Cornell Law Review

Volume 80
Issue 2 *January 1995*

Article 10

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WHY GRAND JURIES DO NOT (AND CANNOT) PROTECT THE ACCUSED

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INTRODUCTION

It has been praised as the greatest instrument of freedom known to our form of government[1] and as a bulwark against oppression.[2] It is closely protected by courts and Congress against those who would change its structure or practice.[3] It has existed in some form in Anglo-American law for more than 800 years[4] and is enshrined in the Bill of Rights. Nevertheless, the federal grand jury remains one of the least understood and most controversial parts of the criminal justice system.

The grand jury's critics are legion:[5] they attack the institution as an anachronism, a waste of money, a tool of government oppression, and even a modern-day Star Chamber.[6] Grand juries have been abolished in a large number of states and in England, and periodic efforts are made to abolish them in the federal system.[7] And although the nominal purpose of the grand jury is to protect those accused of crimes, few defendants take comfort from its presence; indeed, the staunchest defenders of the institution are prosecutors.[8]

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1 *See* United States v. Skurla, 126 F. Supp. 711, 713 (W.D. Pa. 1954).

2 *See* Wood v. Georgia, 370 U.S. 375, 390 (1962); United States v. Hogan, 712 F.2d 757, 759 (2d Cir. 1983); Cornelius W. Wickersham, *The Grand Jury: Weapon Against Crime and Corruption*, 51 A.B.A. J. 1157, 1158 (1965); *cf.* Wayne L. Morse, *A Survey of the Grand Jury System*, 10 OR. L. REV. 101, 101 (1931) ("[D]efenders of the grand jury proclaim it to be one of the bulwarks of our liberties, a protector of the innocent . . . .").

3 *See infra* notes 52-68 and accompanying text.

4 *See* RICHARD D. YOUNGER, THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES 1634-1941, at 1-2 (1963).

5 Sharp criticisms of grand juries are set forth in LEROY D. CLARK, THE GRAND JURY (1975); MARVIN E. FRANKEL & GARY P. NAFTALIS, THE GRAND JURY: AN INSTITUTION ON TRIAL (1977); Melvin P. Antell, *The Modern Grand Jury, Benighted Supergovernment*, 51 A.B.A. J. 153 (1965); Peter Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 463 (1980); William J. Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174 (1973); Ovid C. Lewis, *The Grand Jury: A Critical Evaluation*, 13 AKRON L. REV. 33 (1979); Jon Van Dyke, *The Grand Jury: Representative or Elite?*, 28 HASTINGS L.J. 37 (1976).

6 *See, e.g.*, Morse, *supra* note 2, at 101 ("Accusations that the grand jury is merely a rubber stamp for the district attorney . . . are frequently made."); Seymour M. Hersh, *Subpoenas Linked to Gun Purchase*, N.Y. TIMES, Mar. 14, 1973, at 11 (quoting Senator Edward M. Kennedy's claim that "political" grand juries are "a dangerous modern form of star chamber secret inquisition").

7 Grand juries are still an integral part of the criminal justice system in many states. However, the Fifth Amendment grand jury guarantee has not been incorporated through the Due Process Clause of the Fourteenth Amendment, see Hurtado v. California, 110 U.S. 516 (1884), and thus state grand jury procedures often differ markedly from the federal process. *See generally* 1 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 8.4 (1984); 1 SARA SUN BEALE & WILLIAM C. BRYSON, GRAND JURY LAW AND PRACTICE § 2:04 (1986). Because of these differences, this Article focuses only on federal grand juries.

8 *See, e.g.*, Thomas P. Sullivan & Robert D. Nachman, *If It Ain't Broke, Don't Fix It: Why the Grand Jury's Accusatory Function Should Not Be Changed*, 75 J. CRIM. L. & CRIMINOLOGY 1047 (1984); *see also* ABA GRAND JURY POLICY AND MODEL ACT 1 (2d ed. 1982) (noting that efforts at grand jury reform "have drawn strong attack from many prosecutors") [hereinafter ABA PAMPHLET].

What explains these widely divergent views? The *intensity* of opinion is understandable, because a grand jury proceeding is an important stage in most federal criminal cases. The Fifth Amendment requires that federal felony prosecutions begin with an indictment or presentment,[9] so unless the grand jury is convinced that the matter should proceed to trial, the case cannot proceed. From the defendant's perspective, the grand jury might be the only neutral entity to review the case in its preliminary stages, and thus may provide the only chance to have an unfounded accusation dismissed or an excessive charge reduced without the trauma of a full-blown trial.[10] Given these stakes, it is not surprising that both critics and supporters have heartfelt, and at times strident, feelings about the wisdom and efficacy of the institution.

This division of opinion is not only sharp, but fundamental. After decades of debate, there is still no agreement on the most basic question: whether grand juries perform a necessary and desirable function. This lack of consensus is at least superficially surprising because grand juries perform only two tasks,[11] neither of which is terribly complex. First, grand juries are supposed to serve a "screening function":

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9 The Fifth Amendment states in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . .

U.S. CONST. amend. V. The term "infamous crime" means at least all felonies. *See* Stirone v. United States, 361 U.S. 212, 215 (1960); FED. R. CRIM. P. 7(a) advisory committee's notes. Other than the cases arising in the military, the most important exception to the grand jury requirement is that a defendant may waive his right to be charged by indictment in noncapital cases. *See* FED. R. CRIM. P. 7(b).

A presentment is a criminal charge initiated by the grand jurors, rather than by the prosecutor. Although this was once a frequent method for initiating charges, it is virtually never used today. *See id.* 7 advisory committee's notes (noting that presentments are "obsolete" and not recognized in federal courts); *cf.* MODEL GRAND JURY CHARGE, *reprinted in* 1 BEALE & BRYSON, *supra* note 7, § 5:12, at 47 (informing jurors that they should be reluctant to issue presentment). For an extensive discussion of the presentment power, see Renee B. Lettow, Note, *Reviving Federal Grand Jury Presentments*, 103 YALE L.J. 1333 (1994).

10 If a defendant is indicted *prior* to arrest, any other pretrial proceeding to review the charges is unlikely. In other cases, however, a defendant will have more than one opportunity to have the charges reviewed. A defendant might be arrested pursuant to a warrant, which requires a magistrate to determine in advance if there is probable cause for the arrest. If no warrant is issued, a defendant's case normally must be reviewed by a judicial officer within 48 hours of arrest to determine whether there is probable cause to hold the defendant. County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991). Finally, a defendant is entitled to challenge the legal basis for the arrest at a preliminary examination before a magistrate, an adversarial hearing in which the defendant is entitled to put on evidence and cross-examine witnesses. *See* FED. R. CRIM. P. 5.1(a). The government may, however, preempt the preliminary examination by obtaining an indictment before the hearing takes place. *See id.* 5(c).

11 *See* Branzburg v. Hayes, 408 U.S. 665, 687 (1972); Wood v. Georgia, 370 U.S. 375, 390 (1962). Special grand juries may also issue reports that identify, among other things, noncriminal misconduct by public officials. *See* 18 U.S.C. § 3333(a) (1988). This proce-

they review the prosecutor's case and decide if the government has presented enough evidence to justify an indictment. In forcing the government to present its case to a panel of citizens at an early stage in the process, and in giving these citizens the ultimate charging power, the institution has been likened to a "shield" against ill-conceived or malicious prosecutions.[12]

Second, the grand jury acts as an investigative arm of the government. It helps the prosecutor gather evidence by calling witnesses and issuing subpoenas to compel production of documents.[13] When acting in its investigative capacity, the grand jury has been called a "sword" in the hands of the prosecution in the fight against crime.[14]

The fundamental criticism of grand juries can be stated simply. Many believe that the "shield" works poorly and the "sword" works only too well. The grand jury is frequently criticized for failing to act as a meaningful check on the prosecutor's charging decisions; according to the clichés it is a "rubber stamp," perfectly willing to "indict a ham sandwich" if asked to do so by the government.[15] In contrast, few doubt the effectiveness of the grand jury's investigative power. Here the concern is that prosecutors and grand juries abuse this authority by harassing unpopular individuals and groups.[16]

Despite the age and vigor of the controversy, at least two important points remain underdeveloped with respect to the screening function. First, it is still surprisingly unclear what grand juries are supposed to accomplish, and how successful they are in achieving those goals. There is general agreement that grand juries should derail "unfair" or "unwarranted" prosecutions, but there is little discussion about which cases fit those descriptions. Second, there has been remarkably little attention paid to the ultimate decisionmakers—the jurors themselves. Traditional criticism has focused on prosecutors, courts, and grand jury procedures, but has not analyzed how poorly

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dure is sufficiently rare that it is not usually considered one of the grand jury's basic functions.

12 *See* 1 LAFAVE & ISRAEL, *supra* note 7, § 8.1, at 599; 1 BEALE & BRYSON, *supra* note 7, § 1:07, at 35.

13 *See* United States v. R. Enterprises, 498 U.S. 292, 297-98 (1991) (discussing the scope of grand jury investigative powers).

14 *See* 1 LAFAVE & ISRAEL, *supra* note 7, § 8.1, at 599-600. The same grand jury performs both the screening and the investigative functions, *id.* at 600, although not all indictments require investigation and not all investigations lead to an indictment.

15 *See, e.g., In re* Grand Jury Subpoena of Stewart, 545 N.Y.S.2d 974, 977 n.1 (Sup. Ct.), *aff'd as modified*, 548 N.Y.S.2d 679 (App. Div. 1989) ("[M]any lawyers and judges have expressed skepticism concerning the power of the Grand Jury. This skepticism was best summarized by the Chief Judge of this state in 1985 when he publicly stated that a Grand Jury would indict a 'ham sandwich.' "); *see also* People v. Dukes, 592 N.Y.S.2d 220, 223 (Sup. Ct. 1992) ("[I]n this case, the prosecutor served the grand jury the proverbial 'ham sandwich' and told them, in effect, to take it or leave it.").

16 *See infra* note 140.

equipped the jurors are to decide when criminal charges are appropriate.

This Article focuses on these two points and concludes that, as currently constructed, grand juries not only do not, but cannot, protect the accused from unfounded charges. The Article agrees with the critics who claim that grand juries do not significantly influence a prosecutor's charging decisions, but argues that the weakness in the system lies less with the procedures employed than with the characteristics of the decisionmakers. The root cause of the institution's inability to screen is the jurors' lack of competence to perform their task.

The only issue jurors are asked to decide is whether the prosecutor's evidence is legally sufficient to justify an indictment, but as discussed below, jurors are not qualified to answer this question. Rather than being asked to find facts and apply those facts to the law, the jurors are presented with a single set of facts, instructed on the law by the prosecutor, and asked to decide whether those undisputed facts are sufficient to satisfy a specific legal test—the probable cause standard. This Article concludes that assigning this role to a jury—a role that is nearly unprecedented in American law—ensures that even reasonable, independent-minded jurors will defer to the prosecutor's judgment that an indictment should issue.

Part I looks at the difficulty of evaluating the grand jury's performance of its screening role. Part I.A provides an overview of the grand jury process and outlines the terms of the debate over the institution's effectiveness. Part I.B explores the limits of the debate by showing that the traditional means of measuring effectiveness are inadequate and, at times, misleading. Part I.C then offers a different explanation of why grand juries are not a viable mechanism for screening cases, by showing why jurors lack the capacity to make the probable cause determination required of them.

Part II constructs a more realistic model of the grand jury's role. Part II.A argues that although grand juries may not perform the task traditionally assigned to them, they nevertheless can provide some check on the prosecution. This Part concludes that, when properly understood, grand juries can screen certain types of cases, but that ultimately this type of screening may do more harm than good.

Nevertheless, some have argued that the mere fact of citizen participation in the justice system creates benefits beyond the actual screening of cases, and so Part II.B explores the collateral benefits that may arise from this participation. It concludes that although these marginal benefits exist, they do not outweigh the costs that the grand jury system imposes. Part II.C then sets forth a different view of the grand jury's role, one that offers a more accurate description of

the institution's ability to screen and a more realistic description of its limitations.

Part III looks at the implications of the analysis in Parts I and II. It suggests that the primary reason the grand jury has resisted change is that many of the proposed cures are worse than the disease. This Part examines several reform proposals, highlights their difficulties, and suggests analytical points to guide future reform efforts.

I
THE SCREENING FUNCTION

A. Background

The operation of a typical federal grand jury[17] is straightforward. A pool of citizens is summoned at random from the judicial district where the jury will sit.[18] From the group of qualified[19] people who appear, twenty-three are chosen to serve on the jury.[20] The jurors sit for an indefinite period not to exceed eighteen months;[21] the number of days per month when they must actually appear depends on the prosecutor's case load. A district court judge administers the oath and gives the jurors general instructions about their duties.[22] This marks the end of the judge's formal involvement in the process.[23]

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17 In addition to the grand juries required by the Fifth Amendment, Congress requires the chief judge in the larger federal judicial districts, upon request of the Attorney General, to convene "special" grand juries. *See* 18 U.S.C. §§ 3331-3332 (1988). The terms of service and the duties of the special grand juries may differ somewhat from those of regular grand juries. 18 U.S.C. §§ 3332-3333 (1988). This discussion is limited to regular grand juries.

18 Normally citizens are selected from a grand jury "wheel" that consists of the names of registered voters. *See* Jury Selection and Service Act of 1968, 28 U.S.C. § 1863 (1988). *See generally* Van Dyke, *supra* note 5, at 58-62 (describing selection of California grand jury).

19 Grand jurors must be at least 18 years old, must have resided in the judicial district for at least one year, must be able to read, write, understand, and speak English, must have the mental and physical ability to render satisfactory service, and must not be a convicted felon or have a felony charge pending. 28 U.S.C. § 1865(b) (1988). Jurors also may be excused for cause. *See id.* § 1866.

20 Although twenty-three jurors are normally chosen at the beginning of the session, sixteen are sufficient for the jury to conduct business. *See* FED. R. CRIM. P. 6(a); United States v. Leverage Funding Systems, 637 F.2d 645, 648 (9th Cir. 1980), *cert. denied*, 452 U.S. 961 (1981).

21 *See* FED. R. CRIM. P. 6(g) (limiting grand jury to 18 months, although permitting up to six-month extension if the public interest requires).

22 *See* 1 BEALE & BRYSON, *supra* note 7, § 5:12 (model grand jury charge).

23 A judge may still resolve disputes—ruling on a motion to quash a subpoena, for example, see FED. R. CRIM. P. 17(c)—or may answer questions that arise during the grand jury session, but otherwise plays no role. *See* United States v. Williams, 112 S. Ct. 1735, 1742 (1992) ("[The grand jury's] institutional relationship with the judicial branch has traditionally been . . . at arm's length. Judges' direct involvement in the functioning of the grand jury has generally been confined to . . . calling the grand jurors together and administering their oaths of office."); *see also* CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE 566 (3d ed. 1993) ("[B]ecause he is not present during

From that point forward, the prosecutor dictates the course of the proceedings.[24]

The most striking feature of grand jury hearings is their secrecy. The press and public are barred from the proceedings, as are suspects and their counsel. Even judges are not allowed in the grand jury room; attendance is limited to the prosecutor, the jurors, the court reporter, and the single witness being questioned.[25] Those who participate in the hearing are sworn to secrecy, and the court may use its contempt powers to ensure that this silence is maintained even after the case is resolved.[26]

Once in session, the grand jury's primary task is to review the cases presented to it by the government. The prosecutor calls and questions witnesses, and presents documentary evidence related to the crime in question. Unlike trial jurors, grand jurors may ask questions of the witness and may discuss the case with the prosecutor as evidence is submitted. After the case is presented, the prosecutor asks the jurors to vote to return an indictment accusing the defendant of a specific crime that the prosecutor believes is supported by the evidence. The jurors then deliberate in private.[27] If at least twelve agree that there is probable cause to believe that the suspect committed the crime,[28] the grand jury returns a "true bill" that, when signed by the prosecutor,[29] becomes the indictment. If the grand jury concludes that the evidence is insufficient, it returns a "no bill" (or "no true bill"), and any preliminary charges filed against the suspect are dismissed.[30]

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the grand jury's deliberations, the judge exerts very little practical control over them." (footnote omitted)).

24 The lack of judicial involvement and the resulting domination by the prosecutor have led to conflicting views on whether the grand jury is a creature of the courts, the executive, or neither. *Compare* Brown v. United States, 359 U.S. 41, 49 (1959) (grand jury is an "appendage of the court") *with Williams*, 112 S. Ct. at 1742 (grand jury is not assigned to any of the three branches of government, but is instead "a constitutional fixture in its own right" (internal quotation marks and citations omitted)).

25 *See* FED. R. CRIM. P. 6(d). An interpreter may also be present. *Id.*

26 *See id.* 6(e). Although Rule 6 contains several exceptions to the secrecy requirement, *see id.* 6(e)(3), nondisclosure of grand jury material remains the norm. *See id.* 6(e)(2), (5)-(6). The secrecy requirement does not, however, extend to grand jury witnesses. *Id.* 6(e)(2); Butterworth v. Smith, 494 U.S. 624, 634-36 (1990). For an overview of the grand jury's secrecy requirements, see WHITEBREAD & SLOBOGIN, *supra* note 23, at 551-56.

27 *See* FED. R. CRIM. P. 6(d).

28 *Id.* 6(f).

29 In the federal system the prosecutor apparently is not required to sign the true bill even though the jury has voted to indict. *See* United States v. Cox, 342 F.2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965); *see also* Fields v. Soloff, 920 F.2d 1114, 1118 (2d Cir. 1990) ("the grand jury may not issue an indictment where the prosecutor is opposed").

30 If a suspect is arrested before the grand jury reviews the evidence, as is typically the case, a complaint is filed against the defendant shortly after the arrest. The complaint is later replaced by the indictment. *See* 1 LAFAVE & ISRAEL, *supra* note 7, § 1.4, at 20-21, 25-26.

By traditional trial standards, a grand jury is allowed to consider a surprising, even shocking, mix of evidence. The prosecutor is not required to inform the grand jury of evidence that favors the suspect, even if that evidence is exculpatory.[31] Jurors are allowed to consider hearsay,[32] illegally obtained evidence,[33] tips, rumors, or their own knowledge of the alleged crime.[34] The Rules of Evidence do not apply,[35] so the prosecutor can ask leading questions and pursue matters that would be considered irrelevant if presented at trial. The decision of which evidence to present is also in the prosecutor's hands: the suspect has no right to testify in his own defense,[36] and if he does testify, is not allowed to bring counsel with him into the grand jury room.[37] The suspect may not put on contrary evidence, is not given access to the testimony of his accusers until the trial begins,[38] and indeed, may not even be told he is being investigated.[39] The result of these lax evidentiary standards, when combined with the prosecutor's discretion over the presentation of the evidence, is that grand jurors hear only what the prosecution wants them to hear[40]—the most incul-

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Because jeopardy has not attached at the time of the no bill, however, the government may still prosecute the suspect for the same crime by obtaining another indictment. *See* United States v. Williams, 112 S. Ct. 1735, 1743 (1992); United States v. Thompson, 251 U.S. 407, 413-14 (1920); United States v. Pabian, 704 F.2d 1533, 1533-1537 (11th Cir. 1983).

31 *See Williams*, 112 S. Ct. at 1746; *cf.* Brady v. Maryland, 373 U.S. 83, 87 (1963) (for purposes of trial, "suppression by the prosecution of evidence favorable to an accused . . . violates due process"). However, the Justice Department requires its prosecutors to disclose evidence that they know "directly negates the guilt of a subject of the investigation." *See* U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, § 9-11.233, at 9-268 (1992-1 Supp.) [hereinafter DOJ MANUAL].

32 *See* Costello v. United States, 350 U.S. 359, 363 (1956).

33 *See* United States v. Calandra, 414 U.S. 338, 351-55 (1974). *But cf.* DOJ MANUAL, *supra* note 31, § 9-11.231, at 9-267 to 9-268 ("A prosecutor should not present to the grand jury for use against a person whose constitutional rights clearly have been violated evidence which the prosecutor personally knows was obtained as a direct result of the constitutional violation.").

34 *See* Branzburg v. Hayes, 408 U.S. 665, 701 (1972).

35 FED. R. EVID. 1101(d)(2).

36 United States v. Fritz, 852 F.2d 1175, 1178 (9th Cir. 1988), *cert. denied*, 489 U.S. 1027 (1989). *See also* 1 BEALE & BRYSON, *supra* note 7, § 6:05, at 28 n.1 (citing cases).

37 *See* United States v. Mandujano, 425 U.S. 564, 581 (1976) (plurality); 1 BEALE & BRYSON, *supra* note 7, § 6:16, at 88.

38 A defendant who testifies before a grand jury is entitled to a transcript of his or her own testimony prior to trial. FED. R. CRIM. P. 16(a)(1)(A). A defendant is not, however, entitled to the testimony of other grand jury witnesses until after that witness has testified on direct examination at trial. At that point the prosecutor is obligated to turn over those portions of the witness's grand jury testimony that relate to the direct examination that has just taken place. *See* Jencks Act, 18 U.S.C. § 3500 (1988); FED. R. CRIM. P. 26.2.

39 Although there is no right to be notified of an investigation or to testify before a grand jury, the Department of Justice encourages U.S. Attorneys to provide notice in cases where the suspect may wish to testify. *See* DOJ MANUAL, *supra* note 31, § 9-11.152, at 9-262 (1992-2 Supp.).

40 The prosecutor cannot, of course, control the grand jury's consideration of information obtained outside the grand jury room. *See supra* note 34 and accompanying text.

patory version of the facts possible, regardless of whether that version is based on evidence that will be considered at trial.

Despite the informality of the proceedings, the stakes for the defendant are high. Once the jurors return an indictment, the charges are made public and the formal accusation has the weight of the grand jury behind it. In the public's mind an indictment often carries a presumption of guilt; it can cause economic harm and damage to reputation even if the defendant is later acquitted at trial.[41] Prosecutors have nearly unlimited authority to decide whom to charge and what charges to bring,[42] and judicial review of these decisions is typically unavailable.[43] But as always, broad discretion offers great potential for abuse: overwork, political pressure, laziness, and malice can prompt a prosecutor to bring ill-considered charges against innocent people or excessive charges against those who have committed lesser crimes.[44]

The grand jury's task is to ensure that the harms of a public accusation are not imposed where the government's charging decisions are unfounded or fail to conform to a rational enforcement scheme.[45] It does so by forcing the government to justify its decisions to a group of citizens who have no financial or institutional interest in obtaining convictions. In theory, these citizens are independent of the court and the prosecutor, and thus if it appears that the prosecutor is making unwarranted accusations, the grand jury should refuse to allow the

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But it is doubtful that this type of information plays an important role in many indictment decisions. *See* Campbell, *supra* note 5, at 178 ("In our vast, urban society jurors have no intimate knowledge of the goings-on within the community. They must depend, therefore, upon the facts and knowledge brought before them from extrinsic sources.").

41 *See* United States v. Serubo, 604 F.2d 807, 817 (3d Cir. 1979) ("[A] handing up of an indictment will often have a devastating personal and professional impact that a later dismissal or acquittal can never undo."); *In re* Fried, 161 F.2d 453, 458 (2d Cir.) (Frank, J.) ("[A] wrongful indictment is no laughing matter . . . . In the public mind, the blot on a man's [reputation], resulting from such a public accusation of wrongdoing, is seldom wiped out by a subsequent judgment of not guilty."), *cert. denied*, 331 U.S. 858 (1947); *see also* Sol Wachtler, *Grand Juries: Wasteful and Pointless*, N.Y. TIMES, Jan. 6, 1990, at 25 (Chief Judge of New York State arguing that "[t]he public often equates an indictment with guilt, either because it is iguorant of the difference between grand and petit juries or because . . . it assumes that where there is smoke in the form of an indictment, there must be fire in the form of guilt").

42 *See* Wayte v. United States, 470 U.S. 598 (1985); United States v. Batchelder, 442 U.S. 114 (1979).

43 *See, e.g.*, *Wayte*, 470 U.S. at 607-08 (prosecutor's "broad discretion rests largely on the recoguition that the decision to prosecute is particularly ill-suited to judicial review").

44 *See generally* CLARK, *supra* note 5, at 108 ("Lay citizen involvement in government institutions is an important ingredient when it can prevent government agencies from hardening into bureaucracies that operate only on their own internal dynamic.").

45 "The purpose of pre trial screening is, simply put, to prevent those cases which are weak, insignificant, ill-motivated or otherwise not worth prosecuting from penetrating further into the criminal justice system." DEBORAH DAY EMERSON & NANCY L. AMES, THE ROLE OF THE GRAND JURY AND THE PRELIMINARY HEARING IN PRETRIAL SCREENING 3 (1984).

case to go forward.[46] Secrecy aids this screening function: the grand jury reviews the case in private before a suspect is formally charged. If the charges are unfounded, the case will die a secret death, leaving the suspect's reputation intact.[47]

B. The Debate: How Effectively Do Grand Juries Screen?

Nearly every feature of the grand jury has been criticized over the years, but recently there has been an increased focus on the institution's alleged inability to screen cases. Indeed, it has become nearly an article of faith among both grand jury critics[48] *and* defenders[49] that the grand jury is a "rubber stamp" for the prosecution. As one former prosecutor put it, "If you gave [grand jurors] a napkin, they'd sign it."[50]

The notion that grand juries do not eliminate weak cases is now so well accepted that it is difficult to find any recent scholarly support to the contrary.[51] Although this level of agreement is unusual (especially among academics) it is noteworthy how little impact the consensus has had. Despite all the claims to the contrary, both Congress and the courts have adhered to the view that the grand jury in fact serves as a check on the prosecution.

Courts have consistently maintained that the grand jury protects citizens against official overreaching. In often-quoted language, the Supreme Court has said:

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46 *See* Van Dyke, *supra* note 5, at 62 ("We are better protected by an anonymous group of citizens who cannot use their power to pursue any personal ambitions and who will drift back into society after their term is over.").

47 *See* 2 BEALE & BRYSON, *supra* note 7, § 7:01, at 2; James P. Whyte, *Is the Grand Jury Necessary?*, 45 VA. L. REV. 461, 485-87 (1959).

48 *See, e.g.*, Antell, *supra* note 5; Arenella, *supra* note 5; Campbell, *supra* note 5; *see also* 2 LAFAVE & ISRAEL, *supra* note 7, § 15.2, at 282 ("In recent years, almost all of the commentary in legal periodicals has been critical of grand jury screening." (footnote omitted)).

49 *See, e.g.*, Sullivan & Nachman, *supra* note 8, at 1049 (defending current system, but agreeing that "[k]nowledgeable observers recognize and concede that federal grand juries do not protect citizens from unwarranted accusations by the government"). Even the American Bar Association could not muster much enthusiasm for the screening function. In its statement of grand jury policy, the ABA argued that the grand jury was not obsolete, but mentioned only the investigative function and the "common law tradition" as reasons for the institntion's continued vitality. *See* ABA PAMPHLET, *supra* note 8, at 3.

50 Richard L. Braun, *The Grand Jury—Spirit of the Community?*, 15 ARIZ. L. REV. 893, 914-15 n.144 (1974) (quoting Nilson, *Grand Jury Called Tool of the Prosecutor*, ARIZ. DAILY STAR, Feb. 10, 1974, at A1) (alteration in original).

51 *But see* Braun, *supra* note 50, at 912 ("When functioning properly, [the grand jury] can be a bulwark protecting citizens from unfounded charges and improper government oppression or harassment."); Earl J. Silbert, *Defense Counsel in the Grand Jury—The Answer to the White Collar Criminal's Prayers*, 15 AM. CRIM. L. REV. 293, 295 (1978) (noting without discussion that grand jury " 'continues to function as a barrier to reckless or unfounded charges' " (footnote omitted) (quoting United States v. Mandujano, 425 U.S. 564, 571 (1976)); Van Dyke, *supra* note 5, at 37 (grand jury may still perform screening function in some cases).

> Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.[52]

Lower courts are in nearly complete accord. Over the last several years a large number of appellate and district courts have reaffirmed the view that the grand jury's *raison d'être* is to serve as a shield.[53]

It is possible, and perhaps likely, that most of these judicial statements are simply reflexive incantations of the traditional view, not conclusions of *fact* that grand juries fulfill their historic role. There are, however, two problems with this explanation. First, courts are certainly aware of the claims that grand juries are mere rubber stamps. Indeed, the Supreme Court has recognized the criticism and dismissed it. In *United States v. Mandujano*, a plurality noted:

> The Framers [of the Constitution], most of them trained in English law and traditions, accepted the grand jury as a basic guarantee of individual liberty; *notwithstanding periodic criticism, much of which is superficial, overlooking relevant history, the grand jury continues to function as a barrier to reckless or unfounded charges.*[54]

Second, and more important, the Court continues to act on the assumption that the screening function works, regardless of whether it believes it. In *Gerstein v. Pugh*,[55] for example, the Court held that a suspect can be detained for a significant length of time after arrest

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52 Wood v. Georgia, 370 U.S. 375, 390 (1962); *see also* United States v. Williams, 112 S. Ct. 1735, 1742 (1992) ("[T]he whole theory of [the grand jury's] function is that it . . . serv[es] as a kind of buffer or referee between the Government and the people."); United States v. Dionisio, 410 U.S. 1, 16-17 (1973) (grand jury's task is to "clear the innocent, no less than to bring to trial those who may be guilty" (footnote omitted)); Branzburg v. Hayes, 408 U.S. 665, 686-87 (1972) (noting grand jury's "dual function" of determining probable cause and "protecting citizens against unfounded criminal prosecutions" (footnote omitted)); Hoffman v. United States, 341 U.S. 479, 485 (1951) ("[T]he most valuable function of the grand jury [is] . . . to stand between the prosecutor and the accused." (quoting Hale v. Henkel, 201 U.S. 43, 59 (1906)); *Ex parte* Bain, 121 U.S. 1, 11 (1887) (Grand juries are "a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity.").

53 *See, e.g.*, United States v. Thomas, 788 F.2d 1250, 1254 (7th Cir.), *cert. denied*, 479 U.S. 858 (1986); United States v. DiBernado, 775 F.2d 1470, 1476 (11th Cir. 1985), *cert. denied*, 476 U.S. 1105 (1986); United States v. Coachman, 752 F.2d 685, 689-90 (D.C. Cir. 1985); United States v. Kouba, 632 F. Supp. 937, 944 (D.N.D. 1986).

54 425 U.S. 564, 571 (1976) (plurality opinion) (emphasis added). The judgment in *Mandujano* was unanimous, but the opinion from which the quotation is taken was joined by only four Justices of an eight-member Court. None of the remaining four Justices who concurred only in the judgment expressed reservations about the quoted language.

55 420 U.S. 103 (1975).

only if the legality of the confinement is reviewed by a neutral decisionmaker. Normally that review is supplied by a magistrate in a post-arrest hearing; but when a grand jury indictment precedes the arrest, the Court concluded that no further review is needed. Substituting a grand jury's review of the evidence for a magistrate's review is permissible, the Court found, because of "the grand jury's relationship to the courts and its historical role of protecting individuals from unjust prosecution."[56] Thus the Court's perception of the grand jury's effectiveness, accurate or not, continues to influence doctrine.[57]

Only rarely have courts expressed doubts about the grand jury's ability to protect suspects. The most explicit criticism occurred in *United States v. Dionisio*,[58] where the Court acknowledged: "The grand jury may not always serve its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor."[59] Justice Douglas in dissent was characteristically more blunt: "It is, indeed, common knowledge that the grand jury, having been conceived as a bulwark between the citizen and the Government, is now a tool of the Executive."[60] Significantly, however, the majority in *Dionisio* then upheld the grand jury's expansive subpoena authority, in part because it believed that power to be a necessary component of the screening function.[61] Except for the angst expressed in *Dionisio* and a few lower court opinions,[62] the judiciary's favorable view of grand juries has continued undisturbed.

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56 *Id.* at 117 n.19. It is unclear what the Court meant when it said a grand jury could substitute for a magistrate because of its "relationship to the courts." In a later opinion the Court said that grand juries are *not* part of the judiciary, but are instead independent entities created by the Fifth Amendment. *See Williams*, 112 S. Ct. at 1742. *See also supra* note 24.

57 *See also* Shadwick v. City of Tampa, 407 U.S. 345 (1972) (upholding use of nonlawyers as state magistrates, in part because nonlawyers on grand juries routinely make probable cause determinations). *But see infra* notes 189-95 and accompanying text. The Court has also justified the grand jury's sweeping investigative powers because, among other things, it views that power as necessary to carry out the screening function. *See Branzburg*, 408 U.S. at 688 ("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.").

58 410 U.S. 1 (1973).

59 *Id.* at 17.

60 United States v. Mara, 410 U.S. 19, 23 (Douglas, J., dissenting). Justice Douglas's dissent in *Mara* also applied to *Dionisio*, a companion case. *See id.* at 23 n.*.

61 United States v. Dionisio, 410 U.S. 1, 17-18 (1973) ("[I]f [the grand jury] is even to approach the proper performance of its constitutional mission [to screen cases], it must be free to pursue its investigations unhindered by external influence or supervision.").

62 *See, e.g.*, United States v. Cleary, 265 F.2d 459, 461 (2d Cir.) (characterizing grand jury as "[b]asically . . . a law enforcement agency") (citing cases), *cert. denied*, 360 U.S. 936 (1959); United States v. Kleen Laundry & Cleaners, 381 F. Supp. 519, 521-22 (E.D.N.Y. 1974) (noting dominance of prosecutor in grand jury process); *cf.* Hawkins v. Superior Court, 586 P.2d 916, 919 (Cal. 1978) (rejecting view that state grand jury screens cases).

Grand jury critics have also been unable to influence Congress significantly. During the late nineteenth and early twentieth centuries many states eliminated or restricted the use of grand juries,[63] leading critics to hope that the federal government would follow suit. The most serious effort at change came in the late 1970s on the heels of alleged abuses of the grand jury system by President Nixon's Justice Department.[64] During this period Congress considered numerous structural changes, including at least four proposals to amend the Fifth Amendment to abolish the grand jury requirement.[65] During Congressional hearings there was a great deal of testimony on the grand jury's lack of independence and its ineffectiveness as a screen.[66] But while the proposals had some strong advocates in Congress, in the end only marginal changes were made; there was no enthusiasm for abolishing the institution.[67] The failure of these and other reform efforts has left the grand jury to operate today much as it did at the end of the eighteenth century.[68]

C. The Limits of the Debate

There are several possible explanations for the gap between the commentators' belief that grand juries do not screen cases and the apparent congressional and judicial assumption that they do. One

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63 *See* 2 BEALE & BRYSON, *supra* note 7, § 1:05, at 24-27.

64 *See infra* note 140.

65 The four proposals were introduced by Representative Joshua Eilberg as House Joint Resolutions 59 through 62. *See Grand Jury Reform: Hearings on H.R. 94 Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 995-1002 (1977) [hereinafter *Hearings on H.R. 94*] (text of proposed amendments); *see also id.* at 1003 (summary of proposals). For a comparison of the various statutory proposals to change the grand jury, see *id.* at 1006-08, 1140-48; *see also* S. 3405, 95th Cong., 2d Sess. (1978) (proposed Grand Jury Reform Act of 1978), *reprinted in Appendix to Hearings on S. 3405 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 1-64 (1978).

66 *See, e.g., Hearings on H.R. 94*, *supra* note 65, at 2 (statement of Rep. Eilherg); *id.* at 19 (statement of Linda Bakiel of Grand Jury Project); *id.* at 29 (statement of Doris Peterson of Center for Constitutional Rights).

67 *See* Arenella, *supra* note 5, at 537 n.376. More recent reform efforts also have not fared well. In 1987, for example, an unsuccessful effort was made in Congress to give witnesses the right to be accompanied by counsel in the grand jury room. *See Grand Jury Reform: Hearings on H.R. 2515 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. (1987) [hereinafter *Hearings on H.R. 2515*]. Opponents of the bill argued, among other things, that the presence of counsel would slow down the proceedings, and that the "truth-telling atmosphere" of the hearing would be endangered if the witness's lawyer were present. *Id.* at 7 (statement of Joe D. Whitley, United States Deputy Assistant Attorney General, Criminal Division).

68 *See* ABA PAMPHLET, *supra* note 8, at 3 ("[P]rogress toward implementing some of the key reforms on the federal level has been slow. . . . [A] corrective dose of due process is needed to bring this 12th Century institution fully into the 20th Century.").

The most important changes in grand jury procedure over the last several decades have been the requirement that the proceedings be transcribed, see FED. R. CRIM. P. 6(e)(1), and the method by which the jurors are selected, see *infra* note 93.

possibility is that the courts and Congress believe that the grand jury's shortcomings are insignificant. Many have a strong sense that prosecutors as a group are honest and fair, and that they can be trusted to exercise their charging power responsibly.[69] Thus, the argument goes, even if the grand jury's ability to screen cases is poor, the amount of abuse is small, so the debate over effectiveness is of greater academic than practical significance.[70]

A second possibility is that the problem is too large rather than too small. Altering grand jury practice to make the screening function more effective would require additional procedural protections, and opportunities to challenge those procedures, thereby slowing down the process. Courts have resisted any change that would lead to such a result; more than once the Supreme Court has expressed fears that additional procedural requirements would transform the grand jury hearing into a "mini-trial."[71] The Court and Congress may also be unwilling to change procedures if the result will be fewer indictments in a time of high crime rates, longer proceedings in a time of crowded dockets, and greater expense in a time of scarce resources. Thus, while judicial and legislative supporters of grand juries may not actually believe in the screening power of grand juries, they may be willing to ignore these shortcomings on political or philosophical grounds.[72]

A third possibility is that the commentators are simply wrong, and that grand juries actually perform a screening function and do it tolerably well. Despite the prosecutor's dominant position in the process, jurors may be skeptical enough about the government's exercise of power to reach their own conclusions about whether the requested charges are appropriate. Perhaps there is no reason to believe *ex ante* that citizens who are not directly affected by the crime in question[73] are disposed to return indictments unless they are convinced the prosecutor has accused the right person.

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69 *Cf.* Sullivan & Nachman, *supra* note 8, at 1049 ("[T]he protection of citizens is best left in the hands of the conscientious prosecutors who occupy the offices of United States Attorney and their assistants throughout the country.").

70 *See* YOUNGER, *supra* note 4, at 240 (quoting New York Judge Francis Martin, who dismissed claims that grand juries were rubber stamps as "the rantings of inexperienced and highly theoretical professors").

71 *See, e.g.*, United States v. Calandra, 414 U.S. 338, 349-50 (1974); United States v. Dionisio, 410 U.S. 1, 17 (1973); Costello v. United States, 350 U.S. 359, 363 (1956).

72 The strain on federal law enforcement and judicial resources is likely to get worse before it gets better. Congress and Presidents have shown an increasing willingness recently to federalize crimes that used to be the exclusive responsibility of the states. Procedural changes that would increase the time and money spent on pretrial screening of this larger case load seem unlikely.

73 A potential juror who was involved in one of the crimes to be presented to a grand jury could be excused by the court at the time of impaneling. *See* 28 U.S.C. § 1866(c)(2) (1988) (courts can remove those who "may be unable to render impartial jury service").

Each of these explanations has merit. But at its core, the disagreement about the effectiveness of the screening function is more fundamental. It may be that critics have been unable to show the institution's ineffectiveness because measuring that effectiveness is so confoundingly difficult. Stated differently, there is simply no easy, objectively verifiable way to determine when the grand jury is succeeding or failing. This difficulty has undoubtedly diminished the persuasive impact of the criticisms, and when coupled with inertia and the Fifth Amendment grand jury requirement, is sufficient to convince legislative and judicial decisionmakers to leave the institution well enough alone.

So as a starting point, it is useful to examine the ways that grand jury effectiveness is currently discussed to see why traditional means of measuring effectiveness are inadequate. Once the current shortcomings are understood, it should be possible to focus the debate in a more productive direction.

1. *The Shortcomings of Statistics*

Those who claim that grand juries fail to screen effectively often point to statistics to support this view.[74] Most commonly, they note that an extremely high percentage of cases submitted to grand juries result in indictments. The numbers are impressive: during fiscal 1984, for example, federal grand juries returned 17,419 indictments and only sixty-eight no bills,[75] an astounding 99.6% success rate. Statistics from other years are in accord.[76] Even in the rare instances

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74 *See* Peter Arenella, *Reforming the State Grand Jury System: A Model Grand Jury Act*, 13 RUTGERS L.J. 1, 7-8 (1981) ("[E]mpirical studies establishing that grand juries rarely return 'no bills' appear to support the widespread view that the grand jury merely 'rubber-stamps' the prosecutor's charging decisions." (footnotes omitted)); *see also* Sullivan & Nachman, *supra* note 8, at 1049 (assuming high rate of agreement between prosecutor and grand jury reflects weakness of screening function). *See generally* 2 LAFAVE & ISRAEL, *supra* note 7, § 15.2, at 283 ("Statistics on refusals to indict are also said to show an almost complete lack of grand jury independence."); Morse, *supra* note 2, at 154 ("Some might say that [a high percentage of indictments] shows that grand juries 'rubber stamp' the wishes of prosecutors."); *cf.* People v. Lewis, 430 N.E.2d 1346, 1376 (Ill. 1981) (Simon, J., dissenting) (citing legislator who argued that even if grand jury returns true bills in 95% of cases, "that still meant that in 5% of the cases the grand jury was protecting persons from groundless prosecution"), *cert. denied*, 456 U.S. 1011 (1982).

75 *See* Sullivan & Nachman, *supra* note 8, at 1050 n.16 (citing Statistical Report of U.S. Attorney's Offices, Fiscal Year 1984 (Report 1-21), introductory material, at 2)).

76 Although statistics on the number of no true bills in the federal system are not regularly compiled, in 1976 over 23,000 indictments were returned by federal grand juries and only 123 no bills were returned. *See Hearings on H.R. 94*, *supra*, note 65, at 738 (testimony of Assistant Attorney General Benjamin R. Civiletti); *cf. Federal Grand Jury: Hearings on H.R.J. Res. 46, H.R. 1277, and Related Bills Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 65 (1976) [hereinafter *Hearings on H.R.J. Res. 46*] (statement of United States Attorney General Edward H. Levi) (citing estimates that grand juries disagree with prosecutors in five percent of cases presented). As another example, between 1992 and June 1994 the U.S. Attorney's

when the grand jury refused to indict, it is not clear that the jurors were rejecting the prosecutor's recommendation; in some of these cases even the prosecutor apparently agreed that a true bill should not be returned.[77] For some critics these numbers are persuasive evidence of the grand jury's ineffectiveness.[78]

Yet even brief reflection shows how unhelpful these figures are. That grand juries nearly always return true bills may indeed demonstrate that jurors simply approve whatever charges the government submits, but it could also show that grand juries are a great success. A review of the prosecutor's decisionmaking leading up to the request for an indictment shows why.

Federal prosecutors know that virtually all of their charging decisions must be approved by the grand jury. Thus, in deciding which charges to bring, the prosecutor must determine not only which accusations can be proven at trial, but also which accusations will result in an indictment. If we assume that prosecutors as a group will normally decline to present charges to a grand jury that they think will be rejected, we would expect that prosecutors would submit only those cases that are sufficiently strong to survive a grand jury's review. Thus, *regardless* of whether the grand jury is serving as an effective screen, we would expect a high percentage of the cases presented to lead to indictments.[79]

Office in the District of Columbia reported that grand juries returned 841 indictments and only 16 no bills, a 98% success rate for the prosecution. Telephone Interview with Kevin Ohlson, Special Counsel to United States Attorney for the District of Columbia (Aug. 10, 1994). *Cf.* BLANCHE DAVIS BLANK, THE NOT SO GRAND JURY 42 (1993) (former grand juror noting that, in two years of service, "in every case in which an indictment was sought by the prosecutor, it was delivered").

The number of cases in which the jurors disagree with the *degree* of the crime charged also appears to be small. One empirical study conducted in the late 1920s concluded that state grand juries reduced the prosecutor's requested charges before issuing the indictment in fewer than three percent of the cases. *See* Morse, *supra* note 2, at 155.

77 *See, e.g., Hearings on H.R.J. Res. 46, supra* note 76, at 70 (statement of Rep. William Cohen) ("I spent 2 years prosecuting cases, and I never had a 'no bill' returned unless I wanted one."); Campbell, *supra* note 5, at 178.

78 *See* Arenella, *supra* note 5, at 539 ("Relying on empirical studies indicating that the grand jury rarely refuses to indict, . . . critics have concluded that the grand jury can serve no useful accusatorial function.").

79 *See* George H. Dession, *From Indictment to Information—Implications of the Shift*, 42 YALE L.J. 163, 178-79 (1932) (high rate of agreement between grand jury and prosecutor based on strength of charges presented).

Prosecutors normally take pains to maintain a high conviction rate, and so most would pursue only strong cases even if the grand jury did not exist. Nevertheless, it is easy to imagine cases where a prosecutor might pursue an investigation even if he or she were confident that no indictment would result. For example, a prosecutor might investigate a rival for personal or political reasons, knowing that the mere fact of an investigation will cause reputational damage even if no indictment is issued. The government might also seek indictments against members of a disfavored group, regardless of the strength of the charges, simply because the prosecutor is anxious to appear responsive to political pressure.

Indeed, contrary to the suggestion of critics, there would be cause for concern if grand juries *refused* to indict in a high percentage of cases. A high rejection rate would mean either that the prosecutor failed to evaluate the case properly, and therefore could not determine in advance whether a case was strong or weak,[80] or that the grand jury was so unpredictable that reasonable prosecutors could not anticipate when a true bill would be returned. In the former case the grand jury might be thought to be fulfilling its screening role, despite the prosecutor's troubling performance, but in the latter case the higher percentage of no bills would not be a reliable sign that the screening function was working.

A more relevant statistic might be the percentage of indictments that result in guilty pleas or verdicts of guilt.[81] If a high percentage of indictments resulted in judgments of guilt (as is in fact the case), it would be some evidence that grand juries are not returning indictments in weak or frivolous cases. The argnment would be that if grand juries were allowing weak cases to go forward to trial, the trial juries would discover the flaws in the case and acquit. Thus, the fact that a defendant is found guilty beyond a reasonable doubt could be seen as proof that the decision to indict, based on a finding of probable cause, was proper.[82]

This reasoning also has its limits. While conviction at trial of the crime charged in the indictment is strong evidence that the grand jury acted correctly, a guilty plea is weaker evidence. The overwhelming percentage of convictions are the product of guilty pleas, many of which are the result of a bargain between the prosecution and defense that some charges will be reduced or dropped.[83] It is hard to evaluate

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Although these dangers are real, the corrective mechanism lies outside the grand jury system, because these abuses might occur regardless of whether the grand jury is effective. The remedy probably lies within the U.S. Attorney's office: a prosecutor whose charges frequently turn out to be meritless would likely face severe reputational and professional difficulties.

80 By "weak" cases I mean, for the moment, those that should not be brought to trial because the defendant is likely to be acquitted. This definition is neither as obvious nor as helpful as it may first appear, as is discussed *infra* in part II.A.

81 *See* John C. Keeney & Paul R. Walsh, *The American Bar Association's Grand Jury Principles: A Critique from a Federal Criminal Justice Perspective*, 14 IDAHO L. REV. 545, 548 (1978) ("[T]he grand jury system is ultimately vindicated by a very high conviction rate."); *cf.* 2 LAFAVE & ISRAEL, *supra* note 7, § 15.2, at 284 ("Supporters [of grand juries] also suggest that the crucial statistic is not the percentage of no-bills, but the percentage of indictments that were not supported at trial with sufficient evidence.").

82 The percentage of indicted defendants who are convicted is typically in the 80% to 85% range. In 1986, for example, 32,200 people were indicted by federal grand juries and 27,198 were convicted, an 84.5% conviction rate. *See Hearings on H.R. 2515*, *supra* note 67, at 13 (statement of Joe D. Whitley).

83 *See* HARRY I. SUBIN ET AL., FEDERAL CRIMINAL PRACTICE § 10.5(b) (1992). Recently the Justice Department tried to limit the practice of "charge bargaining" with federal defendants. Pursuant to the "Thornburg Memorandum," prosecutors were instructed to re-

a grand jury's decision when the defendant pleads guilty to a lesser charge than the one set forth in the indictment: it might be that the grand jury simply accepted the prosecutor's recommendation on the higher charge even though the evidence would only support a lesser offense. The grand jury's duty to shield is surely not limited to protecting the completely innocent; it also must encompass the duty to protect lesser criminals from unduly high charges. When a defendant pleads guilty to a lesser charge than the one presented to the grand jury, however, it is difficult to know whether the shield was effective.

It may also be that a guilty plea is not absolute proof of a defendant's factual guilt. The same features of the grand jury system that prevent a full assessment of a defendant's guilt, such as the lack of cross-examination of witnesses and the lack of access to potentially exculpatory evidence, often hamper a defendant's consideration of a guilty plea. For example, a factually innocent defendant who has had no opportunity to cross-examine the government's key witness, and who thus overestimates the likelihood of conviction at trial, may be more likely to plead guilty to an unfounded charge to obtain a "favorable" bargain.[84] Moreover, a defendant who lacks the resources to investigate or to hire experts and consequently doubts his ability to establish an affirmative defense or rebut the prosecution's evidence may prefer whatever benefit is offered in a plea bargain over the risks of trial.[85] In sum, a guilty plea is no guarantee that the grand jury was correct in returning an indictment.[86]

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quire the defendant to plead guilty to the most serious "readily provable offense" with which he had been charged. *Id.* Although the Justice Department has now lifted this requirement, it appears that even under the Thornburg Memorandum a more limited form of charge bargaining still occurred. *See id.*; Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 AM. CRIM. L. REV. 231, 278 (1989). The Federal Sentencing Guidelines have also affected the extent of charge bargaining, *id.* at 279-82, although the extent of the impact is not clear. *See* SUBIN, *supra*, at 149 (characterizing impact of Guidelines as "significant" but noting that the effect must be scrutinized in each case).

84 These risks are minimized, although not eliminated, by the requirement that the trial judge be satisfied that there is a factual basis for a guilty plea. *See* FED. R. CRIM. P. 11(f).

85 Although many defendants and their counsel are hard pressed to conduct an adequate investigation of the facts alleged, courts routinely uphold decisions to plead gnilty, even when that decision may seem foolish in retrospect, as a "strategic" decision. *See, e.g.*, Daugherty v. Beto, 388 F.2d 810, 813 (5th Cir. 1967), *cert. denied*, 393 U.S. 986 (1968); *see also* JAMES E. BOND, PLEA BARGAINING & GUILTY PLEAS 4-34 (2d ed. 1983) ("appellate courts rarely second-guess the wisdom of counsel's recommendation that the defendant plead guilty").

86 One commentator, after analyzing guilty plea statistics from various district courts, concluded that "the pressure on defendants to plead guilty in the federal courts has induced a high rate of conviction by 'consent' in cases in which no conviction would have been obtained if there had been a contest." Michael O. Finkelstein, *A Statistical Analysis of Guilty Plea Practices in Federal Courts*, 89 HARV. L. REV. 293, 295 (1975). *Cf.* Arenella, *supra* note 5, at 471, 508-11 (discussing risks of assuming that guilty pleas reliably indicate guilt).

The premise that underlies the use of statistics to measure effectiveness is that any screening that occurs takes place *in the grand jury room.* But as noted above,[87] that premise is erroneous. Except in one specific type of case,[88] the prosecutor normally knows whether the evidence is sufficient to obtain an indictment before the grand jury votes. The prosecutor has complete control over the evidence submitted, runs no risk of being surprised by adverse judicial rulings or cross-examination, and has enough experience (personally or institutionally) to know how most jurors will react to the evidence. If the prosecutor believes that the grand jury will not indict, in most cases the prosecutor will simply stop the case before it reaches the grand jury room.

The extent to which prosecutorial "self-screening" occurs is impossible to quantify. When a prosecutor decides not to pursue an indictment, that decision is not recorded in any public document, if it is recorded at all. Even if a paper trail existed, the documentation would not be helpful. Few prosecutors would admit that they would have pursued a case but for the presence of a grand jury; to do so would be to admit poor judgment or even an ethical violation. Yet it is precisely these cases that have been "screened" by the grand jury.

In short, the grand jury is most likely to act as a shield when its *existence* convinces a prosecutor, in advance of a request for an indictment, that there is nothing to be gained by pursuing a particular case. Critically, the extent to which any screening takes place in the prosecutor's office depends on the degree to which a prosecutor is convinced that a request for an indictment would be fruitless; this in turn depends on the degree to which the prosecutor believes that if a weak case *were* submitted, it would be rejected. The extent to which these premises are true is discussed below in Part II.B. The point here is that the proper measure of the screening function has little to do with the percentage of indictments or convictions, and much to do with a prosecutor's decision that may be impossible to measure.[89]

The percentage of indictments that do *not* result in a conviction is also inconclusive. A trial jury's refusal to convict does not necessarily mean the grand jury erred in returning an indictment. Trial juries must find evidence of guilt beyond a reasonable doubt to convict. It would be entirely reasonable for the grand jury to conclude that there was probable cause that the defendant was guilty but for the trial jury to find that the proof did not satisfy the reasonable doubt standard.

87 *See supra* note 79 and accompanying text.

88 See *infra* part II.C.3, discussing a grand jury's decision to return a no bill even if the prosecutor has presented sufficient evidence of guilt to indict. Such a decision is commonly known as "jury nullification."

89 This is not to suggest that statistics are useless, or that there are no reasonable inferences that can be drawn from them. For example, when a trial jury acquits in a high percentage of cases it may tell us something about the *prosecutor,* because prosecutors are not supposed to seek an indictment in cases where they do not believe they can prevail at trial before an unbiased decisionmaker. *See* Sullivan & Nachman, *supra* note 8, at 1057.

2. *The Shortcomings of History*

Modern defenders of the grand jury are hard to find. There has been no recent, sustained defense of the institution by academics,[90] and, although courts have routinely rejected challenges to grand jury procedures,[91] there has also been no detailed judicial defense of the institution.

A clue to the Supreme Court's thinking may lie in its comment in *Mandujano*[92] that critics have "overlooked relevant history." For over 300 years (the argument goes) the grand jury has been seen as a shield for the accused. It was viewed that way by the British, who developed the current grand jury model; it was viewed that way by the colonists who brought English law and custom to America; and it was viewed that way by the framers and ratifiers of the Bill of Rights. Because we routinely defer to the wisdom of the Framers, and because grand jury procedures have changed little in the past two centuries, the Court may have decided that there is no basis to believe that the institution has stopped serving its intended purpose. To conclude that the grand jury does not *currently* serve as a screen makes it difficult to explain how the institution *ever* served as such, and to argue that the grand jury has always been a paper tiger is a daunting task indeed.[93]

But if the goal is to evaluate the grand jury, the link between indictments and convictions is a weak indicator.

90 *Cf.* Wickersham, *supra* note 2 (defense by senior counsel for New York Grand Jury Association); Sullivan & Nachman, *supra* note 8 (defense by practicing attorneys).

91 *See, e.g.*, United States v. Williams, 112 S. Ct. 1735, 1743-44 (1992) (federal appellate courts may not exercise supervisory power to dismiss an otherwise valid indictment because of prosecutor's failure to disclose exculpatory evidence to grand jury); United States v. Calandra, 414 U.S. 338, 349-50 (1974) (refusing to extend exclusionary rule to grand juries); Costello v. United States, 350 U.S. 359, 363 (1956) (indictment not subject to challenge on grounds it was based on hearsay).

92 *See supra* text accompanying note 54.

93 It could be argued that the recent judicial decisions on grand jury procedures, *see, e.g., supra* note 91, have eroded a once-powerful institution. The problem with this argument is that these recent decisions did not necessarily change the law dramatically. Many grand juries considered hearsay evidence before *Costello*, see 350 U.S. at 361 n.4, and grand juries undoubtedly considered illegally obtained evidence before *Calandra*. *See* United States v. Blue, 384 U.S. 251, 255 n.3 (1966). Whether prosecutors were required to disclose exculpatory evidence was unsettled before *Williams*. *See* 1 BEALE & BRYSON, *supra* note 7, § 6:03, at 15.

Indeed, some of the changes in grand jury practice have made it easier for the grand jury to screen. The most important of these changes has been the requirement that the jurors be selected in an unbiased manner, and that jury membership be open to all groups in society. *See* Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861-1867 (1988). This development helped stop the practice of the executive "packing" grand juries to ensure an indictment. *See* Helene E. Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 AM. CRIM. L. REV. 701, 724-26 (1972) (discussing packing of grand juries in cases arising under the Alien and Sedition Laws of 1798). *See generally* Van Dyke, *supra* note 5, at 44-45 (discussing importance of representative panel of jurors).

But reliance on history also has its limits. While it is clear that the drafters and ratifiers of the Bill of Rights viewed the grand jury as a source of protection for the accused,[94] it is difficult to find the factual basis for that belief. Historical evidence that the grand jury was once an effective screen is at best inconclusive, and at worst supports the view that the institution never served as much of a shield.[95]

No effort is made to recount the 800-year history of grand juries here; that has been done admirably elsewhere.[96] However, a few observations about the checkered history of the institution are in order, because they reveal how the events leading up to the inclusion of the grand jury provision in the Fifth Amendment, and the experience after ratification, can be used as easily to discredit grand juries as to support them.[97]

a. *Origins of the Institution*

The English practice of using citizens as an accusatorial body began in the twelfth century during the reign of Henry II.[98] Prior to that time, criminal charges were brought by way of private complaint, a system the King found quite unsatisfactory.[99] He therefore pressured

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94 *See infra* notes 132-34 and accompanying text.

95 *See infra* parts I.C.2.a, b.

96 For a particularly good discussion of the history, see Schwartz, *supra* note 93, and YOUNGER, *supra* note 4. *See also* BARBARA J. SHAPIRO, BEYOND REASONABLE DOUBT AND PROBABLE CAUSE 46-93 (1991); CLARK, *supra* note 5; Morse, *supra* note 2, at 101-20; Whyte, *supra* note 47. For an interesting treatment of the early history of the presenting jury, see Irwin L. Lanbein, *The Jury of Presentment and the Coroner*, 33 COLUM. L. REV. 1329 (1933).

97 As a threshold matter, references to "history" obviously cannot prove or disprove the effectiveness of the institution. The historical evidence is episodic and anecdotal: defenders can point to cases where the grand jury protected an innocent defendant, while critics can point to cases where innocent defendants were indicted and guilty defendants set free. At best, historical references can reveal whether there have been shared beliefs or understandings about how well institutions work. Although it may not satisfy a mathematician's standard of proof, a historical study showing a persistent belief in the strength of grand juries, coupled with a lack of persuasive criticism, might bolster the view that the screening function works. *Cf.* OLIVER WENDEL HOLMES, THE COMMON LAW 1 (1881) ("The life of the law has not been logic: it has been experience.") But even if persistent historical support is generally informative, there is no such support for grand juries.

98 *See* CLARK, *supra* note 5, at 8-9; Schwartz, *supra* note 93, at 703. Some writers have suggested that there were earlier institutions of this type on the Continent and in Scandinavia. *See, e.g.*, 2 FREDERICK POLLOCK & FREDERICK WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 642 (2d ed. 1968); Morse, *supra* note 2, at 102-07; *see also* Shapiro, *supra* note 96, at 46 ("the presentment jury is now thought to have come into existence prior to 1166").

99 Among other reasons, Henry was anxious to increase his law-enforcement authority because there was money to be made. Those convicted of crimes were often put to death and their estates forfeited to the Crown. *See* Schwartz, *supra* note 93, at 704, 708-10.

the English barons[100] to accept the Assize of Clarendon,[101] under which a group of sixteen men—twelve from every hundred and four from every township—were called together to decide which citizens should be charged.[102] Unlike modern grand juries, the jurors did not wait for accusations to be brought to them. Because the sheriff could not keep track of all the mischief committed by the locals, each juror was expected to bring to the proceedings the names of those suspected of crimes.[103] The pressure to turn in your neighbors was great: fines were levied on panels that failed to indict those whom the Crown considered guilty.[104] As a result, the earliest grand juries were considered a source of oppression by the citizenry rather than a protection from it.[105]

The apparent turning point in the relationship between grand jury and government came in the famous *Shaftesbury* and *Colledge* cases.[106] In 1681 King Charles II sought treason indictments from two London grand juries against Anthony Ashley Cooper, the First Earl of

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100 The King's courts were one of several tribunals to which complaints might be brought, and criminal cases often ended up in ecclesiastical or baronial courts. Because Henry thought the ecclesiastical courts in particular did not dispense justice evenly, and because he had no desire to share power with the church or barons, he looked for ways to consolidate his authority. *See id.* at 707-10.

101 The term "assize" (or "assisa") originally meant the sitting of a court or assembly. It later came to mean the things done or the enactments passed at that assembly or by the court or assembly. 1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 275 (7th ed. 1956). Prior to the Assize of Clarendon, Henry II also had pressured the Church to accept the Constitution of Clarendon, which increased the King's power with respect to the Church. *See* Schwartz, *supra* note 93, at 703-07.

102 HOLDSWORTH, *supra* note 101, at 77. A "hundred" was a territorial division within England; hundreds were subdivisions of "shires."

103 CLARK, *supra* note 5, at 9. Under the Assize of Clarendon, jurors were required to report whether " 'in their hundred or their township there be any man who is accused or generally suspected of being a robber or murderer or thief, or any man who is a receiver of robbers, murderers or thieves since our lord the king was king.' " HOLDSWORTH, *supra* note 101, at 77. Information already known to the jurors was not the exclusive source of accusations. The sheriff or private parties could still present alleged crimes to the jury for consideration. *See* 2 POLLOCK & MAITLAND, *supra* note 98, at 645; Morse, *supra* note 2, at 112.

104 *See* CLARK, *supra* note 5, at 9; Schwartz, *supra* note 93, at 709.

105 *See* Schwartz, *supra* note 93, at 709 ("Any thought that the grand juries were for the benefit of the people must be quickly dispelled by the historic fact that the grand jury was oppressive and much feared by the common people."). If a grand jury decided to accuse a person, the suspect was subjected to trial by ordeal; this might include sticking the accused's hand in boiling water and requiring him to sustain no injury, or throwing the accused in a lake and requiring him to avoid drowning without swimming. *See* CLARK, *supra* note 5, at 9.

Between the 14th and 17th centuries, trial by ordeals were replaced with jury trials, thereby separating the functions of accusation and guilt determination. *See* Schwartz, *supra* note 93, at 711 & n.47. But while there is some evidence that accusatorial grand juries helped deter spiteful accusations by *private* citizens, there is little evidence that they were a meaningful check on the King's prosecutorial powers.

106 *See Proceedings at the Old-Bailey, Upon a Bill of Indictment for High Treason, Against Anthony Earl of Shaftesbury*, 8 Cob. St. Tr. 759, 759 n.* (1681); *The Trial of Stephen Colledge, at Oxford, for High Treason*, 8 Cob. St. Tr. 550, 550 n.* (1681).

Shaftesbury, and one of his followers, Stephen Colledge.[107] Although there is some dispute over whether the charges were valid,[108] there is no doubt that each grand jury withstood great pressure from the court, and indirectly from the Crown, and refused to indict.[109]

The courage and independence of the *Shaftesbury* and *Colledge* grand juries have been justly applauded; as one American court noted, "These two cases are celebrated as establishing the grand jury as a bulwark against the oppression and despotism of the Crown."[110] To this day the cases are cited as proof of grand jury independence.[111] But the rest of the story is not a happy one, and shows how little protection the grand jury actually provided the accused.

Following the first grand jury's refusal to indict, the Colledge case was moved to Oxford where the potential jurors' views were more agreeable to the King. A second grand jury, again with a measure of official pressure,[112] indicted Colledge. After a brief and unusual trial (during which Colledge's defense notes were apparently turned over to the prosecution), Colledge was convicted, then executed on August 31, 1681.[113] Shaftesbury fared only slightly better. After the first grand jury refused to indict, the King made sure that the London sheriff and mayor, who selected the jurors, were sympathetic to the Crown. Realizing that another grand jury and probable indictment were imminent, Shaftesbury fled the country. These stories led one

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107 In June 1680 Shaftesbury went to Westminster Hall to present to the King's Bench a bill of indictment against the Duke of York. The Duke was partial to Roman Catholicism, a position that was disfavored by Parliament and most English citizens. Unfortunately for Shaftesbury, the Duke was also the brother of King Charles II, who took a dim view of the accusation. Before the grand jurors could consider Shaftesbury's bill, they were dismissed by the Chief Judge of the King's Bench, an ally of King Charles. The King then struck back by seeking the prosecution of those who supported the Protestant cause, including Shaftesbury and Colledge. *See* Schwartz, *supra* note 93, at 711-14.

108 *Compare* Schwartz, *supra* note 93, at 714 & n.61 (evidence of treason may have been fabricated) *with* CLARK, *supra* note 5, at 11 & n.* (basis for refusal to indict unclear).

109 For example, the presiding judge instructed the grand jurors that if they did not return an indictment they would be making themselves criminals. The judge also ruled, over the jurors' protests, that grand jury witnesses would be heard in public. *See* Schwartz, *supra* note 93, at 714-18.

110 *In re* Russo, 53 F.R.D. 564, 568 (C.D. Cal. 1971).

111 *See, e.g., Hearings on H.R.J. Res. 46, supra* note 76, at 63 (statement of Attorney General Edward H. Levi) (citing *Shaftesbury* and *Colledge* as helping to establish grand juries as safeguards against arbitrary prosecution); *cf.* CLARK, *supra* note 5, at 11 ("The Shaftesbury and Colledge cases are often cited as the first examples of the independence of the grand jury from executive pressure.").

112 During the proceedings the King's counsel and the witnesses were shut in the room with the jurors, apparently even during the deliberations. CLARK, *supra* note 5, at 11; Schwartz, *supra* note 93, at 715.

113 *See* Schwartz, *supra* note 93, at 716 & n.68. To ensure that the King's feelings about independent grand juries were not misunderstood, the foreman of the grand jury that refused to indict Colledge was arrested and sent to the Tower of London. He later fled the country. *Id.* at 715.

scholar to conclude that "[f]ar from epitomizing the often-praised independence of the grand jury in political cases, the [*Shaftesbury* and *Colledge* cases] only serve[ ] to prove the extreme vulnerability of that body to the cynical political machinations of the executive."[114]

b. *Coming to America*

Despite the ultimate fate of Shaftesbury and Colledge, by the end of the seventeenth century grand juries were seen as a protector of the liberty of English citizens.[115] Although the source of this perception is unclear, this was the attitude that apparently traveled with the colonists to America. The first regular grand jury to sit in this country was in Massachusetts Bay in 1635, and the practice soon took hold in the other English colonies.[116] Although similar in structure to their English counterparts, the colonial grand juries exercised much greater independence.[117] This independence was almost certainly a function of the relatively weak colonial governments; most colonies had little or no police force, leaving it to the grand jury to ferret out wrongdoing and present accusations.[118]

Grand juries were an effective and important institution in colonial America, keeping a watchful eye on government[119] and their fellow citizens,[120] and serving as quasi-legislative and executive bodies when circumstances warranted.[121] Whether they acted as a shield against the forces of the law is another matter. Because grand juries were the primary source of criminal accusations, there was almost no occasion to rely on them as a buffer. Indeed, as an important instrument of law enforcement, there was probably greater reason for people to worry about the institution than to be comforted by it. And while early grand juries undoubtedly prevented some frivolous crimi-

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114 *Id.* at 719. *See also* CLARK, *supra* note 5, at 12 ("This history tends to undercut the claim that the grand jury has always been a strong and independent institution.").

115 *See* YOUNGER, *supra* note 4, at 2.

116 *See* CLARK, *supra* note 5, at 13. *See generally* YOUNGER, *supra* note 4, at 5-26 (describing colonial grand jury development).

117 *See* YOUNGER, *supra* note 4, at 5-6.

118 *See id.* at 5; CLARK, *supra* note 5, at 13-15.

119 Governor William Bradford, for example, instructed the grand jury of the general court of Massachusetts Bay to look into all abuses within the government. *See* YOUNGER, *supra* note 4, at 7.

120 Early grand juries might accuse individuals of offenses such as disgraceful speech, excessive frivolity, and failing to serve the public. The latter charges could include failing to grind corn properly and "giving short measure" when selling beer. *See id.* at 7-8; *see also* CLARK, *supra* note 5, at 14-15 (grand jury might check on people who failed to attend church regularly).

121 In 1700, for example, a New Jersey grand jury proposed a tax on livestock and slaves. *See* YOUNGER, *supra* note 4, at 13. Grand juries also inspected prisons and roads, resolved boundary disputes, and provided assistance in the administration of local government. *Id.* at 13-14.

nal charges from being brought, the evidence suggests that their main focus was on assisting local governments and finding criminals.

Nevertheless, there were a few famous cases prior to the ratification of the Bill of Rights that have helped sustain the legend of the screening grand jury to this day. Perhaps the best known case involved John Peter Zenger, who was accused of seditious libel in 1734.[122] Zenger published the *New York Weekly Journal*, a newspaper sharply critical of New York Governor William Cosby. Two months after publication began, one of Cosby's allies, Chief Justice James De Lancey,[123] asked a grand jury to indict those who had recently been circulating seditious libel.[124] Although the grand jury appeared to have clearly understood the request to refer to Zenger,[125] it refused to indict him. The Chief Justice therefore submitted the charge of seditious libel to a second grand jury based on two satirical songs that Zenger had published (although not in the *Journal*). This time the grand jury issued the indictment, but did not name a defendant, claiming that it was impossible to discover the identity of the author, printer, or publisher.[126] Governor Cosby then ordered the sheriff to imprison Zenger first and then seek an indictment; once again, the grand jury refused to return a true bill.[127] Fed up with the grand jury's defiance, the Governor bypassed it entirely and filed an information charging Zenger, a controversial move that further eroded popular support for the Governor's actions.[128] Although there was strong evidence of guilt, the trial jury ultimately found Zenger not guilty.[129]

In the years leading up to the Revolutionary War the grand jury's screening role became increasingly prominent. Growing tension between the Crown and the colonies often surfaced in disagreements

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122 For a discussion of the *Zenger* case, see Stanley N. Katz, *Introduction* to JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER (Stanley N. Katz ed., 2d ed. 1972). For a fascinating account of the larger historical context of the Zenger trial, see Eben Moglan, *Considering Zenger: Partisan Politics and the Legal Profession in Provincial New York*, 94 COLUM. L. REV. 1495 (1994).

123 De Lancey had been elevated to Chief Justice by Governor Cosby, who had dismissed the prior Chief Justice, Lewis Morris, after Morris had voted against Cosby's position in a politically charged legal proceeding. *See* Katz, *supra* note 122, at 4; Moglan, *supra* note 122, at 1505-07.

124 Seditious libel, a nonstatutory crime originally developed in the Star Chamber, prohibited statements critical of public officials that threatened public tranquillity by bringing the government into disrepute. Trnth was not a defense. Katz, *supra* note 122, at 12 & n.32.

125 *Id.* at 17.

126 *Id.*

127 *Id.* at 19.

128 Proceeding by information was considered a "high-handed, unfair procedure[ ] which undercut the popular basis of the jury system." *Id.* at 19.

129 *Id.* at 16, 26.

over enforcement of the criminal laws.[130] By this date many colonies had public prosecutors who were chosen by, and were loyal to, the King. These prosecutors had the unhappy task of enforcing the tax laws, which were frequently violated by merchants who hoped to avoid import and export payments by smuggling goods. The unpopularity of the tax laws found a voice in the grand juries, who often refused the prosecutor's request to indict those suspected of breaking what many colonists considered oppressive rules.[131]

The Revolutionary War experience helped lay the groundwork for the inclusion of the grand jury guarantee in the Fifth Amendment. The popularity of the institution, however, arose at least as much from its success as a political weapon as from its role in the criminal justice system.[132] In some ways this popularity is curious: having seen how easy it was for grand juries to harass the disfavored (the British) and shield the favored (the colonists), the colonists might have been more leery of the institution once independence was achieved. As it turns out, of course, the contrary was true: bolstered by the prewar experience and the strong support of both British and American thinkers,[133] the grand jury guarantee was included in the Bill of Rights after relatively little debate.[134]

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130 *See* YOUNGER, *supra* note 4, at 27; 1 BEALE & BRYSON, *supra* note 7, § 1:03, at 15.

131 In 1765, for example, a Boston grand jury refused to indict the leaders of the Stamp Act riots. Three years later a grand jury resisted a demand by the presiding judge to indict the editors of the *Boston Gazette* for libeling Royal Governor Francis Bernard. *See* YOUNGER, *supra* note 4, at 28-30; *see also* Robert Gilbert Johnston, *The Grand Jury—Prosecutorial Abuse of the Indictment Process*, 65 J. CRIM. L. & CRIMINOLOGY 157, 158 (1974) (describing refusal of colonial grand jury to indict publisher of article critical of Massachusetts Lieutenant Governor).

Colonial grand juries also found that they could use their powers offensively. British soldiers who were stationed here often found themselves the subject of grand jury presentments. YOUNGER, *supra* note 4, at 28-36. During the war grand juries supported the American cause by returning presentments against those who joined the British army or who gave information to the enemy. *See* CLARK, *supra* note 5, at 17. The American leaders also found that grand juries could be an effective propaganda tool. In the months following the Declaration of Independence, many grand juries adopted resolutions denouncing the King and urging all Americans to support the "War for Freedom." YOUNGER, *supra* note 4, at 36.

132 *See* CLARK, *supra* note 5, at 17 ("From this pre-Revolutionary and Revolutionary period, the grand jury received much of the esteem that now attaches to the institution; however, it did not function in any strict sense to protect the 'innocent' against arbitrary and unfounded prosecution.").

133 Among the influential writers were Henry Care, John Somers and John Hawles in England and John Adams and Jonathan Sewall in this country. *See* CLARK, *supra* note 5, at 16; YOUNGER, *supra* note 4, at 21-22, 27 & n.2.

134 *See* Van Dyke, *supra* note 5, at 39. During Congressional debate on the Bill of Rights some changes were made in the provisions that were to become the Fifth Amendment, but it does not appear that these changes altered the scope or purpose of the grand jury provision. *See* 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1053, 1117, 1146, 1149, 1154 (1971).

Although there were some well-known cases of grand jury independence in the decades immediately following the ratification of the Bill of Rights,[135] the screening function apparently did not become widely important again until the antebellum years, when it played a role in the slavery debate. With some exceptions, Southern grand juries were quick to indict those involved in crimes related to abolition,[136] and Northern grand juries were slow to indict those similarly accused.

The case of Theodore Parker is a good example. Parker, a Boston Minister, was deeply opposed to the fugitive slave laws. When a fight over a runaway slave erupted at a local courthouse, Parker was accused of obstructing a United States Marshal in the performance of his duties, and his case was presented to a grand jury. Despite a biased charge from the presiding judge (who was an advocate of the slave law), the grand jury refused to indict the minister.[137]

On the surface, these and more recent examples[138] support the view of the grand jury as protector of the oppressed. On closer examination, it becomes obvious that a grand jury usually does not stop a determined prosecutor. As in *Shaftesbury* and *Colledge*, John Peter Zenger eventually was brought to trial, and Theodore Parker was later indicted by a second grand jury consisting of citizens more sympathetic to the slave laws.[139] Parker was never brought to trial, and Zenger was eventually acquitted, but the failure of the grand jury *system* remains: it only delayed, and did not prevent, a public accusation

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135 Perhaps the best known case of grand jury independence involved the twice-unsuccessful efforts to indict former Vice President Aaron Burr for attempting to involve the United States in a war with Spain, and for trying to seize control of New Orleans with a small group of unarmed men. *See* Schwartz, *supra* note 93, at 734-36. Burr was finally indicted when a grand jury was convened in Virginia, the stronghold of Burr's enemy, Thomas Jefferson. Despite Jefferson's best efforts, Burr was acquitted at trial, in part because the judge gave such a narrow jury instruction and made evidentiary rulings so favorable to the defense that conviction was nearly impossible. The trial judge was John Marshall, one of Jefferson's rivals. *Id.* at 736-38; *see also* JEFFREY ABRAMSON, WE, THE JURY 38-45 (1994).

Grand juries also continued to return no bills where charges were brought under unpopular laws. For example, although many Americans gave aid to French privateers, grand juries frequently refused to indict them for violating the Neutrality Proclamation of 1793. YOUNGER, *supra* note 4, at 49. Grand juries also were part of the controversy over enforcement of the Alien and Sedition Act, with Federalist judges urging strict enforcement of the Act and Republicans urging jurors not to indict. *Id.* at 54-55; Schwartz, *supra* note 93, at 721-32. The overtly political use of the institution led one writer to conclude that during this period "[m]any persons came to regard [grand juries] as mere appendages of the federal courts rather than as representatives of the people." YOUNGER, *supra* note 4, at 55.

136 *See* YOUNGER, *supra* note 4, at 90-92.

137 *See* Schwartz, *supra* note 93, at 740-45.

138 For a discussion of grand jury history in the first part of this century, see YOUNGER, *supra* note 4, at 209-41.

139 *See* Schwartz, *supra* note 93, at 746-47.

that was arguably the product of official overreaching. More importantly, even when a grand jury did act as buffer, their decisions appear to have been based more on the political nature of the charges and the ideology of the jurors than on the strength of the accusation. When this anecdotal evidence is coupled with the periodic allegations that grand juries have been used affirmatively to harass and oppress,[140] the historical foundation for the vision of the grand jury as a shield erodes even further.

This last point raises a deeper and more troubling issue. Even when the grand jury refuses to indict in the face of official pressure, it is often unclear whether the institution has acted in a desirable or even legitimate manner. The repeated refusal to indict Zenger seems "right" to us, but only because we no longer think of seditious libel as a legitimate crime. It may well be that the prosecutor presented sufficient evidence in that case to establish that guilt was likely.[141] If so, perhaps the grand jury should have returned a true bill. But because we do not know what evidence was presented, or how it was presented, and, more importantly, because it is not clear what grand juries are supposed to accomplish, it is nearly impossible to say whether they reached the right result.

The same is true in each of the other cases described. Every time a grand jury refuses a prosecutor's request to indict it has acted as a shield, but this does not mean that every refusal to indict is an appropriate exercise of that power. To take the easiest example, when a Southern grand jury refused to indict a factually (and obviously) guilty defendant accused of preventing newly freed slaves from voting following the Civil War, it clearly "shielded" the defendant, but it is hard to argue that the system therefore worked in a legitimate manner.

The difficulty of the point should not be underestimated. We want grand juries to screen out "unjustified" accusations, but in most cases, we also want them to return indictments where the evidence is sufficient. In almost all cases, however, it is impossible to know why

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140 In addition to the allegations that grand juries brought selective presentments against British soldiers during the revolution and against slavery activists before the Civil War, there have been more recent allegations of abusive grand jury practices. It has been alleged, for example, that the Nixon Justice Department conducted investigations and sought indictments against those who criticized the Administration, including student groups and members of the press. For a description of the allegations of abuse, see Michael Deutsch, *The Improper Use of the Federal Grand Jury: An Instrument for the Internment of Political Activists*, 75 J. CRIM. L. & CRIMINOLOGY 1159, 1179-83 (1984); *cf.* Leonard B. Boudin, *supra* note 22, at 20-21 (alleging unfair use of grand juries during McCarthy era); Johnston, *supra* note 131, at 160-68. *See generally* David J. Fine, Comment, *Federal Grand Jury Investigation of Political Dissidents*, 7 HARV. C.R.-C.L. L. REV. 432 (1972).

141 Although it is hard to say with confidence, it appears from available evidence—which may be different from the evidence the grand jury considered—that Zenger was guilty of the crime charged. *See* Katz, *supra* note 122, at 20-26.

the grand jury acted as it did, and so it cannot be said with complete confidence whether any particular grand jury acted appropriately. The proceedings are secret, and the historical record rarely reveals whether the grand jury refused to indict because the prosecutor failed to put forth enough evidence; because the jurors were biased in favor of the accused or prejudiced against the victim; or because of "policy" reasons—for example, the criminal law was unpopular or viewed by the jurors as illegitimate.[142]

The reasons for a grand jury's decision not to indict are explored in more detail below.[143] The point here is that the historical evidence does not justify the great faith placed in grand juries by the courts and Congress. More importantly, a review of history fails to solve the underlying doctrinal problem because it provides no measuring stick for deciding when a grand jury has appropriately injected itself between the government and the accused.

3. *The Shortcomings of a Procedural Critique*

A procedural critique suggests that grand juries cannot screen because the procedures for presenting cases blunts their ability to do so. The claim is that the excessive involvement of the prosecutor, the absence of judicial involvement, the lack of control over the reliability of the evidence, the absence of cross-examination or other contrary evidence, and the low standard of proof prevent the jury from making a reasoned decision about the strength of the government's accusation.[144] Those who advance a procedural critique have proposed that prosecutors be required to present only admissible evidence that would support a conviction at trial,[145] to present exculpatory evidence

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142 There are other possible explanations. The jurors may have been confused by their instructions, may have been prejudiced against the prosecutor, or may have been significantly influenced by outside sources in their deliberations. Although these cases undoubtedly arise, this Article assumes for purposes of analysis that in most cases grand juries understand their instructions and make decisions based primarily on the evidence presented to them.

143 *See infra* part II.A.

144 The most thoughtful and detailed procedural critique of grand juries has been advanced by Professor Arenella. *See* Arenella, *supra* note 5. The American Bar Association also has developed 30 "Grand Jury Principles" and a Proposed Model Act that advocate numerous changes in grand jury procedures. *See* ABA PAMPHLET, *supra* note 8. For other procedural reform proposals, see CLARK, *supra* note 5, at 109-18; FRANKEL & NAFTALIS, *supra* note 5, at 121-31; Braun, *supra* note 50, at 913-17; Lewis, *supra* note 5, at 64-66; *cf.* Sullivan & Nachman, *supra* note 8, at 1065-69 (arguing that no major reform needed, but agreeing with proposals for some modification). *See generally* Arenella, *supra* note 74.

145 CLARK, *supra* note 5, at 135; Arenella, *supra* note 5, at 558-59 (suggesting that Congress overrule *Costello* by statute); *see also* ABA PAMPHLET, *supra* note 8, at 4-5 (Principle No. 6: "The prosecutor *shall* not present evidence to the grand jury evidence which he or she knows to be constitutionally inadmissible at trial." (emphasis added); Principle No. 16: "The prosecutor *should* not make statements or arguments in an effort to influence grand jury action in a manner which would be impermissible before a petit jury." (emphasis ad-

known to the prosecutor,[146] to redraft judicial charges to better inform juries of their powers,[147] and to give putative defendants the right to appear before the grand jury.[148] Others have offered more dramatic proposals, such as allowing grand juries to hire their own lawyer[149] and severing the grand jury's investigative role from its charging role.[150]

A grand jury would undoubtedly make better screening decisions if some or all of these changes were made. There are, however, steep administrative costs associated with many of these proposals. Any change that would limit the admissibility of evidence would also require a procedure to challenge the evidence actually admitted. Because judges and defense counsel are not present at the hearings, challenges would be post hoc, a cumbersome and inefficient process. More importantly, a suspect who wished to challenge the evidence would have to be given access to the grand jury testimony and documents, which would destroy the secrecy of the proceedings. The resulting hearings might yield better screening decisions, but would require a substantial and expensive departure from current practice.

A related and more serious problem is that the procedural critique contains a built-in paradox. On the one hand, the screening function could be made more effective by adopting procedures that are now required at trial—presenting only admissible evidence, for example. On the other hand, the grand jury procedures need not, and indeed should not, *replicate* a trial, even though full trial procedures would obviously enhance the ability to screen. It cannot seriously be maintained, for example, that suspects should have the right to cross-examine witnesses and present evidence to a grand jury, even

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ded)); *cf.* Sullivan & Nachman, *supra* note 8, at 1066 (decisions whether to present hearsay evidence should be left to prosector).

146 Arenella, *supra* note 5, at 565-69; ABA PAMPHLET, *supra* note 8, at 4 (Principle No. 3: "No prosecutor shall knowingly fail to disclose to the grand jury evidence which will tend substantially to negate guilt."). Professor Arenella finds it critical that exculpatory evidence be disclosed, stating, "The grand jury cannot possibly screen out unwarranted prosecutions when the prosecutor fails to present exculpatory evidence that, if believed, would negate defendant's guilt." Arenella, *supra* note 5, at 549; *cf.* FRANKEL & NAFTALIS, *supra* note 5, at 72, 129-30 (noting difficulty with requirement).

147 *See* ABA PAMPHLET, *supra* note 8, at 5, 11 (Principle No. 22: duty of court to give written charge to jurors "completely explaining their duties and limitations"); Arenella, *supra* note 5, at 571-72; Mei Kato Bickner, *The Grand Jury . . . A Layman's Assessment*, 48 CAL. ST. B.J. 660, 736-37 (1973).

148 *See* ABA PAMPHLET, *supra* note 8, at 4 (Principle No. 5: target should have right to testify provided he waives immunity); FRANKEL & NAFTALIS, *supra* note 5, at 128-29.

149 *See* Braun, *supra* note 50, at 916 (proposing that grand juries be assisted by independent counsel or referee).

150 CLARK, *supra* note 5, at 142-43; Arenella, *supra* note 5, at 570-71; Braun, *supra* note 50, at 916. *See also infra* part III.B.

though this would undeniably result in better judgments about the prosecutor's charging decision.[151]

So we are left with a situation where each additional procedural protection is desirable, but full procedural protection is undesirable. What is needed is a logical stopping point for the procedural critique; there must be a way to distinguish those procedures that are *necessary* to the grand jury screening function from those that simply *enhance* the screening function. Standing alone, the procedural critique cannot tell us how to retain the *ex parte*, preliminary nature of the grand jury process while still providing the jurors with sufficient information (quantitatively and qualitatively) to evaluate the charging decision. The critique tells us *why* certain procedures would make the process more effective, but it gives no benchmark to determine when the process is so deficient that the grand jury is no longer fulfilling its intended role.

Perhaps what is needed is a change in focus. A more useful analysis into the screening function might begin by asking *which* cases we want the grand jury to eliminate, and then ask whether the institution has the ability to identify those cases if they were presented by the prosecutor. Once these questions are answered, it should be easier to decide what changes are appropriate.

II
Evaluating Grand Jury Effectiveness

If statistics cannot adequately measure grand jury effectiveness, and if history provides an uncertain guide, the question remains: How can we tell whether grand juries really screen cases? The answer is found only indirectly in the procedures employed by the grand jury, and more directly in the capabilities of the jurors themselves. By focusing on the task grand jurors are asked to perform and their ability to perform that task, it should be possible to predict the likelihood that the prosecutor will refrain from presenting weak cases. As a preliminary matter, however, it is desirable to articulate more precisely what types of cases should not be allowed to go forward to trial.

A. Identifying the Cases that Grand Juries Should Eliminate

A grand jury may refuse to indict for a variety of reasons, not all of which serve the goal of protecting defendants from unwarranted prosecutions. First, the grand jury obviously should eliminate those cases where the defendant is factually innocent ("Group 1"). Even

151 The Supreme Court has correctly noted that the Constitution does not require that a suspect be given the equivalent of two complete trials, one to determine if the charges are proper and another to determine guilt. *See, e.g.*, United States v. Dionisio, 410 U.S. 1, 17 (1973); Costello v. United States, 350 U.S. 359, 363 (1956).

assuming that these defendants will be acquitted at trial, those who did not commit the crime present the best case for derailing charges as quickly and as quietly as possible. The mental anguish that follows an accusation and the burdens of trial will be the most acute here, and the consequences of a mistaken verdict will be the most profound.

The grand jury also should eliminate those cases where the defendant is legally innocent but factually guilty ("Group 2"). Here the defendant committed the crime alleged, but for some procedural, evidentiary, or other reason there is a legal bar to conviction. While it might be argued that the grand jury should not be troubled by this type of defendant—it hardly seems "oppressive" to indict the factually guilty—such an argument is unpersuasive. Allowing a grand jury to indict a legally innocent suspect offers two unappealing possible outcomes. Either the trial or appellate court will acquit the defendant, in which case the post-indictment proceedings will have been a waste of time and resources, or the defendant will be erroneously convicted.[152] Moreover, allowing the indictment of legally innocent defendants denigrates the legal system's interest in its procedural rules. A rational legal system has nearly as high an interest in vindicating the interests protected by its procedural rules, such as the inadmissibility of illegally gathered evidence, as it does in protecting an innocent defendant. As long as these rules create a legal impediment to conviction, no legitimate interest is served by allowing the case to go beyond the grand jury stage.[153]

A third group that a grand jury might eliminate includes cases where the suspect is factually guilty and perhaps legally guilty, but the prosecution fails to make an adequate showing of guilt when the charges are submitted to the grand jury ("Group 3"). This failure might occur because the prosecution has not yet gathered sufficient evidence at the time it seeks an indictment (but will have enough by the time of trial) or because the prosecutor for strategic reasons decided not to reveal the evidence it had already gathered.[154]

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152 Assume, for example, that a factually guilty defendant's coerced confession is the only evidence of guilt. If a grand jury is allowed to consider the confession it will surely indict, even though a conviction should not be possible. If the grand jury does not screen these cases out, either the trial will be a waste of time or the conviction will be erroneous. In either case, the system would be better off if the grand jury refused to indict in the first instance.

153 In some ways there is *greater* reason to protect defendants in this group than there is to protect the factually innocent, because the risk of trial error may be higher than for Group 1. A trial jury that (correctly) believes that a defendant committed the offense might be inclined to convict despite a legal deficiency in the government's case. The fact that the trial judge can enter a judgment of acquittal or that the court of appeals can reverse the conviction affects only the extent to which the risk of error is increased.

154 Strategic reasons might include an unwillinguess to call certain witnesses before the grand jury to avoid tipping off a target that he is under investigation, or the fear of leaks from the grand jury.

The desirability of preventing these charges from going forward is less obvious than with the first two groups. By definition, here the prosecution either has or will have enough evidence to convict, but is prevented from going forward because the grand jury refuses to indict. But while the harm in allowing such cases to proceed to trial may be lower than in Groups 1 and 2, these cases should nevertheless be eliminated at the pretrial stage. There is no logical way for a jury to distinguish cases in this group from cases in which the defendant is legally innocent; from the grand jury's perspective, it is simply a matter of insufficient evidence, regardless of whether the deficiency can be cured. Thus a system of rules that attempts to extend different pretrial treatment to cases in Groups 2 and 3 will necessarily fail. And while the harm to the defendant of allowing such cases to go forward is relatively low, the cost to the prosecutor of having these cases rejected also is low. There is no double jeopardy bar to bringing the same matter before a second grand jury,[155] so when the government fails to obtain an indictment of a guilty suspect, its remedy is to try again.[156]

Fourth, a grand jury might refuse to indict when the prosecutor has presented otherwise sufficient evidence because it disbelieves a witness or the probative value of that evidence ("Group 4"). Although a prosecutor might believe a prisoner's story that he was assaulted by a guard, and a trial jury would be entitled to believe it as well, the grand jury could find the prisoner-victim unworthy of belief and return a no bill. In these instances, the grand jury serves as a separate evaluator of the case. Because reasonable minds can differ about the evidence presented, the grand jurors sometimes will reach a different, albeit reasonable, result than would a trial jury.[157]

The desirability of this type of screening can also be questioned. Requiring the prosecution to convince two panels of citizens of the value of the evidence will surely screen out some cases, but it is hard to say what incremental benefit in accuracy is gained from having two separate judgments. To the extent trial and grand juries reach differ-

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155 *See supra* note 30.

156 This is not to say that the delay created by the need to obtain an indictment is irrelevant. Extensive delay while the prosecutor gathers the evidence for the grand jury can create problems under the Speedy Trial Act. *See* 18 U.S.C. § 3161(b) (1988) (indictment normally must be filed within 30 days of arrest).

157 The number of cases in Group 4 is likely to be small because the grand jury has almost no opportunity to judge witness credibility. The prosecutor often submits hearsay evidence (*e.g.*, through a police officer), so the jurors may never see the actual witness. Even when a witness is presented, there is no cross-examination to test the person's recall or veracity. Ironically, the grand jurors' best chance to determine credibility occurs when the prosecutor wants assistance in deciding which party is telling the truth, and so presents more extensive evidence than is required. For a discussion of this last point, see *infra* part II.C.2.

ent conclusions about the evidence, the trial determination is probably more reliable, given that trial testimony is subject to cross-examination and the rules of hearsay. There is also reason to believe that the mere fact of having the same evidence repeated a second time imposes costs on both the witnesses and the truth-seeking function.[158]

On balance, however, it is probably desirable to have the grand jury eliminate Group 4 cases. A grand jury's unwillingness to believe the prosecution's evidence has particular force where that information is not subject to cross-examination. If a prosecutor cannot convince a grand jury of a witness's credibility in the sheltered environment of the grand jury room, there is little reason to expect a contrary determination by a trial jury that has also seen the defense's evidence.[159] The preliminary nature of the grand jury hearing also has the advantage of alerting the prosecutor to the weaknesses of the accusation early in the process, before resources have been fully committed to the case. So while the trial jury's evaluation of the evidence may be more accurate than the grand jury's, there is still some value in the grand jury's preliminary assessment.

Finally, grand juries might eliminate those cases that should not go to trial for policy reasons ("Group 5"). This group includes cases where the prosecutor has presented sufficient evidence of factual and legal guilt to warrant an indictment, but the jury decides to return a no bill for reasons unrelated to the strength of the evidence.[160] For example, the jury may refuse to indict because it believes that the particular criminal law is unjust, that the prosecutor has an improper motive for seeking the indictment, that the harm caused by the offense is

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158 If it is known that a witness or victim may have to present testimony before two different bodies, this might cause enough trauma to make victims and witnesses as a group less willing to cooperate in an investigation. The cost to the truth-seeking function arises from the ability of a prosecutor to present the same matter to a different grand jury; a witness who testifies before one grand jury and is disbelieved might modify those statements before the next grand jury hearing. Although the defendant will have the ability to cross-examine that witness at trial, even regarding the grand jury testimony, see FED. R. CRIM. P. 26, many defendants would undoubtedly prefer to have an adverse witness testify without the "dry run" that grand juries provide. *See infra* note 212 and accompanying text.

159 Of course, grand jurors are free to discount the evidence presented because they realize they are hearing only one side of the case, and thus in some cases it may be more difficult to convince a grand jury that a witness is truthful than it is to convince a trial jury. Given the grand jury's authority to question witnesses on its own, however, it seems unlikely that the jurors would often sit in silence and refuse to believe a witness simply because that witness's story had not been challenged.

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

de minimis, or that the defendant has suffered enough from the fact of investigation or arrest.[161]

Whether it is desirable for a grand jury to refuse to indict in these cases is discussed in Part II.C below; the focus for the moment is on the first four groups. Assuming that it is proper to remove cases within these groups at the pretrial stage, it is worth examining the grand jury's procedures to see if the institution can identify such cases when they are presented. If it cannot, the prosecutor has no external incentive to self-screen, and thus the goal of shielding the suspect is unlikely to be met.

B. Why the Screening Function Doesn't Work: The Jurors

The barriers to a grand jury's ability to screen are not obvious, because its task seems so simple. Jurors listen to the prosecutor's case and then are asked to answer a single question: is there probable cause to believe that the suspect committed the specified crime?[162]

Stated simply, grand jurors are not qualified to answer this question. Whether probable cause exists is ultimately a legal determination about the sufficiency of the evidence: whether the prosecutor put forth enough information to surpass the legal threshold established by the probable cause standard. In submitting a case to the grand jury we are asking nonlawyers with no experience in weighing evidence to decide whether a legal test is satisfied, and to do so after the only lawyer in the room, the prosecutor, has concluded that it has. Because jurors lack any experience or expertise in deciding whether probable cause exists, it becomes not only predictable but also logical that the jurors will return a true bill. This is not because they are a rubber stamp, but because they have no benchmark against which to

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161 *See infra* part II.C.3.

162 It would be logical to assume that probable cause in this context means something different than it does in the arrest context. In most cases presented to a grand jury the suspect has already been arrested, and so a finding of probable cause has been made by a judicial officer either in issuing the warrant, see FED. R. CRIM. P. 4, or immediately following the arrest. *See* Gerstein v. Pugh, 420 U.S. 103 (1975). A suspect might also have had a preliminary hearing, at which a magistrate again would have ruled on whether there was probable cause to proceed to trial. *See* FED. R. CRIM. P. 5.1(a). It seems wasteful to have a third determination made of exactly the same question.

Surprisingly, courts have not spoken clearly on what probable cause means other than in the arrest and search context. *See* Arenella, *supra* note 5, at 485-87 ("Judicial instructions to grand juries exhibit considerable disagreement over the proper evidentiary standard for measuring probable cause to indict." (footnote omitted)). Because there is little judicial discussion of how probable cause should be defined, I have assumed for purposes of analysis that the definition of probable cause is the same in the grand jury context as it is in the search and seizure context, and have relied on case law from that area. While logic may point toward a different standard, it seems likely that when judges or prosecutors are asked by grand jurors to elaborate on the meaning of probable cause they look to familiar Fourth Amendment law for guidance.

weigh the evidence, and thus no rational basis for rejecting the prosecutor's recommendation to indict.[163]

This disability will affect the jurors' decisionmaking in each of the first four groups mentioned above. By definition, jurors will be unable to spot the cases where the prosecutor has not introduced enough evidence (Group 3), because they do not know how much evidence is required to meet the probable cause standard. Jurors also will not be able to spot those cases where the defendant is factually guilty but legally innocent (Group 2); almost any type of evidence can be presented in a grand jury hearing, so the jurors have no way to determine whether the *admissible* evidence will be sufficient to convict at trial.[164]

Jurors also will struggle to identify weak cases that fall into Groups 1 and 4. The jury is presented with a single version of the facts that are not subject to cross-examination, and so the jurors have no chance to evaluate the evidence and judge credibility. Thus, as long as there is *some* evidence of guilt, the jurors are unlikely to decide that the defendant is factually innocent (Group 1) or that the evidence is unpersuasive (Group 4). In the absence of any contrary facts or arguments, they have no reasoned basis for doing so.[165]

The point can be made most easily by comparing the role of grand jurors to that of trial jurors. It could be argued that trial jurors make a similar "sufficiency of the evidence" decision when they decide whether the prosecution has proved its case beyond a reasonable

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163 Although trial jurors are asked to make a facially similar decision when they return a verdict, the two decisions are significantly different. *See infra* text accompanying notes 166-80.

164 Experience shows, of course, that grand jurors occasionally disagree with the prosecutor about the sufficiency of the evidence. But there is no reason to believe that the jury is making an *informed* decision when it disagrees, because it has no expertise that would support a conclusion contrary to the prosecutor's. It is more likely that jurors who reject the request for an indictment base their decisions on grounds unrelated to the strength of the evidence. These cases, which fall into Group 5, are discussed *infra* in part II.C.

165 This does not mean that the grand jury will never be able to identify an innocent defendant when it sees one. If a prosecutor selected people at random from the scene of a crime and charged them, or if a prosecutor bent on harassment presented a charge that was facially implausible, a jury's common sense would likely lead them to return a no bill. Beyond these rare cases, however (and perhaps they are rare because the jury can detect them), the ability to screen cases in Group 1 is doubtful.

It also is possible that the jurors will simply disbelieve the prosecutor's evidence and return a no bill in Group 4 cases, despite the prosecutor's request for an indictment. In the absence of cross-examination or rebuttal evidence, however, this possibly seems remote. *See supra* note 159; *cf.* Antell, *supra* note 5, at 154:

> [T]he only person who has a clear idea what is happening in the grand jury room is the public official whom these twenty-three novices are expected to check. So that even if a grand jury were disposed to assert its historic independence in the interest of an individual's liberty, it must, paradoxically, look to the very person whose misconduct they are supposed to guard against.

doubt. But in fact, a grand jury's determination of probable cause is qualitatively different than a trial jury's verdict, and these differences are crucial to the ability of the two panels to perform their respective functions.

Perhaps the main justification for having lay citizens serve on trial juries is the belief that nonlawyers are at least as good as judges at sifting through the facts and deciding which of the competing versions of the case is correct.[166] Indeed, the adversary system is premised on the idea of presenting two "biased" versions of the same events, and letting a neutral decisionmaker decide where among the competing views the truth lies.[167] Jurors are well suited for this job: they serve on relatively few cases, thereby minimizing the risk that they will become corrupted by bias or prejudice, or that they will treat cases in an assembly line manner.[168] And while jurors have less experience than a judge in evaluating evidence, the tasks of weighing credibility and spotting flaws in testimony do not require any special legal skill. Thus, the conclusions of lay people will in most cases result in an accurate finding of whether the defendant committed the crime.[169]

Once trial jurors find the facts, they admittedly make a determination that is superficially similar to that made by the grand jury when they decide if those facts establish guilt "beyond a reasonable doubt." Note, however, our discomfort in allowing juries to make this decision. If at any point the court determines that the material facts are not in dispute and that the prosecutor cannot prove guilt beyond a reasonable doubt, the court bypasses the jury and enters a judgment

166 *See* Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 GEO. WASH. L. REV. 723, 734 (1993); Dale W. Broeder, *The Functions of the Jury: Facts or Fictions?*, 21 U. CHI. L. REV. 386, 389 (1954); *see also* Ronald J. Allen, *The Nature of Juridical Proof*, 13 CARDOZO L. REV. 373, 393-401 (1991) (arguing that a juror's lay opinion is needed to understand "richly textured human act[s]" that are basis of even mundane disputes); *cf.* Colgrove v. Battin, 413 U.S. 149, 157 (1973) ("[T]he purpose of the jury trial in criminal cases [is] to prevent government oppression, and . . . assure a fair and equitable resolution of factual issues.") (citation omitted).

167 *See* GEORGE P. FLETCHER, A CRIME OF SELF DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL 6-7 (1988).

168 *See id.* at 7 ("Vesting the power of final judgment in laypeople, whose careers are not affected by their rejection of the state's position, contributes to an independent decision on guilt or innocence."); Murphy, *supra* note 166, at 734 ("As a one-time actor in the justice system, the jury is not susceptible to the cynicism that may beset a judge."); *see also* Duncan v. Louisiana, 391 U.S. 145, 156 (1968) (Juries are "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.").

169 *See* Broeder, *supra* note 166, at 388-89; Murphy, *supra* note 166, at 734; *cf. Duncan*, 391 U.S. at 156 ("If the defendant prefer[s] the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he [i]s to have it.").

of acquittal.[170] Judges can also overrule the jury's finding of guilt after trial or on appeal, but only if no set of facts that *could* have been found by the jury will support a conviction. Judges will not reconsider facts that might have been found by the jury, but are free to redetermine the legal question of whether those facts satisfy the reasonable doubt standard.[171] In short, with limited exceptions,[172] we let the jury make the ultimate legal decision about guilt only when that determination might be affected by the resolution of a factual dispute.

Contrast the trial jury's role with that of the grand jury. Unlike at trial, where the adversary system is designed to present conflicting facts on which the jury's decision is based, a grand jury hearing is carefully structured to *avoid* conflicting facts. The prosecutor is not obligated to present contrary evidence, and the suspect has no right to testify or to challenge the evidence.[173] Instead, the grand jurors are presented with a single version of the events surrounding the crime, and asked to apply a legal standard to those facts.[174]

In virtually every other context such decisions are left to judges and magistrates. Summary judgment,[175] judgments as a matter of law

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170 *See* FED. R. CRIM. P. 29(a). The court may enter the judgment of acquittal sua sponte. *Id.*

171 *See* United States v. McCall, 460 F.2d 952, 956-57 (D.C. Cir. 1972); Goff v. United States, 446 F.2d 623, 624 (10th Cir. 1971).

172 In criminal cases a jury is allowed to make the ultimate legal decision, even when there are no facts in dispute, when determining a criminal defendant's guilt, but not innocence. A court may not direct a verdict in the government's favor, United Brotherhood of Carpenters and Joiners of America v. United States, 330 U.S. 395, 408 (1947), and may not overturn a jury's verdict of acquittal. This refusal to interfere with the jury's decision flows from the desire to allow a jury to "nullify" the evidence, that is, to give the jury power to refuse to convict no matter how clear the evidence of guilt. This power allows a jury to exercise mercy or express its displeasure at the government's actions in particular cases. *See* 2 LAFAVE & ISRAEL, *supra* note 7, § 21.1, at 700. The parallel between the trial jury's and grand jury's nullification powers is discussed *infra* in part II.C.

In civil cases the trial jury is allowed to make the ultimate legal decision when the facts are undisputed and when that decision explicitly calls for a jury's determination (*e.g.*, whether defendant failed to act like a "reasonable person"). Even in this area, however, the commitment to jury decisionmaking is limited: the judge can use the concepts of negligence per se and insufficiency of the evidence to take the decision from the jury and enter summary judgment. *See* WILLIAM PROSSER, LAW OF TORTS 205-08 (4th ed. 1971).

173 *See supra* part I.A.

174 The lack of confidence the system places in the grand jury's conclusions about probable cause is reflected in the rules established to override that decision. If the grand jury refuses to indict, the prosecutor is not barred from seeking a new indictment, even if it relies on the same evidence. *See supra* note 30. Even if the grand jury indicts, the prosecutor is under no obligation to press forward with the case. He or she can refuse to sign the indictment, thereby preventing it from becoming valid. *See supra* note 29. Or, the prosecutor can *nol pros* (refuse to prosecute) a case with leave of court after the indictment is filed. *See* FED. R. CRIM. P. 48(a). Thus, while a true bill is *necessary* to a criminal trial, it does not inevitably lead to a trial.

175 FED. R. CIV. P. 56.

(both before[176] and after the verdict[177]), and judgments of acquittal[178] take the ultimate decision from the jury and give it to the judge, but only if the judge accepts the facts as they could have been found by the jury. The grand jury moves in the opposite direction: the legal decision is taken from the court and given to a jury,[179] but the grand jury is effectively limited to the prosecutor's version of the facts.[180]

The few times nonlawyers make analogous determinations are instructive. The closest parallel to the grand jury decision is the police officer who makes a warrantless arrest. In both cases the decision to accuse is made by nonlawyers, and in both cases the accusation must be based on probable cause.[181] In addition, both the grand jury and the police officer make decisions based on information that has not been tested by the adversary process, increasing the risk that the data are erroneous or incomplete. Because police are routinely allowed to make such decisions, it could be argued that the grand jury's probable cause decisions should be entitled to equal respect.

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176 *Id.* 50(a) (court may enter judgment in civil action prior to verdict if there is no legally sufficient evidentiary basis for a reasonable jury to find in favor of nonmoving party).

177 A judgment overturning the verdict in a civil case may be entered if no reasonable jury could have found in favor of the prevailing party. The court may order a new trial or enter a judgment as a matter of law in favor of the moving party. *See id.* 50(b).

178 FED. R. CRIM. P. 29 (court may enter a judgment of acquittal in a criminal case at any time if government has not presented sufficient evidence to establish guilt).

179 A case may be presented to a federal magistrate at a preliminary hearing to determine if there is probable cause to bind the case over for trial. *See id.* 5.1. But if the grand jury returns an indictment before the preliminary hearing, the hearing is mooted. United States v. Mulligan, 520 F.2d 1327, 1329 (6th Cir. 1975) (per curiam), *cert. denied*, 424 U.S. 919 (1976); *see also supra* note 10.

180 This distinction between "legal" and "factual" determinations may be too crude. As Professor Murphy has pointed out, a jury's decisions can more logically be placed into three relevant groups: (1) factfinding; (2) "standard application" (deciding whether the facts meet certain flexible legal standards such as "reasonable care" or "recklessness"); and (3) determining legal consequences of the facts and/or standard of application. *See* Murphy, *supra* note 166, at 730-31. It could be argued that the grand jury's probable cause determination falls in the second category, because jurors are asked to apply the facts to the flexible standard of probable cause. Because jurors routinely perform this "standard application" task in both civil and criminal cases, it may be that the claim of grand juror incompetence is overstated.

Although Professor Murphy's analysis is extremely useful, I do not think it applies comfortably to the grand jury model, because the "probable cause" question is quantitatively different from the usual standard application. Questions about "reasonableness" and "recklessness" specifically ask for a judgment of whether a party acted appropriately under the circumstances; this is exactly the type of questions juries are well suited to answer. In contrast, the probable cause question is predictive: it asks the grand jurors whether the prosecutor has introduced enough evidence to rise above a threshold level of certainty that the defendant committed the crime. There is no reason to think jurors are particularly good at drawing this line between "probable cause" and "not enough evidence to indict," and many reasons to think that their lack of legal experience makes them unqualified for the task.

181 Virtually all arrests must be supported by probable cause. *See* Dunaway v. New York, 442 U.S. 200, 206-16 (1979).

On closer examination, however, the analogy to police decisions to arrest highlights the incongruity of the grand juror's role. The police are trusted to decide when the appropriate legal standard has been satisfied, but they are not trusted for long. The police must either obtain a warrant before acting on their decision to arrest,[182] or more commonly, must promptly submit that decision to a magistrate for review after the fact.[183] In either case, the Constitution usually requires judicial oversight of the officer's probable cause decision as a matter of course.[184]

Again, the contrast to the grand jury is stark. Once the indictment is returned, the issue of probable cause is conclusively determined.[185] There are few challenges that can be raised to the indictment, none of which address directly the accuracy of the grand jury's probable cause determination.[186] Even more surprisingly, rather than subjecting the grand jury's decision to judicial review, the opposite is true: any decision previously made by a magistrate is subject to citizen review. If a magistrate rules at a preliminary hearing that probable cause does not exist, the prosecutor can still submit the case to the grand jury, and any resulting indictment is valid regardless of the magistrate's finding.[187]

The analogy to a police officer's determination of probable cause to arrest raises a second issue. It may be that while sufficiency of the evidence is normally a question left to the court, probable cause is a

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182 *See* Payton v. New York, 445 U.S. 573 (1980) (nonexigent arrest made in suspect's home requires arrest warrant).

183 *See* Gerstein v. Pugh, 420 U.S. 103, 126 (1975).

184 Police make other probable cause determinations that are not subject to prompt or mandatory judicial review. For example, they can make a warrantless search of an automobile if they conclude there is probable cause to believe that it contains evidence of a crime. *See* California v. Carney, 471 U.S. 386 (1985). Because a challenge of that decision is unlikely to be resolved until a suppression hearing is held, a defendant may be deprived of the items seized for a considerable period.

Although the officer's probable cause determination in this context is similar to the one made for an arrest, the different interests at stake make the decision to search distinguishable. *Gerstein v. Pugh* recognizes that warrantless liberty deprivations are particularly serious matters under the Fourth Amendment, and treat them differently from warrantless searches, 420 U.S. at 114. Because a grand jury's decision to indict imposes many of the same burdens as the officer's decision to arrest, the Court's treatment of arrest decisions made by lay people best reveals the unprecedented nature of the grand jury's actions.

185 *Gerstein*, 420 U.S. at 117 n.19; *see also* Rodriguez v. Ritchey, 556 F.2d 1185, 1191 (5th Cir. 1977) (en banc) ("[I]ndictment by a properly constituted grand jury conclusively determines the existence of probable cause."), *cert. denied*, 434 U.S. 1047 (1978); United States v. Whitehorn, 710 F. Supp. 803, 825 (D.D.C.) ("[T]he Court is not required to determine whether the grand jury had probable cause if the indictment is sufficient on its face."), *rev'd on other grounds sub nom.* United States v. Rosenberg, 888 F.2d 1406 (D.C. Cir. 1989).

186 *See* 2 BEALE & BRYSON, *supra* note 7, §§ 10:18-10:22 (discussing judicial review of indictments).

187 *See* 2 LAFAVE & ISRAEL, *supra* note 7, § 14.3, at 260-62.

simple enough legal concept that grand jurors can apply it without trouble. Perhaps, the argument goes, magistrates review the police officer's determination of probable cause because the police are advocates, not because the determination itself is unduly difficult.[188] Indeed, the Supreme Court has held that a probable cause finding is less a precise legal than a common sense determination:

> Perhaps the central teaching of our decisions bearing on the probable-cause standard is that it is a "practical, nontechnical conception." . . . In dealing with probable cause, . . . we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.[189]

Thus it might be that grand juries are only asked to reach a non-technical legal decision that lay jurors are fully qualified to make.

This argument has intuitive appeal, but its premise is faulty and its scope is overbroad. The premise that probable cause has a common sense meaning may be true with respect to police officers, but it does not follow that it is also true for lay citizens with no training or experience in the law. Courts have emphasized that probable cause "is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules."[190] A fair inference from this observation is that probable cause is in part a matter of pattern recognition: police and magistrates develop a sense over time of which factual contexts make it reasonable to conclude that the proposition in question is true.[191] There is little reason to believe that jurors with no analogous

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188 *Cf.* Johnson v. United States, 333 U.S. 10, 14 (1948) (probable cause determination must be made by "a neutral and detached magistrate instead of . . . by the officer engaged in the often competitive enterprise of ferreting out crime").

189 Illinois v. Gates, 462 U.S. 213, 231 (1983) (quoting Brinegar v. United States, 338 U.S. 160, 175-76 (1949)). The Court also noted: "Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers." *Id.* at 231-32.

190 *Id.* at 232; *see also* United States v. Davis, 458 F.2d 819, 821 (D.C. Cir. 1972) (per curiam) (probable cause is " 'a plastic concept whose existence depends on the facts and circumstances of the particular case' . . . . Because of the kaleidoscopic myriad that goes into the probable cause mix 'seldom does a decision in one case handily dispose of the next' " (citations omitted)); 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 3.2 (2d ed. 1987) (extensive analysis of nature of probable cause determination).

191 The Supreme Court has frequently noted that a police officer's training and experience can be considered when assessing probable cause. *See, e.g.*, United States v. Brignoni-Ponce, 422 U.S. 873, 885 (1975); United States v. Ortiz, 422 U.S. 891, 897 (1975). *See also* United States v. Davis, 458 F.2d at 821 (police officer's experience and training guides probable cause decision).

experience or training[192] will be able to recognize those cases where the evidence satisfies the legal test.[193]

Admittedly, the Supreme Court has held that nonlawyers are constitutionally capable of issuing arrest warrants, at least in some cases. In *Shadwick v. City of Tampa*,[194] the Court concluded that a local court clerk, a nonlawyer, could make the necessary probable cause determination to issue warrants for violations of municipal ordinances. Although the opinion did not address the point, the view that nonlawyers are capable of making the probable cause determination also has the force of history behind it. Historically, magistrates (and indeed, many judges) were not lawyers;[195] it was not until 1968 that full-time federal magistrates were required to be experienced attorneys.[196]

Nevertheless, *Shadwick* provides only circular support for the parallel proposition that grand jurors are capable of making the probable cause determination. After noting the types of simple charges for which the court clerks could issue warrants—impaired driving, trespass, and breach of the peace—*Shadwick* pointed out that "[o]ur legal system has long entrusted non-lawyers to evaluate more complex and

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192 As one frustrated juror described it: "[A grand jury's] membership has no training for its role, and, because of its yearly turnover of membership, it cannot profit from cumulative organizational learning, benefits available to the courts and other parts of the criminal justice system." Bickner, *supra* note 147, at 663. *See also* BLANK, *supra* note 76, at 65-74 (criticizing various aspects of current grand jury practice).

193 It could be argued that although grand jurors do not have any experience with probable cause at the beginning of their service, after several months of sitting they will develop an expertise. Assuming for the moment that this is true, the notion that grand juries climb the learning curve during their first few weeks of service while they are issuing indictments will give little comfort to defendants who are indicted during this period. More importantly, it is not necessarily true that grand juries sit often enough during a term to develop an expertise. Generalizations are difficult because grand juries in different federal districts have widely different case loads, but nationwide in 1990 and 1991 there were 752 and 759 grand juries in existence, respectively, which convened in a total of 10,134 and 10,784 sessions. This means that each grand jury in existence during those years held an average of 14 sessions per year, with each session lasting an average of 5.4 hours. *See* BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1992, at 90 tbl. 1.90 [hereinafter SOURCEBOOK]. *See also Hearings on H.R.J. Res. 46*, *supra* note 76, at 217 (testimony of Judge Russell E. Smith) (noting that in Montana grand juries convene "five or six [times] a year and they sit perhaps 3 or 4 days"); *cf.* BLANK, *supra* note 76, at 2 (New York federal grand jury met twice per week during session).

194 407 U.S. 345 (1972).

195 *See* George L. Haskins, *Lay Judges: Magistrates and Justices in Early Massachusetts*, *in* LAW IN COLONIAL MASSACHUSETTS 1630-1800, at 44-46 (1984); *see also* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 41 (2d ed. 1985) (noting Massachusetts practice as indicative of characteristics of other colonial courts). *See generally* BRADLEY CHAPIN, CRIMINAL JUSTICE IN COLONIAL AMERICA 1606-1660, at 90 (1983) (describing duties of colonial magistrates).

196 *See* 28 U.S.C. § 631 (1988) (Federal Magistrates Act of 1968). Even today, part-time magistrates do not have to be lawyers if there are no qualified members of the bar in the area to fill the position. *Id.* § 631(b)(1).

significant factual data than in [these simple cases]."[197] As an example of this entrustment, the Court offered grand juries, whose "daily determin[ations of] probable cause . . . betray any belief that the Tampa clerks could not determine probable cause for arrest."[198] The analogy between *Shadwick* and grand juries is thus based on an *assumption* of grand juror competence; it sheds little light on whether that assumption is correct.

Yet even if *Shadwick*'s holding is correct, the opinion reveals the overbreadth of the "probable cause is just common sense" argument, because the Court's narrow rationale stands in sharp contrast to the grand jury's sweeping indictment responsibilities. Both courts and commentators have expressed doubts that *Shadwick*'s faith in nonlawyers extends beyond arrest warrants in minor cases;[199] perhaps this is because they recognize that the nature of the decision changes as the crimes get more complicated. To say that a clerk working under judicial supervision is capable of determining probable cause for misdemeanors is hardly persuasive evidence that lay citizens, working under the supervision of the prosecutor, are capable of determining whether that same prosecutor has introduced legally sufficient evidence of securities law, tax law, or RICO violations.[200]

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197 *Shadwick*, 407 U.S. at 351-52.

198 *Id.* at 352. The Court also reasoned that trial jurors make a similar determination when they find proof beyond a reasonable doubt. *Id.* But as explained above, the two decisions are significantly different, making the analogy unhelpful.

199 *Shadwick* did not address whether a nonlawyer could issue a search warrant or an arrest warrant in a more serious case. *See id.* at 347, 352. But at least one federal court and several state courts have expressed strong doubts. *See, e.g.*, United States v. $128,035.00 In U.S. Currency, 628 F. Supp. 668, 672-73 (S.D. Ohio 1986) ("[T]he Court questions the constitutionality of [21 U.S.C. § 881(b)] which authorizes the Clerk of the Court to issue a warrant. . . . [I]t is not clear . . . that a Deputy Clerk of Court possesses the requisite competence and resources to make a probable cause determination that real property may be seized for forfeiture . . . ."); *cf.* People v. Escamilla, 65 Cal. App. 3d 558, 563 (1976) ("[T]he potential inability of a layman to appreciate the subtleties of search and seizure questions casts grave doubt upon the ability of a layman judge to [make the required] probable cause determination."); Gordon v. Justice Court, 525 P.2d 72 (Cal. 1974) (Fourteenth Amendment precludes trial of defendant before nonattorney judge where jail term may result); State v. Groff, 323 N.W.2d 204 (Iowa 1982) (upholding search warrants issued by nonlawyers, but emphasizing formal training and experience of nonlawyer magistrate). *See also* 2 LAFAVE, *supra* note 189, at 158 (*Shadwick* does not necessarily support view that nonlawyer is capable of determining probable cause in more complicated search warrant cases); Abraham S. Goldstein, *The Search Warrant, the Magistrate, and Judicial Review*, 62 N.Y.U. L. REV. 1173, 1184 (1987) ("It is probable that *Shadwick* will eventually be limited to its setting—to arrest warrants issued for very minor offenses—and that arrest warrants for more serious offenses . . . will be held to require a more highly qualified judicial officer."). *Cf.* Charles A. Thompson, *The Fourth Amendment Function of the Grand Jury*, 37 OHIO ST. L.J. 727, 739-40 (1976) ("From the standpoint of experience and training, grand jurors are less capable of [performing] the fourth amendment function than the Tampa clerks.").

200 In contrast to the complex crimes facing grand juries today, early grand juries had a much more simple docket. In fact, the law was such that jurors were expected to know the law without being instructed. As one Massachusetts grand jury was told in 1759, the

Stated differently, the nature of a federal grand jury's work does not lend itself to the same type of probable cause determinations that are made by police officers or court clerks. Federal crimes presented to a grand jury are likely to be more complex and detailed than the traditional street-level crimes that make up the bulk of a police officer's work.[201] The increasing sophistication and scope of economic and organized crime reinforce the view that federal offenses are likely to be more complex. This increased complexity makes analogies to the probable cause decisions by court clerks, and to the decisions by lay magistrates at earlier times in our history, unreliable.[202] And while there is a growing overlap between federal offenses and traditional common-law crimes, no distinction is made for indictment purposes. The grand jury makes the same decision on a federal procurement fraud charge as it does on a simple drug possession charge.

Interestingly, in other contexts the Supreme Court has recognized that the probable cause standard may not be so simple to apply. In *New Jersey v. T.L.O.*, the Court was asked to decide whether the Fourth Amendment requires school officials to have probable cause before searching a student's pocketbook.[203] In finding that the search only needed to be "reasonable" under the circumstances, the Court emphasized the burden the decision would impose:

> By focusing attention on the question of reasonableness, the standard will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit

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laws were sufficiently well known that the jurors "need no Explanation[;] your Good Sence & understanding will Direct ye as to them." WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW 26 (1975); *see also* ABRAMSON, *supra* note 135, at 88.

201 Again, it is difficult to draw firm conclusions from raw data, but in 1992 there were 35,263 cases filed by U.S. Attorneys, 18,891 (53.6%) of which came from the following categories: copyright violations, customs violations, energy pricing, health and safety violations, illegal waste discharge, immigration, internal security offenses, labor-management pension-benefit corruption, labor racketeering, federal, state, local, and other official corruption, organized crime, organized crime drug enforcement, drug dealing (but not possession) and white collar crime (which includes antitrust, bank fraud and embezzlement, bankruptcy fraud, commodities fraud, computer fraud, tax fraud, and various types of insurance, securities, and investment fraud). *See* SOURCEBOOK, *supra* note 193, at 476 tbl. 5.6. Not all crimes in each of these categories will be unduly complex, but as a group they are far more complicated than most state law crimes. *Cf. id.* at 527 tbl. 5.49, Felony Convictions in State Courts.

202 Although the legislative history of the Federal Magistrates Act, 28 U.S.C. § 631(b) (1988), does not express a specific concern with nonlawyers' ability to determine probable cause, it did state that full-time magistrates were henceforth required to be lawyers partly because they were "frequently called upon to apply some of the most sophisticated rules of constitutional law—rules that the best attorneys and judges are hard pressed to apply correctly." *See* H.R. REP. No. 1629, 90th Cong., 2d Sess. 3 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4252, 4256.

203 469 U.S. 325 (1985). The Court also considered and rejected an argument that the Fourth Amendment required the school officials to obtain a warrant before conducting the search. *Id.* at 340.

> them to regulate their conduct according to the dictates of reason and common sense.[204]

Although the parallel between the decisions by school officials and those of grand juries is obviously not exact, the similarities are sufficiently great to cast doubt on whether grand jurors are themselves sufficiently "school[ed] . . . in the niceties of probable cause" to make meaningful decisions to indict.[205]

In sum, the decision to entrust grand jurors with this legal determination is an anomaly in the law. Grand jurors are not permitted to perform the one task for which they are qualified—finding and weighing facts—and are required to perform the one task for which they are not qualified—determining whether a fixed set of facts satisfies a legal standard. In these circumstances, jurors will almost inevitably defer to the prosecutor's conclusion.[206] More to the point, prosecutors can expect this deference and are therefore unlikely to refrain from bringing weak, unfounded, or malicious charges. The grand jury therefore fails to provide the screening that has traditionally justified its existence.

C. Indirect Screening and the True Role of the Grand Juror

Just because grand jurors are not qualified to make the probable cause determination does not mean they fail to screen in *any* respect. A grand jury can countermand the prosecutor's charging decision in at least three ways, quite apart from its assessment of the evidence: it might conduct its own investigation and uncover exculpatory evidence; it might convince the prosecutor to drop the charges by spotting undiscovered weaknesses in the case; or, it may refuse to allow a case to go forward for policy reasons, even though there is plenty of evidence of guilt. But as discussed below, the first two possibilities are of dubious value and the third, while it best explains the manner in which grand jurors act as a shield, may undermine the values the institution is designed to protect.

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204 *Id.* at 343; *see also id.* at 353 (Blackmun, J., concurring in the judgment) ("A teacher has neither the training nor the day-to-day experience in the complexities of prohable cause that a law enforcement officer possesses, and is ill-equipped to make a quick judgment about the existence of probable cause").

205 *Id.* at 343; *see also* O'Connor v. Ortega, 480 U.S. 709 (1987) (plurality) (holding that the probable cause standard does not have to be satisfied before a supervisor in a public agency can search an employee's office). Among other reasons, the plurality in *Ortega* concluded that "[i]t is simply unrealistic to expect supervisors in most government agencies to learn the subtleties of the probable cause standard." *Id.* at 724-25.

206 *Cf.* YOUNGER, *supra* note 4, at 141 ("It is difficult to see why a town meeting of laymen, utterly ignorant both of law and the rnles of evidence, should be an appropriate [charging] tribunal. The summoning of a new body of jurors at each term insures an unfailing supply of ignorance.") (quoting New Jersey Public Prosecutor Eugene Stevenson, *Our Grand Jury System*, 8 CRIM. L. MAG. 713, 719 (1886)).

1. *Uncovering Flaws in the Government's Case*

Although the prosecutor normally decides which evidence will be submitted to a grand jury, the jurors always have the authority to demand more. They are free to question the witnesses themselves, require that more witnesses be called, or subpoena additional documents.[207] This power, one could argue, means that a prosecutor cannot be certain that the grand jury will be satisfied with seeing only one side of the case. A prosecutor who wants to indict despite weak evidence, and who plans to do so by presenting an incomplete set of facts, should be worried that the jurors will look beyond the government's version of the facts. Where the defendant is factually innocent (Group 1), where the prosecutor does not have sufficient evidence (Group 3), or where reasonable juries could differ on the probative value of evidence (Group 4), a prosecutor might hesitate to bring weak charges, fearing that jurors would discover the flaws on their own.

The argument is valid in theory, but it is doubtful that a prosecutor feels such pressure in practice. Grand jurors rarely ask questions[208] or take control of the proceedings in any meaningful way,[209] probably because institutional pressures discourage them from doing so. Typically jurors are required to hear several cases in a sitting, most of which are prepared in advance by the prosecutor and may take only a short time to present. Given the grand jurors' lack of understanding about the legal question they are asked to decide, it would take an unusual and suspicious juror to challenge the prepared evidence and demand that more time be spent on a case. More to the point, if jurors do not know what they are looking for (the quantum of evidence that satisfies the probable cause standard), it is unlikely that they will spend much energy on the search.

The incentives to accept the government's evidence at face value are increased when it becomes clear to jurors that their powers to investigate are subject to prosecutorial oversight. When witnesses are subpoenaed they are often interviewed by the prosecutor before testifying; when documents are produced, they are first reviewed by the prosecution and put into a manageable form before being presented

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207 *See* Campbell, *supra* note 5, at 178 (citing cases); *see also* 1 BEALE & BRYSON, *supra* note 7, § 5:12, at 49 (model charge to grand jury, informing jurors of power to gather additional evidence).

208 Two researchers who studied state grand jury behavior in Arizona concluded: "On the whole, the grand juries who heard the cases in our sample were involved to a limited degree only." EMERSON & AMES, *supra* note 45, at 100; *see id.* at 100-01 (noting that in two counties prosecutor elicited 94% and nearly 100% of the grand jury testimony).

209 *See* Campbell, *supra* note 5, at 178 (investigative powers "rarely, if ever, invoked by the jurors"); *cf.* United States v. Kleen Laundry & Cleaners, 381 F. Supp. 519, 521-22 (E.D.N.Y. 1974) (discussing extent to which prosecutors control grand jury investigations).

to the jury. As sensible as these steps are for administrative reasons, they hardly encourage the jurors to think of themselves as directing the investigation. Any screening that flows from the jurors' exercise of their investigatory powers is therefore likely to be by accident rather than by design.

2. *Helping the Prosecutor Find Weak Cases*

A second possibility assumes a more benign prosecutor. Sometimes the prosecution is truly undecided about whether charges should be filed and looks to the grand jury for help.[210] In some number of cases, primarily those in Groups 1 and 4, the prosecutor will be uncertain whether a crime was in fact committed or how serious a charge is warranted, perhaps because it is difficult to decide which witness is telling the truth. In such cases the prosecutor might welcome the chance to present the conflicting evidence to jurors, hoping that they can determine what happened. The jurors' reactions to the evidence then guides the charging decision.[211]

Here the prosecutor is using the jurors to their best advantage, finding facts and weighing credibility. In these cases the grand jurors will prevent the government from bringing charges by convincing the prosecutor that a trial jury would be unlikely to convict. The obvious drawback to this type of screening is that it has nothing to do with restraining the prosecution from overreaching. Here the grand jury can screen only when the prosecutor is willing to be restrained—when the government is looking for assistance on a difficult question, and, most importantly, when the prosecution goes beyond its normal obligations and presents a full view of the evidence, both favorable and unfavorable. But because there is no *requirement* that more than one side of the case be presented, an unethical prosecutor who hopes to charge a suspect for illegitimate reasons remains free to do so. And while *allowing* the prosecution to have its case reviewed by citizens prior to trial may be an idea with independent merit,[212] it is hard to believe that this is what the framers of the Fifth Amendment had in mind.

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210 *See, e.g.*, United States v. Washington, 431 U.S. 181, 183 (1977).

211 *See* Arenella, *supra* note 5, at 503 ("In close or controversial cases, some prosecutors may use the grand jury's reaction to its evidence to make [the] prediction [whether a conviction is likely]."); Sullivan & Nachman, *supra* note 8, at 1053.

212 It is also debatable whether making the jurors available to assist the prosecution in this manner is appropriate. Allowing the government to present a "dry run" of its case may do nothing more than inform the prosecution of where the holes in its case are. *See, e.g.*, BLANK, *supra* note 76, at 40 (giving examples of grand jurors correcting prosecutor's oversights in presenting evidence); *cf.* 2 LAFAVE & ISRAEL, *supra* note 7, § 15.2, at 282 (defendant may waive right to grand jury review out of concern the "prosecutor will gain valuable preparation for trial in presenting the witnesses before the grand jury").

3. *Shielding the Guilty*

The better view is that grand juries serve only one meaningful screening function, and then only for cases in Group 5. Given the nature of the question asked and the evidence presented, the grand jury is only qualified to screen cases that it believes should not be brought to trial *regardless* of the strength of the evidence. In effect, the grand jury can only serve as a pretrial nullification device, eliminating those cases where the jury believes that an otherwise guilty defendant is not worthy of prosecution.

The parallel to trial juries is again instructive. A trial jury may acquit a defendant no matter how clear the evidence of guilt,[213] and its judgment on this matter is conclusive because the prosecution is barred by the Double Jeopardy Clause from taking an appeal or seeking a new trial.[214] The trial jury's power to nullify is based on a belief that valid laws are not always fair, and that even fair laws can be unfairly applied. A jury, as the disinterested representative of the community, can put this belief into operation by refusing to convict in cases where technical guilt is clear.[215]

The grand jury can perform this nullification function in the pretrial context. Although the jurors have no expertise in deciding whether the evidence is legally sufficient, they retain a rough sense of right and wrong and thus have some ability to decide as a policy matter if a defendant should be charged with a given crime. Regardless of the strength of the evidence, the jurors are free to decide that a suspect accused of a mercy killing is unworthy of condemnation, that a prosecution under a long-dormant vice statute is unfair and should not be allowed, or that charges of drug possession are too severe in light of the potential sanctions. In such cases, the grand jury can return a no bill as a way of voicing its disagreement with the prosecutor's decision to charge.[216]

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213 *See* United States v. Trujillo, 714 F.2d 102, 106 (11th Cir. 1983); United States v. Dougherty, 473 F.2d 1113, 1130-37 (D.C. Cir. 1972). *See generally* Alan Scheflin & Jon Van Dyke, *Jury Nullification: The Contours Of A Controversy*, LAW & CONTEMP. PROBS., Autumn 1980, at 51.

214 United States v. Ball, 163 U.S. 662, 669-71 (1896); *see also* United States v. Scott, 437 U.S. 82, 89-91 (1978).

215 *See Dougherty*, 473 F.2d at 1130-32; Scheflin & Van Dyke, *supra* note 213, at 55.

216 An analogous example, where the prosector looked for guidance before filing charges, occurred in Texas in March 1994. Two men entered a convenience store early one morning and held the clerk at gun point while they took money from the register. As the men were leaving, the clerk took a gun from under the counter and shot one of the fleeing robbers in the back. The events were captured on the store's video camera. Although it seems obvious that some crimes occurred during these events, no preliminary charges were filed against either the wounded robber or the clerk. Instead, the detective in charge of the case was quoted as saying that everything would be turned over to the state grand jury. *See Clerk Shoots Assailant In Back*, AP, Mar. 24, 1994 (on file with author).

If the grand jury is viewed as a pretrial nullification device, its ability to screen cases becomes more meaningful. Now a prosecutor weighing the various charging options does not just ask whether the jurors can be convinced that the evidence is sufficient; instead, the question becomes whether the jurors will decide that the prosecutor is acting "appropriately" in trying to enforce a particular law against a suspect—a vague but decidedly non-legal question that a jury is perfectly capable of answering.[217] A prosecutor who is confident of her ability to convince a jury to indict in a weak case may have much less confidence that a jury can be convinced to indict in an "unfair" case.[218]

This explanation of the grand jury's role may explain much of the folklore that surrounds the institution.[219] The historical vision of grand juries as a bulwark against oppression appears to be the product of a few well-known cases where the grand jury refused to indict. In those cases, however, the jurors often appeared to act without regard to the weight of the evidence. The *Shaftesbury* and *Colledge* cases[220] are cited as the first important examples of grand jury independence;[221] what is missing from the usual analysis of those cases is whether the defendants were guilty. The evidence on this issue is mixed,[222] but it always seems to be beside the point. Supporters of the grand jury see the critical issue as being the jury's refusal of the court's request for an

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217 One recent example where the grand jury refused to return an indictment because of displeasure with the prosecutor's charging decisions is the *Rocky Flats* case, discussed *infra* note 272. In that case the grand jurors refused to return an indictment that named Rockwell International as a defendant, but no individual defendants from Rockwell or the Department of Energy. The refusal to indict appears to have had nothing to do with a lack of evidence against the company. *See* Lettow, *supra* note 9, at 1349-53; *see also id.* at 1355 n.10 (discussing possibility that grand jury's refusal to indict Virginia Governor Charles Robb was influenced by political considerations).

This does not mean that the grand jury exercises this nullification power frequently; in his empirical study Professor Morse concluded that the number of times a grand jury nullified a charge was "negligible." *See* Morse, *supra* note 2, at 157. But, as noted above, the grand jury's *exercise* of its screening prerogative is not what prevents unfounded charges. Instead, it is the prosecutor's decision not to *present* a case because of the risk that a no bill will be returned that operates as a screen.

218 The parallels between the nullification powers of a trial jury and a grand jury are not perfect. Although a trial jury's decision to acquit is final, a grand jury's no bill may simply be a small hurdle for the prosecution to jump, given that the prosecutor can submit the same case to another grand jury. *See supra* note 30. Nevertheless, the first grand jury's refusal to indict may put pressure on an oppressive prosecutor, either from the public or the prosecutor's superiors. So while a grand jury nullification is not as beneficial as a trial jury's, a defendant undoubtedly receives a benefit in either context.

219 *See generally* CLARK, *supra* note 5, at 25-30; 2 LAFAVE & ISRAEL, *supra* note 7, § 15.2, at 289.

220 *See supra* notes 104-11 and accompanying text.

221 *In re* Russo, 53 F.R.D. 564, 568 (C.D. Cal. 1971).

222 *See supra* note 105 and accompanying text.

indictment, and treat as incidental that the grand jurors may not have indicted because their religious sympathies rested with the suspects.

The cases that established the grand jury as a shield in this country (at least in the popular mind) are similar. The refusal to indict John Peter Zenger for seditious libel is easily construed as an example of grand jury protection,[223] even though from outward appearances he was guilty as charged. The no bills returned by grand juries in the pre-Revolutionary War smuggling cases also seem motivated as much by political leanings as by the evidence.[224] And the fact that grand jury decisions in runaway slave cases often turned on whether the grand jury was convened in the North or South strongly suggests that the quantum of evidence was not the deciding factor.[225]

But as these examples suggest, the grand jury's nullification power is a mixed blessing. There undoubtedly have been cases where the grand jury refused to indict, despite strong evidence of guilt, because the defendant appeared to have acted properly,[226] because the prosecution seemed politically motivated,[227] or because the law in question was anachronistic or unpopular. Many see this exercise of power as desirable, and perhaps it is enough to justify the grand jury's reputation as a shield. However, a refusal to indict may also be based on prejudice against the crime victim, bias in favor of the target, or other illegitimate reasons. The danger in giving the power to nullify to a group of unelected, anonymous, and unaccountable citizens is that they are free to use that power in illegitimate ways, precisely because they are unaccountable.[228] The power to nullify is, at least in the particular case, the power to frustrate the presumptive will of the electorate to enforce the criminal law when the evidence shows that a crime has occurred. Although nullification is case specific, and may not even be permanent as to that target, it can be a potent force for frustrating legitimate societal objectives.[229]

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223 *See supra* notes 122-26 and accompanying text.

224 *See supra* notes 128-33 and accompanying text.

225 *See supra* notes 136-37 and accompanying text.

226 In 1991 a state grand jury refused to indict a physician who had helped a leukemia patient commit suicide. *See* Lawrence K. Altman, *Jury Declines to Indict a Doctor Who Said He Aided in a Suicide*, N.Y. TIMES, July 27, 1991, at 1. The jury refused to indict despite the fact that the doctor admitted his behavior in *The New England Journal of Medicine*, *id.*, and the homicide law in New York on its face covers such conduct, *see* N.Y. PENAL LAW § 125.15 (McKinney 1987).

227 Although the refusal to indict Zenger seems politically motivated, so does the Governor's decision to prosecute. *See supra* notes 119-26 and accompanying text.

228 *See* ABRAMSON, *supra* note 135, at 110-11 (discussing studies of racial bias in trial and grand jury decisionmaking); Antell, *supra* note 5, at 155 (noting tendency of some grand jurors to attempt to indict in cases where no criminal conduct occurred).

229 As one court noted with respect to jury trials:

> To encourage individuals to make their own determinations as to which laws they will obey and which they will permit themselves as a matter of

The problems of allowing the grand jury to nullify charges are compounded by the secrecy of the process. At trial the evidence of the defendant's criminal behavior is revealed in open court, so that even if a jury nullifies, a public record of what occurred is kept. Not so with the grand jury. If it returns a no bill against a popular target (a police officer, for example) who is accused of violating the civil rights of an unpopular victim (such as a convicted felon), there is no way to know whether the target was innocent, was guilty but the prosecutor failed to present sufficient evidence, or was guilty but the grand jurors refused to indict because of their sympathy for the target or antagonism for the victim. Not only is there no legal explanation for the decision, but no public record of what happened exists, making debate and reform impossible.

Ironically, this description of the institution's actual role is inadvertently consistent with the requirement that the prosecutor submit only a limited amount of evidence. If we are merely interested in the jurors' rough sense of whether the prosecutor is acting fairly and in accord with community norms, there is less need for the jury to see information presented in nonhearsay form, or to permit the defendant to testify on his own behalf.[230] These steps are demanded at trial because they help the jury correctly assess the competing facts in the case. The grand jury's role is more limited. It sees the most favorable case the prosecutor can muster and decides whether the government is acting fairly, at least from their perspective. There is little else the jurors are capable of deciding.

Reasonable minds can disagree about whether the grand jury's nullification power is desirable, but it seems clear that this function best describes and explains the grand jury's screening role. More importantly, these are the terms on which grand jury reform should be debated: whether the power to nullify is consistent with the constitutional command, and whether it is a desirable part of a rational criminal justice system.

> conscience to disobey is to invite chaos. No legal system could long survive if it gave every individual the option of disregarding with impunity any law which by his personal standard was judged morally untenable.

United States v. Moylan, 417 F.2d 1002, 1009 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970).

230 It is harder to defend the prosecutor's discretion not to present exculpatory evidence. Many of the factors that might bear on a grand jury's decision not to indict may well have a bearing on a jury's decision whether it is fair to charge this defendant with this crime. *See* Arenella, *supra* note 5, at 549.

III
IMPLICATIONS

The analysis set forth above paints a bleak picture. In contrast to some procedural critiques,[231] the analysis suggests that the grand jury's inability to screen cannot be cured with moderate procedural changes or in the type of evidence that the jurors are allowed to consider. Instead, the flaw is structural. As long as the grand jury proceeding is nonadversarial, and as long as the jurors are asked to make a legal determination based on a single set of facts, there will be no reason to believe that prosecutors will refrain from submitting cases because they fear a no bill.

The interesting question is what to do about this state of affairs. There are at least three possibilities. The institution could be left alone, thereby maintaining the status quo. There could be increased efforts at procedural reform, with those efforts directed at making the grand jury process more adversarial. Or, the Constitution could be amended to abolish the grand jury requirement.

A. Do Nothing

As a threshold matter, it might be asked why any reform is needed. Even admitting that the grand jury does not screen, it might be argued that it does no harm. Truly innocent defendants will be acquitted at trial, the reasoning goes,[232] and thus the damage caused by the screening deficiencies is limited to the trauma caused between the time of indictment and trial. Moreover, while grand jurors may not perform as well as they should, it has been argued that there are collateral benefits of the grand jury system, benefits that would be lost if the institution were abolished.[233]

Those who believe that the grand jury is useless but benign fail to appreciate the harm the institution now causes. First, the notion that innocent or over-charged defendants are only temporarily harmed because they will be acquitted at trial is overstated. Most criminal charges are resolved through a guilty plea, not at trial, and as Professor Arenella has shown, an indictment may influence innocent defendants in their pleading decisions. Although rational defendants who are factually or legally innocent would not plead guilty unless the

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231 *See supra* part I.C.3.

232 The Supreme Court has ruled that a fair trial is sufficient to protect defendants from prejudice caused by most errors committed in the grand jury process. *See* United States v. Mechanik, 475 U.S. 66, 70 (1986) (guilty verdict renders errors in grand jury charging decision harmless); Costello v. United States, 350 U.S. 359, 363-64 (1956) ("technical" rules regarding adequacy of evidence required only at trial, not before grand juries); *see also* Arenella, *supra* note 5, at 497 (noting that many courts have assumed that evidentiary errors made before grand jury will be cured at trial).

233 *See* Sullivan & Nachman, *supra* note 8, at 1049, 1051-54.

likelihood of conviction at trial were great, a defendant who lacks information or is particularly risk averse may nevertheless opt for the certainty that a plea provides.[234] The harmful impact of the indictment on such defendants may thus be greater than is traditionally believed.[235]

Second, the presence of the grand jury occasionally has the ironic effect of acting as a shield for the *prosecutor.* A prosecutor who is reluctant to file controversial or unpopular charges may seek to avoid responsibility by characterizing the charges as the acts of the grand jury.[236] Although in some cases this recharacterization may be desirable, as when the target is a powerful government official, in others it can make it harder to hold the prosecutor's office accountable for its enforcement policy. Federal prosecutors are insulated from direct political pressure, and the grand jury may make political oversight even more difficult by injecting an anonymous group and secret proceedings between the office and the people it serves.[237]

Finally, as long as an institution like a grand jury appears to be screening the charging decisions but does not, serious efforts to create procedures that will screen effectively are unlikely. The existence of a body that now provides only a nominal check on the prosecutor has apparently been sufficient to blunt any serious reform that would bring practice into line with the goal of pretrial review. Such a chimerical system complies with the letter of the Fifth Amendment, but fails to advance any interest that the grand jury requirement was designed to protect.

B. Procedural Reforms

Most reform proposals focus on the need to change grand jury procedures.[238] Many of these are meritorious; any procedure that permits a jury to consider competing versions of the case is at least marginally beneficial. Requiring a prosecutor to present potentially

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234 *See* Arenella, *supra* note 5, at 508-11.

235 *See also* 2 LAFAVE & ISRAEL, *supra* note 7, § 15.1, at 282 ("Some defense counsel . . . believe that trial jurors, contrary to the court's instructions, do give weight to the fact that another group of lay persons reviewed the case and issued an indictment.").

236 *See* Lewis, *supra* note 5, at 57 ("[A]lthough the prosecutor makes the decision to go forward in a case, he is able to shift the apparent responsibility to the grand jury, . . . often making the grand jury the scapegoat for an unpopular decision either to indict or not to indict."); Campbell, *supra* note 5, at 178.

237 *Cf.* Antell, *supra* note 5, at 156 (arguing that grand jury "encourages abuses by allowing the prosecuting authority to carry on its work with complete anonymity and with effects greatly magnified by the accompanying judicial rites").

238 *See, e.g.*, CLARK, *supra* note 5, at 109-45; FRANKEL & NAFTALIS, *supra* note 5, at 121-38; Arenella, *supra* note 5, at 539-75; Braun, *supra* note 50, at 913-17. *See generally* ABA STANDARDS FOR CRIMINAL JUSTICE, § 3-3.6 (3d ed. 1993) [hereinafter ABA STANDARDS] (setting standards for quality and scope of evidence prosecutor presents to grand jury).

exculpatory evidence,[239] limiting the use of hearsay,[240] and more clearly informing jurors of their rights and duties[241] are worthy steps toward making the institution more effective.

But these are changes of degree, not kind. If we accept that grand jury proceedings will never resemble a full trial—and more specifically, will never be adversarial—there is little chance that they will ever be a meaningful deterrent to the prosecutor. The prosecutor could be required to disclose to the grand jurors information that is favorable to the suspect, but it would be a poor substitute for allowing the suspect to defend himself. Unless there is a clash of adversaries, grand juries composed of nonlawyers will be left to make a foregone legal conclusion, and thus will be a shield in name only.[242]

One of the more interesting reform proposals would provide grand jurors with their own lawyer.[243] Because of the prosecutor's dominance of the proceedings, it has been suggested that an independent lawyer should be present to advise the jurors. This lawyer would presumably provide unbiased views on the applicable law, thereby helping the jurors reach an independent decision on whether to indict.

Having independent counsel, however, does not remove the problem of lack of juror competence. Unless the jurors' lawyer is prepared to serve as the suspect's advocate and argue why an indictment should not issue—a role that has never been contemplated—the underlying problem will remain. Having a second lawyer in the room will give the jurors another point of view, but will not make them better able to decide if probable cause exists. At best, the independent lawyer can point out misstatements or exaggerations by the prosecution and give the jurors a sounding board for their questions. If the lawyer does more than this, by telling the jurors which questions to ask, or even by recommending that the grand jury refuse to indict, the result would simply be the substitution of the views of one lawyer (the

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239 *See* Arenella, *supra* note 5, at 565-69; ABA STANDARDS, *supra* note 238, § 3-3.6(b). *But cf.* FRANKEL & NAFTALIS, *supra* note 5, at 129-30 (questioning wisdom of requiring disclosure of exculpatory evidence).

240 *See* Arenella, *supra* note 5, at 562-63; *cf.* ABA STANDARDS, *supra* note 238, § 3-3.6(a) (permitting some use of hearsay).

241 *See* CLARK, *supra* note 5, at 142; Arenella, *supra* note 5, at 571-72.

242 Of course, the adversary system is not the only means of uncovering the truth. An inquisitorial system, properly conducted, might result in a satisfactory decision on which cases should proceed to trial. But an inquisitorial pretrial system would be politically unworkable, because it would require magistrates or judges who are now relatively uninvolved in the grand jury system to become the dominant players in the screening process. Such a system would almost certainly be prohibitively expensive.

243 *See* CLARK, *supra* note 5, at 145; *cf.* Braun, *supra* note 50, at 916 (suggesting that a neutral legal officer be present during presentation of evidence to indicting grand juries). Hawaii permits the appointment of an independent counsel to advise state grand jurors. *See* HAW. CONST. art. 1, § 11.

jurors' counsel) for those of another (the prosecutor). Such a scheme might marginally advance the screening goal, but it fails to explain why the jurors are a necessary part of the process.

C. Abolish Grand Juries?

There have been calls to abolish the grand jury in this country almost since the inception of the institution.[244] Many states found the arguments persuasive, and, beginning with Michigan in 1859,[245] more than half abolished the grand jury requirement.[246]

These arguments have, of course, been unsuccessful at the federal level. One reason may be a misunderstanding of the extent to which grand juries serve as a screen. A second, perhaps more telling, explanation may be the size of the task. Political support for the move would be low. The only well-defined constituency who would feel an immediate impact of an improved screening function would be criminals and criminal defense lawyers, two groups that most citizens hold in low (and perhaps equal) regard.[247] Changing the Constitution is hard enough when trying to balance the budget or stop people from burning the flag; it would be even harder to muster the popular support needed to change a little-understood piece of the criminal justice system.

Practical difficulties aside, some have argued that other justifications for retaining grand juries exist, even if their inability to screen is conceded. Two frequently cited reasons for retention are the institution's ability to investigate crimes, and the importance of citizen participation in the criminal process. Neither justification withstands scrutiny.

1. *Jurors and the Investigative Function*

Grand juries are undeniably effective in helping the government investigate crimes. The grand jury is entitled to "every man's evidence" of criminal activity,[248] and by exercising its power to subpoena

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244 *See* YOUNGER, *supra* note 4, at 56. As early as 1792 a Pennsylvania judge warned of the dangers of giving grand juries too free a hand. *See id.* at 59.

245 *Id.* at 66-70.

246 *See* 2 LAFAVE & ISRAEL, *supra* note 7, § 15.1, at 278-79 & n.12 (listing jurisdictions). England abolished grand juries in 1933. YOUNGER, *supra* note 4, at 226.

247 There would be others who would support changes in the screening function. Academics who have criticized the current system would support some types of reform. Business executives and politicians whose careers depend on their reputations might also support reform, hoping that a stronger screening function would make it less likely that weak charges would be filed against them. But at the grass-roots level, it seems unlikely that those who cannot imagine being accused of a crime would be stirred to action in large numbers to lobby for those who will be accused of crimes.

248 *See* Branzburg v. Hayes, 408 U.S. 665, 673 (1972). A grand jury can demand the production of evidence even when compliance with the subpoena is claimed to be burden-

and immunize witnesses, the grand jury can compel the production of evidence that would otherwise be unavailable.[249] On their own, federal law enforcement officials must either depend on a cooperative citizenry or rely on search warrants to gather evidence. Neither of these routes has been a completely satisfactory way to investigate large, complex criminal enterprises. The power to force the production of evidence therefore seems to be an indispensable part of the government's crime-control mission.[250]

Recognizing the need for investigation is not, however, the same as recognizing the need for an investigative grand jury. As with the screening function, the question should be asked: what is the function of the grand jurors? Once again, they seem to be little more than stagehands for the government's production.

As noted, there is no doubt that the prosecutor directs the investigation, not the jurors.[251] It is the prosecutor who decides which witnesses to call, what questions to ask, and which subpoenas to issue.[252] If documents are subpoenaed, the government normally reviews them first and decides which should be presented to the jury.[253] The prosecutor also decides which witnesses are sufficiently important that their testimony should be compelled by grants of immunity.[254] Although

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some, embarrassing, or expensive, *see, e.g.*, Petition of Borden Co., 75 F. Supp. 857 (N.D. Ill. 1948) (subpoena enforced even though it required search of company files going back 20 years), and even where the evidence is claimed to be irrelevant or inadmissible at trial. *See* United States v. Dionisio, 410 U.S. 1 (1973) (no showing of reasonableness required to enforce grand jury subpoena); Blair v. United States, 250 U.S. 273 (1919).

249 A grand jury may, without running afoul of the Fourth Amendment, compel testimony of witnesses who would not otherwise be required to cooperate with police, and may compel production of documents without any preliminary showing of relevance. *Dionisio*, 410 U.S. at 9-10, 16-18. The greater limit on the grand jury's ability to gather evidence is the witness's privilege against self-incrimination. *See* Counselman v. Hitchcock, 142 U.S. 547 (1892). The grand jury can circumvent this privilege, however, by granting "use" immunity, where the government is precluded from using the immunized testimony against the witness. *See* 18 U.S.C. §§ 6002-6003 (1988).

250 Professors LaFave and Israel have identified five advantages that grand juries have over police investigative work: (1) subpoena authority; (2) citizen participation; (3) closed proceedings; (4) the power to extend immunity to witnesses; and (5) secrecy requirements. *See* 1 LAFAVE & ISRAEL, *supra* note 7, § 8.3, at 609.

251 *See supra* part II.C.1.

252 Although subpoenas are technically issued by the court and not the prosecutor, *see* FED. R. CRIM. P. 17(a), for practical purposes it is the prosecutor who decides which subpoenas the court should issue. *See* United States v. Kleen Laundry & Cleaners, 381 F. Supp. 519, 522 (E.D.N.Y. 1974) (Weinstein, J.).

253 *See* United States v. United States Dist. Court, 238 F.2d 713, 720-21 (4th Cir. 1956), *cert. denied*, 352 U.S. 981 (1957); *Kleen Laundry & Cleaners*, 381 F. Supp. at 523.

254 18 U.S.C. § 6003 (1988); *In re* Grand Jury Investigation (Testa), 486 F.2d 1013, 1016 (3d Cir. 1973), *cert. denied*, 417 U.S. 919 (1974). This power to control the investigation in turn minimizes the jurors' ability to screen. If the jurors fully controlled the investigation, presumably they would be exposed to evidence both favorable and unfavorable to the government, and would be able to choose among the facts and decide whether an indictment was proper. But a prosecutor intent on presenting a sanitized version of a weak case is

the prosecutor sometimes reviews these decisions with the jury, and may even put some questions to a vote, many times the prosecutor simply makes the decision and acts accordingly.[255]

There is nothing improper about this procedure; indeed, it *should* be the prosecutor who makes these strategic decisions.[256] As one former prosecutor put it, "[t]he work of examining and collating documents, interviewing witnesses, [and] analyzing discordant evidence . . . require[s] the application of skills and techniques which are totally outside the knowledge of the average grand juror."[257] But if training and experience make the prosecutor the best judge of how the investigatory powers should be used, it is unclear why jurors are needed. If jurors do not decide which evidence should be gathered or what charges should be brought, there is little for them to do except review the evidence and make suggestions or note details that may have escaped the prosecutor's attention. Once again, the wisdom of gathering twenty-three citizens to serve as a prosecution-support service is questionable.[258]

The investigative powers currently given to grand juries could, and probably should, be given by statute directly to prosecutors, thereby eliminating the illusion that the grand jury carries out the investigation.[259] Prosecutors could continue to subpoena witnesses,

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aided by his or her ability to produce only the information that supports the government's view.

255 Courts have held that a prosecutor does not have to obtain grand jury permission before issuing a subpoena. *See* United States v. Santucci, 674 F.2d 624, 627 (7th Cir. 1982), *cert. denied*, 459 U.S. 1109 (1983); United States v. Simmons, 591 F.2d 206, 210 (3d Cir. 1979); *cf. In re* Grand Jury Proceedings (Schofield), 486 F.2d 85, 90 (3d Cir. 1973) ("[A]lthough grand jury subpoenas are occasionally discussed as if they were the instrumentalities of the grand jury, they are in fact almost universally instrumentalities of the United States Attorney's office or of some other [prosecutorial department].").

256 Despite the overwhelming evidence that prosecutors, rather than grand jurors, conduct the proceedings, the Supreme Court continues to suggest the contrary. *See* Costello v. United States, 350 U.S. 359, 364 (1956) (enforcing rule against hearsay evidence "would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules"); *see also* United States v. Williams, 112 S. Ct. 1735, 1743 (1992) (Fifth Amendment grand jury guarantee presupposes an investigative body that is independent of prosecutor and judge).

257 Antell, *supra* note 5, at 155.

258 Both lower courts and commentators have expressed doubts about the grand jurors' ability to influence the investigation. *See, e.g.*, United States v. Basurto, 497 F.2d 781 (9th Cir. 1974); *In re* Grand Jury Proceeding (Schofield), 486 F.2d 85, 90 (3d Cir. 1973); 1 BEALE & BRYSON, *supra* note 7, § 6:10, at 61 ("[I]t is doubtful that the grand jury would have much meaningful input in the often rather technical decision of what witnesses to call and what physical evidence to subpoena."); Braun, *supra* note 50, at 901 ("[I]t is almost impossible for [grand jury] members, unskilled in the law or in criminal investigations, to control inquiries initiated by the prosecutor.").

259 This proposal was made by former Judge William Campbell, who argued that the investigative power should formally be placed where it now resides in fact: in the hands of the prosecutor. *See* Campbell, *supra* note 5, at 180-81. Other commentators are in accord. *See* CLARK, *supra* note 5, at 142; *cf.* Braun, *supra* note 50, at 915-16 (advocating separating

meet with them in secret, and extend immunity in appropriate cases. In addition to efficiency gains, this approach would have the advantage of honesty. Prosecutors would not be able to use the grand jury to shield their investigative decisions, and any abuses could be traced directly to a politically accountable public official, rather than attributed to a secret and unaccountable group of citizens.

2. *The Alleged Benefits of Citizen Participation*

Some commentators have argued that the grand jury should be retained because of the perceived advantages of including lay citizens in the operation of the justice system. The arguments have been summarized as follows:

> What the grand jury loses through a non-adversary, secret proceeding is more than offset by its inclusion of community representatives in the screening process. Participation of laymen contributes to public confidence in the criminal justice system. . . . [I]n a system where most cases do not go to trial, it is especially important that "private citizens" are given an "active role" in the "front lines" of the criminal justice process.[260]

Such arguments are unpersuasive and condescending. Requiring citizens to interrupt their lives for up to eighteen months to perform a meaningless ritual hardly fosters confidence in the system; there is no civic benefit to involving citizens who have no real power and no real effect on the charging decision. If grand jury advocates genuinely believe that lay citizens perform a role in the process, they are deceiving themselves. If they realize that no meaningful screening takes place, they are deceiving the jurors.

Supporters have also advanced more specific arguments in favor of citizen participation. In particular, they argue that lay citizens are needed to investigate official corruption, and that the presence of the jurors encourages witnesses to be truthful.

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grand jury into two panels, one to handle investigations and the other to issue indictments).

260 2 LAFAVE & ISRAEL, *supra* note 7, at 285 (recounting arguments of grand jury supporters); *see also* FRANKEL & NAFTALIS, *supra* note 5, at 119-20 (describing benefits of citizen participation); ABA PAMPHLET, *supra* note 8, at 1 ("grand juries provide an important opportunity for citizens to participate in the criminal justice system"); *In re* Presentment by Camden County Grand Jury, 89 A.2d 416, 443 (N.J. 1952) (Vanderbilt, C.J.) ("[M]aintenance of popular confidence in government requires that there be some body of layman which may investigate any instances of public wrong doing."); Whyte, *supra* note 47, at 486 & n.181 (quoting Virginia Commonwealth County Attorney) ("The more that we can involve the average citizen in the responsibility for law enforcement, the more that citizen is led to observe and respect the laws."). *But see* Norval Morris, *A Plea for Reform*, 87 YALE L.J. 680, 684 (1978) (book review) ("The argument [for the benefits of lay participation] is appealing, but it has all too frequently been used to avoid the issue of whether lay participation in fact accomplishes those ends.").

a. *Investigating Official Corruption*

One commonly claimed benefit of grand juries is that lay jurors will investigate where prosecutors fear to tread. When crimes are committed by public officials or prominent members of the community, the prosecutor's office might be unable or unwilling to pursue the wrongdoers aggressively.[261] Grand jurors, however, are beyond the reach of these potential defendants; they are insulated from pressure by their anonymity and short tenure. Thus, for example, while a prosecutor may not be zealous in investigating misdeeds by the executive branch, a grand jury would feel free to follow the evidence wherever it leads.

This image of the grand jury as a watchdog over government officials is embedded in the popular mind.[262] Stories of "runaway" grand juries during the late nineteenth and early twentieth centuries which, among other things, helped bring down the corrupt New York City Tweed administration,[263] encourage that view. Notables like Thomas Dewey, who rose to fame in part because of the actions of such juries,[264] clearly believed in the power of the institution to keep an eye on government and call corrupt politicians to account.[265] An investigatory system that did not include citizens, the argument goes, would lose the independence and fearlessness needed to uncover official wrongdoing.

But as with the screening function, the legend of watchdog grand juries is more exciting than the reality. It has been decades, at least, since grand juries acted as watchdogs *independent of the prosecutor* to any significant degree. Although grand juries have often exposed corruption, the number of times they have "run away" from the prosecutor is apparently quite small, even historically. As one commentator noted when discussing the apparent success of runaway grand juries, "closer examination reveals that in almost every instance the[se] investigations were not initiated by the grand jury, [but] rather by a crusading newspaper in conjunction with a prosecutor."[266]

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261 For a discussion on the use of grand juries to combat both official corruption and corporate criminality in the earlier part of this century, see YOUNGER, *supra* note 4, at 182-223.

262 *See* 1 BEALE & BRYSON, *supra* note 7, § 1:05.

263 *See* CLARK, *supra* note 5, at 29. Grand juries also helped uncover official corruption in Cincinnati, St. Louis, Chicago, Milwaukee, and San Francisco between 1870 and 1920. *Id.* at 30; YOUNGER, *supra* note 4, at 182-86.

264 *See* YOUNGER, *supra* note 4, at 235.

265 *Id.* at 241.

266 Lewis, *supra* note 5, at 62; *see also* Campbell, *supra* note 5, at 179 ("racket busting" grand jury investigations directed by Thomas Dewey "were prompted not by any forceful initiative of the grand jury but solely as a result of newspaper exposures"). Even a grand jury supporter acknowledged that the corruption investigations by the New York City grand

Whatever its historical importance, there is no doubt that the grand jury's role is less significant today. Government at every level is more complex, making investigations more burdensome. The federal prosecutorial machinery is larger, thereby rendering it more difficult and risky for those who are seeking to avoid investigation to place political pressure on United States Attorneys. Finally, and perhaps most importantly, the role of watchdog has largely been assumed by other institutions. Generalizations are difficult, but it is reasonable to believe that when compared to the nineteenth and early twentieth centuries, today's press and public interest groups are more aggressive about uncovering officials' misdeeds. Congress also has assumed a larger role in investigating corruption, particularly in the executive branch. Oversight committees, independent prosecutor statutes, and special investigative hearings all perform some of the monitoring tasks that grand juries once allegedly performed.[267]

At the same time, Congress has limited the grand jury's ability to issue reports (in lieu of indictments) critical of government performance, which traditionally were a way that grand juries could browbeat officials into performing their jobs.[268] Although special grand juries are allowed to issue reports criticizing the government,[269] there are numerous restrictions on this authority. For example, a grand jury may not issue a report unless it first gives the target a chance to respond in writing;[270] the trial judge then has the discretion to edit the report, or even prevent its issuance.[271]

Although restrictions on the grand jury's authority to issue reports limit the institution's independence, the restrictions should not be mourned. They properly reflect an unwillingness to allow an ex parte, unaccountable body to inflict damage on reputations and careers. Whether these concerns should override the need to check government misdeeds is debatable. What is clear is that grand juries do not have the power they once had to oversee the performance of

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juries in the 1880s were "dependent to some extent upon the co-operation of the county prosecutor." YOUNGER, *supra* note 4, at 188.

267 Congress has its own power to subpoena and to compel testimony by obtaining immunity grants, making it a potent investigator in appropriate cases. *See, e.g.*, Adams v. Maryland, 347 U.S. 179, 183 (1954) (power to summon witnesses); 2 U.S.C. § 192 (1988) (imposing punishment for failure to comply with Congressional subpoena); 18 U.S.C. §§ 6002-6003 (1988) (immunity grants in exchange for compelled testimony before Congress).

268 Grand jury reports, more common in the states than in the federal system, were often used to criticize a public official without actually returning an indictment. *See* 1 BEALE & BRYSON, *supra* note 7, §§ 3:01-3:02.

269 *See* 18 U.S.C. § 3333(a) (1988). It is unclear whether federal grand juries have the authority to issue reports other than pursuant to statute. *See* 1 BEALE & BRYSON, *supra* note 7, § 3:02 (discussing split of authority).

270 18 U.S.C. § 3333(c)(1)-(2) (1988).

271 *Id.* § 3333(d)-(e).

government officials, thereby further diminishing the importance of citizen participation.[272]

b. *Encouraging the Truth*

One of the less obvious reasons for having lay citizens in the grand jury room is that they encourage witnesses to tell the truth. A witness who is willing to mislead a prosecutor in an office may be less willing to lie in the presence of jurors. The grand jury room impresses upon the witness the gravity of the sitnation: the closed doors, the secrecy, the oath (and implicit threat of perjury charges), and the fact that the jurors have taken time out of their lives to hear this witness all convey the message that the questions are important and that weighty consequences may follow from the answers. The jurors' presence also can lend support to the reluctant witness. The jurors stand ready to indict without fear of retribution, and the witness should be prepared to act the same.[273]

This argument has intuitive appeal, but it is hard to know which conclusions to draw from it. It is equally plausible that the jurors' presence has a negligible impact, because a witness otherwise willing to risk contempt or perjury charges by giving incomplete testimony is unlikely to be more forthcoming because of the stern looks of his fellow citizens. It is also possible that a witness with sensitive information who fears that the substance of his testimony will be leaked will be *less* likely to reveal the information to twenty-three jurors than to a single prosecutor.

In short, the presence of the grand jurors may occasionally lead to the discovery of crime that would otherwise go undetected or encourage a witness to be more truthful. But there is no hard evidence

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272 The extent to which grand jurors are *not* supposed to monitor one public official—the prosecutor—is shown in the recent incident involving the grand jury in the *Rocky Flats* case. After more than two years of presenting evidence to the grand jury of alleged environmental crimes at the Rocky Flats nuclear weapons plant, the prosecution entered into a plea agreement with the corporate target of the investigation. The plea agreement was apparently contrary to the wishes of a majority of the grand jurors. Some of the jurors publicly announced their unhappiness with the prosecutor's decision, claimed that they wanted to indict, and sent a report expressing their views to the district judge. The judge not only refused to release the report, he also asked the prosecutor to determine whether any of the jurors had violated the grand jury secrecy rules. *See* Lettow, *supra* note 9, at 1349-53; *Rebellious Grand Jurors Hire Lawyer*, 79 A.B.A. J. 31 (Feb. 1993); *see also In re* Grand Jury Proceedings, Special Grand Jury 89-2 (Rocky Flats Grand Jury), 813 F. Supp. 1451 (D. Colo. 1992) (related proceedings).

273 *See* United States v. Washington, 431 U.S. 181, 187-88 (1977) ("[F]or many witnesses the grand jury room engenders an atmosphere conducive to truth telling, for it is likely that upon being brought before such a body of neighbors and fellow citizens, and having been placed under a solemn oath to tell the truth, many witnesses will feel obliged to do just that."); Keeney & Walsh, *supra* note 81, at 579.

that this benefit necessarily follows from the presence of the jurors, and the magnitude of these benefits can well be doubted.

3. *Preserving the Bill of Rights*

The best reason for retaining the grand jury requirement has nothing to do with the desirability of the institution itself. The Bill of Rights has never been amended, with good reason. The principles and protections contained in the first ten amendments reflect many of our core beliefs about the relationship between state and citizen, beliefs that remain even when a particular amendment no longer seems as important. To change the Fifth Amendment would be to remove not only the grand jury requirement, but also the *idea* that pretrial screening of criminal charges is sufficiently important to warrant constitutional protection. Losing the idea of pretrial screening is more serious than losing the illusory protection of the grand jury, but the latter cannot be removed without undermining the former. Once that idea is deleted from the Constitution, pretrial protection becomes a matter of statute and political opinion, to be kept or discarded as the times dictate.

A related concern is that if the Bill of Rights were amended once it would be easier to amend a second and third time.[274] First the grand jury requirement is eliminated, then the Seventh Amendment right to jury trials in civil cases is abolished as too costly and unnecessary, and then perhaps the Second Amendment is clarified so we know precisely how the phrase "[a] well regulated Militia" relates to the rest of the sentence.[275] Many people wish that some of the amendments were worded differently, but relatively few would want to open the door to dramatic revision. Any proposal to amend the Constitution to eliminate grand juries must factor in the possibility that other, unrelated rights will be diminished by a precedent that the amendment process is an appropriate way to address such problems. As serious as the problems are with the grand jury, they are probably not serious enough to justify the associated risks.

But if the Constitution should not be amended to abolish the grand jury, and if its procedures are unlikely to be modified to allow nonlawyers to make meaningful decisions, few reform proposals are left. One remaining logical alternative would be to change the identity of the decisionmaker. This is currently done when the prosecutor

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274 *Cf.* FRANKEL & NAFTALIS, *supra* note 5, at 118-19 (discussing risks and benefits of amending Fifth Amendment to abolish grand jury requirement, and concluding that such an amendment is not justified); ABA PAMPHLET, *supra* note 8, at 1 (opposing abolition of Fifth Amendment grand jury requirement as a "dangerous precedent").

275 "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

proceeds by information: the evidence is presented in an adversarial hearing before a federal magistrate (almost always a lawyer) rather than to a panel of citizens.

This solution—the replacement of the grand jury with a preliminary hearing—is occasionally proposed,[276] but it creates two problems. First, it fails to satisfy the Fifth Amendment. Second, it fails to achieve the goal of having a nongovernment actor review the charging decisions. There is a fear that prosecutors and judges become hardened and their decisions distorted after years of criminal work and heavy case loads, and that criminal proceedings become "scripted" early in the process: the prosecutor recognizes the "type" of crime and "type" of defendant involved in a case, and then gathers only the evidence and makes only the decisions that are consistent with the script. This concern highlights the value of having rotating panels of non-governmental actors, who are more likely to focus on the precise crime and force the prosecutor to do the same.

The natural, but radical, implication of the desire for a decisionmaker with both expertise and independence from the government is to replace the grand jurors with lawyers who are randomly selected from the community. Lawyers generally have the expertise to assess the sufficiency of the evidence, thus making them qualified to screen the prosecutor's charging decisions. They also would not have ties to the government, and because they would hear only a limited number of cases, they would be less prone to treat cases as if they were on an assembly line. Moreover, there would be a decreased chance of prosecutor domination of the grand jury hearing, since lawyers as a group are normally less deferential to the judgment of others, particularly (although not exclusively) on legal matters.

The impediments to such a reform are large and obvious. Prosecutors would not like it because it would create a new barrier to obtaining a conviction. Lawyers would not like it because serving on grand juries would be burdensome and expensive. And citizens would almost certainly dislike the idea of replacing members of the community with members of the bar.[277] The view, correct or not, that the

276 *See, e.g.*, Campbell, *supra* note 5, at 174.

277 Limiting grand jury participation to certain groups would not be unprecedented, although it is surely inconsistent with modern notions of democratic participation in government. Originally grand jurors were property holders, in part because it was thought they would be more supportive of the government. *See* CLARK, *supra* note 5, at 15; *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES *302 (grand jurors were "gentlemen of the best figure in the country"); Whyte, *supra* note 47, at 470 (colonial grand juries consisted of "most capable" freeholders). *But see* Van Dyke, *supra* note 5, at 44-45 (noting dangers of restricting grand jury membership to upper class). It is obvious, though, that while a panel of lawyers might satisfy the text of the Fifth Amendment, there would need to be significant revision of the Supreme Court's jurisprudence to make the idea constitutionally acceptable.

criminal justice system was becoming further removed from the people it serves would strongly militate against such a change.

But while such a change is highly unlikely, it seems no more unlikely than any other significant reform that would allow the grand jury to effectively monitor the prosecutor's decisions. Nearly all reform proposals come at a high cost, either by making the grand jury process more closely resemble a trial—with the associated resource requirements—or by requiring a constitutional amendment, a move fraught with political and philosophical difficulties.

CONCLUSION

There are several conclusions to be drawn from the preceding analysis. Perhaps the most obvious is the broad and discouraging notion that although the framers of the Bill of Rights considered grand juries an important protector of individual liberty, time and close scrutiny have shown that they are not. Despite the mechanical support voiced by courts for the institution, once the focus is placed on the jurors themselves, and their inability to perform the task assigned to them, it becomes clear that grand juries will not dissuade prosecutors from bringing unfounded charges, nor do they alter the charging decisions in any significant respect. In almost all cases, a criminal defendant would be just as well off without the grand jury as he is with it.

A second conclusion is that there is little benefit, and perhaps great harm, in pretending that the grand jury's shortcomings do not exist. The Supreme Court continues to write opinions that are influenced by the erroneous assumption that grand juries operate as a shield for the accused. The Federal Rules of Criminal Procedure also presume that an indictment is an acceptable substitute for a judicial determination of probable cause.[278] These two points are part of the larger problem: as long as the grand jury creates the pretense of screening, there will not be any serious effort to ensure that real screening will occur. Grand juries have become not just a required, but a sufficient, check on the prosecutor's charging decisions, leaving no room for more meaningful restraints.

A final conclusion is that the dramatic changes needed to fix the problems with grand juries will come at a high cost, and the decision whether to pay those costs raises questions that are more political and philosophical than legal. Perhaps the best explanation for the continued existence of the grand jury is that those in a position to improve the screening process are content with the appearance of protection for the accused, even if there is a large gap between appearance and

278 *See* FED. R. CRIM. P. 5(c) ("[T]he preliminary examination shall not be held if the defendant is indicted . . . before the date set for the preliminary examination.").

reality. At a minimum, Congress and the courts are apparently unwilling to pay the steep price of meaningful reform, so that even if they are troubled by current grand jury practice, they are not troubled enough to be spurred to action.

There is nothing inherently irrational about maintaining the status quo; in a judicial system besieged with problems, fair-minded policy makers could decide that improving pretrial procedures to restrain prosecutors can wait. If the analysis set forth above is correct, real improvement would require either changing the nature of the question grand jurors are asked or the identity of the decisionmakers. Neither option is attractive, and perhaps neither is politically possible. But given the Fifth Amendment's command that the accused be protected from an overzealous government, those who ignore the grand jury's deficiencies—and the unfairness that follows—should bear a heavy burden of justifying the conclusion that real change is not feasible. Although it may satisfy the letter of the Fifth Amendment, maintaining a grand jury in name only fails to carry that burden.