Court avoided deciding whether the same impartiality rules would

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("[P]rosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations . . . .").

164. *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 486 (1972) ("[Officials] directly involved in making recommendations cannot always have complete objectivity in evaluating them.").

165. *See, e.g.*, Liteky v. United States, 510 U.S. 540, 550 (1994) (stating that a criminal trial juror would be improperly biased by "receipt of inadmissible evidence concerning the defendant's prior criminal activities").

166. *See Tumey*, 273 U.S. at 532.

167. *See, e.g.*, Concrete Pipe and Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 619 (1993) (stating that the "high standards" of impartiality applicable to judicial decisionmakers are not applicable to prosecutorial officials); Marshall v. Jerrico, 446 U.S. 238, 248 (1980) (holding that the rigid bias requirements applicable to "officials performing judicial or quasi-judicial functions . . . are not applicable to those acting in a prosecutorial or plaintiff-like capacity").

168. *See, e.g.*, *In re* Grand Jury Proceedings, 700 F. Supp. 626, 629 (D.P.R. 1988) ("Due to our adversary system, prosecutors must necessarily be zealous in their enforcement of the law.").

169. United States v. Knowles, 147 F. Supp. 19, 21 (D.D.C. 1957); *see also, e.g.*, Martin v. Beto, 397 F.2d 741, 752 n.6 (5th Cir. 1968) (Thornberry, J., concurring) ("The basis for holding that the grand jurors do not have to be impartial is that the grand jury is considered an accusatory body that does not pass on the guilt or innocence of the defendant but merely determines whether he should be brought to trial."); 1 BEALE ET AL., *supra* note 13, § 3:21 ("[D]isqualifying grand jurors with extrajudicial knowledge of the case or the parties is not necessary for the grand jury to perform its traditional function."); 4 LAFAVE ET AL., *supra* note 50, § 15.4(g) (noting that the majority of courts find no right to an unbiased grand jury).

170. *See, e.g.*, State v. Murphy, 538 A.2d 1235, 1239 (N.J. 1988) (noting that the idea that grand jurors need not be unbiased is "rooted more in history than justice" and concluding that grand jurors no less than trial jurors should be free from any taint); *cf. Martin*, 397 F.2d at 752 (Thornberry, J., concurring) (noting courts' "ambivalence" about the rule that no impartial grand jury is required).

apply to trial jurors and grand jurors.[171] To date, the question of grand juror bias remains an open issue,[172] even though grand jury bias challenges have become routine in high-profile criminal cases.[173] As these cases make clear, at the heart of the bias problem is a tension between the competing conceptual models the Court has used to insist that the grand jury can serve as both prosecutor and judge.

Nor are these isolated examples. Other recurrent grand jury issues present the same dynamic. In one of the cases related to the September 11 terrorist attacks, for example, the defendant cited the Supreme Court's recent holding that shackling the defendant may unfairly bias the trial jury[174] to argue that handcuffing him during his grand jury testimony unfairly biased the indicting body.[175] Resolving such claims requires choosing a specific vision of grand jury indictment. If the grand jury's function is akin to the judicial neutrality of trial jurors, then logically the courts should care whether grand jurors' judgment is unfairly affected by the highly suggestive sight of a defendant restrained in handcuffs.[176] On the other hand, if the grand jury's function is simply, like a prosecutor, to investigate and accuse, it would make little sense to disqualify grand jurors simply because they were exposed to prejudicial information about the defendant, such as the fact that the government deems him dangerous enough to require restraint.

In sum, as these examples demonstrate, the Model Charge litigation is not an isolated dispute, but a striking illustration of a broader theoretical problem. Like the problem of bias, or harmless error, or shackling defendants, the Model Charge debate cannot be resolved without choosing between a narrow judicial

171. Beck v. Washington, 369 U.S. 541, 546 (1962) ("[E]ven if due process would require a State to furnish an unbiased body when it resorted to grand jury procedure—a question upon which we do not remotely intimate any view—we have concluded that Washington, so far as is shown by the record, did so in this case."). Justice Douglas, in dissent, argued that exposure to prejudicial extra-record evidence should invalidate a grand jury's indictment, just as it requires reversal of the trial jury's verdict. *Id.* at 581 (Douglas, J., dissenting) (arguing that, given the protective function of the grand jury, an indictment should be set aside if "unfairness can be shown to infect" the grand jury process).

172. *See, e.g.*, 1 BEALE ET AL., *supra* note 13, § 3:21 ("[T]he lower courts are divided on the question whether an impartial grand jury is constitutionally required.").

173. *See, e.g.*, United States v. North, 910 F.2d 843, 872 (D.C. Cir. 1990) (Colonel Oliver North asserted claim that grand jurors were biased by exposure to his immunized congressional testimony concerning the Iran Contra investigation); United States v. Kaczynski, 923 F. Supp. 161, 162 (D. Mont. 1996) (alleged Unabomber sought dismissal of indictment on ground that pretrial publicity tainted grand jury); United States v. McVeigh, 896 F. Supp. 1549, 1558 (W.D. Okla. 1995) (Oklahoma City bombing defendant Timothy McVeigh challenged grand jury subpoena on ground that grand jury was biased by pretrial publicity). *See generally* 1 BEALE ET AL., *supra* note 13, § 3:21 ("The issue of preindictment publicity has been raised with increasing frequency in recent years, particularly in federal prosecutions.").

174. Deck v. Missouri, 125 S. Ct. 2007, 2010 (2005) (invalidating as due process violation routine practice of shackling defendant before trial jury).

175. *See* Mark Hamblett, *9/11 Perjury Charges Stand Despite Shackles in Court*, N.Y.L.J., June 1, 2005, at 1.

176. *Deck*, 125 S. Ct. at 2014 (shackling "almost inevitably affects adversely the jury's perception of the character of the defendant").

understanding of grand jury indictment and a broad prosecutorial understanding of the same function. The Court's current approach fails to resolve such disputes because it refuses to choose between these inconsistent conceptual visions. Basic debates about the grand jury's powers are not resolved but periodically emerge in the guise of a new issue.[177] And in the middle, defendants are caught in a system that leaves them without meaningful pretrial review. It is worth revisiting this conceptual problem to seek a more satisfying resolution.

II. THE CONCEPTUAL SOLUTION: THE GRAND JURY SERVES AS A "DEMOCRATIC PROSECUTOR"

While the Model Charge litigation is, as noted above, an illustration of a broader conceptual war, it is an important battle in its own right because it both exposes and advances the conceptual debate. The Model Charge, defended by the majority, articulates a judicial model. It explains grand jury indictment in terms of the narrow role of a judge: Grand jurors' task is to look for probable cause; if they find probable cause they should indict; and they should not consider the wisdom of the law to be enforced or the punishment that might be imposed. In this view, indictment is not a discretionary enforcement decision but a limited probable cause review.[178] The dissenting judges reject this vision in favor of a prosecutorial model. They argue that grand jurors have prosecutorial powers that encompass discretionary considerations, such as the community's sentiment about the law and its perceptions about disproportionate punishment. These powers necessarily go beyond an up-or-down vote on probable cause.[179] The dissenters challenge the constitutional adequacy of the Model Charge as a false conception of grand jury indictment.

Within this debate, which reflects the conceptual morass of modern grand jury doctrine, Judge Kozinski's dissent takes an important, yet simple, step forward.[180] His insight is worth exploring in greater detail.

A. RECOGNIZING GRAND JURY INDICTMENT AS A DEMOCRATIC FORCE WITHIN THE PROSECUTORIAL FUNCTION

Judge Kozinski's opinion is a breath of fresh air because it reflects a rare attempt to go beyond rote characterizations of grand jury history and to think more deeply about the grand jury's role. He would openly classify the federal

177. Professor Shapiro predicts such a quandary when she suggests that "political pressure and institutional ambiguity will keep the grand jury . . . oscillating between the poles of accusation and trial." SHAPIRO, *supra* note 24, at 112.

178. *See supra* note 66 and accompanying text.

179. *See supra* note 87 and accompanying text.

180. The ideas upon which this Article focuses were first expressed in Judge Kozinski's dissent in the panel decision in *Navarro-Vargas I* and later adopted by Judge Hawkins and the rest of the dissenting judges in the en banc decision in the same case. *See* United States v. Navarro-Vargas (*Navarro-Vargas II*), 408 F.3d 1184, 1209 (9th Cir. 2005) (Hawkins, J., dissenting); United States v. Navarro-Vargas (*Navarro-Vargas I*), 367 F.3d 896, 899 (9th Cir. 2004) (Kozinski, J., dissenting in part).

grand jury's job as "prosecutorial," and recognize that with this comes the discretion inherent in the prosecutorial function of charging crimes—a realization that cannot be squared with insisting that grand jurors merely review indictments for "probable cause."[181] At the same time, he would distinguish the function played by grand jurors from that played by government prosecutors by emphasizing the grand jury's identity as a group of citizens.[182] This suggests a subtle but critical shift in understanding grand jury independence. By openly choosing a prosecutorial label, Judge Kozinski recognizes the need to choose a specific conceptual vision of grand jury indictment. At the same time, by emphasizing the grand jury's democratic character as a citizen body, he offers a way to understand the grand jury's "shielding" function without suggesting that the grand jury combines contradictory prosecutorial and judicial roles. These are important insights, the full implications of which the *Navarro-Vargas* dissenters do not explore.

Working from the insights suggested by Judge Kozinski and endorsed by Judge Hawkins, this Article argues that modern criminal procedure would benefit from a conceptual clarification of the federal grand jury's role—from an express recognition that the grand jury serves, in a sense, as a "democratic prosecutor." This suggests that the grand jury is best seen, in the words of Judge Learned Hand, simply as the "voice of the community accusing its members."[183] Below, we lay out the support for such an understanding before turning to the final challenge—the broader implications of viewing the grand jury in this light.

B. SUPPORT FOR UNDERSTANDING THE GRAND JURY AS A "DEMOCRATIC PROSECUTOR"

If it is necessary, as this Article has argued, to choose a single conceptual vision of the federal grand jury, the vision espoused by Judges Kozinski and Hawkins makes great sense. The structure of the grand jury clause suggests a broad prosecutorial role, while an accusatory model helps to rationalize the Supreme Court's body of grand jury rules. Equally important, this vision gives meaning to an otherwise homeless theme—the democratic quality of grand jury decisionmaking. These considerations suggest that Judge Kozinski has hit the nail on the head in his thoughtful and frank discussion of the grand jury's

181. *See Navarro-Vargas I*, 367 F.3d at 900 (Kozinski, J., dissenting in part) (stating that the grand jury's function "is most accurately described as prosecutorial"); *see also id.* at 901 ("There's no reason grand juries cannot or should not make similar political judgments [as prosecutors] about which laws deserve vigorous enforcement and which ones do not, in deciding whom to indict, and on what charges.").

182. *Id.* at 902 (noting that the grand jury brings "community judgment" of local citizens to federal criminal prosecutions).

183. *In re* Kittle, 180 F. 946, 947 (S.D.N.Y. 1910) ("They are the voice of the community accusing its members, and the only protection from such accusation is in the conscience of that tribunal."); *see also, e.g.*, United States v. Smyth, 104 F. Supp. 283, 291 (N.D. Cal. 1952) ("[T]he grand jury breathes the spirit of a community into the enforcement of the law. Its effect as an institution for investigation of all, no matter how highly placed, creates the élan of democracy.").

constitutional function.

1. Honoring the Constitutional Structure of the Grand Jury Clause

The Fifth Amendment grand jury clause is striking in its simplicity: The provision simply states that "[n]o person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."[184] There is good reason to believe this constitutional structure reflects an understanding like that reached by Judges Kozinski and Hawkins—not simply that the grand jury accuses, but that it possesses the broad discretionary powers implied by this prosecutorial role.

To begin with, as originally conceived, the federal grand jury did not simply approve charges offered by third parties (whether by private parties or government prosecutors).[185] The grand jury could also issue criminal charges on its own initiative by making a "presentment."[186] This power is written into the Fifth Amendment, which grants a right not to answer "unless on a *presentment* or indictment of a Grand Jury."[187]

In the colonial era, for example, the grand jury actively used its charging powers to initiate criminal cases against British soldiers whom the Crown would not have prosecuted.[188] It is easy to forget the breadth of the grand jury's constitutional charging role because in the modern federal system, the grand jury presentment is said to have been "abolished."[189] This was accomplished not by constitutional amendment but by the more expedient solution of failing to mention it in the Federal Rules of Criminal Procedure.[190] The grand jury may no longer have the practical power to initiate criminal charges, but the constitutional conception of an active prosecutorial role has not changed.[191]

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184. U.S. CONST. amend. V.

185. *See, e.g.*, Hale v. Henkel, 201 U.S. 43, 59 (1906) (noting that under ancient English grand jury practice, criminal prosecutions were initiated by private prosecutors in the name of the King); 1 LAFAVE ET AL., *supra* note 50, § 1.5(c) (noting that in post-Revolutionary America, private prosecutions were still permissible).

186. *Hale*, 201 U.S. at 60 (stating that a presentment is defined as "the notice taken by a grand jury of any offense from their own knowledge or observation, without any bill of indictment laid before them" (quoting 4 BLACKSTONE, *supra* note 97, at *301)); *see also, e.g.*, 4 LAFAVE ET AL., *supra* note 50, § 15.2(g) ("[T]he grand jury at common law could bring charges on its own initiative through the use of the presentment. This allowed the grand jury to initiate a prosecution over the opposition of the prosecutor."); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1184 (1991) (noting that, historically, the grand jury had "sweeping proactive and inquisitorial powers").

187. U.S. CONST. amend. V (emphasis added).

188. *See* Leipold, *supra* note 67, at 285 n.131 (noting that grand juries supported the colonists by returning charges against British soldiers and citizens who joined the British Army or gave information to the enemy).

189. *See* 4 LAFAVE ET AL., *supra* note 50, § 15.2(g).

190. *See, e.g.*, United States v. Briggs, 514 F.2d 794, 803 n.14 (5th Cir. 1975) ("While constitutionally permitted, the practice of using presentments has disappeared in the federal system, and is not provided for in [the Federal Rules of Criminal Procedure] Rules 6 and 7.").

191. *See* United States v. Cox, 342 F.2d 167, 188 (5th Cir. 1965) (Wisdom, J., concurring) ("Criminal presentment based on the grand jury's own knowledge or on knowledge furnished by others may be in disuse in federal courts, but it has not been read out of the Constitution.").

A limited view of the grand jury's role is also hard to square with the celebrated historic incidents credited with making the grand jury clause an uncontroversial aspect of the Bill of Rights. Grand jury history is incomplete without a ritual tribute to the grand jury's heroism in the famous prosecution of Peter Zenger in which colonial grand jurors refused to indict a newspaper publisher under the unpopular Libel and Sedition Act,[192] or to the famous British case in which grand juries twice refused to indict the Earl of Shaftesbury on charges of treason.[193] These cases are excellent examples of the exercise of the grand jury's prosecutorial discretion to trump the enforcement priorities of government prosecutors—cases in which the grand jury exercised its popular veto over legally sufficient prosecutions.[194]

Indeed, the power to "nullify" valid charges has been described by influential commentators as "arguably . . . the most important attribute of grand jury review from the perspective of those who insisted that a grand jury clause be included in the Bill of Rights."[195] The grand jury was celebrated, historically, not for its narrow ability to apply a legal standard to the facts, but for its broad power to decide not to charge despite overwhelming evidence. In a classic British anecdote, Lord Erskine explained to the King's Bench that the grand jury has the power to refuse to indict, even if a crime is witnessed by all of the judges of England.[196] The grand jury's power not simply to refuse to charge, but

192. *See, e.g.*, Note, *The Grand Jury as an Investigatory Body*, 74 HARV. L. REV. 590, 590–91 (1961) ("An illustrious manifestation of its role as bulwark of individual freedom was the case of Peter Zenger in 1734, in which two New York grand juries refused to return an indictment of criminal libel for an attack upon the colonial governor.").

193. *See, e.g.*, *In re* Report and Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to the House of Representatives, 370 F. Supp. 1219, 1222 n.8 (D.D.C. 1974) (noting that the "most celebrated cases in England" involved refusals to indict Stephen Colledge and the Earl of Shaftesbury, while in the United States the "grand jury action favoring Peter Zenger is equally prominent"). *See generally* Richard H. Kuh, *The Grand Jury "Presentment": Foul Blow or Fair Play?*, 55 COLUM. L. REV. 1103, 1107–08 (1955) (discussing the history of the Shaftesbury case).

194. *See, e.g.*, 4 LAFAVE ET AL., *supra* note 50, § 15.3(c) ("[M]ost of the celebrated instances of grand jury refusals to indict involved cases in which the evidence was sufficient, but the grand jury simply refused to permit an unjust prosecution."); Thompson, *supra* note 77, at 741 ("[T]he grand jury has been . . . effective in frustrating prosecutions by an unpopular government regardless of whether prosecution was legally justified."); Ronald F. Wright, *Why Not Administrative Grand Juries?*, 44 ADMIN. L. REV. 465, 469 (1992) (In the celebrated examples from the American Revolution, "[t]hese grand juries did not refuse to indict because of a lack of proof that the accused had violated a criminal statute. Rather, they refused because they fundamentally disagreed with the government's decision to enforce these laws at all.").

195. *See* 4 LAFAVE ET AL., *supra* note 50, § 15.2(g).

196. In Justice Harlan's dissent in *Hurtado v. California*, arguing for the value of grand jury indictment, he quoted a famous speech to the judges of the King's Bench in 1784 by Erskine, that even "if a man were to commit a capital offense in the face of all the judges of England . . . [t]he grand jury alone could arraign him, and in their discretion might likewise finally discharge him, by throwing out the bill, with the names of all your lordships as witnesses on the back of it." 110 U.S. 516, 543 (1884) (Harlan, J., dissenting).

to reduce charges, also has strong historic roots.[197] These are all exercises of prosecutorial discretion.

As Professor Amar has observed, it is also notable that the grand jury clause lacks any reference to a judicial "probable cause" standard.[198] There is nothing in the Fifth Amendment to suggest that the grand jury's function is to provide the type of independent judicial review that characterizes Fourth Amendment rights.[199] In contrast to the Fifth Amendment, for example, the Fourth Amendment expressly states that warrants (including arrest warrants) may not be issued except on the legal standard of "probable cause."[200] The Fifth Amendment contains no standard for the grand jury's charging decision, but merely provides that charges in serious federal criminal cases can only be issued by the grand jury. This suggests a prosecutorial understanding of the grand jury's charging function.

Weighed against the constitutional structure is the argument that grand juries have traditionally been instructed to screen for "probable cause," which arguably suggests a judicial understanding of its function. It does appear that some, but not all, early grand jury charges described the grand jury's role in terms similar to the probable cause instruction contained in the Model Charge.[201] However, the history of grand jury charges is not uniform; it reflects the same competition over the body's role seen in grand jury litigation more generally.[202] Indeed, an influential criminal procedure treatise states that judges "often will

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197. *See* 1 LAFAVE ET AL., *supra* note 50, § 1.5(b) (stating that in the colonial period, the "willingness of grand juries to downgrade charges to non-capital offenses" was an important factor in reducing the use of capital punishment).

198. *See* Amar, *supra* note 186, at 1184 (suggesting that the Fifth Amendment deliberately omitted the probable cause standard: "Because the decision was to be made by a popular body, perhaps more flexibility was allowed . . . .").

199. Federal courts have not even agreed as to whether grand jurors should apply a probable cause standard, or a prima facie standard, or some other level of proof. *See, e.g.*, 4 LAFAVE ET AL., *supra* note 50, § 15.2(f) ("In the federal courts, the governing [grand jury] standard apparently is the probable cause standard, but some judges use a prima facie instruction.").

200. *See* U.S. CONST. amend. IV ("[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . . ."); Johnson v. United States, 333 U.S. 10, 14 (1948) (holding that probable cause must be determined by a "neutral and detached magistrate").

201. *See, e.g.*, Respublica v. Schaffer, 1 U.S. (1 Dall.) 236, 237 (Pa. 1788) (grand jury charge by Pennsylvania Supreme Court Chief Justice Thomas McKean) ("It is the duty of the Grand Jury to enquire into the nature and probable grounds of the charge . . . . [I]t is incumbent upon the Grand Jury to satisfy their minds, by a diligent enquiry, that there is probable ground for the accusation.").

202. Other judges disagreed with Justice McKean's instruction, including James Wilson, one of the earliest United States Supreme Court justices, who argued that grand jurors should not be satisfied with the results "merely of probability" but should apply the same "moral certainty" standard as petit juries. *See* James Wilson, *Lectures on Law*, *in* 2 THE WORKS OF JAMES WILSON 69, 536 (Robert G. McCloskey ed., 1967). In her thorough historic analysis of the issue, Professor Shapiro concludes that "no commonly accepted evidentiary standard emerged in the early years of the Republic" to guide grand jury indictment decisions. SHAPIRO, *supra* note 24, at 93; *see also id.* at 88 ("If the grand jury in colonial America was depicted as an institution that protected colonial subjects against arbitrary prosecutions, its evidentiary standard nevertheless remained uncertain."). According to Professor Shapiro, the "probable cause" standard did not become established as the sole grand jury standard until quite late in American history. *See id.* at 102.

inform grand jurors of their authority to nullify in the course of the judge's charge to the grand jury upon impanelment."[203] While there is a long tradition of giving grand jury charges—which were used in the new Republic to educate grand jurors on a wide variety of matters[204]—the *standard* grand jury charge has far less of a historic pedigree, dating only from the late twentieth century.[205] To allow this relatively recent tradition of informing grand jurors that they "should" indict if probable cause exists to define the conceptual nature of the grand jury's constitutional role makes little sense.

2. Rationalizing the Body of Modern Grand Jury Precedents

Embracing the grand jury as a "democratic prosecutor" would also have the virtue of validating (and explaining) most of the body of modern grand jury decisions by the Supreme Court. These decisions reflect an integrated body of law in their results, if not always in their reasoning. Leaving aside, for a moment, the Court's rhetoric suggesting that the grand jury is a "neutral" decisionmaker like a magistrate judge,[206] the vision of grand jury indictment that emerges from the Court's decisions does not resemble a judicial process, but rather prosecutorial decisionmaking. The Court has frequently stated that the power of the grand jury to entertain charges is "co-terminous" with the prosecutor's power to present such charges—neither of which may be judicially regulated in the exercise of charging discretion.[207] Like a prosecutor, the grand jury investigates and accuses, and like a prosecutor, the grand jury generally may not be questioned or reviewed in its discretionary exercise of these functions.

The Court's modern precedents have been remarkably consistent in this regard, beginning with its landmark 1956 decision in *United States v. Costello*.[208] In *Costello*, the Court did not simply decline to apply technical hearsay rules to the grand jury process, but affirmatively rendered the basis for the grand jury's charging decision unreviewable.[209] In so doing, *Costello* effectively extended to

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203. *See* 4 LAFAVE ET AL., *supra* note 50, § 15.2(g). To support this intriguing proposition, the authors cite a 1955 grand jury charge that advised grand jurors that the grand jury "may even refuse to indict although its attention is called to a clear violation of law." 18 F.R.D. 211, 214 (1955).

204. *See* 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 5–6 (Maeva Marcus ed., 1985).

205. *See* United States v. Navarro-Vargas (*Navarro-Vargas II*), 408 F.3d 1184, 1196 (9th Cir. 2005) (dating first model charge for federal grand jurors to 1978).

206. *See, e.g.*, Gerstein v. Pugh, 420 U.S. 103, 117–18 & n.19 (1975) (treating grand jury indictment as equivalent to review by a "neutral and detached magistrate").

207. *See* United States v. Williams, 504 U.S. 36, 53 (1992); United States v. Thompson, 251 U.S. 407, 413–14 (1920). This oblique reference is best understood to mean that both the prosecutor and the grand jury enjoy the same degree of insulation from judicial oversight in the exercise of their charging discretion.

208. 350 U.S. 359 (1956).

209. *See id.* at 363 (holding that an indictment returned by a legally constituted and unbiased grand jury is enough on its face to call for trial, and the court may not review the "competency and adequacy of the evidence before the grand jury").

the grand jury's charging decisions deference comparable to that enjoyed by a prosecutor, paving the way for a series of rulings rejecting attempts to regulate the grand jury's accusatory process.[210] This body of grand jury rules provides a dramatic parallel to the deferential principles that govern the prosecutor's charging decisions.

Just as the grand jury's indictment decision is generally immune from judicial review, a prosecutor's discretionary decision to charge a criminal offense—or to decline prosecution—is similarly protected.[211] Equally striking, the exceptions under which the courts will consider challenges to the prosecutor's charging decisions are claims based on invidious discrimination or vindictiveness.[212] These closely parallel the few claims the Court has been open to considering in the grand jury context.[213] Viewing the grand jury as a "democratic prosecutor" is consistent with the conceptual vision that implicitly motivates the Court's modern grand jury precedents. This, too, suggests that Judge Kozinski is correct

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210. *See Williams*, 504 U.S. at 55 (holding that a court may not impose a rule requiring a prosecutor to present substantial exculpatory evidence to grand jury); United States v. R. Enters., Inc., 498 U.S. 292, 301 (1991) (holding that a grand jury subpoena may not be quashed unless there is no reasonable possibility that the category of materials sought "will produce information relevant to the general subject of the grand jury's investigation"); Midland Asphalt Corp. v. United States, 489 U.S. 794, 799 (1989) (holding that a motion to dismiss indictment based on prosecutor's violation of the grand jury rules cannot be appealed on an interlocutory basis); Bank of Nova Scotia v. United States, 487 U.S. 250, 263 (1988) (holding that a court may not dismiss an indictment based on prosecutorial misconduct absent proof that the violations "had an effect on the grand jury's decision to indict"); United States v. Mechanik, 475 U.S. 66, 70 (1986) (holding that trial jury's guilty verdict renders unreviewable any claims of misconduct before grand jury); United States v. Mandujano, 425 U.S. 564, 583–84 (1976) (holding that a grand jury may subpoena a putative defendant to testify without giving *Miranda* warnings); United States v. Calandra, 414 U.S. 338, 349–51 (1974) (holding that a grand jury witness may not refuse to answer questions based on illegally seized evidence); United States v. Dionisio, 410 U.S. 1, 8 (1973) (holding that a grand jury may subpoena voice exemplars without showing "reasonableness" of request); Branzburg v. Hayes, 408 U.S. 665, 667 (1972) (holding that a journalist has no First Amendment privilege not to testify before grand jury).

211. *See, e.g.*, Gerstein v. Pugh, 420 U.S. 103, 118–19 (1975) (emphasizing that a defendant is not "entitled to judicial oversight or review of the decision to prosecute"); United States v. Flemmi, 225 F.3d 78, 86 (1st Cir. 2000) ("[The] decision to prosecute (or, conversely, to forbear) is largely unreviewable by the courts.").

212. *See, e.g.*, Wayte v. United States, 470 U.S. 598, 608 (1985) (noting that, while a prosecutor enjoys broad charging discretion, the decision whether to prosecute may not be based on "an unjustifiable standard such as race, religion, or other arbitrary classification"); Blackledge v. Perry, 417 U.S. 21, 28–29 (1974) (holding that due process prevents prosecutor from vindictive prosecution decisions in retaliation for defendant's exercise of constitutional rights); Oyler v. Boles, 368 U.S. 448, 456 (1962) (noting that notwithstanding a prosecutor's broad discretion in charging, the decision whether to prosecute may not be based on "an unjustifiable standard such as race, religion or other arbitrary classification"). *See generally Prosecutorial Discretion*, 34 GEO. L.J. ANN. REV. CRIM. PROC. 197, 201–02 (2005) (stating that prosecutorial charging discretion is broad but may not be exercised in "bad faith," such as by "selective prosecution, which denies equal protection of the law, or vindictive prosecution, which violates due process").

213. *See* Campbell v. Louisiana, 523 U.S. 392, 398–99 (1998) (recognizing claim based on race discrimination in selecting grand jurors); *Bank of Nova Scotia*, 487 U.S. at 259 (suggesting power to dismiss indictment for "systematic and pervasive" grand jury abuse).

to conclude that the federal grand jury's constitutional role is prosecutorial.[214]

The question that remains is how to reconcile this prosecutorial vision with the equally well-established idea that the grand jury "shields" citizens from wrongful prosecution. We turn to that question below.

3. Finding Meaning in the Democratic Identity of Citizen Grand Juries

Thinking of the grand jury as prosecutorial resonates with the Court's many decisions emphasizing that the grand jury is an "accusatory" body. But an equally powerful insight in the approach adopted by Judges Kozinski and Hawkins is the recognition that, within the charging function, the grand jury serves to temper prosecutorial decisions made by federal government officials by bringing to bear local community sentiment.[215] This is a powerful insight because it provides a different, and compelling, way to understand the puzzling "sword-shield" paradigm.

The conventional understanding, reflected in the Model Charge, is that the grand jury "shields" by performing the same judicial function as (and thus substituting for) evidentiary review by a magistrate judge. This presents a puzzle because it is hard to reconcile with the grand jury's prosecutorial role. A law enforcement official is not normally qualified to serve as a judge in the very case she has initiated.[216] But if the grand jury was intended not so much to provide a neutral judicial shield as to allow citizens to temper and balance prosecutorial charging decisions made by government officials, the model becomes easier to understand. Judge Kozinski suggests a different way to view the grand jury's protective function—not as a judicial equivalent, but as a democratic force within the federal charging process.[217]

This view is also consistent with the otherwise jarring principle that there is no bar to resubmitting an indictment rejected by one grand jury.[218] This doctrine seems to run counter to the normal rule in judicial settings that judicial determination of a legal or factual question bars subsequent reopening of the

214. *See* United States v. Navarro-Vargas (*Navarro-Vargas I*), 367 F.3d 896, 900 (9th Cir. 2004) (Kozinski, J., dissenting in part) ("[T]he function [the grand jury] performs is most accurately described as prosecutorial.").

215. *See id.* at 902 ("An independent grand jury . . . interposes the local community's values on prosecutorial decisions that are controlled by policies set in Washington as to the enforcement of laws passed in Washington.").

216. *See* Gerstein v. Pugh, 420 U.S. 103, 118 (1975); *see also, e.g., id.* at 117 ("[A] prosecutor's responsibility to law enforcement is inconsistent with the constitutional role of a neutral and detached magistrate."); Shadwick v. City of Tampa, 407 U.S. 345, 350 (1972) ("Whatever else [judicial] neutrality and detachment might entail, it is clear that they require severance and disengagement from activities of law enforcement.").

217. *Navarro-Vargas I*, 367 F.3d at 902 (Kozinski, J., dissenting in part). There is good support for Judge Kozinski's insight. *See, e.g.*, SHAPIRO, *supra* note 24, at 42 (noting that grand and petit juries represent "popular and local elements in the system of justice").

218. *See* United States v. Williams, 504 U.S. 36, 49 (1992) (noting that double jeopardy does not bar a grand jury from returning an indictment even though another grand jury refused to do so).

same issue.[219] Such judicial limitations are absent in the grand jury process. Grand jurors can check prosecutors by refusing to indict (and, theoretically, by presenting charges prosecutors refuse to bring). Prosecutors can check grand jurors by seeking reindictment of charges rejected by a grand jury (and, theoretically, by refusing to prosecute charges presented on the grand jury's initiative).[220] But all of these powers are exercised within the confines of the charging function. The grand jury's role is simply a way of dividing power within what we now view as a prosecutorial function. Citizens and government check each other, but not in the same sense that the Judicial Branch checks the Executive Branch.

The benefit of this approach is that by viewing the indicting grand jury as a democratic force within the prosecutorial function, the grand jury's "shield" and "sword" functions are not distinct and competing functions, but part of the same integrated role—the exercise of discretionary authority to approve or decline criminal prosecutions. In this vision, the grand jury's reputation as a "shield" is created not by its ability to apply legal sufficiency standards, but rather by the constitutional presumption that citizens will make criminal charging decisions better (or at least more in keeping with community sentiment) than will government officials.[221]

This view ties in with an otherwise homeless theme that runs throughout Supreme Court decisions about the grand jury. In particular, the Court has emphasized the grand jury's essential quality as a temporary body of citizens drawn from the local community—what might be termed a "democratic" theme of grand jury indictment.[222] The Court has emphasized the "trust reposed" by the Constitution in grand jurors, who are "not appointed for the prosecutor or for the court [but] for the government and for the people."[223] By focusing on the democratic identity of the grand jury as a citizen body, it is possible to understand grand jury screening, not in the legalistic sense of review by a judicial magistrate, but as a "rough screening body guided by a community

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219. While this idea is expressed in the constitutional doctrine of double jeopardy, it is also expressed in procedural principles such as res judicata and collateral estoppel. Such doctrines are inapplicable in the grand jury setting. *See id.*

220. The prosecutor has the acknowledged power to dismiss grand jury charges. *See* FED. R. CRIM. P. 48(a) (the government "may, with leave of court, dismiss an indictment"). This process, however, is a public one, requiring the prosecutor to justify his decision to the court.

221. When the Framers thought of the grand jury as a "shield," it is most likely that they simply believed reserving power to grand jurors was a way to democratize the criminal charging process, which they viewed as a powerful way to protect against overreaching by government. *See* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE 121–22 (1996) (arguing that, for the Framers, the criminal jury was, most fundamentally, "a political institution embodying popular sovereignty and republican self-government").

222. This Article designates this theme as "homeless" because it can as easily be reconciled with a prosecutorial view of the grand jury (the grand jury as a democratic prosecutor) as it can with a judicial view (the grand jury as a democratic judge).

223. Hale v. Henkel, 201 U.S. 43, 61 (1906) (quoting Justice Wilson). This language was echoed in *Williams*, where the Court described the grand jury's role as serving as "a kind of buffer or referee between the Government and the people." 504 U.S. at 47.

sense of justice."[224]

Justice Black, for example, who took a restrictive view of the need for judicial regulation of grand jury proceedings, expressed faith in grand jurors' common sense and lack of institutional bias.[225] Explaining why grand jury witnesses do not need counsel, Justice Black emphasized the good faith and independence of citizen grand jurors: Grand jurors, he explained, "bring into the grand jury room the experience, knowledge and viewpoint of all sections of the community. They have no axes to grind and are not charged personally with the administration of the law."[226] In this view, it is the grand jurors' independence from government, and from institutional loyalties and biases, that justifies placing faith in citizens' abilities to weed out wrongful criminal prosecutions.[227]

Emphasizing the democratic character of the grand jury provides a more satisfying way to understand the Supreme Court's frequent insistence that the grand jury is a neutral and independent body. Although grand jury neutrality is commonly analogized to that of a magistrate judge,[228] it is hard to understand how the grand jury could possibly be independent in the same sense as a judge. Not only does the grand jury serve as a law enforcement body,[229] but grand jurors actively participate in formulating the criminal charges they are ostensibly called upon to judge. It is difficult to understand how the grand jury can possibly be considered independent when it concludes its investigation, puts on its other hat, and sits to judge the merits of its own conclusions.[230] Judge Kozinski's approach suggests a different way of thinking about grand jury independence—as a citizen-based institution independent from the institutional biases of permanent government service.[231] With full knowledge of the facts, admissible and inadmissible, grand jurors may simply take a different view than

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224. 4 LAFAVE ET AL., *supra* note 50, § 15.3(d); *see, e.g.*, United States v. Cleary, 265 F.2d 459, 461 (2d Cir. 1959) ("While [the grand jury] is constitutionally intended to provide a measure of restraint on unjust and ill founded accusations of crime, this protection had its origin in the honesty and fair-mindedness of the grand jurors themselves, and today rests largely on the same foundation, rather than on any court-developed rules." (footnote omitted)).

225. *See In re* Groban, 352 U.S. 330, 346 (1957) (Black, J., dissenting) (contrasting the grand jury, where no right to counsel is needed, with state administrative investigation, where right to counsel should be granted).

226. *Id.*

227. *See, e.g.*, 4 LAFAVE ET AL., *supra* note 50, § 15.3(c) (explaining that the key to grand jury screening, in the view of some, "lies in the jurors' capacity to reflect the community's sense of justice").

228. *See supra* Part I.B.1.

229. *See* Branzburg v. Hayes, 408 U.S. 665, 701 (1972) (stating that the federal grand jury serves "as an important instrument of effective law enforcement").

230. *See, e.g.*, Wong Yang Sun v. McGrath, 339 U.S. 33, 42 (1950) (explaining that when the same body serves "both as prosecutors and as judges," it is hard to avoid the appearance that their decisions are simply "rationalizations of the preliminary finding which [the body], in the role of prosecutor, presented to itself" (internal quotation marks and citations omitted)).

231. *See, e.g.*, Jenkins v. McKeithen, 395 U.S. 411, 430 (1969) ("[T]he grand jury is designed to interpose an independent body of citizens between the accused and the prosecuting attorney and the court."); Quadra v. Superior Court, 403 F. Supp. 486, 491 (N.D. Cal. 1975) ("[T]he grand jury imports the common sense and decency of ordinary citizens into the criminal justice system, providing a buffer against possible prosecutorial excesses.").

government prosecutors of the desirability or appropriateness of prosecution. They may reflect community sentiment—about the harshness of the laws to be enforced, the relative culpability of persons under investigation, or the motivation behind certain prosecutions—that differs from the judgments of national law enforcement officials. Indeed, the grand jury's community-based role may be particularly important given the increasing "federalization" of criminal offenses, a trend under which federal statutes now criminalize an increasing range of offenses traditionally prosecuted in state and local courts.[232] In this conception, it is the "popular character of the grand jury" that provides security to the individual.[233]

In short, this suggests that when we admonish grand jurors not simply to accuse but to "protect the innocent,"[234] we simply mean to impress upon them the gravity of the accusatory role they are constitutionally appointed to fulfill.[235] This principle does not transform grand jurors into judicial officials; it merely calls upon them to be responsible advocates.

III. FALLOUT OF THE CONCEPTUAL SHIFT: BROADER IMPLICATIONS OF A DEMOCRATIC-PROSECUTORIAL THEORY OF GRAND JURY INDICTMENT

The final question is where the model of a "democratic prosecutor" takes us. This Article has argued that the solution to the problematic results created by the Court's mixed model of grand jury indictment is to choose a clear and consistent definition. It has argued, further, that the best conception is one that views grand jury indictment as a democratic force within the prosecutorial function. This conceptual shift has several implications, both narrow and broad.

To begin with, of course, if Judges Kozinski and Hawkins are correct, as this

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232. *See generally* John S. Baker, Jr., *State Police Powers and the Federalization of Local Crime*, 72 TEMP. L. REV. 673, 674 (1999) (noting that "many law review articles have protested the trend of federalizing local crime"). Felon-in-possession charges, for example, make it a federal offense for a convicted felon to bear a firearm, and carry a fifteen-year mandatory minimum sentence for a defendant who has three prior qualifying state convictions—including convictions that may not have carried prior prison time. *See* 18 U.S.C.A. § 924(c) (West Supp. 2005); 18 U.S.C.A. § 924(e) (West Supp. 2002). While federal prosecutors favor such charges because of the ease of proof, grand juries in some localities might well see federal charges as unduly harsh and view state prosecutions as adequate. Moreover, the classic example of the exercise of a grand jury veto is a politically motivated prosecution, which citizens may be in a unique position to assess. Other examples abound where grand jurors may have legitimate differences with federal prosecutors about the desirability of prosecution.

233. United States v. Cent. Supply Ass'n, 34 F. Supp. 241, 244 (N.D. Ohio 1940) (stating that security to accused persons "consists in the popular character of the grand jury" and the secrecy of its deliberations, which allow the grand jurors to "sift the evidence independently, secretly and in their own way"); *see, e.g.*, Gaither v. United States, 413 F.2d 1061, 1066 (D.C. Cir. 1969) (explaining that grand jury indictment protects against official abuse of the charging process by requiring a body of "ordinary citizens" to agree upon indictment in felony cases); United States v. Wells, 163 F. 313, 324 (C.D. Idaho 1908) (noting that the grand jury "serves the purpose of allowing prosecutions to be initiated by the people themselves").

234. *See supra* note 4.

235. *Cf.* United States v. Berger, 295 U.S. 78, 88 (1935) (observing that the prosecutor's goal should be not to win the case, but to see justice done).

Article has argued, the wording of the Model Charge must be changed. The Model Charge reflects a vision of grand jury indictment that does not fairly characterize the grand jury's constitutional powers, and it selectively ignores an entire line of important Supreme Court precedents about the grand jury's discretionary charging powers captured in decisions such as *Vasquez*.[236] Accepting the grand jury as a "democratic prosecutor" suggests that the Model Charge should be thoughtfully redrafted to reflect more accurately the scope of the grand jury's powers.[237] But this model also has broader implications, considered below.

A. ABANDONING THE FAULTY PREMISE OF JUDICIAL "DUPLICATION"

To begin with, if the grand jury is simply a "democratic prosecutor," this calls into question legal authorities that treat grand jury indictment as a judicial determination of probable cause.[238] If grand jury indictment is prosecutorial, it is difficult, if not impossible, to continue to endorse the proposition that indicting a defendant is the legal equivalent of having a judicial magistrate review his charges.

Understanding the grand jury as a democratic element in the federal charging process makes clear that there is no true duplication between the grand jury and the magistrate judge. The grand jury's indictment decision and the magistrate's probable cause review provide distinct and different ways of ensuring the validity of the prosecution—different types of checks within the adversary process, reflecting the potential for grave harm inflicted merely by the initiation of criminal charges.[239] One brings the fresh judgment of citizens to bear in checking governmental overzealousness; the other brings the unbiased judgment of federal judges to bear in assessing the legal sufficiency of the government's evidence. These are two different types of review.

Current principles can withstand conceptual scrutiny only if one considers the mere identity of grand jurors as citizens sufficient to make its review equivalent to that of a neutral judicial officer.[240] This premise is difficult, if not impossible, to accept. If anything, grand jurors are *less* well-equipped than judges to

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236. Vasquez v. Hillery, 474 U.S. 254 (1986); *see supra* text accompanying notes 90–122.

237. Notably, even the model instructions used for federal trial juries suggest a broader range of decisional authority for jurors than the Model Charge. Trial jurors are advised that they "must" acquit if the government fails to prove, beyond a reasonable doubt, each element of the offense charged, but are not advised that they "should" convict if the crimes are so proved. *See* KEVIN F. O'MALLEY ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS: CRIMINAL § 12.10 (5th ed. 2000). It is hard to justify instructions that implicitly suggest a broader scope of authority for trial jurors to reject valid criminal charges than for grand jurors, when the functions they serve suggest the opposite result.

238. *See supra* Part I.B.1.

239. *See, e.g.*, Thompson, *supra* note 77, at 730 (arguing that there should be a "probable cause determination by a neutral and detached magistrate to justify arrest or detention following indictment").

240. A close reading of *Gerstein v. Pugh*, for example, reveals that the Court did not expressly characterize the grand jury's indictment decision as "judicial" but rather allowed it to *substitute* for a judicial probable cause determination based on "the grand jury's relationship to the courts and its historical role of protecting individuals from unjust prosecutions." 420 U.S. 103, 118 n.19 (1975).

conduct meaningful legal review, particularly under the perfunctory review procedures authorized by the Court.[241] More deeply, even if grand jurors are capable of making meaningful probable cause determinations, they should not be constitutionally eligible to do so because they are part of a law enforcement body. These roles are normally deemed incompatible under basic adversary premises about the distinct functions of accusation and adjudication.[242]

Openly recognizing the grand jury as a "democratic prosecutor" would also provide an answer to attempts to "judicialize" the indictment process—a movement the Court has rejected time and again.[243] Movements by the lower courts to import into the grand jury process limits on the evidence that may be considered[244] or obligations to make a balanced indictment presentation,[245] can all be interpreted as efforts to bring due process, whether narrowly or broadly defined, to the grand jury's indictment procedure.[246] This desire, however, is in tension with the entire design of the federal grand jury. The essential attributes of federal grand jury proceedings—secret, one-sided considerations unregulated by evidentiary rules—are the very antithesis of the public notice and hearing procedures generally deemed essential to the process of adjudication.[247] The evident answer to this problem—provided by conceptualizing the grand jury as a "democratic prosecutor"—is not to "judicialize" grand jury procedures, but to

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241. *See* Leipold, *supra* note 67, at 300–01 ("There is little reason to believe that jurors with no . . . experience or training will be able to recognize those case where the evidence satisfies the legal test [of probable cause].").

242. *See, e.g.*, Young v. United States *ex rel.* Vuitton et Fils, S.A., 481 U.S. 787, 816 (1987) (Scalia, J., concurring in the judgment) (stating that for a judicial decisionmaker to "seek out law violators in order to punish them . . . would be quite incompatible with the task of neutral adjudication").

243. This Article would define attempts to "judicialize" the grand jury process to include measures that would alter the ex parte, one-sided nature of its indictment process, such as extending to the accused the right to present evidence or call witnesses. Other proposed reforms, however, are more properly viewed as attempts to enhance the fairness of the grand jury's investigative procedures, such as extending to grand jury witnesses the right to be accompanied by counsel. *See, e.g.*, 5 U.S.C. § 555(b) (2000) ("A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative."). Improvements of the grand jury's investigative procedures would be desirable and are consistent with recognizing the grand jury as a prosecutorial body.

244. *See, e.g.*, United States v. Estepa, 471 F.2d 1132, 1136 (2d Cir. 1972) (noting that a prosecutor should avoid excessive use of hearsay evidence before the grand jury, and when hearsay is used, the prosecutor must disclose to the grand jury that it is not receiving direct eyewitness testimony). *See generally* 4 LAFAVE ET AL., *supra* note 50, § 15.5(b) (discussing attempts by lower courts to regulate use of hearsay evidence before grand jury).

245. *See, e.g.*, United States v. Page, 808 F.2d 723, 728 (10th Cir. 1987) (stating that when seeking an indictment, prosecutor must present to the grand jury "substantial exculpatory evidence" discovered in the course of investigation).

246. *See, e.g.*, *Estepa*, 471 F.2d at 1136 ("The importance of avoiding undue reliance upon hearsay before a grand jury is heightened by this circuit's view that an indictment constitutes a finding of probable cause and avoids the need for a preliminary hearing . . . .").

247. *See, e.g.*, United States v. Bolles, 209 F. 682, 687 (W.D. Mo. 1913) (noting that if the grand jury were to hear witnesses for the defendant as well as for the prosecution, "the whole trial of the case would be drawn before the grand jury, out of the presence of the court and the counsel of the parties" (internal quotation marks and citation omitted)).

abandon the premise that the grand jury is engaging in acts that have the effect of adjudication.[248]

While the Court has compellingly explained the accusatory nature of the grand jury, it has not offered a similarly defensible explanation of the simultaneous principle that indictment stands in for the adjudication of probable cause.[249] To begin with, the Court's own precedents make clear that this principle was not, historically, as airtight as it is today, since grand jury indictment did not always preclude litigation of the question whether "probable cause" supported the government's charges.[250] The origins of the modern principle are generally traced to *Ex parte United States*,[251] a case in which the Court held that a judge in the same jurisdiction must accept the grand jury's indictment as "conclusive" on the question of probable cause.[252] But the Court's original explanation of this principle was not that the grand jury had made a judicial determination of probable cause. Rather, it emphasized the *prosecutorial* nature of the grand jury's function: Were the court to refuse to arrest an indicted defendant, the Court held, it would be tantamount to overriding the government's "absolute right" to prosecute crimes, a function in which the grand jury's powers are coextensive with those of the prosecutor.[253] This reasoning vindicates, rather than challenges, a prosecutorial theory of grand jury indictment.

Some historic context is also critical to understanding the tradition that grand jury indictment was "conclusive" of probable cause in the court to which it was returned. Notably, until relatively late historically, a probable cause determination was not regarded as a purely judicial function, as it is today—even prosecutors could constitutionally be assigned to make binding probable cause determinations.[254] The process of "adjudication" was then thought to be focused on the ultimate determination of guilt or innocence at trial.[255] In the modern era,

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248. *See id.* at 690 (justifying the grand jury's one-sided procedures on the ground that "the action of the grand jury deprives the accused of no right without a public hearing").

249. Most often, the Court has simply repeated this proposition, rather than explained it. *See, e.g.*, Giordenello v. United States, 357 U.S. 480, 487 (1958) ("A warrant of arrest can be based upon an indictment because the grand jury's determination that probable cause existed for the indictment also establishes that element for the purpose of issuing a warrant for the apprehension of the person so charged.").

250. *See, e.g.*, Greene v. Henkel, 183 U.S. 249, 257–58 (1902) (noting that defendant was allowed to challenge existence of probable cause in removal proceedings instituted on grand jury indictment).

251. 287 U.S. 241 (1932).

252. *See id.* at 250; *see, e.g.*, Gerstein v. Pugh, 420 U.S. 103, 118 n.19 (1975).

253. *Ex parte United States*, 287 U.S at 249 (stating that for a court to refuse to issue an arrest warrant where a grand jury has indicted is "equivalent to a denial of the absolute right of the government . . . to put the accused on trial").

254. *See* Ocampo v. United States, 234 U.S. 91, 100 (1914) (approving the proposition that states may use prosecutors rather than magistrates to make binding probable cause determinations to support arrest, on the view that this is only a "quasi-judicial" act rather than an adjudication of guilt or innocence). This proposition has since been resoundingly rejected. *See supra* notes 74, 163.

255. *See Ocampo*, 234 U.S. at 100 (stating that the determination of probable cause involves "no definite adjudication").

we have a far broader understanding of the term. Pretrial probable cause hearings are clearly viewed as "adjudicatory" proceedings that affect the substantial rights of the defendant, even though they do not involve a final adjudication of guilt or innocence.[256] Given this shift, it is hard to continue to defend the proposition that the accusation of a prosecutorial body should deprive the defendant of adjudicatory rights.

While this would necessitate additional pretrial review in federal criminal cases, such a change would be a salutary development. As the Court has recognized, for many defendants, the pretrial stages of a case may be equally or more important than the trial stage.[257] Grand jury decisions operate on the premise that few pretrial protections are needed because extensive protections will be extended at trial. But it makes little sense to shape pretrial rules on the ultimate vision of a trial at which all procedural rights will be granted when few defendants will ever enjoy their trial rights,[258] and the system could not possibly function if more defendants insisted on exercising them.[259] A necessary implication of accepting the grand jury as prosecutorial is that it cannot also act in a judicial role. But more meaningful pretrial procedures are a desirable side-effect of rethinking the "sword-shield" paradigm of grand jury indictment, and not an unfortunate casualty of a better conceptual approach.

B. ACCEPTING COMPETITION BETWEEN PROSECUTORS AND GRAND JURORS

Finally, a necessary implication of viewing the grand jury as a "democratic prosecutor" is that one must recognize and accept a certain degree of inherent competition over the exercise of prosecutorial discretion between prosecutors and grand jurors. Normally, when courts speak of prosecutorial discretion, they are referring to federal prosecutors' broad discretionary authority over the entire process of criminal prosecution, including the framing of criminal charges.[260]

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256. *See supra* notes 141–42 and accompanying text.

257. *See, e.g.*, Ash v. United States, 413 U.S. 300, 310 (1973) ("[E]xtension of the right to counsel to events before trial has resulted from changing patterns of criminal procedure and investigation that have tended to generate pretrial events that might appropriately be considered to be parts of the trial itself."); United States v. Wade, 388 U.S. 218, 224 (1967) ("[T]oday's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality.").

258. *See* ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL FACTS AND FIGURES tbl.3.5 (2004), *available at* http://www.uscourts.gov/judicialfactsfigures/table3.05.pdf (showing that in 2004, approximately four percent of defendants in federal criminal cases went to trial, while over eighty-six percent entered guilty pleas).

259. *See* LLOYD L. WEINREB, DENIAL OF JUSTICE: CRIMINAL PROCESS IN THE UNITED STATES 82 (1977) (noting that our criminal justice system "can offer a trial to all only if few accept the offer").

260. *See, e.g.*, United States v. Batchelder, 442 U.S. 114, 124 (1979) ("Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion."); Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."); United States v. Nixon, 418 U.S. 683, 693 (1974) ("Executive Branch has exclusive and absolute discretion to decide whether to prosecute a case . . . ."). *See generally*

Yet in cases such as *Vasquez*, the Court expressly recognizes that part of this discretionary charging power belongs, instead, to the grand jury.[261] The tension between these lines of authority reveals natural competition between prosecutors and grand jurors for control over the accusatory process. While open conflicts between the grand jury and prosecutor are rare, they present intriguing grand jury challenges—cases in which, for example, grand jurors and prosecutors were in disagreement over whether to indict[262] or whom to indict.[263] Lurking beneath such debates on the grand jury's powers is the realization that vesting broad power in grand jurors necessarily takes some degree of power away from federal prosecutors.

It is clear that this prospect is deeply troubling to many federal judges, including the majority in the Model Charge debate. Judge Kozinski's opinion represents an attempt to breathe a democratic spirit back into the process of criminal prosecution, for better or worse, by exploring the full meaning of the grand jury's "accusatory" constitutional role.[264] But the broadest implication of this view, as he acknowledges, is that local grand juries possess some power to override, at least temporarily, national enforcement priorities.[265] The majority's instinctive reaction against this conclusion is revealed most fully in its warning about the risks of giving grand jurors what Judge Hawkins terms a "full disclosure" instruction.[266]

While we may celebrate colonial grand juries for refusing to indict Peter Zenger under oppressive colonial laws, the majority argues, grand juries have also refused to enforce critical legislation in American history, including the Reconstruction Laws that followed the Civil War.[267] These judges conclude that irresponsible grand jurors are to be more feared than overzealous prosecutors,

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Prosecutorial Discretion, 34 GEO. L.J. ANN. REV. CRIM. PROC. 197, 197 (2005) ("Courts recognize [a prosecutor's] broad discretion to initiate and conduct criminal prosecutions . . . .").

261. *See* Vasquez v. Hillery, 474 U.S. 254, 263 (1986) (noting that the grand jury not only determines probable cause but also has discretion to decide what charges should be levied against defendant).

262. *See* United States v. Cox, 342 F.2d 167, 169–70 (5th Cir. 1965) (discussing controversy sparked by prosecutor's refusal to indict as instructed by grand jury).

263. *See* Judith M. Beall, Note, *What Do You Do With a Runaway Grand Jury?: A Discussion of the Problems and Possibilities Opened Up by the Rocky Flats Grand Jury Investigation*, 71 S. CAL. L. REV. 617, 623–27 (1998) (discussing the Rocky Flats case in which the grand jury sought to indict individual corporate officers but the Justice Department agreed to plea bargain with corporation).

264. *See* United States v. Navarro-Vargas (*Navarro-Vargas I*), 367 F.3d 896, 899 (9th Cir. 2004) (Kozinski, J., dissenting in part) (arguing against placing limitations upon grand juries to restrict their discretion).

265. *See id.* at 902 ("An independent grand jury—one that interposes the local community's values on prosecutorial decisions that are controlled by policies set in Washington as to the enforcement of laws passed in Washington—seems like an important safeguard that is entirely consistent with the grand jury's traditional function.").

266. *See* United States v. Marcucci, 299 F.3d 1156, 1171 (9th Cir. 2002) (Hawkins, J., dissenting) (describing an instruction that would inform grand jurors of their power to reject valid charges as a "full disclosure" instruction).

267. *See* United States v. Navarro-Vargas (*Navarro-Vargas II*), 408 F.3d 1184, 1199 (9th Cir. 2005) (cautioning that grand jury independence has "historically served causes both good and ill").

who are part of an Executive Branch ultimately accountable to the electorate.[268]

In the majority's view, it is ultimately more democratic to leave prosecution decisions in the hands of federal prosecutors, appointed by an administration responsible to the populace as a whole, than to grant power to a group of grand jurors randomly selected from a local community.[269] Undoubtedly, this point is a powerful one, given the clear potential that grand jurors will as often act irresponsibly as courageously. It is also true in the modern era that federal prosecutors are civil servants subject to a large body of Justice Department regulations and guidance that helps to ensure consistency and professionalism in prosecution decisions—something that cannot be said of the grand jurors' ad hoc charging decisions.

As a constitutional matter, however, the countervailing and equally powerful recognition underlying the grand jury clause is that even popularly elected governments cannot always be trusted to make appropriate prosecution decisions.[270] In the modern era, the courts tend to trust in the professionalism of federal prosecutors.[271] Historically, however, that confidence has not always been shared.[272] It is precisely by bringing the judgment of anonymous and unaccountable citizens to the criminal process that the grand jury system ensures a different type of "democratic" input into the administration of the laws.

The fault lines in the current debate are strikingly similar to an argument over allocating prosecutorial discretion that emerged in the South at the height of racial tensions over enforcement of the Voting Rights Act. When a federal grand jury sought to bring perjury charges against two African-American witnesses who had testified to racial discrimination in Mississippi voting procedures, the

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268. *See id.* at 1206 (explaining that grand juries are insulated from the "political pressure" placed upon the Executive Branch).

269. *See id.* ("[T]he grand jury has even greater powers of nonprosecution than the executive because there is, literally, no check on a grand jury's decision not to return an indictment. The grand jury has no accountability at the ballot box, before Congress, the President, or the courts.").

270. Justice Harlan, for example, believed that a grand jury composed of anonymous citizens served as a safeguard against "official oppression" and misuse of the "machinery of the law" for personal benefit. *See* Hurtado v. California, 110 U.S. 538, 554 (1884) (Harlan, J., dissenting) ("[O]ne of the peculiar benefits of the grand jury system, as it exists in this country, is that it is composed, as a general rule, of private persons *who do not hold office at the will of the government, or at the will of the voters*."). He believed that grand juries could protect the "weak and helpless—proscribed, perhaps, because of their race, or pursued by an unreasoning public clamor" due to their isolation from popular politics. *Id.* at 554–55.

271. *See* United States v. Calandra, 414 U.S. 338, 349–51 (1974) (refusing to permit a grand jury to invoke the exclusionary rule of the Fourth Amendment in part because of the Court's faith that "a prosecutor would be unlikely to request an indictment where a conviction could not be obtained").

272. *See, e.g.*, United States v. Wells, 163 F. 313, 325 (1908) ("The purpose of the institution of grand juries was, as we have seen, to interpose a check upon the sovereign . . . .") (quoting FRANCIS WHARTON, A TREATISE ON CRIMINAL PLEADING AND PRACTICE § 366, at 258 (9th ed. Philadelphia, Kay & Brother 1889)).

Justice Department insisted on declining prosecution,[273] and the district judge held the prosecutor in contempt.[274] In *United States v. Cox*, the Fifth Circuit had to decide who held the power *not* to charge—the grand jury or the prosecutor.[275] The result was a highly splintered decision—split along almost exactly the same lines as the Model Charge dispute.[276]

In that case as well, federal judges were openly divided about whom to trust to make enforcement judgments—federal prosecutors operating under instructions from a national administration or local citizens bound by no institutional loyalties. Judge Rives, who trusted the grand jury over the prosecutor, recalled the days of an Attorney General "suspected of being corrupt."[277] Judge Wisdom, who trusted the prosecutor over the grand jury, responded curtly that he was "not aware" of "more lawless Attorneys General than lawless juries."[278] The underlying debate expressly centered on whether national prosecution policies should be resolved in Washington at the hands of federal government officials or by local grand juries, who may be motivated as much by prejudice as by patriotism.[279] The *Cox* case starkly illustrates the dangers of this exchange, given the "climate of community hostility" in which the grand jurors sought to indict the two black witnesses.[280]

As sympathetic as these concerns are, at the same time, it is hard to avoid the conclusion that this risk is an intrinsic part of the grand jury's constitutional role. It is striking that the majority in *Navarro-Vargas II* does not seriously

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273. *See* United States v. Cox, 342 F.2d 167, 193–96 (1965) (Wisdom, J., concurring) (detailing the facts of the case).

274. *See id.* at 170 (quoting district court order holding prosecutor in civil contempt for failing to indict as instructed by grand jury).

275. The fascinating facts of the case, which included attempts to prosecute the witnesses both in state and federal court, are laid out in the concurring opinion of Judge Wisdom. *Id.* at 185–96.

276. Judges who sought to limit the grand jurors' charging powers argued that the grand jury's role is narrowly limited to determining probable cause. *See id.* at 171 (Jones, J.) (asserting that a grand jury "is restricted to a finding as to whether or not there is probable cause to believe that an offense has been committed" and that policy decisions about the advisability of prosecution should be made by federal prosecutors, not grand jurors). Those who believed the grand jury should be entitled to indict against the prosecutor's objection argued that grand jury indictment necessarily involves broad powers of prosecutorial discretion. *See id.* at 179 (Rives, J., concurring in part and dissenting in part) ("We agree that proper enforcement of the law does not require that indictments should be returned in every case where probable cause exists. Public policy may in some instances require that a case not be prosecuted. Such considerations of policy may be submitted to and acted on by the grand jury.").

277. *Id.* at 181 (Rives, J., concurring in part and dissenting in part) (calling the grand jury a "constitutional bulwark" that protects against the corrupt prosecutor).

278. *Id.* at 196 (Wisdom, J., concurring) (arguing that the federal prosecutor—not the grand jury—should have discretion not to prosecute).

279. *See id.* (Wisdom, J., concurring) (asserting that a national prosecution policy should not be decided by "a majority of twenty-three members of a jury chosen from the Southern District of Mississippi"); *see also id.* at 182 (Brown, J., concurring) ("[T]he executive's purpose to effectuate specific policies thought to be of major importance would be frustrated or encumbered were a Grand Jury given the sole prerogative of determining when a prosecution is to be effectively commenced.").

280. *See id.* at 196 (Wisdom, J., concurring) ("This Court, along with everyone else, knows that [the black witnesses], if prosecuted, run the risk of being tried in a climate of community hostility.").

defend the accuracy of the Model Charge.[281] What the majority disputes instead is the necessity of *informing* grand jurors of their constitutional powers.[282] Ultimately, perhaps the best answer to such concerns is to recall that, unlike the absolute unreviewable power of trial jurors to acquit at trial,[283] grand jurors' power to shield defendants from valid criminal prosecutions is neither final nor absolute. The prosecutor is free to resubmit charges to another grand jury (or even to change venues and seek grand jury indictment in a more hospitable district).[284] What the grand jury provides instead is a tempering effect, in which the criminal charging power is shared between citizen and government rather than being exclusively possessed by either.

In sum, recognizing that the grand jury acts as a "democratic prosecutor" has disturbing elements. Grand jurors may use their powers to shield those who should be prosecuted or may agree to indict those who should not. This prospect understandably troubles some federal judges, but it also has its virtues. Bringing community values to federal prosecutions can serve as a force for good within a criminal justice system otherwise dominated by career government officials. Judge Learned Hand, for example, saw the value of the grand jury precisely in its historic role as an "irresponsible utterance of the community at large, answerable only to the general body of citizens."[285] Equally important, while the grand jury serves as a community check on criminal charging decisions, its input is balanced by powers granted to federal prosecutors to override a citizen veto by seeking to reindict. Warts and all, viewing the grand jury as a "democratic prosecutor" is the conceptual vision that best makes sense of its constitutional role.

CONCLUSION

This Article has argued that all is not well with federal grand jury doctrine, and that the Model Charge litigation is simply the most recent facet of a deeper problem. Curing this problem requires the Supreme Court to articulate a clear

281. The majority agrees, for example, that the grand jury can choose not to indict even though probable cause exists—a principle that is certainly not explained in the Model Charge. *See* United States v. Navarro-Vargas (*Navarro-Vargas II*), 408 F.3d 1184, 1205 (9th Cir. 2005) (noting that grand juries may refuse to indict even if they find probable cause). Notably, both the majority and the dissent cite the Supreme Court's *Vasquez* decision for this proposition. *Compare id.* at 1200 ("[G]rand jury may refuse to return an indictment even 'where a conviction can be obtained.'" (quoting Vasquez v. Hillery, 474 U.S. 254, 263 (1986))), *with id.* at 1211–12 (Hawkins, J., dissenting) (relying on *Vasquez* for proposition that grand jury has the discretion to refuse to indict).

282. *See id.* at 1206 ("It is the grand jury's position in the constitutional scheme that gives it its independence, not any instructions that a court might offer."); *cf.* United States v. Dougherty, 473 F.2d 1113, 1136–37 (D.C. Cir. 1972) (stating that it is "pragmatically useful to structure instructions" to trial jurors in such a way that does not inform them of their power to nullify a valid prosecution).

283. *See, e.g.*, *Dougherty*, 473 F.2d at 1130 (noting that the trial jury has the "power to bring in a general verdict of not guilty in a criminal case, that is not reversible by the court").

284. *See* United States v. Thompson, 251 U.S. 407, 414–17 (1920) (reversing trial court's dismissal of an indictment made by a subsequent grand jury).

285. *In re* Kittle, 180 F. 946, 947 (S.D.N.Y. 1910).

conceptual vision of grand jury indictment, rather than continuing to endorse competing judicial and prosecutorial models. A workable and elegant conceptual solution is suggested by the dissenting opinions of Ninth Circuit Judges Kozinski and Hawkins in the Model Charge litigation. They would explain the grand jury's function by declaring it, in essence, a "democratic prosecutor"—a prosecutorial body that brings democracy to the federal charging process by empowering citizens in a constitutional role. These judges recognize that when grand jurors charge crimes in their role as democratic prosecutors, they should not have less charging discretion than the prosecutor herself. The logical implication of this position, of course, is that grand jury charging decisions also should not carry more weight than those of prosecutorial officials. Working from the insights suggested in the dissents, this Article proposes a simple conceptual shift: Limit our understanding of the grand jury's constitutional indictment function to accusation, rather than calling upon grand jurors both to accuse and to adjudicate probable cause. To paraphrase the Supreme Court, just as it is to be regretted whenever a judge must play prosecutor, it is equally to be regretted whenever a prosecutor—even a democratic one—must play judge.[286] The grand jury tempers the exercise of federal charging discretion by bringing to bear local community values in the prosecutorial decisionmaking process. However, this does not qualify the grand jury to make adjudicative judgments that serve as the predicate for coercive government action without normal judicial protections. The conceptual vision of grand jury indictment suggested by Judges Kozinski and Hawkins offers an insightful way to walk this difficult line.

286. *See* United States v. Morton Salt Co., 338 U.S. 632, 641 (1950) ("[I]t is to be regretted whenever a court in any sense must become prosecutor.").