Oklahoma Law Review

Volume 58 | Number 3

2005

Legislating New Federalism: The Call for Grand Jury Reform in the States

John F. Decker
DePaul University College of Law, jdecker1@depaul.edu

OKLAHOMA LAW REVIEW

VOLUME 58 FALL 2005 NUMBER 3

LEGISLATING NEW FEDERALISM: THE CALL FOR GRAND JURY REFORM IN THE STATES

JOHN F. DECKER*

* Professor of Law, DePaul University College of Law. J.D., Creighton University School of Law; LL.M., J.S.D., New York University School of Law. The author wishes to acknowledge the outstanding support provided by student research assistant Christopher M. Kopacz, Class of 2005.

I. Introduction

Imagine the following: a state prosecutor receives a tip from a law enforcement agent that a small accounting firm may be engaging in illegal activities, including fraud, deceptive practices, and obstruction of justice. The prosecutor then issues a subpoena to a former employee of the firm, hoping that the former employee will divulge information about the possible crimes. The employee receives the subpoena, which states only that he must testify before the grand jury in two days or else he may face criminal contempt charges. Even though it is not indicated on the subpoena, the employee suspects that the government may be investigating his old firm, particularly some of the shady business dealings within his department. Or perhaps the government simply wants to know whether he knows anything about his neighbor, who was recently arrested on child pornography charges.

Hardly aware of what a grand jury *is*, the former employee wonders whether he is in any sort of trouble and calls his lawyer. His lawyer informs him that she can not accompany him in the grand jury room because of rules regulating grand jury practice. Nervous and alone, the former employee enters the grand jury room and the prosecutor questions him for several hours, without informing him that he could refuse to incriminate himself. The prosecutor probes the former employee for a variety of information about his former co-workers and then hands the former employee a subpoena for a broad range of personal financial documents, including all of his banking records for the last five years. When he asks the prosecutor who the grand jury is investigating, the prosecutor responds that the former employee is being called only as a "witness," which, in actuality, is a half-truth.

The grand jury witness described in this scenario may be in a great deal of danger. The grand jury could indict him for a number of crimes based only on his peripheral involvement in his former employer's wrongdoing. If the prosecutor wishes, she may secure the indictment by introducing other evidence against him — even hearsay and illegally obtained evidence. Also, if the prosecutor knows of evidence that could explain away the charges, she does not have to present that evidence to the grand jury.[1] The indictment almost certainly will remain valid.[2]

1. United States v. Williams, 504 U.S. 36, 54-55 (1992).

2. *See id.* at 55 (upholding indictment despite prosecutor's failure to present exculpatory evidence to the grand jury).

Recognizing the frequency with which situations like this one occur, a number of legal commentators and organizations have observed that the prosecutor has too much control over the grand jury and its proceedings at the expense of witnesses who have little protection. Thus, these commentators have offered a variety of proposals for reform. These proposals, however, focus primarily on reforming the federal grand jury. By targeting their efforts at the federal level, these grand jury critics have let an important player off the hook: state legislators. While some states have enacted a number of these proposals, many states offer little or no protection to persons who are called to testify before the grand jury. Furthermore, there is little judicial oversight over what happens behind the closed doors of the grand jury room.[3] This article contends that state legislators should become more active in reforming grand juries in their states.

Part II of this article will recount the development of grand jury practice in America and discuss functions of the grand jury, the shroud of secrecy that hangs over its operations, and other aspects of its internal operations. Part III will examine U.S. Supreme Court review of grand jury practices and will reveal how the Court has allowed this institution to retain an essentially inquisitional character with little regard for the rights of subjects who are either called as witnesses or are targets of investigation.

Part IV will present various reform proposals that would more appropriately balance the States' interests in investigating and bringing charges against the perpetrators of those crimes versus the accused's interest in being treated with dignity and respect when facing one of the most powerful legal institutions ever invented. Particularly relevant here are concerns regarding whether a grand jury witness or target should have access to the "guiding hand" of counsel as well as the right to have the grand jury members learn of exculpatory information before they charge an accused and the right to receive admonishments regarding their Fifth Amendment privilege against self-incrimination. In addition, this section will explore other concerns, such as whether a grand jury should be required to base an indictment strictly on evidence that would be admissible in a criminal trial, and whether a target of a grand jury investigation should have a right to appear before the grand jury to provide his side of the story. Part IV also will describe legislation and case law currently in effect in various states that have adopted, in whole or in part, suggested reforms offered by critics of many grand jury practices. These include, for example, expansion of the role of counsel for those facing grand jury scrutiny.

---

3. *See infra* Part III.

Part V will argue first that these suggested reforms, many of which are already law in several states, level the playing field between possibly innocent, if not overwhelmed, grand jury targets and prosecutorial authorities who take unfair advantage of this institution, which the U.S. Supreme Court analogizes as a "sword." Moreover, these reforms also may actually increase the grand jury's effectiveness as an investigatory body. This section next will assert that what might be described as "New Legislative Federalism" provides the necessary and most appropriate framework for the introduction of needed reform.

New Legislative Federalism derives its support from several political theories and traditions, including Federalism, New Judicial Federalism, and Popular Constitutionalism. Under New Legislative Federalism, state legislatures are encouraged to fulfill their law-making responsibilities by stepping into legal voids created by other government bodies, particularly when those bodies have been unwilling or ill-equipped to meaningfully address those voids. One such void is state grand juries. While most courts have thus far failed to assert much supervisory or constitutional authority over grand juries, the time has come for state legislatures to take notice of the growing problems with the institution and take up the reins of reform.

II. Background

A. History of the Grand Jury

In order to fully comprehend the modern grand jury, it is important to have an understanding of this body's history. The grand jury can be traced back to twelfth-century England during the reign of King Henry II.[4] While the grand jury served a primarily accusatory function, its creation was motivated by political concerns; the grand jury allowed the king to consolidate his power and extend his governing authority throughout the land.[5] At its inception, the grand jury consisted of twelve men from the community whom the king authorized to accuse others of "murder, robbery, larceny, and the harboring of

4. JOHN F. DECKER & BRUCE L. OTTLEY, THE INVESTIGATION AND PROSECUTION OF ARSON § 4-2, at 232 (1999); Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 25 FLA. ST. U. L. REV. 1, 5-6 (1996). Other historians have found evidence of bodies resembling grand juries as far back as the tenth century. *See* 1 SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 1:2, at 1-4 to -5 (2d ed. 1997).

5. 1 BEALE, *supra* note 4, § 1:2, at 1-6. By increasing the number of prosecutions, the king raised money through forfeiture penalties. *Id.* This also increased his power over the Church and the nobility. Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1, 5 (2002).

criminals."[6] The jurors did not hear evidence and did not consider the truth of their accusations.[7] Instead, jurors simply determined "whether the defendant was accused or reputed to be guilty within the community."[8] Those charged by the grand jury would face "a trial by ordeal, which frequently resulted in death or dismemberment."[9] Thus, community members often feared the grand jury, which — in the absence of prosecutors or an organized police force — wielded a great deal of power in the English criminal justice system.[10]

During the fourteenth century, the jury system was separated into two distinct groups.[11] The petit jury was created to render a verdict of guilty or innocent during the trial.[12] The indicting grand jury, called the "grande inquest," was composed of twenty-four knights chosen by the sheriff and had the responsibility of accusing alleged criminals.[13] Over the course of the next few centuries, the grand jury evolved along with the criminal justice system generally.[14] For instance, the grand jury, like trial juries, began to hear testimony from witnesses and deliberate privately.[15]

The grand jury system carried over into the American colonies and took on new forms.[16] Many grand juries took active roles in local government by investigating corrupt government officials and supervising tax collections and public works.[17] As the colonies moved toward the American Revolution, the grand juries often assumed a central role in the political landscape.[18] Unlike the English grand jury, which was an extension of the king's authority, colonial grand juries openly resisted the English monarchy.[19] Jurors refused to indict leaders of the Stamp Act rebellion, as well as those accused of libel against the government, such as John Peter Zenger and members of the *Boston*

---

6. 1 BEALE, *supra* note 4, § 1:2, at 1-5.
7. *Id.* § 1:2, at 1-6.
8. *Id.*
9. Simmons, *supra* note 5, at 6.
10. *Id.* at 6-7, 15.
11. DECKER & OTTLEY, *supra* note 4, § 4-2, at 232; Kadish, *supra* note 4, at 8.
12. DECKER & OTTLEY, *supra* note 4, § 4-2, at 232; Kadish, *supra* note 4, at 8.
13. DECKER & OTTLEY, *supra* note 4, § 4-2, at 232; 1 WAYNE LAFAVE & JORDAN ISRAEL, CRIMINAL PROCEDURE § 8.2(a) (1984).
14. DECKER & OTTLEY, *supra* note 4, § 4-2, at 232. The elimination of the trial by ordeal led, in part, to the development of the jury's role in the criminal justice system. *See* 1 BEALE, *supra* note 4, § 1:2, at 1-7.
15. DECKER & OTTLEY, *supra* note 4, § 4-2, at 232.
16. 1 BEALE, *supra* note 4, § 1:3, at 1-11.
17. *Id.* § 1:3, at 1-13 to -14.
18. *Id.* § 1:3, at 1-14.
19. Kadish, *supra* note 4, at 10-11.

Gazette.[20] Also, grand juries used their powers to return indictments against British soldiers and Americans who joined the British army or otherwise aided the British.[21]

Upon the colonies' victory against the British, many people sought to reduce prosecutorial abuse of power; thus, most states included a grand jury provision in their respective constitutions.[22] The Federal Constitution also includes a grand jury requirement, which provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ."[23] In the early years of the Republic, Americans viewed the grand jury as an essential safeguard of personal liberty, and, as such, it was the primary method of initiating criminal charges.[24] State grand juries also continued to perform many duties, including the oversight of local construction projects and the recommendation of laws to state legislatures.[25]

By the mid-nineteenth century, the grand jury was no longer unanimously held in high regard.[26] Some critics argued that the grand jury was a "cumbersome, expensive, and inefficient" relic, particularly in western states with populations spread thinly across large areas.[27] Other critics noted "that the grand jury's inquisitorial procedures posed a threat to individual liberty."[28] Representatives to state constitutional conventions often intensely debated the value of the grand jury, and some states eliminated the grand jury requirement altogether, permitting prosecutions to proceed by either grand jury indictment or a preliminary examination.[29] The reform movement gained momentum after an 1884 U.S. Supreme Court decision, *Hurtado v. California*,[30] which affirmed that the Federal Constitution's grand jury requirement did not apply

20. 1 BEALE, *supra* note 4, § 1:3, at 1-14.

21. *Id.* § 1:3, at 1-14 to -15.

22. DECKER & OTTLEY, *supra* note 4, § 4-2, at 233. Of the original thirteen states, however, only Pennsylvania, Delaware, and North Carolina expressly required that all charges be brought by a grand jury indictment. 1 BEALE, *supra* note 4, § 1:4, at 1-17.

23. U.S. CONST. amend. V.

24. 1 BEALE, *supra* note 4, § 1:4, at 1-16.

25. *Id.* § 1:4, at 1-20 to 1-21.

26. *Id.* § 1:4, at 1-21.

27. *Id.* § 1:4, at 1-24.

28. *Id.* § 1:4, at 1-21.

29. *Id.* § 1:4, at 1-22 to -24; DECKER & OTTLEY, *supra* note 4, § 4-2, at 233.

30. 110 U.S. 516 (1884).

to the states.[31] After this decision, the next six states admitted to the union did not guarantee the right to grand jury review in their constitutions.[32]

To be sure, the grand jury remained an important body in many states during this time. For example, during Reconstruction, grand juries in many southern states refused to indict Ku Klux Klan members and other persons who committed acts of violence and intimidation against freed slaves.[33] In addition, many grand jury investigations uncovered widespread corruption by public officials.[34] The most notable of these investigations led to the indictment of "Boss" Tweed, a prominent New York City politician, and his associates in 1872 for crimes involving corruption.[35] In that case, the grand jury demonstrated its independence by operating "[w]ithout the prosecutor's assistance" and issuing an indictment "in a district that had otherwise been very loyal to Tweed."[36]

While the early twentieth century witnessed the decline of the grand jury in the states, this period also saw the explosive rise in prominence of the federal grand jury, mainly due to the increasing number of federal crimes, consequently expanding the federal grand jury's jurisdiction.[37] Also, the increasingly professional and inquisitional nature of the criminal justice system convinced many people that professional prosecutors — not inexperienced lay persons — should control grand jury proceedings.[38]

The Federal Rules of Criminal Procedure, adopted in 1946, set guidelines that brought consistency to grand jury procedures, which had previously been unregulated and widely-varying among jurisdictions.[39] The rules also increased the role of the prosecutor while diminishing the grand jury's independence.[40] In the past fifty years, the federal grand jury has become

---

31. *Id.* at 534-38; 1 BEALE, *supra* note 4, § 1:5, at 1-23 to -24. The Court's holding was later reaffirmed in *Lem Woon v. Oregon*, 229 U.S. 586, 590 (1913) (upholding a state practice allowing a felony charge to proceed directly to trial without any pre-trial screening procedures) and *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975) (stating in dictum that the Constitution does not require a state to provide "judicial oversight or review of the decision to prosecute"). DECKER & OTTLEY, *supra* note 4, § 4-2, at 237-38.

32. 1 BEALE, *supra* note 4, § 1.5, at 1-24.

33. *Id.* § 1.5, at 1-22 to -23.

34. *Id.* § 1.5, at 1-25.

35. *Id.*

36. Roger Roots, *If It's Not a Runaway, It's Not a Real Grand Jury*, 33 CREIGHTON L. REV. 821, 833 (2000).

37. *Id.* at 833-34.

38. SUSAN W. BRENNER & GREGORY G. LOCKHART, FEDERAL GRAND JURY: A GUIDE TO LAW AND PRACTICE § 2.4, at 22 (1996); *see also* Richard D. Younger, *The Grand Jury Under Attack*, 46 J. CRIM. L. & CRIMINOLOGY 26 (1955).

39. Roots, *supra* note 36, at 836.

40. BRENNER & LOCKHART, *supra* note 38, § 2.4, at 22-23.

increasingly politicized.[41] Members of the Nixon administration used the grand jury to obtain information about their political enemies and disrupt their activities.[42] Ironically, the grand jury later contributed to the downfall of the Nixon administration through its vigorous investigations of the Watergate affair.[43] Under the guidance of Special Prosecutor Leon Jaworski, federal grand juries returned indictments against forty-five persons, including several high-level officials in the Nixon administration, and took the unprecedented step of naming President Nixon as an "unindicted co-conspirator."[44] More recently, Independent Counsel Kenneth Starr was accused of exploiting the grand jury's powers in his investigations of President Clinton by subpoenaing a wide array of people and documents, as well as breaching the tradition of confidentiality of grand jury proceedings.[45]

B. Purposes of the Grand Jury

Scholars often describe the modern grand jury as serving two functions in the criminal justice system, that of a "sword" and a "shield."[46] The grand jury operates as a sword through its broad investigative powers.[47] As the United States Supreme Court has noted, "[t]raditionally the grand jury has been

41. Use of the grand jury by presidents for political purposes is, by no means, a twentieth-century innovation. Thomas Jefferson attempted to indict his political rival Aaron Burr for treason. After a Kentucky grand jury returned a no true bill, Jefferson brought the case before a less sympathetic grand jury in Virginia, which issued the indictment. *See* Simmons, *supra* note 5, at 13-14.

42. LEROY D. CLARK, THE GRAND JURY: THE USE AND ABUSE OF POLITICAL POWER 5-6 (1975).

43. Donald C. Smaltz, *The Independent Counsel: A View from the Inside*, 86 GEO. L.J. 2307, 2317-21 (1998).

44. United States v. Nixon, 418 U.S. 683, 687 (1974); *see* Ira P. Robbins, *Guilty Without Charge: Assessing the Due Process Rights of Unindicted Co-conspirators*, 2004 FED. CTS. L. REV. 1, at *III.A.5 (Jan. 2004), http://www.fclr.org/2004fedctslrev1.htm (noting the potential for using the unindicted co-conspirator label as a political weapon).

45. *See* Stuart P. Green, *Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements*, 53 HASTINGS L.J. 157, 209 (2001) (noting that "Kenneth Starr was viewed by many as overreaching, self-righteous, and vindictive"); Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259, 267 (2001) (referring to the criticisms of Starr's subpoenas of bookstore records and Monica Lewinsky's mother); *Kendall: 'A Deluge of Illegal Leaks,'* WASH. POST, Feb. 7, 1998, at A13 (President Clinton's attorney accusing Starr's office of leaking grand jury information to the press).

46. *See* United States v. Calandra, 414 U.S. 338, 342-43 (1974) ("In England, the grand jury served for centuries both as a body of accusers sworn to discover and present for trial persons suspected of criminal wrongdoing and as a protector of citizens against arbitrary and oppressive governmental action.").

47. DECKER & OTTLEY, *supra* note 4, § 4-2, at 234.

accorded wide latitude to inquire into violations of criminal law."[48] In fact, English grand jurors could freely pursue investigations based on their personal knowledge of wrongdoing.[49] Today, virtually no obstacles stand in the way of the grand jury's investigative powers.[50] The modern grand jury can subpoena any witnesses[51] or evidence[52] that might aid in its investigation, and it need not comply with the "technical procedural and evidentiary rules governing the conduct of criminal trials."[53] The grand jury can compel witnesses to testify — even over an assertion of the Fifth Amendment privilege against self-incrimination — by granting the witness immunity.[54] Witnesses who do not comply with the subpoena face civil or criminal contempt.[55]

The grand jury subpoena is a valuable tool, because it uncovers evidence that may be unobtainable by other investigative bodies, such as the police. A police officer wishing to search a particular place for evidence may be required to go before a magistrate and obtain a warrant based on probable cause.[56] On the other hand, a grand jury can subpoena the same evidence without satisfying any preliminary standard whatsoever.[57] The grand jury also has the power to compel testimony from any person, even if that person is not a target of its investigation.[58]

The grand jury's investigative function has become essential to prosecuting complex cases such as white collar crimes and organizational offenses.[59] In such cases, grand juries can subpoena numerous witnesses and enormous amounts of records, and they spend considerable time reviewing the

48. *Calandra*, 414 U.S. at 343.

49. Costello v. United States, 350 U.S. 359, 362 (1956).

50. DECKER & OTTLEY, *supra* note 4, § 4-2, at 234.

51. A subpoena that orders a witness to appear before the grand jury and testify is commonly called a *subpoena ad testificandum*. BLACK'S LAW DICTIONARY 1467 (8th ed. 2004).

52. A subpoena that orders a witness to appear before the grand jury and bring documents or physical evidence is commonly called a *subpoena duces tecum*. *Id.*

53. *Calandra*, 414 U.S. at 343.

54. Kastigar v. United States, 406 U.S. 441, 453 (1972) (holding that a grant of use or derivative use immunity "is sufficient to compel [a witness's] testimony over a claim of the privilege" against self-incrimination).

55. *See* BRENNER & LOCKHART, *supra* note 38, § 13.15, at 376-84, § 14.15, at 472-83 (describing the reach of the federal civil and criminal contempt statutes).

56. 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.2, at 483 (4th ed. 2004).

57. *Id.* § 4.13(c), at 828.

58. United States v. R. Enters., Inc., 498 U.S. 292, 298-300 (1991).

59. *Constitutional Rights and the Grand Jury: Hearing Before the H. Subcomm. on the Constitution of the Comm. of the Judiciary*, 106th Cong. 24 (2000) [hereinafter *Hearings*] (prepared statement of Sara Sun Beale).

evidence.[60] Recently, Independent Counsel Kenneth Starr used the grand jury to subpoena from one witness eleven broad categories of documents that resulted in an astounding 13,120 pages of documents.[61]

The grand jury operates as a shield by protecting citizens from unfounded accusations of criminal wrongdoing.[62] In this way, the grand jury's role resembles that of a judicial officer during a preliminary examination: both screen cases to determine the existence of "probable cause to believe that a crime has been committed by the person suspected of criminality."[63] The grand jury, however, is an independent body of citizens, sometimes described as a fourth branch of the government.[64] Thus, the grand jury can reject a charge that has sufficient evidentiary support and one which the jurors feel is unjust or based upon improper motives.[65] Moreover, the secrecy of the proceedings and the lack of judicial review of indictments make the jurors' decisions generally impossible to reverse.[66]

The grand jury's reputation as a shield did not exist until the seventeenth century during the famous cases involving the Earl of Shaftesbury and one of his followers, Stephen College.[67] King Charles II ultimately sought to indict the two men, his political enemies, for treason.[68] However, several grand juries, sympathetic to Shaftesbury's cause, resisted political pressure and refused to issue the indictments.[69] Though College and Shaftesbury did not escape punishment,[70] the grand juries' refusal to indict gave the grand jury system a reputation as "one of the chief safeguards of the liberty of Englishmen."[71] The modern grand jury technically remains an independent

60. *Id.*

61. United States v. Hubbell, 530 U.S. 27, 31 (2000).

62. DECKER & OTTLEY, *supra* note 4, § 4-2, at 235.

63. *Id. See* 1 BEALE, *supra* note 4, § 1:7, at 1-31.

64. *See* United States v. Williams, 504 U.S. 36, 47 (1992) (noting that the grand jury "has not been textually assigned . . . to any of the branches" of government). *But see* BRENNER & LOCKHART, *supra* note 38, § 2.3, at 11 (noting the traditional perspective of the "grand jury as an 'arm of the court'").

65. 1 BEALE, *supra* note 4, § 1:7, at 1-31.

66. *See* Simmons, *supra* note 5, at 25 (describing the lack of judicial review of federal indictments).

67. 1 BEALE, *supra* note 4, § 1:2, at 1-9.

68. Simmons, *supra* note 5, at 8.

69. *Id.* at 8-9.

70. College was indicted by another grand jury and later tried and executed. *Id.* at 9. Shaftesbury also faced the prospect of indictment by a second grand jury and thus fled the country. *Id.* at 10.

71. 1 BEALE, *supra* note 4, § 1:2, at 1-10.

body, but as a practical matter, it relies heavily on the prosecutor to secure evidence and give the jurors legal advice.[72]

C. The Role of Secrecy

One of the grand jury's most important characteristics is the secret nature of its proceedings.[73] During grand jury proceedings, only the grand jurors, the prosecutor, a court reporter, and a witness may be in the room.[74] Those present cannot publicly disclose information learned from the proceedings,[75] although several provisions allow prosecutors to share information with other government officials.[76] Another exception applies to witnesses, who may reveal the content of their grand jury testimony to others.[77] The U.S. Supreme Court held that a witness's First Amendment right to "make a truthful statement of information he acquired on his own," trumps the grand jury's secrecy rule.[78] No one else may witness the jurors deliberating or voting.[79]

The veil of secrecy surrounding the grand jury can be traced to the College and Shaftesbury cases in 1681, in which the king wanted the grand juries to hold public hearings regarding the treason charges.[80] The grand juries, however, resisted the political pressure and privately heard testimony from the witnesses.[81] Thus, the grand jury's clandestine nature arose from a need to maintain its independence from the government.[82]

Although the modern grand jury largely functions in tandem with the prosecutor — a circumstance that nullifies the original rationale for grand jury secrecy[83] — courts and scholars have formulated additional justifications for

---

72. William J. Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174, 177 (1973).

73. Kadish, *supra* note 4, at 16 (describing grand jury secrecy as "an implicit part of American criminal procedure").

74. *See* FED. R. CRIM. P. 6(d)(1). It should be noted that in some jurisdictions, a witness who is testifying may be permitted to bring an attorney into the grand jury room, although the attorney must assume only a passive role in the proceedings. *See infra* Part IV(B)(1) for a more thorough treatment of the right to counsel in state grand jury systems.

75. DECKER & OTTLEY, *supra* note 4, § 4-2, at 304; *see, e.g.*, FED. R. CRIM. P. 6(e)(2)(B) (stating the general secrecy rule).

76. *See, e.g.*, FED. R. CRIM. P. 6(e)(3) (listing several exceptions to the secrecy requirement).

77. *See* Butterworth v. Smith, 494 U.S. 624, 636 (1990).

78. *Id.*

79. *See* FED. R. CRIM. P. 6(d)(2).

80. Kadish, *supra* note 4, at 13; Fred A. Bernstein, Note, *Behind the Gray Door:* Williams*, Secrecy, and the Federal Grand Jury*, 69 N.Y.U. L. REV. 563, 595 (1994).

81. Bernstein, *supra* note 80, at 595.

82. *Id.*

83. For this reason, some scholars have argued that the secrecy requirement should be

the secrecy requirement.[84] First, the rule prevents subjects or targets of grand jury investigations from escaping to avoid capture.[85] Second, the rule prevents the defendant from perjuring himself at trial to overcome the evidence against him.[86] Third, it allows the grand jurors to search for the truth and deliberate without any tampering or external pressure.[87] Fourth, it prevents tampering with witnesses and evidence.[88] Fifth, it creates an official atmosphere that encourages witnesses to testify freely and fully.[89] Sixth, it protects and encourages people who would not otherwise provide valuable information without assurances of confidentiality.[90] Finally, the requirement protects the reputations of innocent subjects and targets against whom the grand jury does not issue an indictment.[91] As these proffered rationales indicate, the secrecy requirement has evolved to protect not only the grand jurors, but also witnesses, subjects and targets of investigations, and the criminal justice system generally.

D. General Information

1. The Federal Grand Jury[92]

The Fifth Amendment to the U.S. Constitution states that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ."[93] Courts have interpreted this provision as requiring a grand jury indictment in all federal felony cases.[94] In cases where the defendant has waived his right to an indictment or where

---

curtailed or abolished. *See* Simmons, *supra* note 5, at 72; *see also* Bernstein, *supra* note 80, at 620 (concluding that the indicting, but not the investigative, grand jury should be conducted in a more public manner).

84. Bernstein, *supra* note 80, at 595; Kadish, *supra* note 4, at 13.

85. United States v. Procter & Gamble Co., 356 U.S. 677, 682 n.6 (1958) (quoting United States v. Rose, 215 F.2d 617, 628-29 (3d Cir. 1954)).

86. Kadish, *supra* note 4, at 17 (citing United States v. Cobban, 127 F. 713, 718 (D. Mont. 1904)).

87. *Id.* at 19-20 (discussing United States v. Amazon Indus. Chem. Corp., 55 F.2d 254 (D. Md. 1931)).

88. *Procter & Gamble Co.*, 356 U.S. at 677, 682 n.6 (quoting *Rose*, 215 F.2d at 628-29).

89. *Id.*; W. Wilson White, *In Defense of the Grand Jury*, 25 PA. B. ASS'N Q. 260, 263-64 (1954).

90. Daniel C. Richman, *Grand Jury Secrecy: Plugging the Leaks in an Empty Bucket*, 36 AM. CRIM. L. REV. 339, 345 (1999).

91. *Procter & Gamble Co.*, 356 U.S. at 677, 682 n.6 (quoting *Rose*, 215 F.2d at 628-29).

92. For a more thorough treatment of the federal grand jury, see BRENNER & LOCKHART, *supra* note 38.

93. U.S. CONST. amend. V.

94. Green v. United States, 356 U.S. 165, 183 (1958).

the offense is punishable by less than one year in prison, a prosecutor need not proceed by indictment.[95]

The federal grand jury consists of between sixteen and twenty-three people[96] who are "selected at random from a fair cross section of the community in the district or division wherein the court convenes."[97] The basic qualifications for grand jury service are the same as those for petit jurors.[98] Also like a petit jury, the composition of a grand jury must comply with constitutional requirements. Thus, prospective jurors cannot be systematically or deliberately excluded from grand jury service solely based on their race or gender.[99] Unlike a petit jury, a grand jury is selected by a district court judge or magistrate.[100] The court generally conducts only a limited voir dire of the prospective jurors, thus denying prosecutors and defense counsel an initial opportunity to examine the jury panel or challenge the jury's makeup.[101]

There are two types of grand juries in the federal system: "regular" and "special" grand juries. Regular grand juries are the descendants of the common law grand jury and determine whether there is sufficient evidence to return federal charges and conduct investigations into possible federal criminal activity.[102] When at least twelve jurors agree to bring charges,[103] the jury issues a "true bill."[104] If twelve jurors do not favor indictment, the jury issues a "no true bill."[105] Regular grand juries sit for eighteen months, although the court can extend the juries' term by an additional six months.[106] Congress created special grand juries, on the other hand, as part of the Organized Crime Control Act of 1970.[107] This act created new criminal offenses, including the Travel Act and the Racketeer Influenced and Corrupt

95. BRENNER & LOCKHART, *supra* note 38, § 2.2, at 6, § 2.2, at 10.

96. FED. R. CRIM. P. 6(a)(1).

97. 28 U.S.C. § 1861 (2000).

98. *Id.* § 1865(b) (grand jurors required to be eighteen years of age, a U.S. citizen, a resident of the judicial district for at least one year, able to read and write English, and not convicted of a felony without restoration of citizenship rights).

99. DECKER & OTTLEY, *supra* note 4, § 4-2, at 238-39 (citing Campbell v. Louisiana, 523 U.S. 392, 398-400 (1998) (race); Ballard v. United States, 329 U.S. 187, 193 (1946) (gender)).

100. BRENNER & LOCKHART, *supra* note 38, § 5.2, at 80 (noting that practices differ among the jurisdictions).

101. *Id.* The Federal Rules of Criminal Procedure, however, permit the government or "a defendant" to challenge the grand jury. FED. R. CRIM. P. 6(b)(1).

102. BRENNER & LOCKHART, *supra* note 38, § 2.4, at 22, § 3.1, at 29.

103. FED. R. CRIM. P. 6(f).

104. BRENNER & LOCKHART, *supra* note 38, § 19.3, at 618.

105. *Id.*

106. FED. R. CRIM. P. 6(g).

107. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 101(a), 84 Stat. 922, 941.

Organizations Act (RICO), designed to combat organized crime.[108] Special grand juries were authorized in order to conduct the complex and lengthy investigations required to prosecute these offenses.[109] Hence, special grand juries sit for eighteen months, and a court can extend the jury's term by an additional eighteen months.[110] Like regular grand juries, special grand juries can issue indictments, but they may also submit reports on their investigations.[111]

2. State Grand Juries

While the Fifth Amendment requires a grand jury indictment for *federal* offenses, neither this provision nor the Fourteenth Amendment's Due Process Clause has been interpreted to impose the same requirement for *state* crimes.[112] Hence, many states have reduced the role of the grand jury in their criminal justice systems. About half of the states do not require a grand jury indictment to prosecute any type of criminal offense, and, in these states, all criminal prosecutions can begin by information.[113] The other half of the states require a grand jury indictment for certain categories of crimes.[114] Many of these states, like the federal system, require a grand jury indictment only for felony offenses.[115] Some states, such as Minnesota and Florida, have a more narrow provision, requiring a grand jury to approve only offenses punishable by death or life imprisonment.[116] In contrast, the South Carolina Constitution contains a broader grand jury provision that guarantees the right to an indictment for all state crimes in which the punishment is at least a $200 fine or thirty days imprisonment.[117]

Just as the indictment requirement varies among states, so does the size of the grand jury.[118] In eighteen states and the District of Columbia, the number of jurors who comprise the grand jury can vary within a specified range —

108. 1 BEALE, *supra* note 4, § 1:6, at 1-30.

109. *Id.* at 1-31.

110. 18 U.S.C. § 3331(a) (2000).

111. *Id.* § 3333 (authorizing special grand juries to submit to the court reports "concerning noncriminal misconduct, malfeasance, or misfeasance in office involving organized criminal activity by an appointed public officer or employee as the basis for a recommendation of removal or disciplinary action" or "regarding organized crime conditions in the district").

112. Hurtado v. California, 110 U.S. 516, 535 (1886).

113. 1 BEALE, *supra* note 4, § 8:2, at 8-15.

114. *Id.*

115. *See, e.g.*, ALASKA CONST. art. I, § 8.

116. FLA. CONST. art. I, § 15; MINN. R. CRIM. P. 17.01.

117. S.C. CONST. art. I, § 11.

118. For the sizes of each state's grand jury, see 1 BEALE, *supra* note 4, § 4:8, at 4-38 n.8.

such as sixteen to twenty-three jurors[119] — and in the remaining states, the size of the grand jury is static.[120] In a majority of states, the grand jury must contain between twelve and eighteen jurors.[121] In some states, the grand jury looks more like the federal grand jury and contains as many as twenty-three persons.[122] A number of states fall to the other end of the spectrum, with two states requiring as few as five jurors to be present to hear evidence.[123]

Similarly, the number of jurors required to concur in a decision to indict varies among states.[124] In sixteen states, only a majority of the maximum number of jurors is required to indict.[125] In the remaining states, a greater percentage — usually seventy-five percent — must agree, with a few states requiring near-unanimity before an indictment can issue.[126]

III. The U.S. Supreme Court's Lack of Grand Jury Oversight

Though the foundations had been laid in earlier cases,[127] the U.S. Supreme Court developed much of its federal grand jury jurisprudence in the 1970s.[128]

---

119. *See id.* These jurisdictions are: Alaska (12-18); Arizona (12-16); D.C. (16-23); Florida (15-18); Georgia (16-23); Maryland (12-23); Michigan (13-17); Minnesota (16-23); Mississippi (15-20); New Hampshire (12-23); New York (16-23); North Carolina (12-18); North Dakota (8-11); Pennsylvania (15-23); Rhode Island (13-23); South Dakota (6-8); Utah (9-15); Vermont (18-23); Virginia (5-7). *Id.*

120. *Id.* It should be noted, however, that some states only require a quorum — rather than the entire jury — to conduct business.

121. *Id.* These states are: Alabama (18); Alaska (12-18); Arizona (12-16); Arkansas (16); Colorado (12); Florida (15-18); Hawaii (16); Idaho (16); Illinois (16); Kansas (15); Kentucky (12); Louisiana (12); Maine (13); Michigan (13-17); Missouri (12); Nebraska (16); Nevada (17); New Mexico (12); North Carolina (12-18); Oklahoma (12); South Carolina (18); Tennessee (13); Texas (12); Washington (12); West Virginia (16); Wisconsin (17).

122. *Id.* These jurisdictions are: D.C. (16-23); Georgia (16-23); Maryland (12-23); Massachusetts (up to 23); Minnesota (16-23); New Hampshire (12-23); New Jersey (12-23); New York (16-23); Pennsylvania (15-23); Rhode Island (13-23); Vermont (18-23).

123. *Id.* These states are Indiana (requiring only 6 jurors, with a quorum of 5) and Virginia (5-7).

124. *See id.*

125. *Id.* These jurisdictions are: Alaska; Arizona; D.C.; Georgia; Illinois; Maryland; Massachusetts; Michigan; Minnesota; New Hampshire; New Jersey; New York; North Dakota; Pennsylvania; Rhode Island; Vermont.

126. *Id.* These states are: Indiana (5 of 6); Maine (12 of 13); Tennessee (12 of 13).

127. *See, e.g.*, Hale v. Henkel, 201 U.S. 43, 76 (1906) (holding that a grand jury subpoena ordering the production of documents constituted a Fourth Amendment violation); Boyd v. United States, 116 U.S. 616, 632 (1886) (sustaining defendant's challenge to a court order to produce certain documents on both Fourth and Fifth Amendment grounds); Hurtado v. California, 110 U.S. 516, 538 (1884) (declining to extend the grand jury requirement to state prosecutions under the Fourteenth Amendment's Due Process Clause).

128. *See, e.g.*, Douglas Oil Co. of Cal. v. Petrol Stops Nw., 441 U.S. 211, 228-29 (1979)

During that time, the Court decided a number of cases that largely removed the federal courts from the task of overseeing grand jury proceedings.[129] In 1992, the Court seemed to summarize its position when it stated that "the grand jury is an institution separate from the courts, over whose functioning the courts do not preside . . . ."[130] This section will briefly discuss some of these cases and their effects on federal grand jury practices.

A. Evidentiary and Procedural Rights

The Court's first modern case considering the constitutionality of grand jury procedures was a 1956 decision, *Costello v. United States*.[131] In that case, the Court held that an indictment based solely on hearsay evidence did not violate a defendant's Fifth Amendment rights.[132] In a brief opinion, the Court indicated a grand jury indictment can be constitutionally obtained with only minimal procedural requirements.[133] The Court stated that an indictment that is "returned by a legally constituted and unbiased grand jury" and that is "valid on its face" satisfies the Fifth Amendment.[134] Requiring grand juries to further abide by the evidentiary rule prohibiting hearsay testimony "would run counter to the whole history of the grand jury institution, in which laymen

(holding that a district court abused its discretion by releasing grand jury transcripts to a civil litigant); United States v. Washington, 431 U.S. 181, 182 (1977) (holding that a target of a grand jury investigation is not entitled to be informed in advance that he is a "potential defendant in danger of indictment"); United States v. Wong, 431 U.S. 174, 179 (1977) (rejecting the defendant's argument that she was entitled to be informed about her privilege against self-incrimination); United States v. Mandujano, 425 U.S. 564, 580 (1976) (holding that a grand jury witness is not entitled to receive *Miranda* warnings prior to giving testimony); Fisher v. United States, 425 U.S. 391, 414 (1976) (holding that a subpoena ordering an attorney to produce documents delivered to him by his client did not violate the client's Fifth Amendment rights); United States v. Calandra, 414 U.S. 338, 351-52 (1974) (declining to extend the Fourth Amendment exclusionary rule to grand jury proceedings); United States v. Dionisio, 410 U.S. 1, 7, 14 (1973) (rejecting defendant's Fourth and Fifth Amendment challenges to a subpoena ordering him to produce a voice exemplar); Branzburg v. Hayes, 408 U.S. 665, 708-09 (1972) (rejecting news reporter's First Amendment challenge to a grand jury subpoena); Kastigar v. United States, 406 U.S. 441, 453 (1972) (holding that a grant of use/derivative use immunity compelled a defendant to testify before the grand jury).

129. *See, e.g.*, *Dionisio*, 410 U.S. at 17-18 ("[I]f [the grand jury] is even to approach the proper performance of its constitutional mission, it must be free to pursue its investigations unhindered by external influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it.").

130. United States v. Williams, 504 U.S. 36, 47 (1992).

131. 350 U.S. 359 (1956).

132. *Id.* at 363. *See generally* BRENNER & LOCKHART, *supra* note 38, § 10.6, at 325-26.

133. *Costello*, 350 U.S. at 363-64.

134. *Id.* at 363.

conduct their inquiries unfettered by technical rules."[135] Moreover, applying the rule to the grand jury context would cause unnecessary delay without improving the fairness of the defendant's trial.[136]

One year later, the U.S. Supreme Court addressed a grand jury witness's right to counsel in *In re Groban*.[137] In dictum, the Court noted that a "witness before a grand jury cannot insist, as a matter of constitutional right, on being represented by his counsel . . . ."[138] While this question was not expressly before the Court in *Groban*,[139] the Court approvingly cited the language from that case in later cases.[140] Thus, a witness clearly has no right to the presence of counsel in the grand jury room.[141] However, the Court's decisions do not appear to prevent a witness who has obtained representation from leaving the jury room during the proceedings to consult with the attorney.[142]

In the Court's most recent decision interpreting grand jury procedures, it addressed whether a prosecutor must present exculpatory evidence to the grand jury when seeking an indictment.[143] The Court rejected the defendant's arguments that the federal courts' supervisory powers over the grand jury permitted a court to dismiss an indictment when a prosecutor failed to present exculpatory evidence to the jury.[144] Relying on the historical position of the grand jury as an independent body separate from the courts, the Court concluded that "any power federal courts have to fashion, on their own initiative, rules of grand jury procedure is a very limited one" and did not extend to supervising the grand jury's procedure for hearing evidence.[145] Moreover, such a requirement would transform the grand jury from its historical role as an accusatory body into an adjudicative body in which a grand jury target would be entitled to present his own defense.[146]

---

135. *Id.* at 364.

136. *Id.*

137. 352 U.S. 330 (1957).

138. *Id.* at 333.

139. *Id.* at 330-31 (describing the issue as involving the appellants' Fourteenth Amendment rights under the Due Process Clause to the assistance of their own counsel while testifying at an Ohio State Fire Marshal investigative proceeding).

140. United States v. Williams, 504 U.S. 36, 49 (1992); United States v. Mandujano, 425 U.S. 564, 581 (1976).

141. *See* BRENNER & LOCKHART, *supra* note 38, § 13.9, at 369.

142. *Id.* § 13.9, at 370 (citing *Mandujano*, 425 U.S. at 581).

143. *Williams*, 504 U.S. at 40.

144. *Id.* at 45. The defendant did not argue that the presentation of exculpatory evidence was constitutionally required by the Fifth Amendment. *Id.*

145. *Id.* at 50.

146. *Id.* at 51-52.

In addition, the U.S. Supreme Court also has determined that a witness who is subpoenaed before a federal grand jury has no right to be given *Miranda* warnings prior to giving testimony.[147] In a 1976 case, *United States v. Mandujano*,[148] the Court held that the *Miranda* warnings were a prophylactic rule to negate the coercive nature of custodial interrogations and not judicial proceedings.[149] Testifying before a grand jury is a less coercive setting than being interrogated while in police custody, thus diminishing the witness's need to be informed of his rights.[150] Furthermore, the right to remain silent and the right to an attorney — the primary components of the *Miranda* warning — are not implicated in grand jury settings.[151] Unlike a suspect in police custody, a witness who is subpoenaed before the grand jury has "an absolute duty" to answer questions, subject only to the Fifth Amendment.[152] And, as the Court stated in *Groban*, the witness has no right to counsel during grand jury proceedings.[153]

In subsequent cases, the Court ruled that grand jury witnesses are not constitutionally required to receive other warnings.[154] For instance, in *United States v. Washington*,[155] the Court held that a target of a grand jury investigation is not constitutionally entitled to be informed in advance that he

147. United States v. Mandujano, 425 U.S. 564, 580 (1976). In *Miranda v. Arizona*, 384 U.S. 436, 467 (1966), the U.S. Supreme Court held that a person in police custody must be given certain warnings if the person is to be interrogated. The person must be warned that he has the right to remain silent, that anything said can and will be used against him in court, that he has the rights to consult with a lawyer and to have the lawyer present with him during the interrogation, and that if he is indigent, a lawyer will be appointed to represent him. *Id.* at 467-73.

148. 435 U.S. 564 (1976).

149. *Id.* at 579-80.

150. *Id.* at 580.

151. *Id.* at 580-81; *see also* United States v. Washington, 431 U.S. 181, 183 n.2 (1977) (noting that a prosecutor "overstated" the defendant's constitutional rights when he informed him prior to giving grand jury testimony that he had the right to remain silent).

152. *Mandujano*, 425 U.S. at 581.

153. *Id.*

154. *See generally* BRENNER & LOCKHART, *supra* note 38, §13.8, at 367-69.

155. 431 U.S. 181 (1977). In *Washington*, the defendant attempted to reclaim his van, which was impounded after police officers identified a stolen motorcycle inside the van. *Id.* at 182. The police officer did not believe the defendant's explanation, and the defendant was summoned to appear before a grand jury to explain the appearance of the stolen item. *Id.* at 183. Prior to the defendant's testimony, the prosecution recited the *Miranda* warning and also informed him that he had the right to end the questioning at any time if he wished to speak to a lawyer. *Id.* at 183-84. The grand jury indicted the defendant on charges relating to the stolen property, but the district court suppressed the defendant's testimony and dismissed the indictment because the defendant was not properly advised of his Fifth Amendment privilege against self-incrimination. *Id.* at 184-85.

is a "potential defendant in danger of indictment" in order to comply with the Fifth Amendment's Self-Incrimination Clause.[156] Also, in *United States v. Wong*,[157] the Court concluded that a witness could not suppress evidence that she committed perjury while testifying before the grand jury on the ground that she was not effectively informed about her privilege against self-incrimination.[158] In fact, the Court has strongly suggested that there is *no* constitutional requirement that a witness be informed of his privilege against self-incrimination.[159]

B. Subpoenas

Just as the U.S. Supreme Court has held that the Constitution does not require the grand jury to abide by strict procedural and evidentiary rules, the Court has held that the Constitution places few restrictions on the grand jury's use of its subpoena power. According to the Court, the grand jury can initiate an investigation "merely on suspicion that the law is being violated, or even just because it wants assurance that it is not."[160] Therefore, the grand jury has broad authority to issue subpoenas throughout the course of its investigation.[161] The grand jury is not required to establish probable cause[162] or satisfy any preliminary standard of reasonableness[163] before issuing a subpoena, "because the very purpose of requesting the information is to ascertain whether probable cause exists."[164]

---

156. *Id.* at 182, 189. The Court reasoned that "target witness status neither enlarges nor diminishes the constitutional protection against compelled self-incrimination" and therefore, "potential-defendant warnings add nothing of value to protection of Fifth Amendment rights." *Id.* at 189.

157. 431 U.S. 174 (1977). In *Wong*, the defendant was indicted for giving perjured testimony to the grand jury that was investigating, in part, her participation in bribery of public officials. *Id.* at 175-76. The defendant, a Chinese immigrant, moved to dismiss the indictment, arguing that she did not understand the prosecution's explanation of her Fifth Amendment rights. *Id.* at 176.

158. *Id.* at 179 (rejecting the defendant's claims on both self-incrimination privilege and due process grounds).

159. *See* Minnesota v. Murphy, 465 U.S. 420, 431 (1984) (citing *Washington*, 431 U.S. at 186) (noting that "we have never held that [warnings about the privilege against self-incrimination] must be given to grand jury witnesses").

160. United States v. Morton Salt Co., 338 U.S. 632, 642-43 (1950).

161. *See* United States v. R. Enters., Inc., 498 U.S. 292, 297-99 (1991).

162. *Id.* at 297.

163. *See* JEROLD H. ISRAEL ET AL., CRIMINAL PROCEDURE AND THE CONSTITUTION 460-61 (1989).

164. *R. Enters.*, 498 U.S. at 297.

The Court has addressed challenges to subpoenas on a number of constitutional grounds, including the Fourth[165] and Fifth Amendments.[166] The first two such cases arose around the turn of the twentieth century. In *Boyd v. United States*,[167] decided in 1886, the defendant was served with a court order — similar to a subpoeana[168] — to turn over a private document that could have implicated him in the illegal importation of glass.[169] The U.S. Supreme Court compared the court order to the "general search warrants" that the framers sought to curtail and thus held that the order called for an unreasonable search and seizure in violation of the Fourth Amendment.[170] Likewise, compelling the defendant to produce the document that would be used to convict him of a crime violated his Fifth Amendment privilege against self-incrimination.[171]

In the 1906 case of *Hale v. Henkel*,[172] the Court again sustained a defendant's Fourth Amendment challenge to a subpoena.[173] In that case, the grand jury investigated a company's possible antitrust violation, and an officer of the corporation was subpoenaed to testify before the grand jury and to produce a number of company documents.[174] The U.S. Supreme Court held that the subpoena was "far too sweeping in its terms" and if the company were compelled to turn over the documents, it would "put a stop to the business of that company."[175] Therefore, the subpoena violated the Fourth Amendment's particularity requirement.[176] The Court rejected the defendant's Fifth Amendment claim, however, holding that the Fifth Amendment protects individuals and does not extend to protect corporations that might be incriminated.[177]

---

165. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.").

166. *Id.* amend. V ("No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law . . . .").

167. 116 U.S. 616 (1886).

168. *See* United States v. Dionisio, 410 U.S. 1, 12 n.10 (1973) (noting that the court order in *Boyd* was treated as the equivalent of a subpoena).

169. *Boyd*, 116 U.S. at 617-18.

170. *Id.* at 627.

171. *Id.* at 634-35.

172. 201 U.S. 43 (1906).

173. *Id.* at 77.

174. *Id.* at 44-46.

175. *Id.* at 76-77.

176. *Id.* at 77.

177. *Id.* at 75.

More recently, the Court seems to have departed from portions of its analysis in *Boyd* and *Hale*.[178] In *United States v. Dionisio*,[179] a grand jury subpoenaed twenty people, including the defendant, to produce voice exemplars to compare their voices to those in a government-recorded conversation.[180] The Court first held that the defendant's privilege against self-incrimination does not apply to voice exemplars, because they are merely physical characteristics and are not testimonial in nature, as required to trigger the Fifth Amendment's protections.[181] In addressing the defendant's Fourth Amendment challenge to the subpoena, the U.S. Supreme Court first stated that a subpoena to appear before the grand jury is not a "seizure" but rather an obligation shared by all citizens.[182] Moreover, people do not have a reasonable expectation of privacy in the characteristics of their voices, which are "constantly exposed to the public."[183]

Because the order to produce a voice exemplar did not violate the Fourth Amendment, the Court held that the grand jury was not required to satisfy any preliminary showings of the reasonableness of the subpoena.[184] Acknowledging the historic powers of the grand jury to determine the parameters of its investigations, the Court concluded, "Any holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws."[185]

Thus, in light of *Dionisio*, it appears that the Fourth Amendment applies to grand jury subpoenas only insofar as the terms of a subpoena *ad testificandum* may be too broad and, thus, an unreasonable seizure.[186] Even the exclusionary rule, which suppresses evidence seized in violation of a defendant's Fourth Amendment rights, does not apply to evidence that serves as the basis of grand jury subpoenas, according to the Court's decision in *United States v. Calandra*.[187] In reaching its decision, the Court echoed the rationales it offered in *Dionisio*.[188] The Court noted the grand jury's traditionally broad

178. BRENNER & LOCKHART, *supra* note 38, § 14.20, at 513.

179. 410 U.S. 1 (1973).

180. *Id.* at 3.

181. *Id.* at 6-7 (comparing voice and handwriting as physical characteristics).

182. *Id.* at 9-10.

183. *Id.* at 14.

184. *Id.* at 15 (rejecting the lower court's "minimal" requirement of a showing of reasonableness).

185. *Id.* at 17.

186. BRENNER & LOCKHART, *supra* note 38, § 14.20, at 512.

187. 414 U.S. 338, 350 (1974).

188. *Id.*; *see also* BRENNER & LOCKHART, *supra* note 38, § 14.20, at 512 (regarding *Dionisio*, 410 U.S. at 12). The Court also concluded that application of the exclusionary rule

investigative powers, and it stated that application of the exclusionary rule to grand jury proceedings would "halt the orderly progress of an investigation and might necessitate extended litigation of issues only tangentially related to the grand jury's primary objective."[189]

With respect to the Fifth Amendment, a person who is subpoenaed to testify before the grand jury may validly assert the privilege against self-incrimination, although the government can overcome the privilege by granting the witness immunity.[190] Prior to 1970, Congress authorized only one form of immunity called "transactional" immunity.[191] A witness granted transactional immunity can be compelled to testify but cannot be prosecuted for any crimes relating to the compelled testimony.[192] The U.S. Supreme Court affirmed the constitutionality of such immunity because it offered the same protections as the privilege against self-incrimination.[193] In 1970, Congress replaced the transactional immunity statute with one authorizing "use" or "derivative use" immunity, a narrower form of immunity that protects witnesses from any prosecution that relies on the use of the compelled testimony or evidence derived from the testimony.[194] In *Kastigar v. United States*,[195] the U.S. Supreme Court considered the constitutionality of the 1970 immunity statute and held that a witness who is granted use/derivative use immunity could be compelled to testify against himself.[196] The Court stated that such immunity left both the witness and the government in substantially the same position as if the witness had asserted the privilege against self-incrimination.[197] Therefore, use or derivative use immunity was co-extensive with Fifth Amendment standards and could overcome an assertion of the privilege against self-incrimination.[198] If the government wishes to prosecute the grantee of use/derivative use immunity, it has the burden to show by a

---

to grand jury proceedings would not further the policy behind the rule, which is to deter police misconduct. *Calandra*, 414 U.S. at 351.

189. *Calandra*, 414 U.S. at 349.

190. Kastigar v. United States, 406 U.S. 441, 453 (1972).

191. *See id.* at 448-52.

192. *Id.* at 450-52 (discussing Counselman v. Hitchcock, 142 U.S. 547 (1892)).

193. *Counselman*, 142 U.S. at 585-86 (striking Congress's immunity statute but holding that an immunity statute that provides protection co-extensive with the Fifth Amendment would be constitutionally permissible).

194. 18 U.S.C. §§ 6002-6003 (2000) (federal immunity provisions); *Kastigar*, 406 U.S. at 452-53; *see* CLARK, *supra* note 42, at 53 (noting that the amendments to the immunity statute, urged by President Nixon's Department of Justice, "strengthened the statutory bases for harassment of certain witnesses").

195. 406 U.S. 441 (1972).

196. *Id.* at 442, 462.

197. *Id.* at 458-59.

198. *Id.* at 453.

preponderance of the evidence that it obtained the evidence used to file charges against the immunized party from sources wholly independent of the immunized testimony.[199]

C. Hurtado *and the Absence of Oversight of State Grand Juries*

State grand juries differ from most aspects of criminal procedure in that states regulate state grand juries with very little federal interference. Unlike all other criminal procedure provisions contained in the Bill of Rights, such as the rights to counsel and a jury trial, the right to a grand jury indictment was not incorporated by the U.S. Supreme Court and made applicable to the states through the Fourteenth Amendment's Due Process Clause.[200] Thus, the Court has considered few cases in which it was forced to determine whether a state's grand jury procedures meet federal constitutional requirements.

The Court first considered the incorporation question in the 1884 case of *Hurtado v. California*.[201] The Court addressed a California state constitutional provision that required prosecutions to begin by way of either grand jury indictment or by information after approval by a magistrate.[202] The prosecution filed an information against the defendant charging him with murder.[203] The defendant, convicted and sentenced to death, argued that the Fourteenth Amendment's due process requirement guaranteed the right to grand jury indictment.[204]

The Court rejected the defendant's argument that the prominence of the grand jury in English law rendered it an essential component of due process.[205] Although American criminal procedure derived largely from the English system, certain procedures not followed in England can nonetheless satisfy due process.[206] According to the Court, if American law were forever constrained by the due process practiced by its English predecessors, there would be no room for reform and adaptation to the changing times.[207] The Court noted the "primitive" grand jury "heard no witnesses in support of the

199. *Id.* at 460; *see, e.g.*, United States v. Bartel, 19 F.3d 1105, 1112-14 (6th Cir. 1994) (holding that the government successfully demonstrated that the source of information for the indictment did not come from the defendant's immunized testimony, but rather from earlier interviews of witnesses unrelated to the defendant's testimony); *see also* BRENNER & LOCKHART, *supra* note 38, § 15.6, at 565 (discussing *Kastigar* hearings).

200. Hurtado v. California, 110 U.S. 516, 535 (1884).

201. 110 U.S. 516 (1884).

202. *Id.* at 517.

203. *Id.* at 518.

204. *Id.* at 519.

205. *Id.* at 521-30.

206. *Id.* at 528-29.

207. *Id.*

truth of the charges to be preferred, but presented upon their own knowledge, or indicted upon common fame and general suspicion . . . ."[208] Recognizing the lack of protection this procedure afforded defendants, the Court stated that "it is better not to go too far back into antiquity for the best securities for our 'ancient liberties.'"[209]

Furthermore, the Fourteenth Amendment did not require that all states follow the same procedures in order to satisfy the due process requirement.[210] With respect to prosecution by indictment or information, both are "merely . . . preliminary proceeding[s]," and they "can result in no final judgment . . . ."[211] Under California's information procedure, defendants were assisted by counsel and given an opportunity to cross examine witnesses, and a magistrate certified whether there was probable cause of the defendant's guilt.[212] Such a procedure, the Court concluded, satisfied the basic requirements of due process.[213]

The *Hurtado* decision was premised on two notions that have been undercut by subsequent cases. First, on a constitutional level, the Court held that the Due Process Clause does not require all states to adopt the same criminal procedures.[214] Beginning with *Mapp v. Ohio*,[215] however, the Court began the process of incorporating the various provisions of the Bill of Rights and effectively mandating that states maintain certain minimum procedural standards.[216] The second premise was that the grand jury is not an effective protector of defendant's rights.[217] More recent decisions by the Court, however, have showered the grand jury with praise by declaring it "an integral part of our constitutional heritage"[218] and inferring that "[i]ts adoption in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an instrument of justice."[219] Also, in case

208. *Id.* at 530.
209. *Id.*
210. *Id.* at 535.
211. *Id.* at 538.
212. *Id.*
213. *Id.*
214. *Id.* at 535-37.
215. 367 U.S. 643 (1961) (holding that the Fourth Amendment exclusionary rule applies to the states through the Fourteenth Amendment).
216. *Id.* at 655. *See generally* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 3 (3d ed. 2002).
217. *Hurtado*, 110 U.S. at 530.
218. United States v. Mandujano, 425 U.S. 564, 571 (1976).
219. Costello v. United States, 350 U.S. 359, 362 (1956).

after case, the Court has referred to the grand jury's important shield function.[220]

Despite these changes in the Court's jurisprudence, the decision in *Hurtado* has never been overruled. In a 1913 case, *Lem Woon v. Oregon*,[221] the Court upheld an Oregon law that did not require a pre-trial screening procedure.[222] More recently, the Court stated in dictum that the Due Process Clause does not require that a state provide any "judicial oversight or review of the decision to prosecute."[223]

IV. Reform Proposals in Federal and State Courts

Calls to reform the grand jury system have been pronounced since the nineteenth century.[224] England, birthplace of the grand jury, heeded these calls and abolished the body in 1933.[225] Also, about half of the states have eliminated the requirement that prosecutions begin with a grand jury indictment.[226]

Within the federal system, the widespread abuse of the grand jury system the Nixon administration sparked a new wave of reform proposals in the late 1970s and early 1980s.[227] However, grand jury practice and procedure did not change in any significant way.[228] The reasons for the inaction at the federal level are not clear. Perhaps the use of the grand jury to uncover widespread corruption within the Nixon administration demonstrated the value of the institution and, thus, slowed the tide of reform. Also, the U.S. Supreme Court's vehement defense of the grand jury's powers and the Court's reluctance to place any restrictions on those powers may have convinced some people that grand juries are functioning properly in the absence of reforms.[229]

---

220. *See* United States v. Williams, 504 U.S. 36, 47 (1992); Butterworth v. Smith, 494 U.S. 624, 629 (1990); United States v. Mechanik, 475 U.S. 66, 74 (1986) (O'Connor, J., concurring); United States v. Sells Eng'g, Inc., 463 U.S. 418, 423-24 (1983); *Mandujano*, 425 U.S. at 571; United States v. Calandra, 414 U.S. 338, 343 (1974); Branzburg v. Hayes, 408 U.S. 665, 686-87 (1972).

221. 229 U.S. 586 (1913).

222. *Id.* at 590.

223. Gerstein v. Pugh, 420 U.S. 103, 119 (1975) (dictum).

224. *See* 1 BEALE, *supra* note 4, § 1:5, at 1-21.

225. *See* Campbell, *supra* note 72, at 174.

226. 1 BEALE, *supra* note 4, § 8:2, at 8-15.

227. Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 272 (1995).

228. *Id.*

229. *Id.* at 270.

Maybe grand jury reform proved to be too difficult, and it simply fell to the wayside as more pressing political matters emerged.[230]

State governments, however, have been more receptive to calls for grand jury reform and have adopted many of the proposals that the federal government has ignored. Surprisingly, state legislatures — rather than state courts — have been an important source of reform. This section will outline many of the proposed legislative reforms as well as some of the proffered arguments against codification of these proposals. This section also will discuss the reforms as they have been introduced in many states.

A. Abolition of the Grand Jury

William J. Campbell, a former federal district court judge, famously presented the case for the abolition of the federal grand jury in a 1973 article.[231] Judge Campbell argued that the grand jury's reputation as an independent investigative body is a "myth."[232] Grand jurors lack the skills and training to conduct the sophisticated investigations necessary for prosecution, thus turning the grand jury into, "[a]t its best, . . . a sounding board for the predetermined conclusions of the prosecuting officials."[233] Moreover, the secrecy requirement shields prosecutors from public scrutiny and professional responsibility in cases of prosecutorial misconduct.[234] Judge Campbell concluded that, because of these problems, the federal grand jury does not warrant the "time, money, and energy" invested in the system, and therefore, it should be abandoned.[235] As an alternative to the grand jury, Judge Campbell suggested a probable cause hearing before a judicial officer, in which prosecutors would possess all of the powers currently held by the grand jury.[236]

Few other scholars or practitioners have advocated the complete abolition of the federal grand jury.[237] Doing so would require the arduous process of

230. *Id.* at 273.
231. Campbell, *supra* note 72, at 174.
232. *Id.* at 180.
233. *Id.* at 178.
234. *Id.* at 179-80.
235. *Id.* at 180.
236. *Id.* at 180-81.
237. *But see* Melvin P. Antell, *The Modern Grand Jury: Benighted Supergovernment*, 51 A.B.A. J. 153 (1965) (advocating the abolition of the grand jury). Judge Antell states:

> The real evil of the grand jury system — its viciousness, if you will — lies not so much in the fact that the grand jury is, as has often been said, the prosecutor's alter ego, as it does in our pretension that it is actually an informed and independent quasi-judicial organ, a pretension which misrepresents the prosecutor's unilateral action as the product of stately proceedings conducted by judicial standards.

passing a constitutional amendment,[238] the first to amend the Bill of Rights.[239] Moreover, some observers maintain that the grand jury is an important part of the criminal justice system and dispute the charges that prosecutors abuse the grand jury powers and that grand jurors do not actively participate in the process.[240] Finally, some commentators have argued that the participation of ordinary citizens in the criminal justice process as grand jurors may ensure that the jurors, defendants, and victims perceive the system as fair and legitimate.[241]

The total abolition of the grand jury has not occurred in any state. While many states have eliminated the obligation that prosecutors secure indictments, the grand jury exists under the laws of all states.

B. Procedural Reforms

By far, the majority of reform proposals involve a series of legislative changes to grand jury procedures. These proposals essentially seek to override U.S. Supreme Court decisions holding that the various rights are not constitutionally required and include granting the right to have counsel present in the grand jury room, the right to receive various warnings, the right to receive transcripts, as well as regulations involving the type of evidence a prosecutor must and must not present.[242] Procedural reforms such as these have been advocated by a number of organizations including the American Bar Association,[243] the National Association of Criminal Defense Lawyers,[244]

Id. at 156.

238. Campbell, *supra* note 72, at 182 (noting that the "enormity of [the] task" of amending the Constitution should not be a deterrent).

239. Leipold, *supra* note 227, at 321 (arguing that elimination of the only pretrial screening requirement enumerated in the Constitution — without an alternative constitutionally-mandated procedure — would undermine the idea that pretrial screening procedures warrant constitutional protection).

240. 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, 1053 (1984).

241. Simmons, *supra* note 5, at 55-65. *But see* Leipold, *supra* note 227, at 317 (describing such arguments as "unpersuasive and condescending").

242. *See supra* Part III (discussing the U.S. Supreme Court cases that have concluded that these grand jury rights are not constitutionally mandated).

243. *See* ABA MODEL GRAND JURY ACT (2d ed. 1982) [hereinafter ABA].

244. *See* Comm'n to Reform the Federal Grand Jury, *Federal Grand Jury Reform Report & Bill of Rights*, CHAMPION, July 2000, at 16 [hereinafter *Federal Grand Jury Reform Report*] (published by the National Association of Criminal Defense Lawyers, Washington, D.C.).

and the Council for Court Excellence.[245] They were also included in a 1985 bill proposed by Representative John Conyers.[246]

1. The Right to Counsel

The most vigorously-argued proposal is granting a grand jury witness the right to have counsel present in the grand jury room while the witness is testifying.[247] In *Mandujano*, a plurality of the Court stated that a grand jury witness "could have the assistance of counsel, but that counsel could not be inside the grand jury room."[248] Furthermore, *In re Groban* and later cases have quashed any notion that an unindicted grand jury witness, even if a target of the jury's investigation, is entitled to have counsel appointed.[249] Thus, one may wonder to what "assistance of counsel" the Court was referring. Certainly, a witness is permitted to consult with a private attorney before and after the grand jury proceeding.[250] Commonly, however, federal prosecutors permit witnesses to temporarily stop the proceedings and confer with their attorneys.[251] This procedure may not be constitutionally mandated,[252] and some lower court decisions have upheld restrictions on a witness's right to confer with counsel.[253] For instance, a federal district court once ordered that a witness testify for twenty minutes and then be granted ten minutes to confer with her attorney.[254]

Grand jury reformers assert that witnesses should be granted a statutory right to counsel in the grand jury room.[255] Advocates of this proposal argue

245. *See* DISTRICT OF COLUMBIA GRAND JURY STUDY COMM'N COUNCIL FOR COURT EXCELLENCE, THE GRAND JURY OF TOMORROW: NEW LIFE FOR AN ARCHAIC INSTITUTION (2001) [hereinafter CCE], *available at* http://www.courtexcellence.org/juryreform/GrandJuryReform.ExecutiveSummary.pdf.

246. H.R. 1407, 99th Cong. (1985); *see also* Nancy Blodgett, *Grand Jury Curbs: 'Abuses' Ominous to Lawyers*, 71 A.B.A. J. 22 (1985).

247. *See* ABA, *supra* note 243, § 201, at 17-18; CCE, *supra* note 245, at 7; CLARK, *supra* note 42, at 126; Gerald B. Lefcourt, *Curbing Abuse of the Grand Jury*, 81 JUDICATURE 196, 196-97 (1998); *Federal Grand Jury Reform Report*, *supra* note 244, at 21; Sullivan & Nachman, *supra* note 240, at 1067; Kathryn E. White, Comment, *What Have You Done with My Lawyer?: The Grand Jury Witness's Right to Consult with Counsel*, 32 LOY. L.A. L. REV. 907, 935-36 (1999).

248. United States v. Mandujano, 425 U.S. 564, 581 (1976).

249. *See In re* Groban, 352 U.S. 330, 333 (1957).

250. *See* Butterworth v. Smith, 494 U.S. 624, 635 (1990).

251. White, *supra* note 247, at 934.

252. *See* Conn v. Gabbert, 526 U.S. 286, 292 (1999) ("[N]o decision of this Court has held that a grand jury witness has a right to have her attorney present outside the jury room.").

253. BRENNER & LOCKHART, *supra* note 38, § 13.9, at 370-71.

254. United States v. Soto, 574 F. Supp. 986, 988 (D. Conn. 1983).

255. *See supra* note 247 (citing authorities).

that testifying before a grand jury is an intimidating experience,[256] and one that can incriminate the witness or expose the witness to criminal charges, such as perjury, contempt, and obstruction of justice.[257] If allowed in the room, counsel could advise the witness on any legal issues that might arise during the proceedings and ensure that the witness properly asserts any applicable rights or privileges[258] — the most important of which is the privilege against self-incrimination. The current practice, which forces witnesses to leave the room to confer with an attorney, is a waste of time, according to supporters of reform.[259] It is also unfair to the witnesses, who are strongly dissuaded from asserting their right to counsel at a time in which they would most benefit from that right.[260] Furthermore, the presence of attorneys would deter many forms of prosecutorial misconduct, which currently occurs unchecked due to the veil of secrecy surrounding the proceedings.[261]

To thwart criticisms that counsel would delay or otherwise interfere with the proceedings, advocates of this proposal stress that counsel would play a strictly passive role.[262] The witness's attorney could only whisper comments to the witness and could not make objections, address the grand jurors, or take an active role in the proceedings.[263] Some prosecutors have argued, however, that counsel would interfere with the investigation — if not the proceedings themselves — because witnesses would be less candid and would often look to their attorneys for advice on how to respond to particular questions.[264] Opponents of the proposal also dispute the proponent's claims that attorneys in the room would not cause delays, unnecessary litigation, and breaches in secrecy, because disagreements between the prosecutor and the witness's attorney would inevitably require court intervention.[265]

Following the advice of the reformers, at least twenty-four state legislatures have created a statutory right to counsel in conjunction with the grand jury.[266]

---

256. Lefcourt, *supra* note 247, at 196-97; *Federal Grand Jury Reform Report*, *supra* note 244, at 21.

257. *See* Lefcourt, *supra* note 247, at 196.

258. White, *supra* note 247, at 911.

259. *Federal Grand Jury Reform Report*, *supra* note 244, at 21.

260. *Id.*

261. John Gibeaut, *Indictment of a System*, 87 A.B.A. J. 34, 36-38 (2001).

262. *Federal Grand Jury Reform Report*, *supra* note 244, at 21.

263. Sullivan & Nachman, *supra* note 240, at 1067.

264. *Hearings*, *supra* note 59, at 11-12 (prepared statement of James K. Robinson and Loretta E. Lynch); *Federal Grand Jury Reform Report*, *supra* note 244, at 21.

265. *Hearings*, *supra* note 59, at 12.

266. FLA. STAT. ANN. § 905.17(2) (West 1999 & Supp. 2005); IDAHO CODE ANN. § 19-1121 (2003); 725 ILL. COMP. STAT ANN. 5/112-4(b) (West 1993 & Supp. 2005); IND. CODE ANN. § 35-34-2-5.5 (LexisNexis 2004); KAN. STAT. ANN. § 22-3009 (1995); LA. CODE CRIM. PROC.

Thirteen states guarantee the right to have counsel present in the jury room for all "witnesses" or other persons who appear before the grand jury.[267] Seven states limit this right to "targets" or persons under investigation by the grand jury.[268] Two states condition the right to counsel on a grant of immunity,[269] and one state conditions the right on a waiver of immunity.[270] Also, at least two states have codified the right to consult with an attorney in reasonable intervals outside the grand jury room.[271]

In most states that have established a statutory right to counsel, this right is limited to counsel privately retained; only seven states require the appointment of counsel to targets, subjects, or witnesses.[272] In addition, eight states require all witnesses to be admonished of their right to counsel.[273] Ten states require that all targets of grand jury investigations be admonished of their right to counsel.[274]

ANN. art. 433(2)(A) (2003); MASS. ANN. LAWS ch. 277, § 14A (LexisNexis 2003); NEB. REV. STAT. § 29-1411(2) (1995); NEV. REV. STAT. § 172.239 (2003); N.M. STAT. §§ 31-6-4(C), (D) (2004); N.Y. CRIM. PROC. LAW § 190.52 (McKinney 1997 & Supp. 2005); N.C. GEN. STAT. § 15A-623(h) (2001); 22 OKLA. STAT. § 355 (2001); S.D. CODIFIED LAWS § 23A-5-11 (1997); TEX. CODE CRIM. PROC. art. 20.17(b) (Vernon 2005); UTAH CODE ANN §§ 77-10a-13(2)(a),(4)(a) (2002); VA. CODE ANN. § 19.2-209 (1996); WASH. REV. CODE ANN. § 10.27.120 (West 2004); WIS. STAT. ANN. § 968.45 (West 2005); ALA. R. CRIM. P. 12.7(a); ARIZ. R. CRIM. P. 12.6; MICH. CT. R. 6.005(I); MINN. R. CRIM. P. 18.04; PA. R. CRIM. P. 231.

267. FLA. STAT. ANN. § 905.17(2) (West 1999); IDAHO CODE ANN. § 19-1121; KAN. STAT. ANN. § 22-3009(2) (1995); MASS. ANN. LAWS ch. 277, § 14A; NEB. REV. STAT. § 29-1411(2); 22 OKLA. STAT. § 355(B)(4); S.D. CODIFIED LAWS § 23A-5-11; UTAH CODE ANN. § 77-10a-13(4)(a); VA. CODE ANN. § 19.2-209; WASH. REV. CODE § 10.27.120; WIS. STAT. ANN. § 968.45(1); MICH. CT. R. 6.005(I)(1); PA. R. CRIM. P. 231(A).

268. 725 ILL. COMP. STAT. ANN. 5/112-4(b); IND. CODE ANN. § 35-34-2-5.5(a); LA. CODE CRIM. PROC. ANN. art. 433(A)(2); NEV. REV. STAT. § 172.239(1); N.M. STAT. §§ 31-6-4(C), (D); TEX. CODE CRIM. PROC. art. 20.17(b); ARIZ. R. CRIM. P. 12.6.

269. N.C. GEN. STAT. § 15A-623; MINN. R. CRIM. P. 18.04.

270. N.Y. CRIM. PROC. LAW § 190.52(1).

271. N.C. GEN. STAT. § 15A-623(h); ALA. R. CRIM. P. 12.7(a).

272. IND. CODE ANN. § 35-34-2-5(b)(3); KAN. STAT. ANN. § 22-3009(1); NEB. REV. STAT. § 29-1411(2); N.Y. CRIM. PROC. LAW § 190.52(1); 22 OKLA. STAT. § 355(B)(3); S.D. CODIFIED LAWS § 23A-5-13(4); ALA. R. CRIM. P. 12.7(a).

273. IDAHO CODE ANN. § 19-1121 (2003); KAN. STAT. ANN. § 22-3009(1); NEB. REV. STAT. § 29-1409(2); S.D. CODIFIED LAWS §§ 23A-5-13(1), (4); UTAH CODE ANN. § 77-10a-13(4)(a) (2002); WASH. REV. CODE ANN. § 10.27.120 (West 2004); MICH. CT. R. 6.005(I)(2); Commonwealth v. Field, 331 A.2d 744, 746 (Pa. Super. Ct. 1974).

274. 725 ILL. COMP. STAT. ANN. 5/112-4(b) (West 1993 & Supp. 2005); IND. CODE ANN. § 35-34-2-5(b)(2); LA. CODE CRIM. PROC. ANN. art. 433(A)(2) (2002); NEV. REV. STAT. § 172.239(4) (2003); N.M. STAT. § 31-6-11(C) (2004); TEX. CODE CRIM. PROC. ANN. §§ 20.17(b), (c) (Vernon 2005); ALA. R. CRIM. P. 12.7(a); ARIZ. R. CRIM. P. 12.6; Pinkerton v. State, 784 P.2d 671, 676 (Alaska Ct. App. 1989); State v. Cook, 464 N.E.2d 577, 581-82 (Ohio Ct. App. 1983).

Virtually all the state laws permitting counsel to be present in the grand jury room include language strictly limiting the attorney's participation in the proceedings. In Florida, for example, the attorney "shall not be permitted to address the grand jurors, raise objections, make arguments, or otherwise disrupt proceedings before the grand jury."[275] Similarly, in Louisiana, the witness's attorney "shall be prohibited from objecting, addressing or arguing before the grand jury."[276] Generally, the attorney may only "advise" or "counsel" the witness. Furthermore, in Nevada, the law expressly states that the attorney shall not "[s]peak in such a manner as to be heard by the members of the grand jury."[277]

While the statutory language is nearly absolute in restricting the attorney from participating in the grand jury proceedings, some case law has further defined the bounds of permissible conduct. In *In re People v. Riley*,[278] a New York court held that an attorney may take written notes during the proceedings.[279] In that case, the court balanced the right of the grand jury to efficiently perform its duties against the right of an attorney to represent his client.[280] The court determined that note-taking is a "standard legal procedure" that is useful to the attorney-client relationship and does not disrupt the functioning of the grand jury.[281] Moreover, note-taking would not jeopardize the secrecy of the grand jury since a defendant may reveal the contents of his testimony to his attorney and anyone else he wishes as soon as he leaves the room.[282] Thus, the court held, the prosecutor erred in confiscating the attorney's notes, and the court ordered the notes returned to the attorney.[283]

In another notable case, *People v. Smays*,[284] a New York court dismissed a grand jury indictment where the prosecution improperly suggested during the defendant's grand jury testimony that the defendant was receiving strategic advice from his attorney in responding to the prosecutor's questions.[285] The prosecutor, among other comments, asked the defendant, "Is that your answer,

275. FLA. STAT. ANN. § 905.17(2) (West 1999).
276. LA. CODE CRIM. PROC. ANN. art. 433(A)(2).
277. NEV. REV. STAT. § 172.239(2)(b).
278. 414 N.Y.S.2d 441 (N.Y. Sup. Ct. 1979).
279. *Id.* at 444.
280. *Id.* at 443.
281. *Id.* at 443-44.
282. *Id.* at 444. Moreover, if the defendant is indicted, the attorney is entitled to receive a transcript of the defendant's grand jury testimony. *Id.*
283. *Id.*
284. 594 N.Y.S.2d 101 (N.Y. Sup. Ct. 1993).
285. *Id.* at 108.

sir? Or is that the defense attorney's answer?"[286] While the court noted that counsel may not give strategic advice during the proceedings on how to answer the prosecutor's questions, it found that the record did not support such an accusation.[287] Instead, the attorney could have been advising his client on arguably improper questions and issues relating to the privilege against self-incrimination.[288] If the attorney had appeared to offer strategic advice, then, according to the court, the prosecutor should have requested a recess and sought an order from the supervising judge to limit the scope of counsel's advice.[289]

2. Exculpatory Evidence

A second procedural reform would require that prosecutors present certain exculpatory evidence to the grand jury when seeking an indictment.[290] This proposal is a direct response to *United States v. Williams*,[291] in which the U.S. Supreme Court held that prosecutors had no such duty.[292] Because the prosecutor decides what evidence to present to the jury, supporters of this proposal argue that hearing evidence that negates the defendant's guilt would allow the grand jury to make more independent decisions when choosing whether to indict.[293] Because grand jury proceedings are conducted *ex parte*, it is important that the prosecution present sufficient evidence for jurors to make an informed decision and perform their duty to screen the prosecutor's cases.[294] In addition, the strong likelihood that an indictment will lead to a guilty plea makes the grand jury's indictment almost as punitive as a petit jury's guilty verdict.[295] This means that numerous people are convicted and sentenced without having an opportunity to challenge the evidence against them.[296] Opponents of this proposal argue that this requirement would

286. *Id.* at 105 (emphasis omitted).

287. *Id.* at 107.

288. *Id.* at 107-08.

289. *Id.* at 108.

290. H.R. 1407, 99th Cong. § 3323 (1985); ABA, *supra* note 243, § 101; CCE, *supra* note 245, at 8; Lefcourt, *supra* note 247, at 196; *Federal Grand Jury Reform Report*, *supra* note 244, at 21; Ali Lombardo, Note, *The Grand Jury and Exculpatory Evidence: Should the Prosecutor Be Required to Disclose Exculpatory Evidence to the Grand Jury?*, 48 CLEV. ST. L. REV. 829, 830 (2000).

291. 504 U.S. 36 (1992).

292. *Id.* at 47.

293. Lombardo, *supra* note 290, at 841.

294. *See* Gustafson v. State, 854 P.2d 751, 761 (Alaska 1993); Johnson v. Superior Court, 539 P.2d 792, 796 (Cal. 1975).

295. *See Hearings*, *supra* note 59, at 24-25 (prepared statement of Prof. Sara Sun Beale); Simmons, *supra* note 5, at 66-67.

296. *See Hearings*, *supra* note 59, at 24-25 (prepared statement of Prof. Sara Sun Beale).

transform the grand jury into an adjudicative body and would force courts to review the evidence presented to the grand jury.[297] Opponents also note that the U.S. Attorney's Manual already imposes upon prosecutors a duty to present exculpatory evidence.[298] A prosecutor's violations of this provision, however, do not require a dismissal of the indictment or provide any legal recourse for the defendant.

About ten state legislatures have incorporated exculpatory evidence provisions into their rules governing grand jury proceedings.[299] While all of the provisions suggest a preference that the grand jury hear exculpatory evidence, there are notable differences in the language used.

Four state codes essentially require prosecutors to present exculpatory evidence to the grand jury.[300] Three of these states limit the requirement to evidence of which prosecutors are "aware" at the time,[301] while the other limits it to evidence in the prosecution's "possession, custody, or control."[302] Additionally, two of these provisions simply refer to "exculpatory" evidence.[303] On the other hand, one statute refers to "any evidence which will explain away the charge,"[304] and another describes "substantial and competent evidence negating the guilt of a subject or target that might reasonably be expected to lead the grand jury not to indict . . . ."[305]

In seven states, the legislatures have granted the grand jurors authority to request or require exculpatory evidence.[306] For instance, in New Mexico, if a grand jury, after hearing the evidence submitted to it, "has reason to believe that other lawful, competent and relevant evidence is available that would disprove or reduce a charge or accusation or that would make an indictment

297. *See Williams*, 504 U.S. at 51 (finding this argument persuasive).

298. *Hearings*, *supra* note 59, at 14 (prepared statement of Robinson and Lynch); *see* U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL § 9-11.233 (1997).

299. ARIZ. REV. STAT. ANN. § 21-412 (2002); CAL. PENAL CODE § 939.71 (2002); CONN. GEN. STAT. ANN. § 54-47f(f) (West 1998 & Supp. 2005); IDAHO CODE ANN. § 19-1106 (2003); NEV. REV. STAT. §§ 172.145(1), (2) (2003); N.M. STAT. § 31-6-11(B) (2004); N.D. CENT. CODE § 29-10.1-27 (1991); OR. REV. STAT. § 132.320(8) (2003); UTAH CODE ANN. § 77-10a-13(5)(c) (2002); IOWA R. CRIM. P. 2.3(g).

300. CAL. PENAL CODE § 939.71; CONN. GEN. STAT. ANN. § 54-47f(f); NEV. REV. STAT. § 172.145(2); UTAH CODE ANN. § 77-10a-13(5)(c).

301. CAL. PENAL CODE § 939.71; NEV. REV. STAT. § 172.145(2); UTAH CODE ANN. § 77-10a-13(5)(c).

302. CONN. GEN. STAT. ANN. § 54-47f(f).

303. CAL. PENAL CODE § 939.71; CONN. GEN. STAT. ANN. § 54-47f(f).

304. NEV. REV. STAT. § 172.145(2).

305. UTAH CODE ANN. § 77-10a-13(5)(c).

306. ARIZ. REV. STAT. ANN. § 21-412; IDAHO CODE ANN. § 19-1106; NEV. REV. STAT. § 172.145(1); N.M. STAT. § 31-6-11(B) (2004); N.D. CENT. CODE § 29-10.1-27 (1991); OR. REV. STAT. § 132.320(8) (2003); IOWA R. CRIM. P. 2.3(g).

unjustified, then it shall order the evidence produced."[307] Besides New Mexico, two other states impose a mandatory duty on grand juries to request evidence they believe is exculpatory.[308] On the other hand, four states have a permissive ("may") or hortatory ("should") provision.[309]

It is notable that a number of states have developed a similar requirement as a result of court action. Many state courts — on the basis of the courts' supervisory powers[310] or due process requirements[311] — have determined that in some circumstances, prosecutors must present certain exculpatory evidence to the grand jury. Many courts have not yet developed a precise standard for enforcement of the requirement, and some have noted the requirement only in dictum. The courts that have considered the extent of the requirement generally track the standards found in the statutory requirements. For instance, the Hawaii Supreme Court has held that prosecutors must present evidence favorable to the defendant only if it is clearly exculpatory.[312] Similarly, the New Jersey Supreme Court has held that the prosecutor's duty to present exculpatory evidence to the grand jury "is triggered only in the rare case in which the prosecutor is informed of evidence that both directly negates the guilt of the accused *and* is clearly exculpatory."[313]

Despite the varying descriptions of the states' exculpatory evidence requirement, case law clearly shows that the standard "is a very difficult one for the defendant to satisfy."[314] For instance, evidence that one witness failed to identify the defendant in a lineup is not materially exculpatory.[315] In addition, a prosecutor is not always obligated to present a witness's prior inconsistent statement, especially where the statement did not directly relate

---

307. N.M. STAT. § 31-6-11(B).

308. NEV. REV. STAT. § 172.145(1); N.D. CENT. CODE § 29-10.1-27.

309. ARIZ. REV. STAT. ANN. § 21-412 ("may"); IDAHO CODE ANN. § 19-1106 ("should"); OR. REV. STAT. § 132.320(8) ("should"); IOWA R. CRIM. P. 2.3(g) ("may").

310. *See, e.g.*, State v. Hogan, 676 A.2d 533, 540 (N.J. 1996) (finding *United States v. Williams* inapplicable to state grand juries due to the court's supervisory powers over state grand jury proceedings and noting the court's power to extend greater protections to state defendants than those given by the federal government).

311. *See, e.g.*, People v. Torres, 613 N.E.2d 338, 341 (Ill. App. Ct. 1993) ("[W]e recognize the possibility that, under certain circumstances, a prosecutor's intentional withholding of such [exculpatory] evidence could result in a denial of a defendant's right to due process."); Mayes v. City of Columbus, 664 N.E.2d 1340, 1348 (Ohio Ct. App. 1995) ("[I]n the interest of justice, if the prosecuting party is aware of any substantial evidence negating guilt he should make it known to the grand jury, at least where it might reasonably be expected to lead the jury not to indict.").

312. State v. Bell, 589 P.2d 517, 520 (Haw. 1978).

313. State v. Hogan, 676 A.2d 533, 543 (N.J. 1996).

314. 1 BEALE, *supra* note 4, § 4:17, at 4-86 to -87.

315. People v. Gibson, 688 N.Y.S.2d 561, 561-62 (N.Y. App. Div. 1999).

to the charge.[316] Also, one court held that a victim's recantation of her complaint against the defendant was not necessarily exculpatory because of the generally unreliable nature of recantations as well as the particular circumstances of the victim's recantation.[317]

On the other hand, an indictment was properly dismissed where the prosecutor, first, withheld evidence that a thirteen-year-old girl — who was the alleged victim of sexual abuse by her father — had made similar accusations against her brother and later recanted, and, second, actively discouraged the grand jury from exploring such evidence.[318] In another case, where a complainant informed authorities that he mistakenly identified the defendant in a lineup and that he had seen the perpetrator on the street since the lineup, the court held that the grand jury should have considered this evidence.[319]

Cases in which an indictment was dismissed for failure to present exculpatory evidence generally involve egregious problems with the prosecutor's presentation of the evidence to the grand jury.[320] In these cases, the prosecutor has seriously misled the jury and prevented it from performing its screening duty.[321] For example, one court noted that the prosecutor's failure to introduce certain evidence "infringed upon the Grand Jury's power to be the exclusive judge of the facts."[322] Another court held that the prosecutor's actions "clearly destroyed the existence of an independent and informed grand jury and irreparably impaired its function."[323]

3. The Exclusionary Rule

Reformers have advocated for application of the exclusionary rule to illegally-obtained evidence from grand jury proceedings.[324] Recall that the

316. Gustafson v. State, 854 P.2d 751, 762 (Alaska Ct. App. 1993); Commonwealth v. Tanso, 583 N.E.2d 1247, 1256-57 (Mass. 1992).

317. *Hogan*, 676 A.2d at 544. The witness recanted her complaint after she was threatened and harassed by the defendant and his family. *Id.* at 536, 544.

318. Sheriff, Clark County v. Frank, 734 P.2d 1241, 1243-44 (Nev. 1987).

319. People v. Scott, 568 N.Y.S.2d 857, 858 (N.Y. Sup. Ct. 1991).

320. *See, e.g.*, *Frank*, 734 P.2d at 1245 (concluding that the prosecution's actions "clearly destroyed the existence of an independent and informed grand jury and irreparably impaired its function").

321. *See, e.g.*, Johnson v. Superior Court, 539 P.2d 792, 796 (Cal. 1975) (stating that requiring prosecutors to present exculpatory evidence only when the grand jury requests such evidence "would nullify its protective role").

322. People v. Manfro, 571 N.Y.S.2d 986, 991 (N.Y. Sup. Ct. 1991).

323. *Frank*, 734 P.2d at 1245.

324. *See* H.R. 1407, 99th Cong. § 3322 (1985); ABA, *supra* note 243, § 101; Lefcourt, *supra* note 247, at 196; *Federal Grand Jury Reform Report*, *supra* note 244, at 22.

U.S. Supreme Court, in *United States v. Calandra*[325] and *United States v. Blue*,[326] held that dismissal of an indictment is not constitutionally required under such circumstances.[327] Under the proposed rule, an indictment secured by evidence seized in violation of the Fourth or Fifth Amendment would be dismissed.[328] Opponents of this reform proposal argue further that questions of admissibility can be complex and should not be used to delay the grand jury proceedings.[329]

Many state courts have cited the Supreme Court's decisions in *Calandra* and *Blue* with approval, and some of these courts have upheld indictments partially based on illegal evidence.[330] Like the U.S. Supreme Court, these courts are reluctant to limit the grand jury's investigative powers and to permit judicial inquiries into the quality of evidence presented to the grand jury.

---

325. 414 U.S. 338 (1974).

326. 384 U.S. 251 (1966).

327. *Calandra*, 414 U.S. at 347 (Fourth Amendment violations); *Blue*, 384 U.S. at 255 (Fifth Amendment).

328. Lefcourt, *supra* note 247, at 196.

329. *Hearings*, *supra* note 59, at 14 (prepared statement of Robinson and Lynch). The U.S. Attorney's Manual prohibits prosecutors from presenting evidence that a prosecutor "personally knows" was obtained in violation of the witness's constitutional rights. UNITED STATES ATTORNEY'S MANUAL, *supra* note 298, § 9-11.231.

330. *See, e.g.*, *Ex parte* Gonzalez, 686 So. 2d 204, 206 (Ala. 1996) (following *Calandra*); People v. Dunbar, 500 P.2d 819, 820 (Colo. 1972) (citing *Blue* approvingly); State v. Stepney, 435 A.2d 701, 706 (Conn. 1980) (citing *Calandra* and *Blue* approvingly); United States v. Washington, 328 A.2d 98, 101-02 (D.C. 1974), *rev'd on other grounds*, 431 U.S. 181 (1977) (following *Blue*); People v. Jackson, 381 N.E.2d 316, 320 (Ill. App. Ct. 1978) (following *Calandra*); State *ex rel.* Pollard v. Criminal Court, 329 N.E.2d 573, 585 (Ind. 1975) (citing *Calandra* approvingly); State v. Hall, 235 N.W.2d 702, 712-13 (Iowa 1975) (following *Calandra* despite finding that "the prosecutor exceeded the bounds of propriety"); *In re* Special Investigation No. 227, 466 A.2d 48, 49 (Md. Ct. Spec. App. 1983) (following *Calandra*); Commonwealth v. Santaniello, 341 N.E.2d 259, 261 (Mass. 1976) (following *Calandra*); State v. Stapleton, 539 S.W.2d 655, 657-58 (Mo. Ct. App. 1976) (upholding indictment over Fourth Amendment challenge); *In re* Secret Grand Jury Inquiry, John & Jane Does Thirty Through Thirty-Nine, 553 P.2d 987, 991-92 (Mont. 1976) (following *Calandra*); State v. Blake, 305 A.2d 300, 303 (N.H. 1973) (following *Blue*); Buzbee v. Donnelly, 634 P.2d 1244, 1250 (N.M. 1981) (citing a state statute); People v. Joseph, 402 N.Y.S.2d 751, 752 (N.Y. Sup. Ct. 1978) (rejecting Fourth Amendment challenge to indictment); State v. Whisenant, 711 N.E.2d 1016, 1022 n.9 (Ohio Ct. App. 1998) (citing *Calandra* approvingly); State v. Scott, 504 P.2d 1053, 1055 (Or. Ct. App. 1973) (upholding indictment over *Miranda* challenge); Commonwealth v. Levinson, 389 A.2d 1062, 1069-70 (Pa. 1978) (citing *Calandra* approvingly); State v. Acquisto, 463 A.2d 122, 127 (R.I. 1983) (citing *Calandra* and *Blue* with approval); State v. Fitts, No. 01-C-019201CC00009, 1992 WL 127415, at *3 (Tenn. Crim. App. June 12, 1992) (following *Calandra*); Albarqawi v. State, 626 S.W.2d 136, 138 (Tex. App. 1981) (upholding indictment over Fifth Amendment challenge); State v. Slie, 213 S.E.2d 109, 114-15 (W. Va. 1975) (following *Calandra*).

Some state courts have held, however, that an indictment based *wholly* on illegally obtained evidence could be dismissed.[331] For instance, where the only evidence presented to the grand jury was an identification of the defendant obtained in violation of his Sixth Amendment right to counsel, the indictment was invalid.[332] Other courts have applied a somewhat similar standard,[333] under which an indictment based on illegally-seized evidence might be dismissed if the remaining evidence is insufficient to support the charge.[334] Although such standards do not place a heavy burden upon law enforcement authorities, they have been adopted by only a small number of states.[335]

4. Admonishments

Another set of proposals would require that witnesses receive certain admonishments before testifying. First, witnesses would be informed of their Fifth Amendment privilege against self-incrimination.[336] Second, subjects and targets of grand jury investigations would receive *Miranda*-like warnings.[337] According to supporters, such warnings would protect unsophisticated citizens from exploitation by the government.[338] Opponents, however, claim that prosecutors already provide an "advice of rights" form and an "advice of

331. State v. Jenkins, 277 A.2d 703, 707 (Del. Super. Ct. 1971); Reaves v. State, 250 S.E.2d 376, 381-82 (Ga. 1978).

332. *Jenkins*, 277 A.2d at 707 (withholding judgment until the prosecution addressed other rulings by the court).

333. Although the two standards are similar, it is theoretically possible that a prosecutor presents to the grand jury both illegally-obtained evidence that is of great weight and properly-obtained evidence that is of insignificant weight. Such an indictment would seem to pass muster under the first test because the indictment is not *wholly* based on illegal evidence. At the same time, this indictment would not meet the second standard, because the remaining evidence is minimal and insufficient to support an indictment.

334. Mohn v. State, 584 P.2d 40, 42 (Alaska 1978); People v. Sherwin, 82 Cal. App. 4th 1404, 1409 (Cal. Ct. App. 2000); People v. J.H., 554 N.E.2d 961, 965 (Ill. 1990); State v. Terrell, 283 N.W.2d 529, 531 (Minn. 1979) (following state rules of criminal procedure); *see also* State v. Sugar, 417 A.2d 474, 487 (N.J. 1980) (in case of "outrageous" behavior by law enforcement, reversing indictment and permitting trial court to fashion exclusionary remedies).

335. *See supra* notes 331-34.

336. *See* H.R. 1407, 99th Cong. § 3325(b) (1985); *Hearings*, *supra* note 59, at 38 (prepared statement of Prof. Andrew D. Leipold); ABA, *supra* note 243, § 200(2)(d); CLARK, *supra* note 42, at 126; Lefcourt, *supra* note 247, at 196. In *United States v. Wong*, 431 U.S. 174, 179 (1977), the U.S. Supreme Court held that this warning was not constitutionally required.

337. ABA, *supra* note 243, § 200(2)(c)-(e); CCE, *supra* note 245, at 8; *Federal Grand Jury Reform Report*, *supra* note 244, at 23-24. In *United States v. Mandujano*, 425 U.S. 564, 580 (1976), the U.S. Supreme Court held that *Miranda* warnings were not required to be given to grand jury witnesses.

338. *Federal Grand Jury Reform Report*, *supra* note 244, at 24.

status" letter to targets,[339] and requiring the warnings would cause delays in the proceedings.[340]

Currently, twenty-three states mandate — as a result of legislation or case law — that particular admonishments be given to grand jury witnesses.[341] Fourteen states require warnings only when a witness is a target or subject of a grand jury investigation.[342] In the remaining nine states, certain warnings are disclosed to all grand jury witnesses.[343] The substance of the warnings varies from state to state, though nearly all refer to the witness's right to counsel[344] and privilege against self-incrimination.[345] Meanwhile, some states require

339. *See* UNITED STATES ATTORNEY'S MANUAL, *supra* note 298, § 9-11.151.

340. *Hearings*, *supra* note 59, at 16 (prepared statement of Robinson and Lynch).

341. CONN. GEN. STAT. ANN. §§ 54-47f(d)-(e) (West 1998 & Supp. 2005); IDAHO CODE ANN. § 19-1121 (LexisNexis 2003); 725 ILL. COMP. STAT. ANN. 5/112-4(b) (West 1993 & Supp. 2005); IND. CODE ANN. §§ 35-34-2-5(a), (b) (LexisNexis 2004); KAN. STAT. ANN. § 22-3009(1) (1995); LA. CODE CRIM. PROC. ANN. art. 433(A)(2) (2002); NEB. REV. STAT. § 29-1409(2) (1995); NEV. REV. STAT. §§ 172.195(2), 172.239(4) (2003); N.M. STAT. § 31-6-11(C) (2004); S.D. CODIFIED LAWS § 23A-5-13 (1997); TEX. CODE CRIM. PROC. ANN. 20.17(c) (Vernon 2005); UTAH CODE ANN. §§ 77-10a-13(4)(b), (c) (2002); VA. CODE ANN. § 19.2-215.7(A) (1996); WASH. REV. CODE ANN. § 10.27.120 (West 2004); ALA. R. CRIM. P. 12.7(a); ARIZ. R. CRIM. P. 12.6; MICH. CT. R. 6.005(I)(1), (2); Pinkerton v. State, 784 P.2d 671, 676 (Alaska Ct. App. 1989); People v. Spencer, 512 P.2d 260, 262 (Colo. 1973); United States v. Washington, 328 A.2d 98, 100 (D.C. 1974), *rev'd on other grounds*, 431 U.S. 1981 (1977); State v. Pollard, 329 N.E.2d 573, 589-90 (Ind. 1975); People v. Diponio, 210 N.W.2d 105, 107 (Mich. Ct. App. 1973); State v. Vinegra, 341 A.2d 673, 675 (N.J. Super. Ct. App. Div. 1975); State v. Cook, 464 N.E.2d 577, 581-82 (Ohio Ct. App. 1983); Commonwealth v. Field, 331 A.2d 744, 746 (Pa. Super. Ct. 1974).

342. CONN. GEN. STAT. ANN. §§ 54-47f(d), (e); 725 ILL. COMP. STAT. ANN. 5/112-4(b); LA. CODE CRIM. PROC. ANN. art. 433(A)(2); N.M. STAT. § 31-6-11(C); S.D. CODIFIED LAWS § 23A-5-13; TEX. CODE CRIM. PROC. ANN. art. 20.17(c); UTAH CODE ANN. §§ 77-10a-13(4)(b),(c); ALA. R. CRIM. P. 12.7(a); ARIZ. R. CRIM. P. 12.6; *Pinkerton*, 784 P.2d at 676; *Spencer*, 512 P.2d at 262; *Washington*, 328 A.2d at 100; *Vinegra*, 341 A.2d at 675; *Cook*, 464 N.E.2d at 581-82.

343. IDAHO CODE ANN. § 19-1121; KAN. STAT. ANN. § 22-3009(1); NEB. REV. STAT. § 29-1409(2); NEV. REV. STAT. § 172.195(2); VA. CODE ANN. § 19.2-215.7(A); WASH. REV. CODE ANN. § 10.27.120; MICH. CT. R. 6.005(I)(1), (2); *Pollard*, 329 N.E.2d at 589-90; *Field*, 331 A.2d at 746.

344. IDAHO CODE ANN. § 19-1121; 725 ILL. COMP. STAT. ANN. 5/112-4(b); IND. CODE ANN. §§ 35-34-2-5(a), (b); KAN. STAT. ANN. § 22-3009(1); LA. CODE CRIM. PROC. art. 433(A)(2); NEB. REV. STAT. § 29-1409(2); NEV. REV. STAT. § 172.239(1); N.M. STAT. § 31-6-11(C); S.D. CODIFIED LAWS § 23A-5-13; TEX. CODE CRIM. PROC. ANN. 20.17(c); UTAH CODE ANN. §§ 77-10a-13(4)(b), (c); WASH. REV. CODE ANN. § 10.27.120; ALA. R. CRIM. P. 12.7(a); ARIZ. R. CRIM. P. 12.6; MICH. CT. R. 6.005(I)(1), (2); *Pinkerton*, 784 P.2d at 676; *Cook*, 464 N.E.2d at 581-82; *Field*, 331 A.2d at 746.

345. CONN. GEN. STAT. ANN. §§ 54-47f(d), (e); IDAHO CODE ANN. § 19-1121; 725 ILL. COMP. STAT. ANN. 5/112-4(b); KAN. STAT. ANN. § 22-3009(1); NEB. REV. STAT. § 29-1409(2); NEV. REV. STAT. § 172.195(2); N.M. STAT. § 31-6-11(C); S.D. CODIFIED LAWS § 23A-5-13; TEX. CODE CRIM. PROC. ANN. 20.17(c); UTAH CODE ANN. §§ 77-10a-13(4)(b), (c); VA. CODE

warnings that closely track the language of *Miranda*.[346] Although some of the statutes containing such requirements refer to the witness's "right to remain silent,"[347] it is perhaps more accurate to say that the witness has a right not to incriminate himself.[348] Finally, a few states mandate that prosecutors inform witnesses of the general nature of the grand jury's investigation[349] or, when appropriate, that they are targets or subjects of the investigation.[350]

Utah has perhaps the most thorough set of admonishments.[351] There, prosecutors must inform targets and subjects of their status as targets or subjects as well as their rights by counsel and to invoke the privilege against self-incrimination.[352] Prosecutors also must inform targets that the government "is in possession of substantial evidence linking him to the commission of a crime for which he could be charged" and also describe "the general nature of that charge and of the evidence that would support the charge."[353] Subjects, meanwhile, must be informed of "the general scope of the grand jury's investigation."[354]

ANN. § 19.2-215.7(A); WASH. REV. CODE ANN. § 10.27.120; ALA. R. CRIM. P. 12.7(a); ARIZ. R. CRIM. P. 12.6; *Pinkerton*, 784 P.2d at 676; *Spencer*, 512 P.2d at 262; *Pollard*, 329 N.E.2d at 589-90; *Diponio*, 210 N.W.2d at 107; *Vinegra*, 341 A.2d at 675; *Cook*, 464 N.E.2d at 581-82; *Field*, 331 A.2d at 746. This group includes states that require notice of the "right to remain silent," a related — though by no means equivalent — protection to the privilege against self-incrimination.

346. Under *Miranda v. Arizona*, 384 U.S. 436 (1966), a person undergoing custodial interrogation must be informed that he has the right to remain silent, that anything he says can be used against him, that he has the right to an attorney, and that an attorney will be appointed for him if he cannot afford one. Although the U.S. Supreme Court has held that a witness who has been subpoenaed to testify before a grand jury is not in custodial interrogation for *Miranda* purposes, *see* United States v. Mandujano, 425 U.S. 564, 580 (1978), some states require warnings similar to those required by *Miranda*. *See* 725 ILL. COMP. STAT. ANN. 5/112-4(b); NEB. REV. STAT. § 29-1409(2); N.M. STAT. § 31-6-11(C); S.D. CODIFIED LAWS § 23A-5-13; TEX. CODE CRIM. PROC. ANN. 20.17(c); ALA. R. CRIM. P. 12.7(a); ARIZ. R. CRIM. P. 12.6.

347. *See, e.g.*, N.M. STAT. § 31-6-11(C).

348. *See Mandujano*, 425 U.S. at 580-81 (concluding that a witness has no right to remain silent and instead has a duty to answer all questions that would not incriminate him).

349. IND. CODE ANN. §§ 35-34-2-5(a), (b); NEV. REV. STAT. § 172.195(2); N.M. STAT. § 31-6-11(C); UTAH CODE ANN. §§ 77-10a-13(4)(b), (c); *Vinegra*, 341 A.2d at 675.

350. CONN. GEN. STAT. ANN. § 54-47f(d)-(e); IND. CODE ANN. §§ 35-34-2-5(a), (b); N.M. STAT. § 31-6-11(C); UTAH CODE ANN. §§ 77-10a-13(4)(b), (c); *Pinkerton*, 784 P.2d at 676; United States v. Washington, 328 A.2d 98, 100 (D.C. 1974), *rev'd on other grounds*, 431 U.S. 1981 (1977).

351. *See* UTAH CODE ANN. §§ 77-10a-13(4)(b), (c).

352. *Id.*

353. *Id.* § 77-10a-13(4)(c).

354. *Id.* § 77-10a-13(4)(b).

In most jurisdictions that require admonishments, the statutes make no mention of the appropriate remedy when prosecutors fail to give the required warnings. Some state courts addressing this problem have refused to dismiss the indictment, instead holding that the tainted testimony could not be introduced against the defendant at trial.[355] On the other hand, one state imposes a severe remedy for prosecutors failing to administer the warnings, granting transactional immunity to aggrieved witnesses.[356] In Nebraska, when a subpoena does not include an advisement of rights, the witness may not be prosecuted "on account of any transaction, matter, or thing concerning which he or she testifies or any evidence he or she produces . . . ."[357] Perhaps future case law will fill this gap in the legislation.

5. The Right to Appear

An additional significant proposal for reform requires that targets of grand jury investigations be given an opportunity to testify and present evidence to the grand jury.[358] Supporters claim that fairness dictates that a target be able to testify on his own behalf.[359] Also, the target's evidence would enhance the grand jury's decision-making abilities.[360] Opponents of this requirement argue that it is not always clear who is a target until the grand jury completes its investigation.[361] Furthermore, in some cases, notifying a target of the grand jury's investigation increases the danger that he will attempt to flee or obstruct justice.[362]

Only three states recognize a target's right to appear before a grand jury.[363] At least two other states narrow the right to persons who have already been arraigned or arrested on the charges pending before the grand jury.[364] Other state statutes, consistent with the prosecutor's traditional role in conducting grand jury investigations, note that the prosecutor may, in his discretion, grant a target's request to testify or present evidence before the grand jury.[365] In

355. *See, e.g.*, State v. Vinegra, 341 A.2d 673, 675 (N.J. Super. Ct. App. Div. 1975).

356. NEB. REV. STAT. §§ 29-1409(2), (3) (1995).

357. *Id.*

358. H.R. 1407, 99th Cong. § 3324(a)(1) (1985); ABA, *supra* note 243, § 102; CCE, *supra* note 245, at 7; Lefcourt, *supra* note 247, at 196; *Federal Grand Jury Reform Report*, *supra* note 244, at 22.

359. *Federal Grand Jury Reform Report*, *supra* note 244, at 22.

360. *Id.*

361. *Hearings*, *supra* note 59, at 15 (prepared statement of Robinson and Lynch).

362. *Id.*

363. IND. CODE ANN. § 35-34-2-9(b) (LexisNexis 2004); NEV. REV. STAT. § 172.241(1) (2003); N.M. STAT. § 31-6-11(C) (2004).

364. N.Y. CRIM. PROC. LAW § 190.50(5) (McKinney 1997); 22 OKLA. STAT. § 335 (2001).

365. *See, e.g.*, NEB. REV. STAT. § 29-1410.01 (1995) (allowing a person to petition a court

some states, if a prosecutor denies the target's request, the prosecutor must keep a record of the denial and the grand jury must be informed of the target's request.[366]

In states granting a right to appear, a target must be given notice of his target status and his right to appear, unless the target is a flight risk or the notice will result in the obstruction of justice.[367] If the target chooses to testify, he must agree to the waiver of certain protections, such as statutory immunity or the privilege against self-incrimination.[368] In one state, New York, an indictment may be quashed if the target is not given notice of his right to appear before the grand jury.[369]

6. The Right to Transcripts

Finally, some reformers advocate for giving witnesses a transcript of their grand jury testimony.[370] Opponents of this proposal argue that it would subvert the secrecy of the grand jury.[371] Proponents assert that witnesses are free to reveal the testimony they provided to the grand jury anyway.[372] Also, having a transcript of their testimony can help witnesses who are called before the grand jury a second time to clarify ambiguities or inconsistencies and protect witnesses from being indicted for perjury.[373]

Currently, the vast majority of state grand jury rules do not contain special provisions that allow grand jury witnesses to receive transcripts of their testimony.[374] Such provisions only exist in a few state statutes.[375] In some states, the request for a transcript must be related to a later proceeding against

---

for review of a prosecutor's denial of a request to appear before a grand jury). *See, e.g.*, KY. R. CRIM. P. 5.08. Note that some states provide procedures for a complainant or witness to request to appear before the grand jury.

366. *See, e.g.*, NEB. REV. STAT. § 29-1410.01; KY. R. CRIM. P. 5.08.

367. IND. CODE ANN. § 35-34-2-9(b); NEV. REV. STAT. § 172.241(2); N.M. STAT. § 31-6-11(C); N.Y. CRIM. PROC. LAW § 190.50(5)(a).

368. IND. CODE ANN. § 35-34-2-9(b) (waiver of immunity); NEV. REV. STAT. § 172.241(2) (privilege against self-incrimination); N.Y. CRIM. PROC. LAW § 190.50(5)(b) (waiver of immunity).

369. N.Y. CRIM. PROC. LAW § 190.50(5)(c).

370. ABA, *supra* note 243, § 201(3), at 18; CLARK, *supra* note 42, at 135-37 (advocating right to transcript for defendants); Lefcourt, *supra*, note 247, at 197; Sullivan & Nachman, *supra* note 240, at 1068; *Federal Grand Jury Reform Report*, *supra* note 244, at 22-23.

371. *Hearings*, *supra* note 59, at 15 (prepared statement of Robinson and Lynch).

372. *Federal Grand Jury Reform Report*, *supra* note 244, at 22-23.

373. *Id.* at 23.

374. 1 BEALE, *supra* note 4, § 5:5.

375. COLO. REV. STAT. § 16-5-204(4)(g) (2004); NEB. REV. STAT. § 29-1407.01(2) (1995); NEV. REV. STAT. § 172.295 (2003); WASH. REV. CODE ANN. § 10.27.090(5) (West 2004).

the witness[376] or a second subpoena before the same grand jury.[377] In other states, a witness must simply show "good cause" for receiving a transcript.[378]

It should be noted that many more states grant *defendants* a right to receive transcripts of the grand jury proceedings against them, although the scope of the right varies widely.[379] In many of these states, a defendant must meet a high standard — usually a "particularized need" — in order to receive a copy of portions of the transcript.[380] In some states, the defendant has a right under state discovery rules to receive the grand jury transcripts of his own testimony or the testimony of any person the prosecution intends to call as a witness at trial.[381] Other states automatically furnish a copy of the grand jury transcript to defendants following their indictments.[382] As one court noted, such a rule

376. WASH. REV. CODE ANN. § 10.27.090(5).

377. NEV. REV. STAT. § 172.295.

378. COLO. REV. STAT. § 16-5-204(4)(g); NEB. REV. STAT. § 29-1407.01(2).

379. CAL. PENAL CODE § 938.1(a) (2002); CONN. GEN. STAT. ANN. § 54-45a(a) (West 1998 & Supp. 2005); N.D. CENT. CODE § 29-10.1-38 (1991); 22 OKLA. STAT. § 340(B) (2001); S.C. CODE ANN. § 14-7-1700 (1986 & Supp. 2004); UTAH CODE ANN. § 77-10a-13(7)(f) (2002); WIS. STAT. ANN. § 971.23(1)(a) (West 2005); HAW. R. PENAL P. 5(c)(2)(iv); IDAHO CRIM. R. 6.3(c); MICH. CT. R. 6.107(A); ILL. SUP. CT. R. 412(a)(iii); MINN. R. CRIM. P. 18.05(1); N.J. CT. R. 3:6-6(b); R.I. SUPER. R. CRIM. P. 16(a)(2); VT. R. CRIM. P. 16(a)(2)(B); WYO. R. CRIM. P. 16(a)(1)(A)(I)(3); People v. Bartholomew, 337 N.Y.S.2d 906, 910 (Nassau County Ct. 1972).

380. UTAH CODE ANN. § 77-10a-13(7)(e)(ii) (2002) (same); D.C. SUPER. CT. R. CRIM. P. 6(e)(3)(C)(ii) (permitting disclosure upon "a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury"); OHIO R. CRIM. P. 6(E) (same); Arthur v. State, 711 So. 2d 1031, 1078 (Ala. Crim. App. 1996) (requiring a "preliminary showing of particularized need"); People v. Dist. Court, 610 P.2d 490, 494 (Colo. 1980) (authorizing disclosure "[o]nly in those cases where clear examples of inappropriate conduct by the district attorney may affect the validity of the defendant's indictment or the determination of probable cause"); Hinojosa v. State, 781 N.E.2d 677, 679 (Ind. 2003) (requiring defendant to "show with particularity a need to prevent injustice"); State *ex. rel.* Clagett v. James, 327 S.W.2d 278, 283 (Mo. 1959) (granting a lower court judge discretion to release grand jury transcripts "as he deems proper to meet the ends of justice").

381. UTAH CODE ANN. § 77-10a-13(7)(f) (witnesses the prosecutor intends to call); WIS. STAT. ANN. § 971.23(1)(a) (testimony of the defendant); ILL. SUP. CT. R. 412(a)(iii) (testimony of the defendant and persons the prosecution intends to call at trial); R.I. SUPER. R. CRIM. P. 16(a)(2) ("all relevant recorded testimony before a grand jury of the defendant"); WYO. R. CRIM. P. 16(a)(1)(A)(i)(3) (testimony of the defendant); *Bartholomew*, 337 N.Y.S.2d at 910 (testimony of prosecution witnesses).

382. CAL. PENAL CODE § 938.1 (a); CONN. GEN. STAT. ANN. § 54-45a(a); N.D. CENT. CODE § 29-10.1-38; 22 OKLA. STAT. § 340(B); S.C. CODE ANN. § 14-7-1700; HAW. R. PENAL P. 5(c)(2)(iv); IDAHO CRIM. R. 6.3(c); MICH. CT. R. 6.107(A) ("the part of the record . . . that touches on the guilt or innocence of the accused"); MINN. R. CRIM. P. 18.05(2) (testimony of the defendant and any persons either side intends to call as a witness); N.J. CT. R. 3:6-6(b); VT. R. CRIM. P. 16(a)(2)(B).

recognizes that having transcripts is a necessary condition toward ensuring "effective review" of prosecutorial misconduct.[383]

7. Other Procedural Reforms

Other proposals for reforming federal grand jury procedure include: (1) seventy-two hour notice before a person is scheduled to testify;[384] (2) meaningful, on-the-record instructions to the jurors about their duties and powers;[385] (3) a prohibition on calling witnesses before the grand jury when a prosecutor knows that the witness plans to invoke the privilege against self-incrimination;[386] and (4) a prohibition on naming unindicted co-conspirators in indictments.[387]

C. Other Proposals for Reform

In addition to the list of procedural reforms, some scholars and practitioners have suggested other unique reforms. For instance, some observers have recommended that the size of the grand jury be reduced from twenty-three people.[388] One study has recommended that the grand jury consist of eleven to fifteen people, with eight required to indict.[389] A smaller grand jury would encourage more active participation by the jurors and less absenteeism, according to the study.[390]

Also, some commentators have urged more stringent subpoena requirements in certain circumstances. Under current federal law, prosecutors need not satisfy any preliminary standard of reasonableness to justify the issuance of a subpoena.[391] A number of commentators, however, recommend that prosecutors who wish to subpoena an attorney's records first obtain judicial review to determine whether the subpoena is relevant and necessary

383. Dustin v. Superior Court, 122 Cal. Rptr. 2d 176, 188-89 (Cal. Ct. App. 2002).

384. ABA, *supra* note 243, § 200(1), at 18; Lefcourt, *supra* note 247, at 197; *Federal Grand Jury Reform Report*, *supra* note 244, at 24; *Hearings*, *supra* note 59, at 38 (prepared statement of Prof. Leipold).

385. ABA, *supra* note 243, § 103, at 17; CCE, *supra* note 245, at 6-7; Lefcourt, *supra* note 247, at 197; *Federal Grand Jury Reform Report*, *supra* note 244, at 24.

386. ABA, *supra* note 243, § 201(4)(a), at 18; CCE, *supra* note 245, at 7; *Federal Grand Jury Reform Report*, *supra* note 244, at 24.

387. Robbins, *supra* note 44, at *I.3; ABA, *supra* note 243, § 205, at 18; CCE, *supra* note 245, at 8; *Federal Grand Jury Reform Report*, *supra* note 244, at 23.

388. CCE, *supra* note 245, at 5 (advocating a reduction in size of federal grand jury to fifteen members); Sullivan & Nachman, *supra* note 240, at 1068-69.

389. CCE, *supra* note 245, at 5.

390. *See* Michael Waldman, *Grand Jury: Ripe for Reform; Council for Court Excellence Study Suggests Changes*, CRIM. J., Winter 2002, at 6.

391. United States v. Dionisio, 410 U.S. 1, 15 (1973).

to the grand jury's investigation.[392] Indeed, a few courts have suggested that such a preliminary showing may be appropriate.[393] Similarly, some commentators have advocated a similar showing of reasonableness when prosecutors seek to subpoena certain physical evidence, such as blood and hair samples.[394] A small number of state courts, recognizing the "interest in human dignity and privacy,"[395] have agreed and held that prosecutors must satisfy a preliminary standard before obtaining such evidence.[396]

Other proposals attack the various secrecy rules surrounding the grand jury.[397] In fact, at least four members of the U.S. Supreme Court have recognized a need to lift the veil of secrecy in some circumstances:

> Grand jury secrecy is, of course, not an end in itself. Grand jury secrecy is maintained to serve particular ends. But when secrecy will not serve those ends or when the advantages gained by secrecy are outweighed by a countervailing interest in disclosure, secrecy may and should be lifted, for to do so in such a circumstance would further the fair administration of criminal justice.[398]

---

392. Max D. Stern & David Hoffman, *Privileged Informers: The Attorney Subpoena Problem and a Proposal for Reform*, 136 U. PA. L. REV. 1783, 1833 (1988) (proposing "a clear and convincing demonstration . . . that the evidence sought is necessary at that time to the continued viability of a legitimate investigation or prosecution, and that all attempts to obtain the evidence from non-attorney sources have proved fruitless"); Stacy Caplow, *The Reluctant Witness for the Prosecution: Grand Jury Subpoenas to Defense Counsel*, 51 BROOK. L. REV. 769, 800 (1985) (urging "a substantial showing of relevancy as well as exhaustion of all other available sources"); Thomas K. Foster, Note, *Grand Jury Subpoenas of a Target's Attorney: The Need for a Preliminary Showing*, 20 GA. L. REV. 747, 779 (1984) (advocating a "preliminary showing of relevance or need").

393. *See, e.g.*, *In re* Grand Jury Subpoena (Legal Servs. Ctr.), 615 F. Supp. 958, 964 (D. Mass. 1985) (requiring a preliminary showing of need for attorney subpoenas).

394. Rosemary Elizabeth-Anne Smith, Comment, *A Proposal to Prevent Unlawful Bodily Intrusion in the Context of a Grand Jury Subpoena Duces Tecum*, 19 DAYTON L. REV. 633, 673 (1994) (proposing a "reasonableness" standard for a subpoena of physical evidence).

395. Woolverton v. Multi-County Grand Jury Okla. County, 1993 OK CR 42, ¶ 12, 859 P.2d 1112, 1115-16.

396. *Id.* (holding that probable cause is required to subpoena intrusive physical evidence and that a reasonable and individualized suspicion is required to subpoena noninvasive physical evidence); *In re* May 1991 Will County Grand Jury, 604 N.E.2d 929, 935 (Ill. 1992) (requiring "[s]ome quantum of relevance" before a subpoena for physical evidence may be issued).

397. *See* Kadish, *supra* note 4, at 69-70 (advocating that government attorneys be permitted to use grand jury materials for civil proceedings only to the extent that the materials were discoverable through civil discovery devices); BLANCHE DAVIS BLANK, THE NOT SO GRAND JURY: THE STORY OF THE FEDERAL GRAND JURY SYSTEM 81 (1993) (urging a reconsideration of the secrecy surrounding the grand jury system, including its finances).

398. Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 403 (1959) (Brennan, J., dissenting).

Advocating a more extreme position, Professor Ric Simmons has argued that the secrecy requirement should be abolished.[399] According to Simmons, the modern justifications for grand jury secrecy diverge from the primary historical rationale, which was keeping prosecutors outside of the grand jury room.[400] Also, the same policy that necessitates public trials — ensuring public confidence in the criminal justice system — applies with equal force to grand jury proceedings.[401]

V. Legislating Grand Jury Reform

Although the U.S. Supreme Court has consistently required little judicial oversight of grand jury procedures and few protections for those forced to appear before the grand jury, the campaign to reform the grand jury should not end with that Court. The previous section described a number of proposals to reform the grand jury's procedures by improving the body's functioning and granting meaningful rights to grand jury witnesses. Each of these proposals has been advocated by a number of scholars, practitioners, and distinguished legal organizations and has been enacted into law in at least a few states. This section first contends simply that states should take measures to implement these procedural reforms. Then, this section argues that the burden should rest upon state legislatures to take a more active role in furthering criminal procedure rights and pass legislation to improve the grand jury.

A. In Support of Procedural Reforms to the Grand Jury

At present, the grand jury in most jurisdictions operates according to a prosecutor's discretion with little judicial oversight. Indeed, anyone familiar with the institution knows the old adage that a body of grand jurors would indict a ham sandwich, if asked to do so by a prosecutor.[402] Even if this were not strictly true, it accurately reflects the fact that the prosecutor wields a tremendous amount of power over the operations of the grand jury.

399. Simmons, *supra* note 5, at 72.

400. *Id.*

401. *Id.* at 72-73 ("A criminal trial involves identical risks of witness tampering, juror tampering, and possible inhibition of witness testimony, yet jury trials are required to be open and public.") Simmons also contends that the grand jury's secrecy bears a heavy cost in terms of procedural justice, stating that "[a] closed procedure is generally perceived to be less fair than an open one." *Id.* at 73; *see also* BLANK, *supra* note 397, at 73-74; Bernstein, *supra* note 80, at 623.

402. *See* Niki Kuckes, *Delusions of Grand Juries: Everyone Knows That a Grand Jury Would Indict a Ham Sandwich. So Why Do We Bother to Use Them?*, LEGAL AFF., Nov.-Dec. 2003, at 38, 39 (also compiling the various descriptions of grand juries, including "fifth wheel," "tool of the executive," "prosecution lapdog," and "ignominious prosecutorial puppet").

Furthermore, the prosecutor's broad subpoena power allows him to force anyone to testify or produce evidence for virtually any reason.[403] People wishing to object to a subpoena face a difficult, if not impossible, challenge.[404] This substantial authority wielded by the prosecutor calls for at least a few procedural safeguards to ensure that grand jury proceedings are conducted fairly. It also justifies procedures to guarantee that indictments possess a minimum degree of reliability, particularly because, in our criminal justice system, cases rarely go to trial. Even in cases where the accused prevails, an indictment brings with it serious consequences for the accused.[405]

Many jurisdictions have at least a few procedures to ensure that the grand jury operates fairly and reliably. The procedural reforms outlined above are a good start toward accomplishing each of these goals. First, the reforms would offer substantial protection to those subpoenaed to appear before the grand jury. As some commentators have noted, appearing before a grand jury is an unfamiliar, intimidating, and confusing experience, and one that can result in severe consequences.[406] Targets and subjects of grand jury investigations as well as defendants who have already been charged are especially vulnerable when appearing. Having their counsel present during the testimony would alleviate much of the witnesses' confusion and apprehension. Attorneys also would be better able to protect the witnesses' rights and assist them in asserting any privileges they may have. As the United States Supreme Court recognized in *Gideon v. Wainwright*,[407] attorneys serve critical functions because "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law."[408] Because of their lack of legal knowledge, witnesses also should receive notice of all applicable rights[409] so that they would have ample opportunity to exercise those rights. In addition, providing witnesses with a transcript of their testimony would better equip them to consult with their attorneys about any consequences of their testimony.

Second, the proposed reforms would significantly aid the grand jurors in performing their screening and investigating duties. For instance, requiring

403. *See supra* notes 160-64 and accompanying text.

404. *See supra* Part III.B.

405. *See* Gentile v. State Bar of Nev., 501 U.S. 1030, 1043 (1991) (plurality opinion) (recognizing that defense counsel may act to mitigate the serious consequences that an indictment can have on an accused).

406. *See supra* note 255-57 and accompanying text.

407. 372 U.S. 335 (1963).

408. *Id.* at 345 (quoting Powell v. Alabama, 287 U.S. 45, 69 (1932)).

409. This includes notice of: (1) the right to have counsel present; (2) the privilege against self-incrimination; (3) target or subject status, if applicable; and (4) the scope or general nature of the investigation; *see supra* Part IV.B.4.

prosecutors to present any exculpatory evidence they have in their possession would give jurors a more balanced view of the case. This would encourage jurors to independently examine and weigh the evidence before reaching a conclusion. The same rationale supports granting the target the right to appear before the grand jury. The jurors would have an opportunity to assess the target's testimony and determine whether it defeated the prosecutor's evidence and showed a lack of probable cause to indict.

Finally, the reform proposals would reduce prosecutorial misconduct and cause the grand jury to be less of an arm of the prosecutor. The mere presence of witnesses' attorneys during testimony would deter prosecutors from using improper methods, and it would help prevent prosecutors from violating witnesses' rights or privileges. Likewise, the application of the exclusionary rule to grand jury proceedings would ensure that prosecutors cannot obtain an indictment with evidence that the prosecutor knows was obtained illegally.

Despite the arguments of many critics of grand jury reform, the experience of other states clearly shows that these reforms can be imposed without jeopardizing the institution. The legislators drafting the statutory provisions and the courts interpreting those provisions have successfully safeguarded the various interests at stake. That is, the reforms have served to protect the grand jury witnesses, targets, and defendants without interfering with prosecutors' work or diminishing the secrecy in which the grand jury operates. A few examples show how reforms have not interfered with the grand jury system.

First, courts have successfully upheld a witness's right to have counsel present without interfering with the grand jury's functioning. The two New York cases described above,[410] *In re People v. Riley*[411] and *People v. Smays*,[412] illustrate this balance. On one hand, the courts permitted the grand juries to conduct their proceedings in an efficient manner. Thus, the attorneys' note-taking and consulting with the witness were permitted.[413] On the other hand, the court granted the grand jury witness the ability to actually benefit from the presence of his attorney in a setting in which the prosecutor possesses a great deal of authority. Therefore, the prosecutors were not permitted to confiscate the attorney's notes or unfairly accuse the witness of receiving strategic legal advice.[414] Also, the witnesses in these cases retained meaningful contact with their attorneys, without hampering the grand juries' screening and investigative functions.

410. *See supra* notes 278-89 and accompanying text.
411. 414 N.Y.S.2d 441 (N.Y. Sup. Ct. 1979).
412. 594 N.Y.S.2d 101 (N.Y. Sup. Ct. 1993).
413. *Id.* at 107; *Riley*, 414 N.Y.S.2d at 444.
414. *Smays*, 594 N.Y.S.2d at 107; *Riley*, 414 N.Y.S.2d at 444.

The Massachusetts case of *Commonwealth v. Griffin* provides another example of this balance.[415] In *Griffin*, three city officials testified before a grand jury and were accompanied in the room by the same attorney.[416] The officials, who were indicted for violating various election and bidding laws, argued that the attorney had a conflict of interest in representing the three defendants.[417] The Supreme Judicial Court of Massachusetts ultimately affirmed that the state statute granting witnesses the right to have an attorney present necessarily entitled them to receive effective assistance of counsel and freedom from genuine conflicts of interests.[418] If the conflict is only potential, however, a court will not dismiss the indictment unless the witness shows material prejudice resulting from the representation.[419] In the grand jury context, the attorney's role is limited to advising a witness whether he may assert any privileges or whether he should answer the prosecution's questions.[420] Because of his limited role, the attorney was not in a position to trade one client's testimony for the better treatment of another client.[421] Therefore, the court held, the conflict was not genuine, but rather potential in nature, and the court remanded the case for a hearing on the issue of prejudice.[422]

Next, regarding admonishments to grand jury witnesses, some balancing provisions have been included within the statutes that require the warnings. For instance, as noted above, some states require that targets of grand jury investigations be notified of a number of rights as well as their target status before they testify in front of the grand jury.[423] However, critics may charge that such notice could give targets the opportunity to obstruct the grand jury's investigation. To prevent such obstructions, some states have written an exception into the notification requirement. For example, in New Mexico, a prosecutor can forego notifying the target upon a showing to the presiding judge "by clear and convincing evidence that providing notification may result in flight by the target, result in obstruction of justice or pose a danger to another person."[424] This exception reflects one circumstance in which the

415. 535 N.E.2d 594 (Mass. 1989).
416. *Id.* at 595.
417. *Id.* at 596.
418. *Id.* at 595-96; *cf.* FLA. STAT. ANN. § 905.17(2) (West 1999) (prohibiting an attorney or law firm from representing multiple clients in the same grand jury investigation).
419. *Griffin*, 535 N.E.2d at 596.
420. *Id.*
421. *Id.* at 597.
422. *Id.*
423. *See supra* notes 350-53 and accompanying text.
424. N.M. STAT. § 31-6-11(C) (2004).

balance is appropriately tipped away from the target's rights in favor of the safety of others and the effectiveness of the grand jury's investigation.

Legislatures also have balanced the parties' interests by ensuring that violations of the grand jury provisions have the appropriate remedies. For instance, dismissal of the indictment may be too harsh a remedy for many violations of the proposed laws, especially where the prosecutor has not engaged in misconduct. In some states, a prosecutor's failure to inform a target of his rights requires only that the grand jury testimony not be used to impeach the target at trial.[425] Similarly, where illegally-obtained evidence is used to secure a defendant's indictment, some state courts have held that dismissal is not required as long as there was otherwise sufficient evidence to establish probable cause.[426] On the other hand, in some cases, dismissal of the indictment seems necessary to correct an egregious error. For example, an indictment should not stand where it was secured substantially with evidence that was obtained illegally.[427] This remedy seems appropriate, because it deters behavior that likely constitutes misconduct by law enforcement and it ensures a basic level of fairness and reliability of grand jury proceedings.[428] For the same reasons, dismissal of the indictment also may be appropriate where a prosecutor knew of but failed to present exculpatory evidence that could explain away the charges.

For these reasons, the procedural reforms described above would improve all facets of the grand jury system. But identifying areas of reform is only half of the battle to encourage state legislatures to enact grand jury reform. The other half is convincing legislators, first, to take an interest in the subject, and second, that they can and should enact changes. "After all," some legislators might say, "isn't the grand jury a problem for the courts?" The remainder of this article is devoted to responding to that exact concern.

B. New Legislative Federalism

For many years after the incorporation of most of the Bill of Rights in the mid-twentieth century, the development of rules of criminal procedure was the primary domain of the U.S. Supreme Court.[429] Besides setting parameters for

425. *See supra* note 355 and accompanying text.

426. *See supra* note 330 and accompanying text.

427. The need for such a rule is supported by cases like *State v. Sugar*, 417 A.2d 474, 487 (N.J. 1980) (reversing indictment in case of "outrageous" behavior by law enforcement).

428. Recall that the original purposes for the Fourth Amendment's exclusionary rule were to preserve "the imperative of judicial integrity," Mapp v. Ohio, 367 U.S. 643, 659 (1961) (quoting Elkins v. United States, 364 U.S. 206, 222 (1960)), and to deter violations of the Fourth Amendment, *id.* at 656.

429. G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV.

grand jury proceedings, the Court has actively drawn and re-drawn the boundaries in cases involving all areas of criminal procedure, such as the death penalty, searches and seizures, and the right to counsel. In the past twenty years, however, a number of movements have encouraged other participants to become involved in advancing the constitutional rights guaranteed to criminal defendants.

Foremost among these movements is the U.S. Supreme Court's increased emphasis on principles of federalism. Perhaps the Rehnquist Court's most notable contribution to constitutional law was its decisions limiting the role of the federal government while according a greater role to state governments.[430] In support of defining a more rigid balance between the governments' responsibilities, one justice stated,

> [I]t was the insight of the Framers that freedom was enhanced by the creation of two governments, not one. . . . Were the Federal Government to take over the regulation of entire areas of state traditional concern, . . . the boundaries between the spheres of federal and state authority would blur and political responsibility [to the citizenry] would become illusory.[431]

Thus, in areas where the federal government is precluded from regulating, state governments may freely develop their own laws to address the underlying issues. As Justice William Brennan stated, "[T]he Court's contraction of federal rights and remedies on grounds of federalism should be interpreted as a plain invitation to state courts to step into the breach."[432] Although much of the debate in this area has focused on a variety of economic legislation, supporters of federalism recognize the broader principle that state governments should be encouraged to "serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[433]

Another movement draws from general federalist principles and involves the state courts' increasing willingness to find state constitutions as a source of constitutional rights.[434] Under this movement, known as New Judicial

---

1097, 1111 (1997).

430. *See* Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 429-30 (2002) (beginning article by stating "it seems agreed on all sides now that the Supreme Court has an agenda of promoting constitutional federalism").

431. United States v. Lopez, 514 U.S. 549, 576-77 (1995) (Kennedy, J., concurring)).

432. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548 (1986).

433. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932).

434. *See* BARRY LATZER, STATE CONSTITUTIONS AND CRIMINAL JUSTICE 3 (1991); *see also* DRESSLER, *supra* note 216, § 1.02[A] (citing additional sources that discuss New Judicial

Federalism, many state courts have rejected the reasoning or results of U.S. Supreme Court decisions and have elected to decide cases through an independent interpretation of their state constitutions. Because the U.S. Supreme Court's interpretations of federal constitutional provisions provide only a "floor," or minimum standards for states to follow, courts in many states have begun to raise the "ceiling" by offering increased protections to citizens of their states.[435]

Two examples illustrate New Judicial Federalism in practice. First, in *South Dakota v. Opperman*,[436] the U.S. Supreme Court held that the Fourth Amendment permits law enforcement officials to conduct warrantless "inventory searches" of vehicles. Then, on remand, the South Dakota Supreme Court held that such inventory searches were invalid under the South Dakota Constitution, stating that "[w]e find that logic and a sound regard for the purposes of the protection afforded by S.D.Const., Art. VI, § 11 warrant a higher standard of protection for the individual in this instance than the United States Supreme Court found necessary under the Fourth Amendment."[437] Another example comes from *United States v. Bagley*,[438] in which the U.S. Supreme Court held that under the Fourteenth Amendment, a prosecutor's failure to disclose exculpatory evidence to a defendant requires reversal only where the defendant can show a reasonable probability that the trial would have had a different outcome. In *State v. Laurie*,[439] however, the New Hampshire Supreme Court concluded that under its state constitution — which provides an explicit right for defendants "to produce all proofs that may be favorable to [them]" — the *Bagley* standard was too burdensome for defendants.[440] Instead, it held, once the defendant shows that the prosecution withheld exculpatory evidence, "the burden shifts to the [prosecution] to prove beyond a reasonable doubt that the undisclosed evidence would not have affected the verdict."[441]

A third movement, advocated by some scholars, is called Popular Constitutionalism. Under this theory, the Supreme Court's role in interpreting the Constitution is minimized or virtually eliminated.[442] Instead, "'the

---

Federalism).

435. *See* LATZER, *supra* note 434, at 4.

436. 428 U.S. 364 (1976).

437. State v. Opperman, 247 N.W.2d 673, 675 (S.D. 1976).

438. 473 U.S. 667 (1985).

439. 653 A.2d 549 (N.H. 1995).

440. *Id.* at 552.

441. *Id.*; *see also* People v. Vilardi, 555 N.E.2d 915 (N.Y. 1990) (also rejecting, under the New York Constitution, the U.S. Supreme Court's *Bagley* standard).

442. LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 8 (2004) ("Both in its origins and for most of our history, American

people,' acting through politics, should determine the meaning of the Constitution."[443] Scholars supporting this theory believe that democratically elected legislators are more suited to fairly decide controversial and policy-oriented issues arising under the Constitution.[444] Leaving constitutional law to the courts contradicts the historic spirit of self-government and demonstrates a lack of faith in the American people to protect constitutional liberties.[445]

One does not have to wholeheartedly accept either New Judicial Federalism or Popular Constitutionalism to acknowledge the strength of their underlying premises. In our federalist system of government, protecting constitutional rights does not begin and end with the U.S. Supreme Court. The Supreme Court's application of much of the Bill of Rights to the states did not signal that states could not and should not further advance these rights. Instead, as one scholar has explained, the Court's decisions provided a legal framework for states to analyze the issues and develop their own civil liberties jurisprudence.[446] Now that a substantial amount of case law exists on the grand jury, states have a model for protecting civil liberties as well as a model for enhancing the grand jury's functioning. State legislators should continue to develop that model.

Furthermore, the Supreme Court's aggressive approach to protecting individual rights during the Warren Court era reflects a historical tradition: where one body of government fails to respond to legal necessity, another body may feel compelled to fill the vacuum. Herbert Packer agreed that during the 1950s when the legislative and executive bodies failed to address the need to fully recognize the fundamental human rights of all American citizens, the Warren Court stepped into the "law-making vacuum" because it thought it must.[447] Likewise, Charles Whitebread has asserted that a byproduct of *federal* Supreme Court *unwillingness* during the post-Warren Court period to maintain the momentum toward expansion of human liberty was the *state* supreme courts' *willingness* to dig into their respective state constitutions to find liberty that the Federal Supreme Court had been unable to discover in the Federal Constitution.[448] In the case of the grand jury, the

---

constitutionalism assigned ordinary citizens a central and pivotal role in implementing their Constitution.").

443. David A. Strauss, *Pop Con*, LEGAL AFF., Mar.-Apr. 2005, at 60.

444. *Id.* at 61.

445. KRAMER, *supra* note 442, at 246-48.

446. Tarr, *supra* note 429, at 1111.

447. Herbert L. Packer, *The Courts, the Police, and the Rest of Us*, 57 J. CRIM. L. & CRIMINOLOGY 238, 240 (1966).

448. Charles H. Whitebread, *The Burger Court's Counter-Revolution in Criminal Procedure: The Recent Criminal Decisions of the United States Supreme Court*, 24 WASHBURN

current absence of constitutional protections for witnesses and judicial oversight of the proceedings has created a vacuum that desperately needs to be filled. If legislators do not fill that vacuum by imposing reforms, future courts may attempt to do so through case law.

Thus, like courts, state legislators also must bear the burden of furthering the rights contained in the Constitution. When a court issues a constitutional decision affecting criminal procedure, the issue should not be dead. State legislators should consider how the decision affects their state's criminal justice system and whether the decision requires legislative action. For instance, the U.S. Supreme Court has explicitly stated that a particular issue was a question for legislatures rather than courts.[449] Such statements should cause legislatures to take up the issue. In other cases, the Court's failure to offer protection under the Constitution has rightfully prompted legislators to question whether a particular form of protection reflects a sound policy judgment and should therefore be enacted as law.[450] The U.S. Supreme Court's consistent lack of oversight of state grand juries thus creates an obligation for states to impose meaningful standards for their grand jury procedures.

This does not mean that reform should be left up to state courts alone. Many characteristics of the legislative process render state legislatures important players in advancing grand jury reform. First, state legislatures can broadly examine the entire system and how it operates in their states and then, in light of that evidence, enact a series of comprehensive reforms at one time. This gives legislators an advantage over courts, whose decisions are generally restricted by the facts of a particular dispute before them.[451] In enacting

---

L. J. 471, 498 (1985).

449. Perhaps the best example of this occurred in *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001), in which the Court held that that the Constitution is not violated when an officer makes an arrest for a minor criminal offense punishable by a maximum $50 fine. After describing many of the difficulties that courts would have in drawing the line between offenses for which an arrest would be permitted and those for which it would not, the Court stated, "[i]t is of course easier to devise a minor-offense limitation by statute than to derive one through the Constitution . . . . It is, in fact, only natural that States should resort to this sort of legislative regulation . . . ." *Id.* at 352.

450. For example, in the wake of *Illinois v. Caballes*, 125 S. Ct. 834 (2005) (holding that a drug sniff of a vehicle during a lawful traffic stop does not violate the Fourth Amendment), an Illinois state legislator introduced legislation to require that canine sniffs be based on a reasonable belief that drugs are in the car. Gary Wisby, *Lawmaker Wants to Keep Drug Dogs on a Leash*, CHICAGO SUN-TIMES, Feb. 15, 2005, at 16.

451. See, for example, the Court's decision in *Blakely v. Washington*, 124 S. Ct. 2531, 2538 n.9 (2004), in which the Court declined to comment on the applicability of its decision on the Federal Sentencing Guidelines, only to invalidate the Guidelines the following term in *United States v. Booker*, 125 S. Ct. 738 (2005).

comprehensive reform, legislatures can address a number of ancillary issues to the proposals, such as the appropriate remedy for violations of a witness's right. Furthermore, legislatures can provide notice to prosecutors and defense attorneys to allow them to adjust to the changes. Perhaps most importantly, statutory reform would provide certainty in the rules for the parties involved and the courts that will have to review claims arising under the legislation. Legislatures could eliminate much litigation by enacting thorough statutes with few ambiguities.

In addition, state legislatures are well-suited to consider the public policy implications when passing grand jury reform. Whereas courts frequently recoil at the suggestion that they ground their decisions in public policy considerations, legislatures are expected to do so.[452] Legislatures usually have a standing committee that continually monitors criminal justice issues and, with the committee's many resources, could take up the issue of grand jury reform.[453] Legislators can also form commissions, consult experts and practitioners, and review the laws of other states that have enacted grand jury reforms, thus seeking a broad array of opinions to determine whether a particular reform is merited.

This type of hand-in-hand coordination with the courts does not invoke separation of powers problems or the like. After all, the rights delineated in the Bill of Rights are exceedingly important and form the framework for how the criminal justice system operates in this country. A state legislature that does not seek to continually advance these principles through legislation, but rather relinquishes such duties to the courts, violates the very spirit in which the Constitution was written. With this in mind, state legislatures should seek to reform the historic institution of the grand jury.

VI. Conclusion

In the past few years, politicians and media pundits have issued harsh rhetoric condemning so-called "activist judges" for "legislating from the bench."[454] Judges, in turn, could fairly criticize legislators for failing to "legislate from the legislature." Instead of leaving it to courts to further

452. *See, e.g.*, Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 488 (1979) (Powell, J., dissenting) (stating, with respect to school desegregation, that "[c]ourts are the branch least competent to provide long-range solutions acceptable to the public and most conducive to achieving both diversity in the classroom and quality education").

453. At the federal level, see *Hearings*, *supra* note 59 (congressional subcommittee hearing on grand jury reform). *See also* Hans A. Linde, *Observations of a State Court Judge*, *in* JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 117, 127 (Robert A. Katzmann ed., 1988).

454. *See* Keenan D. Kmeic, *The Origin and Current Meanings of "Judicial Activism,"* 92 CAL. L. REV. 1441, 1442-43 (2004).

constitutional protections and then criticizing the judges for reaching the wrong results, legislatures often would do well by taking their own initiative.

With respect to the grand jury, a number of states have already heeded the calls of reform. Some states, such as New York and Utah, have enacted a number of legislative reforms to their state grand juries.[455] Other states have taken important first steps toward reform. Former Governor Gray Davis of California, for instance, commissioned a study of the state's grand jury that recommended a number of reforms including the presence of a witness's attorney during testimony.[456]

The grand jury is an oft-celebrated body that serves an important function within the criminal process. The list of reforms advocated in this article does not represent an attempt to weaken the grand jury or interfere with its proceedings. Rather, these reforms are intended to strengthen the grand jury so that it operates fairly and with a reasonable amount of oversight to prevent prosecutorial misconduct or overreaching. These reforms are also intended to ensure that the grand jury's indictments are worthy of respect. A system that cannot distinguish a ham sandwich from an alleged criminal should be tolerated no more.

---

455. In Utah, subjects and targets of grand jury investigations are advised of the nature of the investigation and given extensive warnings of their rights, including their right to have counsel present in the grand jury room. UTAH CODE ANN. § 77-10a-13(4) (2002). Also, the grand jurors are aided by some evidentiary rules. *See id.* § 77-10a-13(5) (limiting admissibility of hearsay to what would be permitted in a preliminary hearing and requiring prosecutors to disclose to the grand jurors when someone has asked to present exculpatory evidence to the grand jury).

New York's grand jury procedures are similar to Utah's. In fact, the National Association of Criminal Defense Lawyers report indicated that New York's grand jury was similar to the model they advocate:

> There, the rules of evidence for grand jury proceedings are virtually identical to those which govern trials. Targets have the right to testify on their own behalf and can recommend specific witnesses to the grand jury. Examination of reported decisions in New York, as well as the collective experience of Commission members from New York, reveals that procedures there have not led to the kind of inefficient mini-trials hypothesized by opponents of reform.

Federal Grand Jury Reform Report, *supra* note 244, at 19.

456. *See* Michael Vitiello & J. Clark Kelso, *Reform of California's Grand Jury System*, 35 LOY. L.A. L. REV. 513, 601 (2002).