Restoring the Grand Jury

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RESTORING THE GRAND JURY

Kevin K. Washburn*

Though it is enshrined in the Constitution, the grand jury is one of the least respected institutions in American criminal justice today. Scholars regard the grand jury just as doctors regard the appendix: an organic part of our constitutional makeup, but not of much use. While scholars have proposed reforms, most of them seem only loosely related to the fundamental purpose of the grand jury. In an era of plea bargains, the grand jury can serve a crucial role in insuring popular legitimacy in the criminal justice system. In light of the criticism, however, the grand jury seems to be failing in that role. This Article theorizes that, as the United States has become more diverse, the grand jury has lost its role as “the voice of the community.” Since a grand jury functions by majority vote and is drawn from the entire jurisdiction, the grand jury has lost its role as a countermajoritarian force of the local community against central authority. Ironically, the problem may have developed from efforts to insure diverse representation in criminal justice through unthinking adoption of the principle that trial juries should be drawn from panels representing a “fair cross-section of the community.” As the grand jury has become a microcosm of the broader melting pot, each community’s voice has been lost amid a cacophony of voices from other communities within the same jurisdiction. This has harmed citizens in poor and minority communities where legitimacy issues are most salient. No jurisdiction is just one community, and no grand jury can serve its purpose of representing a community if it is drawn from all communities. Grand juries should be reconstituted so that each grand jury represents an actual community of people who are likely to share common concerns about local issues of criminal justice.

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INTRODUCTION

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

Jury service provides a concrete opportunity for meaningful participation by everyday citizens in one of the most important—and high stakes—activities of government.2 And through their participation on juries, ordinary citizens become invested in criminal justice and government itself. Indeed, it is largely on citizen participation that the legitimacy of the American criminal justice system rests.

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

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

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1. See Miller-El v. Dretke, 545 U.S. 231, 272-73 (2005) (Breyer, J., concurring) (quoting Alexis de Tocqueville's claim that the use of juries raises the people to the bench and invests them with the direction of society).
2. See Powers v. Ohio, 499 U.S. 400, 406 (1991) (“The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system.” (citing Duncan v. Louisiana, 391 U.S. 145, 147-58 (1968))); Branzburg v. Hayes, 408 U.S. 665, 690 (1972) (“Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process.”).
indict "a ham sandwich," is so commonplace that it has become cliché.  
Consistent with such criticism, critics have implicitly or explicitly urged abolition of the grand jury or, alternatively, have offered ambitious proposals for reform. These proposals range from staffing solutions, such as giving the grand jury administrative staff or independent legal counsel, to evidentiary and procedural reforms, such as allowing the suspect to

Prosecutor's Duty to Disclose Exculpatory Evidence, 13 Geo. J. Legal Ethics 361, 365 (2000) (noting the "widespread view that this erosion of the grand jury's ability to act as a check on prosecutorial power is beyond repair"); Andrew D. Leipold, Why Grand Juries Do Not (and Cannot) Protect the Accused, 80 Cornell L. Rev. 260, 323 (1995) ("In almost all cases, a criminal defendant would be just as well off without the grand jury as he is with it."); David A. Sklansky & Stephen C. Yeazell, Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa, 94 Geo. L.J. 683, 690 (2006) ("Today, the grand jury's role makes little sense . . . .")


5. See, e.g., William J. Campbell, Eliminate the Grand Jury, 64 J. Crim. L. & Criminology 174, 182 (1973); see also Brenner, supra note 3, at 123 (noting that one solution is to abolish the grand jury through constitutional amendment); Cassidy, supra note 3, at 365; Leipold, supra note 3, at 323.

6. See Ric Simmons, Re-examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?, 82 B.U. L. Rev. 1, 22, 68–73 (2002); see also Marvin E. Frankel & Gary P. Naftalis, The Grand Jury: An Institution on Trial 123–26 (1977) (presenting an earlier proposal for counsel and transcripts); Cassidy, supra note 3, at 393–94 (proposing a reform that would require prosecutors to meet an ethical obligation not to distort the evidence or mislead the grand jury, which would indirectly require presentation of exculpatory evidence in many cases); Kuckes, supra note 4, at 17, 22 n.123, 30, 36–37, 66 (proposing reforms that would allow grand jury witnesses to bring counsel into the grand jury room with them when they testify and would allow them to have transcripts of their testimony).

7. Akhil Reed Amar, Reinventing Juries: Ten Suggested Reforms, 28 U.C. Davis L. Rev. 1169, 1185 (1995) (arguing that we should give the grand jury a staff). Professor Niki Kuckes argues that the grand jury should be allowed to use the court, rather than the prosecutor, as its advisor. Kuckes, supra note 4, at 31, 65 ("[G]ive the grand jury an independent legal adviser, selected from outside of the prosecutor's office."); see also Brenner, supra note 3, at 124–28 (outlining the advantages of giving a grand jury independent legal counsel); Ovio C. Lewis, The Grand Jury: A Critical Evaluation, 13 Akron L. Rev. 33, 64 (1979) (noting that the grand jury needs "additional resources, such as independent legal counsel, investigators, and clerical staff").
testify, prohibiting the use of hearsay testimony, forbidding resubmission of a case after a grand jury has initially declined to indict, or requiring prosecutors to offer more evidence in each case.

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

Historically, the grand jury was heralded because of its ability to serve as a check by “the people” in the local community on laws imposed by a central government that was more distant from ordinary citizens. The grand jury was intended by the Anti-Federalists to be a check on federal authority. As the Supreme Court has looked increasingly toward originalist interpretations of the Constitution to determine constitutional meaning in cases involving criminal procedure, the Court could use such an interpretive lens to restore life to the Fifth Amendment’s grand jury requirement. Today, grand juries rarely serve the purposes envisioned by the founders.

One need not be an originalist, however, to want to restore power to the grand jury. A legal realist who is skeptical of the power of the rule of law and the outcome of court decisions may also see benefits in restoring decision making to community groups that have a different agenda than judges.

One recent unusual case vividly demonstrates the importance of the purpose served by grand juries. Following Hurricane Katrina, the attorney general of Louisiana demanded prosecution of medical workers who had remained at a New Orleans hospital with critically ill patients. When numerous patients died at the hospital while awaiting rescue, the attorney

8. Simmons, supra note 6, at 19, 71.
9. Cassidy, supra note 3, at 393–94 (discussing the duty to disclose exculpatory evidence).
general focused blame on a surgeon and accused her of murdering some of the patients. When the local district attorney moved slowly to press charges, the state attorney general began an investigation and ordered a local grand jury from Orleans Parish to be empanelled to hear the charges.

As the grand jury investigation proceeded, the local community support shifted toward the surgeon. In New Orleans, she became "something of a folk hero" for staying behind to help critically ill patients. While other doctors had fled the oncoming storm, the surgeon had provided care for four days in a "sweltering" hospital that had lost electricity and sometimes reached 110 degrees until all the surviving patients were evacuated. Thirty-four patients died during the ordeal. Though prosecutors accused the surgeon of administering lethal doses of painkillers and sedatives, the Orleans Parish grand jury refused to issue indictments and instead returned a "no true bill" decision.

Viewed from the outside, this New Orleans grand jury appeared to have done exactly what the founders intended. It prevented an official exercising central statewide authority (the state attorney general) from using his power to charge a local citizen with a serious crime. Who better to make the decision to prosecute actions under such circumstances than other citizens from the same community who faced the same unusual hardships? It is this ability, rarely seen in modern grand juries, that ought to be restored.

When the grand jury is viewed in this context, it is clear that most of the existing reform proposals do nothing to restore the grand jury to its original role. In sum, this role is to serve as the representative of the views of the local community in criminal justice. To restore the grand jury to its original role, reformers must make a subtle but important shift in focus. Reform proposals ought to be focused not so much on making the grand jury more independent of the prosecutor, but on making the grand jury less independent of the people in the local community. Such a shift would not only align the grand jury more closely with its original constitutional purpose, and better serve all communities, but it might also have a particularly good effect in minority communities. It might help to restore the legitimacy of the criminal justice system in such communities by improving their democratic involvement in these important issues.

Though minority communities and the founding era’s Anti-Federalists may seem like strange bedfellows in the post-civil rights era, they actually may have something in common: a mistrust of federal (prosecutorial)

13. The attorney general also identified two other medical workers, nurses, who were later offered immunity in exchange for their grand jury testimony. Nossiter, supra note 12.
14. Id.
15. Id. (noting that hundreds of people had attended a rally in support of the doctor).
16. Id.
17. Filosa & Pope, supra note 12.
18. Id.
19. Id. Afterward, the district attorney expressed agreement with the grand jury’s decision; the attorney general, whose office had also been involved in presenting the case, criticized the grand jury’s decision. Nossiter, supra note 12.
power and a belief that such power can be an instrument of abuse of local citizens.

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

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

The unfortunate practical effects of such a regime are myriad. The districtwide grand jury that has the responsibility to review narcotics cases from the urban inner city or the violent crime case from the distant Native American reservation may have no residents from either of those communities serving as a juror. Yet, in a society that remains highly segregated, it may be far more important that each community is represented accurately and fairly in important local institutions of criminal justice, than that each community have token membership in a jurisdictionwide institution.

This Article argues for restoration of the grand jury's original role as an institution of local sovereignty that gives citizens of each community an opportunity to participate meaningfully in the criminal justice system. In accordance with the original purpose of the grand jury, the grand jury's essential task must be to express the will of the community about the prosecution of the law and, at least in some cases, to determine the legitimacy of applying a national law in the local community in a particular set of circumstances.

Part I of this Article places the grand jury both in historical context, explaining the conventional narrative as to how it earned a hallowed place in the Bill of Rights, and in contemporary perspective, explaining what this narrative might mean about the proper role of the grand jury today. It also explains the grand jury's role vis-à-vis the trial jury and explains why the grand jury may be far more useful than the trial jury in addressing the most

20. See infra text accompanying note 65.
pressing contemporary challenges in criminal justice. Part II surveys and evaluates the views of some of the leading critics of the grand jury and reviews their proposed reforms. Part III more closely examines the conventional criticism that the modern grand jury fails to serve as an adequate check on prosecutorial power and explains why this criticism is misplaced. It also discusses some of the other common analytical errors in recent works critical of grand juries. Part IV explains the grand jury’s more appropriate role as a barometer of legitimacy of criminal justice in each community and offers a theory as to why application of the Sixth Amendment’s “fair cross-section” rule has produced such pernicious results in the grand jury context. Finally, Part V offers a proposal for a new “neighborhood grand jury” model, which could restore the grand jury to its historic role and help criminal justice achieve greater democratic legitimacy at the local level.

I. ESTABLISHING THE GRAND JURY: THE GRAND JURY IN CONTEXT

A. Why Juries?

A citizen jury is a peculiar institution for making decisions. Why would a government choose to use a body of citizens, rather than a learned judge or a panel of experts, for making a criminal justice decision? Reasons abound. One obvious purpose is to imbue criminal justice with a democratic element. Judge Learned Hand called the grand jury “the voice of the community,” and it has also been likened to “the pulse of the community.” Use of a jury gives “the community,” through ordinary citizens, an important role in the provision of criminal justice.

This democratic role serves numerous valuable purposes. First, opportunities for citizen participation further the legitimacy of the entire

24. Simmons, supra note 6, at 74-75 (noting that “the grand jury provides the criminal justice system with a critical input of real-life experience, allowing the enforcement and application of criminal laws to undergo a regular review by ordinary citizens”). The grand jury is the first means of community input in the criminal justice system and is often the only such input in light of the fact that most indictments result in pleas rather than trials. Id. at 46.
25. These purposes are no less important just because they are vague. Speaking of the grand jury’s cousin, the trial jury, Justice Antonin Scalia recently hailed it as “the spinal column of American democracy.” Neder v. United States, 527 U.S. 1, 30 (1999) (Scalia, J., concurring in part and dissenting in part). Scalia seems to use the metaphor as simply meaning that the jury trial right was important or central. He fails to elaborate further on the metaphor except to explain that the jury’s power is designed to counterbalance the power of judges. See id. at 32 (noting that “the Constitution does not trust judges to make determinations of criminal guilt”).
The theory is that having members of the community involved in the process assures their investment in the process and confidence in the outcome. The citizens' familiarity with the system in turn breeds trust. Alexis de Tocqueville asserted that each citizen who serves on the jury feels invested in society and feels that he has a share in the government. Tocqueville also suggested that juries are useful in educating the citizenry; citizens who serve on a jury gain a better understanding of an important governmental process. Others have suggested that in addition to civic education, jury service works a moral transformation on the common citizen. It creates a civic responsibility that “reinforces a vision of popularly-controlled political participation.” Use of a jury may also improve the quality of the outcome, for it has often been suggested that the numerous lay people on a jury, with varying talents and perspectives, collectively have a comparative advantage over a single judge in a range of areas, from reviewing facts and understanding human nature, to understanding the moral legitimacy of the law and expressing community morality. A jury may even have a better sense of justice than a judge does.

26. “Ultimately, citizen representatives in the jury system have input” into governance which “contributes to internal legitimacy” of the government and the criminal justice system. Ethan J. Leib & David L. Ponet, Citizen Representation and the American Jury 29 (n.d.) (unpublished manuscript, on file with author); see also Simmons, supra note 6, at 70 (noting that the grand jury provides a sense of “procedural justice” that “enhances the legitimacy of the criminal justice system”).

27. Harry Kalven, Jr. & Hans Zeisel, The American Jury 7–9 (1966) (arguing that the jury diffuses suspicion that might center on a judge and even “makes tolerable the stringency” of certain unpopular decisions).

28. Ordinary anonymous citizens serving in part-time, episodic roles are more trustworthy because they offer less opportunity for corruption than identifiable full-time, long-serving government officials, such as judges. Jeffrey Abramson, We, The Jury: The Jury System and the Ideal of Democracy 32 (1994) (“A network of local juries rotating anonymous persons through its ranks was far more bribery-proof than standing panels of known judges . . . .”).


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

31. Abramson, supra note 28, at 32–33 (citing claims made by the Anti-Federalists at the time of the nation’s founding). Indeed, there is some empirical evidence suggesting that ordinary citizens serve competently in jury service. See Leib & Ponet, supra note 26, at 17 n.20 (citing studies).


33. See, e.g., Ring v. Arizona, 536 U.S. 584, 615 (2002) (Breyer, J., concurring) (stating that “jurors possess an important comparative advantage over judges [in being] more attuned to ‘the community’s moral sensibility’” (quoting Spaziano v. Florida, 468 U.S. 447, 481 (1984) (Stevens, J., concurring in part and dissenting in part))); see also Teague v. Lane, 489 U.S. 288, 314 (1989) (holding that “the purpose of the jury is to guard against arbitrary abuses of power by interposing the commonsense judgment of the community between the State and the defendant”); Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (holding that “[t]he purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken
In sum, the democratic and populist elements of the jury may be critical in maintaining trust in the criminal justice system among the citizens. However, history suggests that the grand jury has an even more specific purpose.

B. The Grand Jury in American Narrative

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

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

Grand juries in London, a predominately Protestant Whig city, twice refused to issue indictments, despite strong pressure from Crown authorities. After resisting the King’s demands, the two grand juries were widely lauded for their courage. Crown authorities later presented the case to a grand jury in Oxford, which was more sympathetic to the King, and an indictment soon issued. The stubbornness of the London grand juries, however, helped establish the reputation of grand juries as prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge”.

34. Duncan v. Louisiana, 391 U.S. 145, 156 (1968) (noting the jury’s role as a safeguard against a compliant, biased, or eccentric judge and contrasting the jury’s “common-sense judgment” with the “more tutored but perhaps less sympathetic” judgment of a judge); see also Kalven & Zeisel, supra note 27, at 106–07, 285 (characterizing the jury’s function as a guarantor of lenity and equity in dispensing justice).

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


38. Leipold, supra note 3, at 281–82.
independent of the government. As a result, the perception of the grand jury as a bulwark of citizens’ liberty reportedly was widespread in England at the end of the seventeenth century, a time when British colonists were flooding into North America.

Meanwhile, in the colonies, the first American grand jury convened in Massachusetts in 1635, and grand juries spread to other colonies soon thereafter. The early colonial grand juries worked independently and proactively, at least in part because local government was relatively limited with few or no police resources to investigate accusations.

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

Consistent with prevailing practice, the Crown presented its case to a grand jury in New York and sought an indictment. When the grand jury declined to issue the indictment, the Crown presented the case to a second grand jury, which also refused to indict. The Crown then bypassed the grand jury altogether and prosecuted Zenger on the basis of a charging instrument called an “information,” which, unlike an indictment, was not the product of a grand jury. Following a jury trial, Zenger was acquitted of the offense.

According to the historical accounts, the Crown’s extraordinary efforts to bypass the grand jury in the Zenger case stoked widespread resentment in the colonies. The resulting acquittal by the trial jury resonated widely in

39. However, subsequent to the two juries’ failure to indict, the King moved Stephen Colledge’s case to Oxford, where potential jurors had views more sympathetic to the King. Following a short trial which included Colledge’s defense notes being turned over to the prosecution, Colledge was convicted and executed on August 31, 1681. See Helene E. Schwartz, Demythologizing the Historic Role of the Grand Jury, 10 Am. Crim. L. Rev. 701, 715-16 (1972). Anthony Ashley Cooper, the First Earl of Shaftesbury, then fled the country, fearing a probable indictment from a second grand jury in his case. Thus, instead of being symbolic of the grand juries’ independence, Schwartz suggested that the Colledge and Shaftesbury cases are actually indicative of the grand juries’ vulnerability to politics. Id. at 719.

40. Leipold, supra note 3, at 283.
41. Id.; Kadish, supra note 36, at 9-10.
42. See, e.g., Leipold, supra note 3, at 283 (noting that most colonial governments had little or no police force and it was grand juries that originated accusations).
44. See Leipold, supra note 3, at 284.
the colonies, leaving a strong impression on colonial America of the importance of the role of juries in criminal justice.45

Emboldened by the outcomes of the Zenger proceedings, pre-Revolutionary American juries and grand juries "all but nullified the law of seditious libel in the colonies."46 As a result, the Zenger case helped to burnish the reputation of the grand jury. Together with the trial jury, the grand jury came to be viewed as a valuable shield against government oppression.

During the years preceding the Revolutionary War, public prosecutors appointed by the Crown sought to enforce unpopular British revenue laws in the colonies. In 1765, a grand jury in Boston refused to indict colonists who had incited riots against the notorious Stamp Act.47 And, in case after case, grand juries rejected the requests of public prosecutors and repeatedly refused to enforce what the grand juries saw as unjust and oppressive laws. The stubbornness of colonial grand juries had serious implications for British policies. Many British laws, such as the Stamp Act and other unpopular revenue measures, were rendered unenforceable in the colonies.48

The grand jury's reputation in the colonies as a shield against unjust laws was thus established by the time of the American Revolution. Inclusion of the grand jury in the Fifth Amendment seems to be based largely on widespread popular respect for the grand jury at the time of the founding.49

The important role played by grand juries in the pre-Revolution era led, apparently with very little debate,50 to the adoption of the grand jury in the Bill of Rights.51 The Fifth Amendment specifically provided that no person could be prosecuted for a felony without a grand jury indictment.52

46. Alschuler & Deiss, supra note 36, at 874.
49. Younger, supra note 47, at 44–46 (discussing state ratifying conventions in which grand juries were discussed).
50. Roger A. Fairfax, Jr., The Jurisdictional Heritage of the Grand Jury Clause, 91 Minn. L. Rev. 398, 412 (2006). But see Younger, supra note 47, at 45 (noting specific state ratifying conventions that debated “the necessity of an express guarantee of the right to indictment by a grand jury in all criminal cases”).
51. Leipold, supra note 3, at 285.
52. The Fifth Amendment guarantees the right to an indictment: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the
Grand juries were also adopted by many states, in one form or another, though in one of the early cases of the Fourteenth Amendment incorporation debate, the Supreme Court pointedly declined to hold that grand juries are essential to due process in state prosecutions.

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

The historical narrative set forth above is recounted widely by scholars and it represents the conventional wisdom as to the historical justification for the American grand jury. If this narrative is accurate, it has several implications, particularly at a time when the Supreme Court is employing originalism in constitutional interpretation. While a defense of originalism is beyond the scope of this Article, it is clear as a descriptive matter that the Supreme Court has used originalist methodology in a number of recent cases involving criminal procedure. In Crawford v. Washington, for example, the Court unabashedly—and unanimously—turned to the “historical background of the [Confrontation] Clause to understand its meaning.” Likewise, leading scholars across the political spectrum have embraced originalism in some form or another. A common tool of originalist interpretation is to identify the evil that the provision was intended, at the time of the founding, to address. By identifying such an evil, one can determine the “core, specific original purpose” of the provision. With respect to the grand jury, originalist methodology is not

Militia, when in actual service in time of War or public danger . . . .” U.S. Const. amend. V. This guarantee is incorporated into Rule 6 of the Federal Rules of Criminal Procedure, which sets forth the method for constituting a grand jury and applicable rules, such as the rule of secrecy. See Fed. R. Crim. P. 6(e)(2). A criminal defendant may waive the right to an indictment and allow the United States to proceed on the basis of a complaint or another charging instrument called an “information.” Fed. R. Crim. P. 7(b).

54. Hurtado v. California, 110 U.S. 516, 532–34 (1884). Akhil Reed Amar offers a compelling argument that Hurtado is wrong. In the context of a broader argument about incorporation generally, he argues that “due process of law” is a phrase that may have meant, essentially, “by grand jury indictment,” which was roughly the construction the English phrase had been given in British law. Amar, supra note 10, at 200–01. Hurtado was a 5–4 opinion and Amar’s opinion is strongly reflective of Justice John Marshall Harlan’s dissent in the case.
55. See, e.g., Brenner, supra note 3, at 68–76; Leipold, supra note 3 at 284–87; Simmons, supra note 6, at 4–16. Moreover, in the absence of any competing narrative, there is no reason to doubt the truth of this descriptive account.
60. Rubenfeld, supra note 57, at 1982.
new. Judge Hand once famously remarked, "We took the [grand jury] as we found it in our English inheritance, and he best serves the Constitution who most faithfully follows its historical significance . . . ."61

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

Second, in the paradigmatic cases commonly discussed in the historical narrative, the grand jury's primary method for exercising its power was not a rigorous review of facts, but a stubborn refusal to enforce general laws. In other words, the grand jurors do not seem to have disagreed so much with the prosecutor's presentations of the facts, but with the legislator's right to impose such laws, or at least the prosecutor's decision to enforce them in a given context. So, for example, the grand jurors in the Zenger case did not necessarily believe that Zenger was innocent of seditious libel; similarly, in the tax protestor cases, the grand jurors did not believe that the protesters were being wrongly accused of protesting their taxes. Rather, the conventional narrative suggests that the grand juries simply disagreed with the substance of these laws. These grand juries felt, for example, that speech critical of the government, so-called "seditious libel," ought not be illegal.62 Likewise, taxes and duties that were imposed in the absence of proper democratic representation in Parliament were invalid (hence, the popular refrain, familiar today to school children and citizens of the District of Columbia, "no taxation without representation").

In sum, the grand jury may have one important responsibility that suggests that its role is to review the sufficiency of the evidence for indictments. But the historical narrative also suggests some other roles and responsibilities: considering the legitimacy of laws, and/or considering the legitimacy of the application of those laws in a particular case. In these respects, the grand jury presumably was meant to serve a far different purpose than the trial jury has come to serve.

62. Cf. U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . ").
D. Grand Juries Versus Trial Juries in Contemporary Policy

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

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


Scholars have long encouraged greater citizen participation in criminal justice on the theory that it will increase the law's legitimacy and serve

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63. 100 U.S. 303 (1879).
64. See generally Randall Kennedy, Race, Crime and the Law (1997) (surveying and criticizing the cases).
65. For the federal system, this principle has been codified in the Jury Selection and Service Act of 1968. 28 U.S.C. § 1861 (2000).
66. 476 U.S. 79 (1986). *Batson* held that a prosecutor's peremptory challenges to all four potential African American jurors violated the defendant's equal protection rights because it "deprives the defendant of the protection against the arbitrary exercise of judicial or prosecutorial power, undermines public confidence in the judicial system, stimulates and perpetuates racial prejudices, and ignores the fact that a potential juror's race has no relation to that juror's fitness for jury service." Mark W. Smith, Ramseur v. Beyer: The Third Circuit Upholds Race-Based Treatment of Prospective Grand Jurors, 27 Ga. L. Rev. 621, 633 (1993).
67. 499 U.S. 400 (1991) (holding that the criminal defendant does not have to be a member of the same racial group as the juror on whose behalf he raises equal protection claims).
68. 505 U.S. 42 (1992) (holding that a criminal defendant's racially discriminatory exercise of peremptory challenges may also be unconstitutional).
69. See, e.g., Stephanos Bibas, Plea Bargaining Outside of the Shadow of Trial, 117 Harv. L. Rev. 2464, 2467-68 (2004) (arguing that it makes no sense to design rules of criminal procedure around trials when plea bargains are the norm).
other important democratic values. But, the prevalence of plea bargaining has drastically reduced the number of trials and robbed citizens of opportunities for direct participation in criminal justice. Plea bargaining inhibits transparency, insuring that criminal justice is run behind closed doors by insiders (judges, prosecutors, defense attorneys, and law enforcement officials) to the exclusion of outsiders (ordinary citizens and victims) who are left ill informed about criminal justice. As a result, some of the most basic purposes of juries are lost: criminal law is deprived of the legitimacy that is served when ordinary citizens are directly involved in its implementation, and the valuable jury process of debating, enforcing, and preserving societal norms rarely happens.

Some scholars are skeptical that there is any way to improve citizen participation. Professor Steve Bibas has offered partial solutions, suggesting that prosecutors “publicize accurate statistics” about the criminal justice system and invite “citizen advocates” to “serve for two weeks at a time . . . within prosecutors’ offices, consulting on proposed felony charges and dispositions.” These efforts would give “citizens a voice in criminal justice procedures” and thereby “increase the system’s legitimacy and respect in their eyes.” Likewise, Professor Angela Davis proposes the creation of “public information departments” within prosecutors’ offices that would enhance public knowledge of the prosecutorial function and a “prosecution review board,” with a review function driven by affirmative complaints and random reviews of cases.

While these proposals might help at the margins in addressing the decline of citizen participation in criminal justice, these scholars have overlooked

70. See, e.g., David Fontana, Reforming the Administrative Procedure Act: Democracy Index Rulemaking, 74 Fordham L. Rev. 81, 103 (2005); Kuckes, supra note 56, at 1317; Jason Mazzone, The Justice and the Jury, 72 Brook. L. Rev. 35, 54 (2006); Simmons, supra note 6, at 16; Jay Tidmarsh, Pound’s Century, and Ours, 81 Notre Dame L. Rev. 513, 582 (2006).
71. See Bibas, supra note 69, at 2466; see also King, supra note 45, at 41, 59 (noting that only three to ten percent of felony cases go to trial).
72. Bibas, supra note 69, at 2467–68.
73. See generally Bibas, Transparency, supra note 4.
74. Id. at 947–49 (arguing that citizen alienation from criminal justice clouds the law’s substantive message and effectiveness and impairs legitimacy and trust); see also Dan M. Kahan, Social Influence, Social Meaning, and Deterrence, 83 Va. L. Rev. 349, 362–63 (1997) (discussing the expressive impact of criminal laws).
75. Bibas, Transparency, supra note 4, at 952 (“A note of pessimism is in order.”).
76. Id. at 955.
77. Id. at 959–60.
78. Id.
80. The board would have the power to shed light on prosecutorial practices and recommend disciplinary actions of prosecutors. Id. at 463.
81. Not even Stephanos Bibas himself has much enthusiasm for his modest reform suggestions. See Bibas, Transparency, supra note 4, at 958 (“One cannot be certain, but transparency might [improve thoughtful democratic influence over criminal justice].”); id. at
a far more useful institution that is hiding in plain sight. While plea bargaining has rendered the trial jury all but irrelevant as a nexus for citizen participation, one need look only to the grand jury for an institution that can fill this citizen review role very effectively. In the federal system and in some state systems still, grand juries review nearly every felony offense. Unlike the new institutions proposed by Professors Bibas and Davis, which seem weak and easily marginalized, the grand jury is an existing institution with constitutional status in which citizens already serve. Moreover, rather than playing a mere advisory, informational, or post hoc review role, the grand jury already exercises real institutional power. The citizens on a grand jury theoretically have great independence and work in a large team. If a significant goal is improving citizen participation, why ignore the grand jury?

2. Trial Jury Nullification and Grand Jury Discretion

The prevailing legal principle—that nullification by a trial jury is illegitimate—means that a juror who abides by her oath may be required to ignore issues of racial justice that lie beneath the surface of a criminal prosecution. Theoretically, at least, the trial jury has the responsibility to adhere to a legal standard and to follow that legal standard as described by the court in jury instructions. Jurors often take an oath in which they pledge to do just that. As a practical matter, the oath restricts the juror’s lawful authority to use her vote on guilt or acquittal to express her views on racial justice. Thus, though a trial jury has the theoretical power to refuse to convict a guilty person, it has no legally recognized right to do so. Therefore, trial jury nullification is widely considered an unlawful abuse of power and an especially pernicious one because it can erode the rule of law.

The question of nullification led to an intense debate in the late 1990s between two leading African American criminal law scholars over the propriety of nullification by trial jurors. Professor Paul Butler famously argued that black trial jurors should nullify the law in prosecutions of blacks for nonviolent narcotics offenses, both to protest prosecutions of blacks for nonviolent narcotics offenses, both to protest
black offenders and also to deny the criminal justice system the legitimacy it seeks by seating black jurors.\textsuperscript{87} Professor Randall Kennedy strongly objected to this approach, arguing that nullification subverts the rule of law and, ultimately, the entire legal system.\textsuperscript{88}

Despite its intensity, the Butler-Kennedy debate related entirely to the trial jury, an institution that can be only marginally useful in addressing the underlying problem in any circumstances. In light of the rise of plea bargaining and the sharp decline in jury trials, Butler and Kennedy might as well have been arguing about the proper placement of the proverbial deck chairs on the Titanic.\textsuperscript{89}

Unlike the trial jury, the grand jury reviews nearly every felony case, at least in the federal system and in those states that use the grand jury in such a manner. And in contrast to nullification by the trial jury, which is of disputed legality and at best highly controversial,\textsuperscript{90} the grand jury has always been thought to have the power to decline to indict a guilty suspect. Such an action is entirely lawful and, based on its rich historical heritage, apparently entirely legitimate.

The Supreme Court has recently—and expressly—sanctioned the right of a grand jury to deny an indictment even where the evidence meets the legal standard of probable cause.\textsuperscript{91} This understanding is also reflected in the oaths taken by grand jurors and the instructions grand jurors are given at the outset of their work, which imbue them with more discretion than their trial counterparts. Indeed, grand juror oaths commonly instruct jurors to indict "no person through malice, hatred or ill will and require them to affirm that they will not leave unindicted any person "through fear, favor or affection, or for any reward, or the promise or hope thereof . . . ."\textsuperscript{92} By creating these very modest restrictions on grand jury discretion, this language clearly seems to affirm the existence of a broad discretion.

Some commentators have labeled the grand jury's power to decline to indict a guilty suspect "grand jury nullification."\textsuperscript{93} Others have rejected

\begin{itemize}
\item \textsuperscript{88} See generally Kennedy, supra note 64, at 301–10.
\item \textsuperscript{89} The jury nullification threat might also increase slightly the bargaining power of the defendant in plea bargaining negotiations.
\item \textsuperscript{90} See Miller & Wright, 2005 ed., supra note 4, at 482.
\item \textsuperscript{91} Vasquez v. Hillery, 474 U.S. 254, 263 (1986) ("The grand jury is not bound to indict in every case where a conviction can be obtained." (quoting United States v. Ciambrone, 601 F.2d 616, 629 (2d Cir. 1979) (Friendly, J., dissenting))).
\item \textsuperscript{92} See, e.g., Okla. Stat. Ann. tit. 22, § 324 (West 2003); \textit{see also} Idaho R. Crim. P. 6.1(c)(3); Benchbook for U.S. District Court Judges 7.08 (4th ed. 2000) (Oath to Grand Jurors). In contrast, the oath for federal trial jurors requires the juror to swear or affirm to render "a true verdict according to the law and the evidence." \textit{Id.}
\item \textsuperscript{93} Leipold, \textit{supra} note 3, at 307–10 ("Reasonable minds can disagree about whether the grand jury's nullification power is desirable, but it seems clear that this function best describes and explains the grand jury's screening role. More importantly, these are the terms on which grand jury reform should be debated: whether the power to nullify is consistent with the constitutional command, and whether it is a desirable part of a rational criminal
such rhetoric because it is misleading. Use of the nullification rhetoric invites reference to the jury nullification debate and implies that grand jury discretion is illegitimate. Since the grand jury has the lawful authority to decline to indict, the grand juror's power is more akin to the power known as "prosecutorial discretion" than jury nullification. Thus, perhaps the grand jury's power to decline to indict should more appropriately be called "grand jury discretion." In any event, the grand jury's right to refuse to indict a guilty suspect contrasts sharply with the responsibilities of the trial jury. Given that the grand jury has discretion to deny the application of law in a particular case, why ignore the grand jury?

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

It is curious that scholars have virtually ignored the grand jury, especially in the context of the jury nullification debate. One reason may be that few scholars have much respect for the modern grand jury and few seem to pay much attention to the obvious implications of the traditional historical narrative.

II. SCHOLARLY CRITICISM OF THE MODERN GRAND JURY AND LEADING PROPOSALS FOR REFORM

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

A. Conventional Criticism of the Grand Jury

Despite the widespread belief that the grand jury's role is to serve as a check on the prosecutor, the grand jury is widely criticized for failing to live up to this role. The criticism is reflected in a cliché common among academics and practitioners that a skillful prosecutor could convince a grand jury to indict "a ham sandwich." The idea animating the cliché, that the grand jury has utterly lost any independence from prosecutors, resonates widely and has come to reflect the conventional wisdom. Indeed, the only phrase that appears in the literature almost as often as "ham sandwich" is "rubber stamp." In a very real sense, the grand jury has become the laughingstock of American criminal procedure.

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

97. See supra note 4 and accompanying text.

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

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

The “ham sandwich” phrase is frequently attributed to former New York Chief Judge Sol Wachtler. See, e.g., United States v. Navarro-Vargas, 408 F.3d 1184, 1195 (9th Cir. 2005) (“This skepticism was best summarized by the Chief Judge of this state in 1985 when he
Moreover, a gap has developed between courts and the academy as to the utility of the existing grand jury. While judges continue to use image-laden rhetoric about the importance of the grand jury as a shield against the prosecutor, legal scholarship is replete with scornful language castigating the grand jury and arguing for reform. Professor Andrew Leipold concludes, for example, that grand jurors, who are not law trained and have little experience weighing evidence, are simply incompetent to second-guess a prosecutor's decision to charge. Likewise, Professor Niki Kuckes concludes that "the grand jury is not an independent institution in any meaningful sense" because it "consists of a series of panels of citizens" who serve in a part-time role and who "virtually never hear from any voice of legal authority other than the prosecutor." Professor Angela Davis notes that the prosecutor "handles the calling and questioning of witnesses" and "essentially control[s] the process." Other scholars have made similar claims. In sum, most everything said about the grand jury in modern academic literature reflects a particular understanding of the grand jury and its relation to the prosecutor, which nearly all scholars view as a subservient relationship.

publicly stated that a Grand Jury would indict a 'ham sandwich.'" (citing In re Grand Jury Subpoena of Stewart, 545 N.Y.S.2d 974, 977 n.1 (Sup. Ct. 1989)); Fletcher v. Graham, 192 S.W.3d 350, 369 n.3 (Ky. 2006) (noting that "the 'indict a ham sandwich' reference is attributable to former New York Chief Judge Sol Wachtler"). For use of the term by academics see supra note 4.

100. Leipold, supra note 3, at 269–72 (noting the gap).
101. See, e.g., Branzburg v. Hayes, 408 U.S. 665, 686–87 (1972) (discussing the grand jury's role in "protecting citizens from unfounded criminal prosecutions"); see also Wood v. Georgia, 370 U.S. 375, 390 (1962) (characterizing the grand jury "as a primary security to the innocent against hasty, malicious and oppressive persecution").
102. Professor Kuckes has noted the gap and has been highly critical of the courts for fraudulently endorsing the notion that grand juries are independent. See Kuckes, supra note 4, at 47. She accuses the judiciary of marketing an expedient fiction of grand jury independence that helps courts to appear consistent with historical traditions while actually increasing prosecutorial power. See id. at 56; see also Brenner, supra note 3, at 67 (arguing that "grand juries' continued presence invidiously maintains the illusion of a community voice"). Professor Kuckes details the ways courts use the "fiction of grand jury independence," but she is somewhat unclear on the motives. See generally Kuckes, supra note 4. She seems to assume that judges are complicit in the growth of prosecutorial power, but that growth in power has also treaded on judicial power. See generally id. The point that she does not adequately address is, why is it desirable for the court to use the fiction to achieve these results? My reading of Professor Kuckes's excellent research leads me to believe that the fiction may be more of a "comforting fiction" than an expedient one. That is, the behavior of courts may reflect naive optimism, rather than malignancy.

103. Leipold, supra note 3, at 294–95.
105. Davis, supra note 79, at 423.
106. See, e.g., Bibas, Transparency, supra note 4, at 911, 930; Brenner, supra note 3, at 73; Cassidy, supra note 3, at 365; Roots, supra note 47, at 823; Simmons, supra note 6, at 32.
B. Existing Grand Jury Reform Proposals

Consistent with the widespread criticism, several commentators have suggested that the grand jury is an irreparable anachronism, an artifact that has outlived its usefulness and that should be abolished. Other scholars have viewed the grand jury just as a doctor sees the appendix: a useless organ, but one that is unavoidable because it is part of us. Many scholars have urged reforms that would reinvigorate the grand jury. These are briefly surveyed below.

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

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

Other scholars have focused on legal counsel. Professor Kuckes has argued that the grand jury needs legal counsel outside the prosecutor’s office and suggests that the court could serve this role. Likewise, Professor Susan Brenner argues that the grand jury should be given its own independent lawyer who would serve in that role for the duration of the

107. See, e.g., William J. Campbell, Eliminate the Grand Jury, 64 J. Crim. L. & Criminology 174, 178 (1973) ("[T]he grand jury has ceased to function as an agency independent of prosecutorial influence."); Cassidy, supra note 3, at 365 ("[T]here is a widespread view that this erosion of the grand jury’s ability to act as a check on prosecutorial power is beyond repair."); Leipold, supra note 3, at 323 ("In almost all cases, a criminal defendant would be just as well off without the grand jury as he is with it."); Sklansky & Yeazell, supra note 3, at 690 ("Today, the grand jury’s role makes little sense...").

108. Brenner, supra note 3, at 123 (noting that one solution is to abolish the grand jury through constitutional amendment); see also Frankel & Naftalis, supra note 6, at 118 (citing the "powerful body of opinion that favors abolition of the grand jury"). The general debate has been occurring for a very long time. See Edwards, supra note 37, at 35 ("That the institution and its workings are open to criticism no one will question, but that the defects which are pointed out by [the grand jury’s] critics are of such a nature as to justify its abolition cannot be so readily conceded.").

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

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

111. Kuckes, supra note 4, at 31, 65 (suggesting that grand juries be given “an independent legal adviser, selected from outside of the prosecutor’s office”).

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

113. Lewis, supra note 7, at 64.

114. Kuckes, supra note 4, at 31, 65.
term of the grand jury. These proposals create an approach to grand jury reform that might collectively be called the “well-staffed grand jury.”

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

2. “Information Empowerment” Proposals

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

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

117. Andrew Leipold is in good company. In the early nineteenth century, Jeremy Bentham had criticized the grand jury as a “‘miscellaneous company of men’ untrained in the law.” Younger, supra note 47, at 56.
118. Simmons, supra note 6, at 19, 71.
119. Id. at 23, 71.
120. See Cassidy, supra note 3, at 366 (noting the duty to disclose exculpatory evidence); Kuckes, supra note 4, at 31, 65 (suggesting that prosecutors be required to provide “some quantum of exculpatory evidence to be presented”); Suzanne Roe Neely, Note, Preserving Justice and Preventing Prejudice: Requiring Disclosure of Substantial Exculpatory Evidence to the Grand Jury, 39 Am. Crim. L. Rev. 171, 171 (2002). The U.S. Supreme Court rejected such a requirement in United States v. Williams, 504 U.S. 36, 53–54 (1992) (holding that an indictment may not be dismissed solely on the basis that the government failed to present substantial exculpatory evidence to the grand jury).
121. See, e.g., Arenella, supra note 3, at 562. Several states appear to have included evidentiary rules as part of their grand jury proceedings. For example, Utah has limited the admission of hearsay to instances in which it would be admissible in preliminary hearings. Decker, supra note 53, at 395 n.455 (citing Utah Code Ann. § 77-10a-13(4)–(5) (2002)).
Though applying the rules of evidence might seem to limit the information before the grand jury, proponents argue that quite the contrary result would be achieved by adapting the hearsay rule to the grand jury; it would force the prosecution to call a range of witnesses to testify and thereby provide a much richer and more textured presentation of the facts to the grand jury. As a result, these proposals might be grouped together as "information empowerment" approaches.

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

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

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

III. RECONSIDERING THE ROLE OF THE GRAND JURY
AS A CHECK ON PROSECUTORIAL POWER

What is most striking about the prevailing criticisms and the leading reform proposals is that they seem entirely disconnected from the historical narrative that is offered to justify the existence of the grand jury in the first place. Consider the common reasons for seeking to change the way the grand jury functions.

John Decker also points out that National Association of Defense Lawyers applauded New York's application of evidentiary trial rules to grand jury proceedings. Id. at 395. For a discussion of various state evidentiary rules imposed on state grand juries, see Brenner, supra note 3, at 83–86.
123. See Arenella, supra note 3, at 558–75.
124. Id. at 572–75.
125. See, e.g., id. at 474, 539 (using the "rubber stamp" metaphor).
A. The Grand Jury as a Check on Runaway Prosecutor Power

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

This singular focus on the prosecutor in leading scholarly works seems somewhat inconsistent with the grand jury’s general purpose as suggested in the standard historical narrative of the grand jury. Professor Davis’s approach ignores the traditional American narrative of the grand jury in at least two respects. First, the seventeenth- and eighteenth-century grand juries were lionized not for their rigorous review of facts or even their careful application of a legal standard to those facts. Rather, the praise heaped on the Shaftesbury and Zenger grand juries, as well as those that refused to apply the Stamp Act in the colonies, likely had little to do with rigorous review of facts or application of law. Indeed, Zenger was almost certainly guilty of seditious libel—he criticized the government no doubt in an effort to bring scorn upon it. Likewise, presumably the tax-protecting colonists did not seriously deny that they sought to disrupt the Stamp Act; they simply disagreed about the law’s legitimacy. If the Shaftesbury and Zenger grand juries had viewed their roles in the same narrow way that modern scholars like Professor Davis seem to view them, as mere reviewers of probable cause, then these historical grand juries probably should have issued indictments. Likewise, if these grand juries merely viewed their role as carefully reviewing prosecution charging decisions for evenhandedness, or nonarbitrariness, they may still have proceeded to indict. But these grand juries had a different and, in some ways, more robust view of their role. They disagreed with the laws that the prosecutor was seeking to enforce and believed that they had the right to nullify these

126. Davis, supra note 79, at 423.
127. Id.
128. Id.
129. Another commentator, Michael Cassidy, has argued, for example, that the drafters of the Fifth Amendment sought to prevent two types of prosecutorial abuse through the grand jury. First, they sought to prevent a prosecutor from withholding evidence and, in effect, substituting his own will for the judgment of the grand jury. Second, they sought to prevent a prosecutor from pursuing an indictment not supported by probable cause in order to gain leverage over an individual. Cassidy, supra note 3, at 376–77.
130. See Leipold, supra note 3, at 309 (noting that “from outward appearances [John Peter Zenger] was guilty as charged”).
unfair laws. 131 Indeed, these early grand juries simply refused to apply British laws that were unpopular locally. They effectively nullified general or national laws that the local community deemed unjust.

This is the key lesson from the historical narrative. Despite widespread dissatisfaction with the modern grand jury’s lack of independence from the prosecutor, it is their use of their own discretion to decline to indict for policy reasons, not their rigorous scrutiny of facts, which earned these grand juries praise and ultimately a hallowed place in the Bill of Rights.

It is worth noting again that the grand jury has never lost this power. The Supreme Court continues today to recognize the right of the grand jury to refuse to indict, even in cases in which the evidence is sufficient to establish a conviction beyond a reasonable doubt. 132 And unlike the trial jury, the grand jury can nullify the law without stigma. The American grand juries in the Zenger case and in the tax revenue cases were lionized for doing so.

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

Since the grand jury was admired for its ability to nullify the law, not for its rigorous scrutiny of the prosecutor’s evidence in a particular case, almost all of the existing reform proposals seem ill conceived. Most of the existing grand jury reform proposals are designed to improve the grand jury’s ability to scrutinize the prosecutor’s factual evidence, improve the quality or quantity of facts that are before the grand jury, or improve the expertise of the citizens who serve on the grand jury. While these reforms might indeed have the effect of making indictments more difficult to obtain by the prosecutor, none seem in any way designed to bring back the aggressively independent grand jury that was willing to nullify illegitimate laws.

Indeed, rigorous review of facts is the proper domain of the trial jury. Despite the strong implication of the ham sandwich rhetoric, the grand jury’s screening or “shield” role is relatively new and it has never been very substantive. The grand jury has almost always been primarily an aid to law enforcement. 133

131. See Simmons, supra note 6, at 15–16, 23, 71 (“[T]he most celebrated cases for which the grand jury gained its reputation... had nothing to do with deciding whether the amount of evidence presented met a given legal standard.”).

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

133. Roots, supra note 47, at 831 (“Crossing the Atlantic Ocean with the first English colonists, the notion of the grand jury as an indispensable arm of law enforcement became entrenched.”).
In early history, the grand jury did not have a prosecutor to guide it. Cases were prosecuted privately. The modern approach, in which a public prosecutor brings the accusation to the grand jury, actually reins in the grand jury from its historical role. Early grand juries may not have indicted ham sandwiches, but they may well have occasionally indicted innocent citizens. Though many scholars are disappointed at the level of scrutiny that grand jurors apply to the cases brought to them by prosecutors, the grand jury's responsibility has been to evaluate the case presented by the prosecutor for probable cause, which is hardly a rigorous standard.

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

The purpose of the grand jury, in contrast, is sometimes to insure that a guilty person is not convicted, at least if the local community disagrees with the content or application of the laws. Indeed, this discretion is afforded to grand juries but denied to trial juries. This unquestionably legitimate discretion is one of the comparative advantages that the grand jury has over the trial jury. Indeed, to a grand jury acting within its discretion, the facts are sometimes irrelevant. This may be part of the reason that one detects a fair amount of ambivalence toward the grand jury by lawyers and judges.

While the trial engages in a pristine legal process with fair procedures and protections for the defendant, the grand jury reflects a more populist

135. See, e.g., Leipold, supra note 3, at 289 (criticizing many of the procedural reform proposals on the basis that the grand jury "need not, and indeed should not, replicate a trial").
137. United States v. Cox, 342 F.2d 167, 189–90 (5th Cir. 1965) (Wisdom, J., concurring) ("[T]he grand jury has the unchallengeable power to defend the innocent from government oppression by unjust prosecution. And it has the equally unchallengeable power to shield the guilty . . . ").
138. Lest this point be overstated, note that some of the debates about jury nullification in the trial jury context have begun to seep into the grand jury context. In United States v. Marcucci, 299 F.3d 1156, 1159 (9th Cir. 2002), the defendants challenged the prosecutor's failure to instruct the grand jury on its power of nullification. This issue echoes the longstanding debate in the trial jury and may cause the issues to merge to some degree. See also Gregory T. Fouts, Note, Reading the Jurors Their Rights: The Continuing Question of Grand Jury Independence, 79 Ind. L.J. 323, 325 (2004) (criticizing the Marcucci court for refusing to require the instruction of grand jurors about their nullification right).
political influence, with fewer protections. As Judge Hand explained it, the grand jury is

the voice of the community accusing its members, and the only protection from [its] accusation is in the conscience of that tribunal.... [This constitutes] an irresponsible utterance of the community at large, answerable only to the general body of citizens, from [which the grand jurors] come at random, and with whom they are again at once merged.\(^{1}\)

This is not a particularly ringing endorsement. Judge Hand clearly viewed the grand jury, in some senses, as a populist and lawless mob.

To be effective in the traditional sense that earned it enshrinement in the Fifth Amendment, however, the grand jury must be populist in nature. It need not be concerned with facts; rather, it should scrutinize policy and law.\(^{4}\) It is this role that should be restored.

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

In a very real sense, those scholars who seek to use the grand jury to rein in prosecutorial power are simply aiming too low. They may well be blinded by antipathy for the prosecutor and that institution’s increasing power in modern criminal law.\(^{141}\) But it is not prosecutors who make the laws that vest prosecutors with power; rather, it is legislatures. The grand jury’s ability to nullify a law is a negative power, not an affirmative one, but it can make a powerful political statement about the legitimacy of a law and can effectively render any law a dead letter.

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

\(^{139}\) In re Kittle, 180 F. 946, 947 (C.C.S.D.N.Y. 1910).
\(^{140}\) See generally Tomer, supra note 48 (suggesting that grand jurors ought to be told of the capital ramifications of their actions, which reflects an appreciation for the distinctly political role of grand juries).
\(^{141}\) Some of the scholarship seems to blame the grand jury for ever broader prosecutorial power as though the grand jury was the source of the power. But it is, of course, the legislature, not the grand jury, that gives the prosecutor power.
B. Wrong Turns in Grand Jury Scholarship

It is remarkable how frequently scholars have parroted the standard historical narrative set forth above and then offered procedural reforms that seek to transform the grand jury into a far different institution than it was at the time of the founding.\textsuperscript{142} For the most part, scholars have ignored the clear implications of the historical narrative, that is, that the shining purpose of the grand jury is to decline to enforce a valid law, whether because of the law itself or in the context of particular facts.\textsuperscript{143} Many of them have done so by characterizing the nature of the role of the grand jury incorrectly, often leading them to misunderstand the purpose of the grand jury. Some of these errors are discussed below.

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

Many of the critics of prosecutorial power view the grand jury as an essentially neutral participant and focus their reform efforts on how to provide greater fairness between the defendant and the prosecutor (on the explicit premise that the grand jury—and criminal justice authority in general—has tilted too far toward the prosecutor).\textsuperscript{144} This approach reflects a 1960s view of criminal justice, which pitted the prosecutor against the defendant in a battle over basic procedural ground rules. This approach reached its zenith, perhaps, in cases like \textit{Gideon v. Wainwright}\textsuperscript{145} and \textit{Miranda v. Arizona}.

While it is natural, in an accusatorial and adversarial system, to see the process of justice as a competitive event between the prosecutor and the defendant and his counsel, this approach dramatically oversimplifies the interests at stake and elides the considerable nuance present in the process of criminal justice.

Indeed, our understanding of the criminal justice system, and its purpose, has become much more complex in recent years. Modern criminal procedure recognizes many legitimate institutional participants in the criminal justice system beyond the prosecutor and the defendant. The 1980s and 1990s, for example, saw the rise of the role of the victim. The victims’ rights movement and aggressive advocacy on behalf of the victim

\textsuperscript{142} See, e.g., Simmons, supra note 6, at 8–12 (discussing the Shaftesbury and Zenger cases); \textit{id.} at 70–72 (suggesting reforms such as abolishing representation of cases by prosecutors and abolishing grand jury secrecy); \textit{see also} Brenner, supra note 3, at 68–71, 70 n.16 (citing the Zenger case); \textit{id.} at 121–29 (suggesting reforms such as providing a grand jury counsel for federal grand juries and empaneling a regional grand jury to investigate government operations within its region).

\textsuperscript{143} Leipold, supra note 3, at 307–08 (“This explanation of the grand jury’s role may explain much of the folklore that surrounds the institution.”).

\textsuperscript{144} See, e.g., Decker, supra note 53, at 343 (presenting “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”).

\textsuperscript{145} 372 U.S. 335 (1963).

\textsuperscript{146} 384 U.S. 436 (1966).
has made the victim a very real participant in the criminal justice system. While the victim was always present in the background, some of the modern developments move the victim from a place in the back of the courtroom to a much more substantial institutional role in the disposition of criminal cases. Indeed, the victim now has a legally protected role in criminal trials and sentencing. In many jurisdictions, the victim must be consulted prior to disposition of cases outside trials. At least one scholar has even suggested that victims ought to be given a Gideon-like right to counsel to represent them at trial. While the newly invigorated role of the victim is problematic in a variety of respects, and therefore controversial, it cannot be ignored. Because the victim's interests are often different than, and often in conflict with, the interests of the prosecutor, the presence of the victim undermines the existence of a dualistic criminal justice universe that some scholars stubbornly continue to observe.

The Supreme Court has also worked aggressively in recent decades to increase (or perhaps restore) the status of the jury in the criminal justice system. In Duncan v. Louisiana, for example, the Court underscored the importance of “community participation in the determination of guilt or innocence.” Likewise, in Williams v. Florida, the Court highlighted “community participation” and the sense of “shared responsibility” that results from group decision making. These themes have grown even stronger in the last decade. In a very recent series of cases, the Supreme Court has reasserted the importance of the jury in finding facts relevant to guilt and sentencing in criminal cases. As a result of these cases, the jury

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147. Paul Gewirtz, Victims and Voyeurs at the Criminal Trial, 90 Nw. U. L. Rev. 863, 868 (1996) (“[N]o movement in criminal law has been more powerful in the past twenty years than the ‘victims’ rights’ movement, which has sought to enhance the place of the victim in the criminal trial process.”).
150. See Tom Lininger, Bearing the Cross, 74 Fordham L. Rev. 1353, 1398–1400 (2005) (recommending that victims in rape cases be represented by counsel at government expense).
152. See Lininger, supra note 150, at 1398–1400.
is a force that must be reckoned with much more often in sentencing. Since much of the rhetoric about the jury suggests that the role of the citizen juror is to represent the public at large, and the community in particular, the increasing institutional role of juries at trial and in sentencing reflects the increasing status of the public and the community in criminal justice.\footnote{56}

As a result of both the victim and jury developments, there are additional legitimate participants in the criminal justice system that represent interests other than those represented by the prosecutor and the defendant. The criminal case is no longer simply a battle between a prosecutor and a defendant in a neutral forum. It is much more nuanced. It involves a range of different institutional players, each with a different legitimate interest in the criminal justice system. Thus, it is utterly simplistic to assess the value of the grand jury solely as it relates to the balance of power between the prosecutor and the defendant.

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

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

Other critics view the grand jury as a key institutional player, but overemphasize the importance of the balance of power between the grand jury and the prosecutor.\footnote{57} This approach also presents a false dichotomy and likewise fails to account for critically important actors.\footnote{58}

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

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"[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (internal quotation marks omitted)).
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156. That jury trials are waivable means that the use of the jury is subject to the control of the defendant. This is somewhat antithetical to the view that the community has an independent right to be involved in criminal justice. However, it does reflect that the community has a right to participate when there is controversy about guilt. One scholar has made a compelling argument, based on historical practice and precedent, that the Court erred when it held in \textit{United States v. Cotton}, 535 U.S. 625 (2002), that the right to a grand jury indictment is waivable by the defendant. \textit{See generally} Fairfax, supra note 50. If the Court read the Fifth Amendment to require indictment by grand jury to establish the court’s jurisdiction in a criminal case, there would be a much clearer legal claim buttressing the standing of the community in criminal cases.

157. \textit{See supra} Parts II.A-B.

158. In an insightful article, Professor Kuckes breaks out of these characterizations and focuses heavily on the grand jury’s democratic purposes. \textit{See generally} Kuckes, supra note 56. Professor Kuckes, however, creates her own false dichotomy that limits her analysis. \textit{See infra} Part II.B.3.
of the local community, a veto over national or state laws that the local community deems illegitimate or that are not appropriate in a given case.

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

Likewise, the view of the grand jury merely as a protector of the accused is far too narrow. The grand jury is an agent of the local community, with the responsibility to provide local community input (and potentially a veto) on the law that the prosecutor seeks to enforce as an agent of the legislature. The grand jury not only has the interests of the defendant in mind, but also the interests of the community. The protection that the grand jury offers the defendant may be justified precisely because the defendant is a member of the community. After all, protecting each individual member of the community from overreaching by the government is the best way to protect the entire community.

In some respects, the prosecutor and the grand jury are merely agents. As the prosecutor is effectively an agent of the state or national legislature, the grand jury can be seen as an agent of the community and its job is to protect the community from unjust applications of the state or national laws. If this is the proper light in which to view the grand jury, the question is not how to make the grand jury more independent of the prosecutor, but how to make the grand jury less independent of its own community. In other words, if there is a problem with the grand jury, it may be in the nature of an agency problem between the grand jury and the community it is theoretically constructed to represent.

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

3. Grand Jury as Executive, Judicial, or Legislative Actor

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

Another false dichotomy about the grand jury is set forth in an article by Professor Kuckes which suggests that at times the Supreme Court has treated the grand jury as a judicial actor and at other times as a prosecutor. Using this duality as an explanatory device for the muddled nature of grand jury jurisprudence, she makes a seductive argument that the path out of the confusion is to select only one of these roles for the grand jury and to stay true to it. She then characterizes the grand jury as “a democratic force within the prosecutorial function” and concludes that the grand jury ought to be seen as a sort of “democratic prosecutor.” If the grand jury is a prosecutor, then it follows that a defendant ought to have greater procedural rights before the grand jury. Though this conclusion might be convenient for one who wishes to enhance procedural rights for defendants, it is not very compelling, for several reasons outlined below.

A real insight in Kuckes’s work is the separation of powers approach that she suggests as a mode of analysis. In setting the question up as a dilemma, a binary decision between prosecution and adjudication, however, Kuckes has oversimplified the issue. Our system of government recognizes at least three different roles with regard to the criminal laws. Indeed, in our tripartite system of government, the question of the role for the grand jury actually presents not a dilemma but a “trilemma.”

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

If the grand jury is not exercising an executive-prosecutive function, does it follow that the grand jury is better characterized as exercising a judicial role? Well, yes, perhaps, at least to the extent that it is ruling on probable cause. But while the grand jury nominally adjudicates for probable cause, it

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159. See generally Kuckes, supra note 56.
160. Id. at 1299–1309.
161. Id. at 1299.
162. Id. at 1313.
163. See generally id.
was not canonized for its ability to measure the facts against a legal standard of probable cause. Indeed, when it acts in its heroic historical role, the grand jury is not usually applying law at all, but defying it. This would hardly seem to be a judicial action.

Under the three obvious options available for selection in an American model of governance, the elimination of the executive and the judicial role leaves one other obvious option: a legislative role. And this characterization fits better than one might expect. While Professor Kuckes characterizes the citizen participatory role of the grand jury as a “homeless theme” that runs through the jurisprudence, that theme is homeless only if one creates a false dichotomy that creates no place for it. Such a false choice ignores the compelling purpose reflected in the historical narrative which suggests that the role of the grand jury was sometimes neither to prosecute, nor to adjudicate, but to serve a policy- and law-making (or at least law-blocking) role. In many respects, the grand jury is a quasi-political body designed to exercise local popular sovereignty.

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

The obvious implication of the conventional historical narrative of the grand jury is that it was enshrined in the Bill of Rights for its ability to undermine unpopular laws or to block their application in the local community (either generally or in particular circumstances). Its job, in other words, seems to have been simply to serve as a local institution of popular sovereignty, a local check on general laws. Blocking a law is not necessarily a prosecutorial function nor an adjudicative function, but a political and somewhat legislative one. Indeed, in seeking to determine whether a government actor is behaving in a legislative or an adjudicative capacity, we frequently look to factors such as whether there is an individualized determination, based on “adjudicative facts” or one based on general, sometimes called “legislative,” facts. In

165. Kuckes, supra note 56, at 1300. Even Professor Kuckes recognizes the grand jury’s “democratic” elements. Id.
166. One of the best reform proposals suggests that grand juries ought to be told of the capital ramifications of their actions. See Tomer, supra note 48. Such a reform is particularly insightful because it credits the distinct political role of the grand jury.
167. According to one Revolutionary-era source, the grand jury is “a body of truth and power inferior to none but the legislature itself.” Younger, supra note 47, at 41 (quoting 1 The Miscellaneous Essays and Occasional Writings of Francis Hopkinson, Esq. 229–35 (Phila., T. Dobson 1792)).
168. For the constitutional distinction as it arises in the context of ordinary administrative law questions of due process, compare, for example, Londoner v. City and County of Denver, 210 U.S. 373, 385–86 (1908) (holding that an agency decision as to a tax on an individual taxpayer requires a hearing), with Bi-Metallic Investment Co. v. State Board of
the paradigmatic Zenger case, the grand jury likely was not making an individualized judgment about the facts related to Zenger’s guilt, but was operating at a policy level, expressing its view that seditious libel is not a crime that should be prosecuted.\textsuperscript{169} It was making its decision based on legislative facts. Thus, one can argue that the grand jury is better viewed as a political actor that exercises legislative power, though only negative and not affirmative legislative power.

The grand jury’s power is somewhat akin to the President’s veto power, though it is much narrower because the grand jury only works in specific cases and has only limited geographic jurisdiction. Likening the grand jury to the President might, at first blush, suggest that the grand jury is exercising an executive rather than a legislative role. But the President’s veto power is not an executive power at all; it is a legislative power.\textsuperscript{170}

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

Another distinction sometimes suggested is that trial juries and trial jurors are officers of the courts.\textsuperscript{171} Grand juries, on the other hand, exercise an authority that is independent of the courts and not subject to judicial supervision.\textsuperscript{172} These existing legal rules support the view of the grand jury as an institution that is neither strictly prosecutorial, nor strictly judicial, but sometimes exercises political or quasi-legislative powers.

\textit{Equalization}, 239 U.S. 441, 445 (1915) (holding that an agency decision that applies to all equally does not require a hearing).

\textsuperscript{169} See \textit{supra} notes 43–44 and accompanying text.

\textsuperscript{170} Most of the President’s powers are considered executive powers, but when the President decides to exercise the veto, the President is participating in the legislative process. Indeed, the President’s veto power is described in Article I, Section 7. \textit{E.g.}, \textit{INS v. Chadha}, 462 U.S. 919, 951 (1983); Vasan Kesavan & J. Gregory Sidak, \textit{The Legislator-in-Chief}, 44 \textit{Wm. & Mary L. Rev.} 1, 4–5 (2002).

\textsuperscript{171} \textit{United States v. Arredondo}, 349 F.3d 310, 318–19 (6th Cir. 2003) (“Jurors and veniremen are officers of the court. Their conduct is governed by a separate section of the federal contempt statute, 18 U.S.C. § 401(2) (prohibiting ‘misbehavior’ by a court officer), as well as the generally applicable contempt provision of 18 U.S.C. § 401(1).”). Consider that prosecutors are also officers of the court, though the supervisory power of the court is somewhat limited due to separation of powers concerns.

\textsuperscript{172} \textit{See United States v. Williams}, 504 U.S. 36, 47 (1992) (asserting that “the grand jury is an institution separate from the courts,” over which the courts “do not preside” and have no supervisory authority).
C. The Deeper Ramifications of Grand Jury Discretion

To be fair, some critics may have downplayed the implications of the historical narrative that portrays the grand jury as a political institution because they are troubled that broad grand jury discretion is akin to nullification by the trial jury. Consider Professor Leipold's objection:

The danger in giving the power to nullify to a group of unelected, anonymous, and unaccountable citizens is that they are free to use that power in illegitimate ways, precisely because they are unaccountable. The power to nullify is, at least in the particular case, the power to frustrate the presumptive will of the electorate to enforce the criminal law when the evidence shows that a crime has occurred. Although nullification is case specific, and may not even be permanent as to that target, it can be a potent force for frustrating legitimate societal objectives.\textsuperscript{173}

While this is a legitimate objection and one that causes serious consternation in the trial jury nullification context, the obvious implications of the historical narrative of the grand jury require us to grapple with such a role. Indeed, if the historical narrative means anything, it may well mean that "frustrat[ing] the presumptive will of the electorate" is an important job of the grand jury.\textsuperscript{174}

One might well find it curious that the constitutional founders, who created a new central government, would create a government institution that was mythologized precisely because of its ability to frustrate central government authority. The grand jury was perceived as a valiant and heroic institution when it was used to obstruct the power of the distant Crown. But when the founders retained the grand jury, they created an institution that could obstruct laws enacted through a democratic process.

Presumably, laws that were made right here on American soil are less offensive than laws made in England. Indeed, the Federalists argued against the use of juries for just this reason.\textsuperscript{175} We might expect grand jurors to be less aggressive in blocking laws that were enacted on their behalf by their own representatives. The need for such a political function is simply less compelling in this context. However, the Anti-Federalists feared central authority in general and it was for this reason that they insisted on the Bill of Rights.

One could wonder whether such a countermajoritarian institution is necessary in a democratic society. And one might also wonder about the wisdom of the founders in creating such an institution. But they did create it. Retention of the institution is clearly consistent with the mistrust of central authority that is apparent throughout the Constitution and the Bill of

\textsuperscript{173} Leipold, \textit{supra} note 3, at 309.
\textsuperscript{174} Id.
\textsuperscript{175} Abramson, \textit{supra} note 28, at 33 (noting that Federalists accused those who wanted to maintain the local jury of "fighting old battles" against the British Crown because, with democratic representation of local views in the legislature, Federalists thought juries were no longer necessary).
Rights. This mistrust often extended to authority that was democratically elected.

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

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

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

IV. THE GRAND JURY AS BAROMETER OF LEGITIMACY AND A THEORY OF WHAT WENT WRONG

While conventional criticism of the grand jury in scholarship is ill founded to the extent that most of it is entirely unmoored from the grand jury’s original purpose and overly focused on the role of the grand jury vis-à-vis the prosecutor, criticism of the role of the grand jury in modern criminal justice may nevertheless be appropriate. Whether one accepts the conventional wisdom that the grand jury should act more independently of the prosecutor, or the more nuanced view presented here—that the grand jury’s role is to represent the local community and thus act more independently of all the instruments of central authority, including the state or national legislature—a good deal of evidence suggests that the modern grand jury tends not to act very independently in either sense. The grand jury today rarely rebuffs a prosecutor on a request for an indictment and

176. Leipold, supra note 3, at 286.
177. Simmons, supra note 6, at 14, 19; see also Alschuler & Deiss, supra note 36, at 890–92.
178. Presumably, however, these dire consequences occurred only because significant portions of the relevant communities were denied participation as jurors in criminal justice processes.
thus rarely nullifies the law. According to much of the academic literature, prosecutors achieve success rates above ninety-nine percent in obtaining indictments from grand juries.179

It is true that a high success rate for prosecutors seeking indictments is not necessarily problematic. It could reflect positively on the cases that prosecutors choose to bring to grand juries. Such statistics could reflect, for example, simply that communities are generally pleased with the laws being prosecuted and the local application of those laws. It could mean that the laws are legitimate in virtually every application and that the grand jury simply has not had an opportunity to use its powers to block prosecutions. In short, the high success rates may be due to the fact that prosecutors are highly skilled in reading, and adhering to, the grand juries’ preferences. On the other hand, the high indictment rate may reflect the failure of the grand jury to exercise properly its constitutionally envisioned function of protecting local communities from the unfair application of locally unpopular laws enacted by a central authority. Under the current regime, it is simply impossible to know which account is correct.

From another vantage point, however, it is easy to conclude that the grand jury is not living up to its constitutionally envisioned role. For decades, the American criminal justice system has suffered withering criticism related to race and discrimination. This criticism strikes directly at the legitimacy of the system.180 The historical narrative suggests that the best way to find out what the community thinks about the legitimacy of a general law is to ask the local grand jury for an indictment to enforce it.

Return now to the debate in which the question of the community’s recognition of the legitimacy of criminal justice arose: the context of powder versus crack cocaine sentencing disparities. Professor Kennedy argued that African American members of Congress from predominantly African American congressional districts pushed for harsh penalties for the distribution of crack cocaine.181 On this basis, Professor Kennedy suggested that black communities might well support such sentences; he used this argument as a basis for undermining those who criticized the crack/powder disparity.182 Other scholars strongly disagreed.183


181. Kennedy, supra note 64, at 370–72.

182. See id.
Ultimately, the debate was inconclusive, however, because it is simply impossible to determine how much support punitive narcotics laws have had within the communities most ravaged with drugs and prosecutions.

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

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

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

Why is today’s grand jury refusing to address important issues of criminal justice policy? Theories abound. Professor Brenner, for example, notes that as the laws have become more complex jurors have been forced to rely much more on the prosecutor to understand them.\footnote{Brenner, supra note 3, at 67 ("At worst, grand juries’ continued presence invidiously maintains the illusion of a community voice. This lulls corrective action and permits increased prosecutorial abuse.").} Professor Leipold makes a similar, though slightly more nuanced point. He suggests that grand jurors are not effective in screening cases because probable cause is a vague and fluid standard best understood by people who have seen numerous cases and have internalized the “pattern recognition” of probable cause in actual cases.\footnote{Leipold, supra note 3, at 300–02.} These theories are not very compelling, however. It is hard to believe, for example, that today’s narcotics laws are any more complex than the laws applied by colonial grand juries, such as seditious libel or the Stamp Act. Likewise, probable cause is not difficult to understand; it is simply a fairly low bar.\footnote{See Angela J. Davis, Arbitrary Justice: The Power of the American Prosecutor 26 (2007). “Probable cause is the lowest legal standard on the legal spectrum” and “is easy to meet.” Id.}

In her incisive critique of prosecutors, Arbitrary Justice, Professor Davis makes several compelling arguments as to why grand juries fail to serve as an adequate check on prosecutors. First, the grand jury is institutionally weak; it is composed of “ordinary citizens without legal training.”\footnote{Id.} Second, while the grand jury can call additional witnesses, the grand jurors “don’t usually know enough about the case to know which witnesses to
call."  

Third, "[g]rand jurors don’t know the criminal statutes or how to apply them, so they must rely on the prosecutor."  

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

This Article offers a theory. One obvious difference between the pre-Revolutionary grand juries and grand juries today is the inclusiveness of the juries and the diversity of the communities they represent. Early American grand juries were far better at representing their communities than modern grand juries. In those times, most of what counted as a relevant "community" for purposes of government were narrowly defined to include a limited group of people, white male property owners, who had much in common. Consistent with the then-prevailing construction of the political community, colonial and early American juries were composed entirely of members of this very narrow class. These grand juries represented communities that were homogeneous and exclusive. In facing a common enemy abroad, these communities had political interests that were very closely aligned. In the years since, the American citizenry has become much more diverse. To some degree, juries have come to reflect this diversity.

In other words, while the grand jury as a legal institution has changed slightly in the past two centuries, the grand jurors—and the political communities that they represent—have changed tremendously. In an increasingly diverse world, the average grand jury simply may no longer be composed of a community of people with common interests. It may well be that changes to the demographics of the grand jury, rather than the changes to the legal institution, explain the decline in grand jury

188. Id.  
189. Id.  
190. See id. at 25–30, 38.  
191. Professor Adam Samaha has described these communities as "comparatively tiny, crowded against the eastern seaboard, economically backward, isolated by crude transportation and communication technology, tolerant of one human being owning others, wedded to narrow gender roles, [and] religiously parochial." Adam M. Samaha, Dead Hand Arguments and Constitutional Interpretation, 108 Colum. L. Rev. (forthcoming Apr. 2008) (manuscript at 16, on file with author). One can see why such communities might be far more cohesive, at least in contrast to today’s more diverse jurisdictions.  
193. Id. at 868.  
194. Some have noted the striking inability of the trial juries to keep pace with the increasing diversity of American society. See Nancy J. King & G. Thomas Munsterman, Stratified Juror Selection: Cross-Section by Design, 79 Judicature 273, 273 (1996). In 1990 one of four Americans claimed nonwhite ethnicity, while in 1960, "90 percent of Americans were white, and most of the remaining 10 percent were African American." Id.
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independence. As the grand jury becomes more diverse, it is much less likely to represent a unified voice. A more diverse grand jury is likely to be more divided. An institution that is divided, in turn, is weaker than one that is unified. In some senses, this change has the clear effect of shifting power from the grand jury to the prosecutor (and even the legislature).

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

B. The Failure of the Cross-Sectional Ideal

In nearly a century and a half since the Civil War, the Supreme Court has repeatedly addressed problems related to racial composition of juries.195 As the United States grew and became more diverse, and as women and members of minority groups earned the right to vote and serve on juries, courts worked to address the changing demographic circumstances. The legal principle that has emerged in this jurisprudence is that a defendant is entitled to a jury selected from a broader jury venire that fairly represents the entire community. The legal hook for this principle resides in the Sixth Amendment. Its guarantee of an “impartial” jury in a criminal trial has been interpreted to require that trial jurors be chosen from a venire that represents a “fair cross-section” of the community.196

In the context of a trial, the cross-sectional ideal can be very useful in assuring a fair jury to the defendant and for members of the various minority communities within the jurisdiction. At trial, most American courts require a unanimous verdict to convict.197 Thus, every vote counts. A single stubborn member of the jury can theoretically withhold a vote in favor of conviction, insuring that a minority community’s voice has an opportunity to be heard in the deliberation process.

While the “fair cross-section” principle seems sensible in the abstract, it has not produced satisfactory results in achieving ideal jury composition in practice for a variety of reasons. First, the rule has been enforced only in a very broad fashion.198 Appellate courts have recognized that it is

195. See generally Kennedy, supra note 64.
197. See Patton v. United States, 281 U.S. 276, 288 (1930) (holding that unanimity is one of the “essential elements” of a federal criminal jury trial); Fed. R. Crim. P. 31(a) (requiring a unanimous verdict).
198. See generally Jeffrey S. Brand, The Supreme Court, Equal Protection and Jury Selection: Denying That Race Still Matters, 1994 Wis. L. Rev. 511 (criticizing the failure of the jurisprudence to achieve real inclusion of members of minority groups on juries).
improbable or impossible for a court to achieve a jury venire that constitutes a perfect cross-section of the community. Because of the practical difficulties in obtaining a perfect cross-section, however, courts have accepted wide deviations from the perfect cross-sectional ideal. In some cases, these deviations have seemed to overcome the ideal. In many cases, the courts have upheld jury venires that not just marginally but substantially failed to capture the racial diversity in the jurisdiction. In the worst cases, the venires are grossly disproportionate to the racial demographics of a given jurisdiction, yet the venire meets the very low legal standard that the courts have defined.

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

This criticism is not new. In the vast legal literature on juries, numerous commentators have noted problems in achieving racially diverse juries. Among the suggested solutions are to use race conscious jury venire or panel-selection techniques. As our jurisprudence has grown ever more hostile to race consciousness and affirmative action, however, such efforts

199. See Holland v. Illinois, 493 U.S. 474, 477–80 (1990). Justice Scalia, writing for the majority, opined that the Sixth Amendment guaranteed the defendant a jury drawn from a fair cross-section of the community, but not a jury representative of the community’s racial and ethnic composition. Id.

200. In evaluating jury venires in a fair cross-section analysis, the courts tend to measure the “absolute disparity” between the demographics of the jury venire and the demographics of the jurisdiction by simply subtracting the former from the latter. So, for example, if African Americans constitute ten percent of the population within the jurisdiction and make up only one percent of the population on the jury venire, then the “absolute disparity” is nine percent. Such a disparity might well be found constitutional. See, e.g., United States v. Butler, 611 F.2d 1066, 1069–70 (5th Cir. 1980) (holding an absolute disparity of less than ten percent to be constitutionally insignificant). As a result, juries are routinely found constitutional even if they dramatically fail to mirror the population of the jurisdiction. Id.


202. Alschuler, supra note 201, at 731–41 (outlining several possible methods and citing the strengths and weaknesses of each); see also King, supra note 201, at 760–75 (summarizing approaches).
are likely to fail. Moreover, as argued below, the cross-sectional ideal may be failing to serve any useful purpose in the grand jury context.

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

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

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

Second, when the fair cross-sectional ideal is applied to a statewide, countywide, or districtwide community, each minority community's minority status will be reflected in the grand jury. In that sense, the fair

203. King, supra note 201, at 734 (noting that race conscious jury selection policies are suspect for a variety of reasons under modern cases). Professor Nancy King's predictions seem to be bearing out. See Parents Involved in Cnty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2768 (2007) (overturning a school integration plan that relied on racial classifications in efforts to fill slots for an oversubscribed school, with Chief Justice John Roberts famously saying that ""[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race"); Gratz v. Bollinger, 539 U.S. 244, 246, 275 (2003) (holding that a race conscious school admissions policy was not sufficiently narrowly tailored to survive scrutiny).

204. See Wayne R. LaFave, Jerold H. Israel & Nancy J. King, 4 Criminal Procedure § 15.4(d) (3d ed. 2000) (citing Hobby v. United States, 468 U.S. 339 (1984)); see also Powers v. Ohio, 499 U.S. 400, 409 (1991) (holding that the Equal Protection Clause bars a prosecutor from using peremptory challenges to exclude potential jury members solely on the basis of race); United States v. Rodriguez-Lara, 421 F.3d 932, 940 (9th Cir. 2005) (""The selection of a grand or petit jury in violation of either the equal protection or the fair cross-section guarantee is structural error that entitles a defendant to relief without a demonstration of prejudice."").

205. Fed. R. Crim. P. 31(a) (requiring a unanimous jury verdict); see also Ethan J. Leib, Supermajoritarianism and the American Criminal Jury, 33 Hastings Const. L.Q. 141, 142 (2006) (discussing the widespread adherence to the jury-unanimity rule in state courts).
cross-sectional ideal seems designed to prevent any community from having a grand jury that fully represents it. In this way, the fair cross-section principle has transformed the grand jury from a countermajoritarian institution to one that simply reinforces the power of the entrenched majority.

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

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

Put another way, in seeking to create a grand jury that constituted "a fair cross-section of the community," courts have emphasized the cross-sectional ideal at the expense of the community ideal. It is likely that the early grand jury was respected and deemed to be effective because it expressed the will of the local community. It was able to express that will, however, only because it was tightly connected to the community it represented.

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

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

V. RESTORING THE INDEPENDENCE OF THE GRAND JURY

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

In the eras of Zenger and later the Stamp Act protests, the interests of the community and its grand jury presumably were well aligned. In each instance, the grand jury took actions that earned it praise from the local community. Early American grand juries represented communities that were smaller and much less diverse. Grand juries consisted of educated and propertied white males and they no doubt represented similarly situated citizens quite well. Women and nonwhites were nonentities, as a legal matter; the grand jury was not expected to represent their interests. As jurisdictions grew larger and more diverse, they came to be composed of more and more communities. But instead of multiplying, grand juries remained static, defined by very broad geographic terms, not narrow community ones. As the world has become more diverse, the grand jury has thus failed to remain relevant.

The way to restore the “independence” of the grand jury, and really the essential purpose of the grand jury, is to recognize the grand jury’s political and representative nature and to restore the attributes that would allow it to maintain relevance. The insight offered by Professors Albert Alschuler and Andrew Deiss that the grand jury’s “role in American civic life declined” as its “composition became more democratic” ought to be viewed as a profound tragedy. The grand jury has an important role to play in a governmental system that necessarily sacrifices local legitimacy when it locates power in various central (and distant) governmental authorities. One way to restore the legitimacy of criminal justice is to return the grand jury to its role as a democratic institution of popular sovereignty.

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

206. A second factor was, perhaps, the prestige of the grand jury. In those early days, the “community” that the grand jury represented was an elite community composed of educated white male property owners, and the grand juries were often created by asking leading or “key” members of the community to select the members. See generally Sara Sun Beale et al., Grand Jury Law and Practice § 3:6 (2d ed. 2005). Although the “key man” system of selecting jurors has not been struck down, it has been much more rigorously policed, and grand juries now tend to be composed of ordinary citizens whose names are drawn from public roles, not “key” ones drawn from the community elite. See id.

207. Alschuler & Deiss, supra note 36, at 867–68.
A. The "Neighborhood Grand Jury" or the "Grand Jury by Zip Code"

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

Though "propertied white males" was an artificial community that looks too narrow in hindsight, the grand jury presumably represented that constituency well. On the community's behalf, the grand jury refused to apply laws enacted by a central government that were unpopular locally. While no one would argue for a return to grand juries composed only of propertied white males, one who yearns for the return of the "independent" grand jury may well wish for a grand jury that better represents each community and that is more tightly constructed. By giving community members a much more meaningful role in criminal justice, such a grand jury could help to restore the legitimacy of criminal justice in each community.

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

Instead of a districtwide or countywide grand jury, each jurisdiction should construct numerous "neighborhood grand juries" that represent much smaller constituencies and that are thus likely to be more closely aligned with the communities (or neighborhoods) that they represent. Consider perhaps a "grand jury by zip code" approach. A grand jury in each zip code would vastly expand the involvement of the local community in criminal justice. Another way to achieve the same ideal, using existing political boundaries, would be to choose small political districts, such as House legislative districts or city council districts. Professor Adriaan Lanni has put forth a similar proposal in a much wider context, arguing that

208. Such grand juries were often, at least in some places, selected by election. Younger, supra note 47, at 28–29.
209. See, e.g., Simmons, supra note 6, at 21 (discussing the elimination of hearsay evidence).
210. See, e.g., King, supra note 201, at 767 (recognizing the importance of fairness and the use of race in the jury selection process).
211. For a not very different approach related to trial juries, see Kim Forde-Mazrui, Jural Districting: Selecting Impartial Juries Through Community Representation, 52 Vand. L. Rev. 353 (1999). Forde-Mazrui argues for the selection of jurors from legislative districts that have been further divided into "communities of interest." Id. at 386.
“grand and petit juries” should be “drawn from a small catchment area representing the local community.”

As Professor Lanni has suggested, it is not at all clear what would be the most efficacious means of selecting the definition of “community” for such purposes. However, the notion here is that a grand jury that is more localized could replicate the kind of community that existed when the Bill of Rights came into being and could meet the constitutionally intended purposes of the Grand Jury Clause more closely. Consider that the population of Boston around the time of the adoption of the Bill of Rights numbered approximately 18,000 residents, a substantial percentage of whom were women and children and others who could not serve on a grand jury.

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

Consider a large, diverse city like Los Angeles. Perhaps there should be 150 or more grand juries scattered at various places across the city. Such a decentralized model would give greater voice to subcommunities in Los Angeles and insure that the diversity that exists on the streets is actually represented in this governmental institution.

The most compelling cases for the use of localized grand juries arise for those offenses that have a distinctly local impact, for example, cases where both the victim and the defendant are members of the same community. Most crimes against persons and many narcotics offenses meet these criteria. Hearing such cases in the neighborhood grand jury can increase the notion of self-determination at the local level. When an offense occurs at the local level and primarily affects people within a single community, it is more difficult to justify interference from a broad central authority. On the other hand, crimes that involve outsiders present different problems. There, the costs of using local grand juries may exceed the benefits.

212. Lanni, supra note 94, at 394–95. Lanni notes that “the history and tradition of the jury as protector of the people against the unjust use of government power furthers the community justice movement’s goal of enhancing the legitimacy of the criminal system.” Id. at 395.

213. Id. at 395.


215. The twenty-three citizens that serve on a grand jury cannot serve as a countermajoritarian force of local populism against the application of national or statewide laws if they merely represent a homogenized microcosm of the same legislature that created those laws.
While some may doubt the salience of the localized geographic community in an increasingly atomized physical world in which many people are far more connected to nongeographic communities defined by professional connections or other communities developed through Internet capabilities, geographic communities are still highly salient to many of the most common crimes. Violent crime, for example, affects one’s sense of physical safety and has the most significant effects on people within the zone of risk of such events.

B. The Advantages of Neighborhood Grand Juries for Local Offenses

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

1. Expanded and Improved Educative Benefits of Jury Service

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

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

When a grand jury is drawn from a countywide venire, most of the members will routinely see crimes committed in neighborhoods not their own. Because members of grand juries tend to see only felonies, they see

216. See, e.g., Powers v. Ohio, 499 U.S. 400, 406–07 (1991) ("‘I do not know whether the jury is useful to those who are in litigation; but I am certain it is highly beneficial to those who decide the litigation; and I look upon it as one of the most efficacious means for the education of the people which society can employ.’” (quoting de Tocqueville, supra note 29, at 337)).

217. For an idiosyncratic account of service on a federal grand jury in the Southern District of New York, see Blanche Davis Blank, The Not So Grand Jury: The Story of the Federal Grand Jury System (1993). Blank discusses the sharing of bags of candies and tins of cookies and pizzas among jurors. Id. at 18.
only the worst actors and the most tragic events. In their ordinary roles as
grand jurors, citizens rarely see any happy occurrences in those
communities. As a result, grand jurors necessarily develop a warped view
of those communities with the most crime, and this warping occurs no
doubt most profoundly when the community is not their own. Communities
would be far better served if members of the community became more
informed about the crime in their own communities. Those citizens would
be better situated—and better motivated—to work to address these
problems, even after jury service has ended.

2. Improved Community Representation and
   Legitimacy in Criminal Justice

A grand jury constructed from a single zip code or neighborhood would
also be much more effective in providing the “voice” of the community, to
borrow Judge Hand’s metaphor.218 Of course, the voice of the community
may now have an accent or use a different language entirely, as the number
of languages spoken in the United States has increased dramatically. To
give the grand jury its intended purpose, however, each of those voices
must be heard.

Any jurisdiction has multiple community voices. Legitimacy will be
fully restored only when the criminal justice system can hear each of the
substantial voices present in the jurisdiction.219 Substantial criminal justice
scholarship suggests that legitimacy is better served when the community is
invested in fair criminal justice processes.220 In turn, the rule of law is
served. Citizens are more likely to comply with the law and cooperate with
police in investigations.221

If the most serious legitimacy problems stem from a lack of trust in the
government in certain quarters, the most effective way to address such
mistrust, again to borrow from Tocqueville, is to give citizens from those
communities a “share in government.”222 If inclusion builds trust, then the

218. See supra note 22 and accompanying text.
219. Thomas Jefferson once famously proposed that trial jurors be elected by voters from
small districts, a proposal that would have had not entirely dissimilar effects. See, e.g.,
Daniel D. Blinka, Jefferson and Juries: The Problem of Law, Reason, and Politics in the
New Republic, 47 Am. J. of Legal Hist. 35, 100 (2005). Such a proposal is far more radical
than the one proposed here, in light of intervening developments with the jury, such as
particular constitutionalized selection requirements developed through interpretation of the
Sixth Amendment. Jefferson was writing at a time when the jury had discretion to decide
questions of law, a power that is now mostly denied it. See id. at 44–46, 98–99.
220. See, e.g., Tom R. Tyler, Procedural Justice, Legitimacy, and the Effective Rule of
221. Id. See generally Daniel C. Richman & William J. Stuntz, Al Capone’s Revenge:
An Essay on the Political Economy of Pretextual Prosecution, 105 Colum. L. Rev. 583
(2005).
the people itself, or at least a class of citizens, to the bench of judicial authority.... [I]t
invests the people, or that class of citizens, with the direction of society.... [The jury]
invests each citizen with a kind of magistracy; it makes them all feel the duties which they
criminal justice system ought to seek to maximize inclusion among those communities in which trust is lowest. Likewise, forcing members of the affected community to share the decision as to whether to indict will locate important decisions about law enforcement within the community itself. Members of such communities who serve on grand juries may come away with a fuller appreciation of the law enforcement function, possibly making them better citizens.

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

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

3. Increased Power of the Community Relative to the Prosecutor

The neighborhood grand jury model would inevitably have some ramifications for prosecutorial power. As it stands, the grand jury often covers such broad jurisdiction that it does not likely feel invested in—or knowledgeable about—the community where the crime occurred. Each grand juror is likely to have different interests and none is likely to necessarily have a very strong interest in any given case. Indeed, some may feel simply inconvenienced by being required to serve and bored by the substance of the testimony. These circumstances may heighten the power of the prosecutor and law enforcement officials in several ways. Such grand juries are less likely to exercise their own curiosity about investigations, are more likely to accede to the prosecutorial momentum, and are perhaps more likely to defer to these law enforcement experts who know more than any single grand juror about the community in which the crime occurred.

On the other hand, a grand jury drawn entirely from one community is more likely to know as much, collectively at least, about the neighborhood as the prosecutor and law enforcement agents. Moreover, such a grand jury is likely to be even more interested in crime and criminal justice policy in

are bound to discharge towards society; and the part which they take in the Government.” (alterations omitted) (quoting de Tocqueville, supra note 29, at 334, 337)).
that neighborhood. Finally, it is also more likely to unite around these important concerns. Unless the prosecutor resides in the same neighborhood as the grand jurors, she may be viewed with skepticism. As a result, the prosecutor may be less successful in making the grand jury her “handmaiden,” to borrow a term from Professor Kuckes. Indeed, one clear way to change the balance of power between the grand jury and the prosecutor is to tighten up the bonds between the grand jurors so that the grand jury is emboldened and self-confident.


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

C. Potential Disadvantages of Neighborhood Grand Juries

The neighborhood grand jury poses some risks that may be troubling in some contexts. To the extent that the purpose here is to free the community, as represented by the grand jury, to prefer its own normative policy judgments over those of a central legislature, one could imagine certain circumstances in which the grand jury will behave in a manner inconsistent with rule-of-law values. For example, a grand jury may be less protective of a suspect who is from outside the local community, and therefore it might be more inclined to issue an unwarranted indictment.

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224. See generally Alschuler, supra note 201; King, supra note 201.
225. Consider the so-called “Texas 10 Percent Plan” extolled particularly by Professor Gerald Torres as a “work-around” for the Hopwood decision restricting affirmative action at the University of Texas. See Lani Guinier & Gerald Torres, The Miner’s Canary: Enlisting Race, Resisting Power, Transforming Democracy 69–73 (2002). In seeking to achieve greater diversity, the University of Texas offered admission not on the basis of race, but on the basis of status in the top ten percent of the class at any public high school in Texas. Id. Though this approach did not address race explicitly, it nevertheless had the effect of producing a more racially balanced class. Id.
227. Most scholars do not feel that the existing grand jury is very protective of an innocent defendant in any case. See supra notes 3–9 and accompanying text. Those who hew to the “ham sandwich” metaphor would be hard-pressed to complain about a grand jury that was too ready to indict. Grand juries already indict in more than ninety-nine percent of cases. See supra note 179 and accompanying text. Since commentators expect the grand jury to rubber stamp any indictment presented to it, a defendant would likely be in little worse position under this proposal. In that sense, this proposal leaves the average criminal suspect no worse than under the existing regime.
This might be called the "false positive" effect. Or, on the other hand, a grand jury may be too protective of the member of the community, and thereby decline to issue a righteous indictment. This might be called a "false negative."

These are serious potential problems, and the best way to address them is perhaps to retain jurisdictionwide grand juries for some offenses and to use community grand juries primarily for local offenses with local suspects and local victims. For localized offenses, like most violent offenses, the relative interest in the offense in the local community is high and the relative interest by the central authority is low. Thus, the central government has a much lesser claim to legitimate concern. On the other hand, for offenses with national or regional impacts, or that cross jurisdictional boundaries, the central authority has greater legitimacy, and a grand jury with a wider reach may be more appropriate.

While some may be concerned about a community grand jury's willingness to issue an unwarranted indictment, others might be troubled by the potential for the so-called false negative, that is, the grand jury's refusal to indict an obviously guilty defendant. This is the concern that raises the specter of "nullification" for some scholars and implicates rule-of-law concerns.

In some cases, a false negative will presumably reflect a disagreement with a state or national law because the local community elevates its own cultural standards over the behavioral standard set by law. Indeed, in some cases, the so-called "false negative" will constitute a community veto of a criminal prosecution of an offender in the community. Since the grand jury represents the same community that will presumably have to live with the offender in its midst if there is no prosecution, the grand jury’s refusal to indict will reflect a profound statement by the community. The grand jury will bear accountability for that decision.228 Indeed, if the suspect is truly blameworthy, it is the members of the community, including the members of the grand jury, who will bear the consequences of the release of that suspect back into the community.

To some degree, such an outcome can be justified by common notions of self-determination. The neighborhood grand jury could help address the difficult issues raised by the controversial notion of a "cultural defense."229 If the neighborhood grand jury can effectively screen a case through its own

228. Some scholars suggest that nullification, in the jury context, is useless as a political protest because it is an ambiguous act; the jury could have acquitted for a variety of reasons. See, e.g., Kennedy, supra note 64, at 301; Andrew D. Leipold, The Dangers of Race-Based Jury Nullification: A Response to Professor Butler, 44 UCLA L. Rev. 109, 122 n.52 (1996). For nullification to be effective as a protest, however, it is really only prosecutors and law enforcement who need to hear the message. If a grand jury refuses to indict, a prosecutor will make it his business to find out why. Thus, as a protest, nullification is likely to be highly effective with the appropriate audience.

community’s cultural lens, then the need for a cultural defense at trial may be lessened.

Racially divided communities could provide challenges to the neighborhood grand jury model. In the South during the civil rights era, there were dozens of cases involving homicides of African Americans in which indictments were handed down, but trial juries failed to convict.230 In recent years, federal and state prosecutors have re instituted prosecutions against some of the suspects in those cases.231 The failure of the criminal justice system to provide justice to black crime victims in the South in the 1960s reveals some of the limits of using the criminal justice system to achieve social change, or even to support those who are seeking positive change.232 That it was rarely the grand jury that posed the problem in those cases, though, is telling. In most respects, the neighborhood grand jury model would likely have little ill effects.

While it is generally true that racial prejudices may be stronger in individual localized communities, many of the most shocking cases of injustice in the South in the 1960s involved violent acts done in African American neighborhoods, in homes and churches. In those cases, a neighborhood grand jury may have been even more responsive than the existing grand juries were. Since grand juries tended to behave responsibly in the South in the 1950s and ’60s, we can be reasonably sure that neighborhood grand juries would be responsible today. The grand jury in a mixed-race community might well mediate some of the racial conflict in that community. Moreover, no criminal prosecution is ever instituted unless a prosecutor investigates the case and presents it to the grand jury. If a prosecutor could get an existing grand jury to “indict a ham sandwich,” surely she can use her persuasive powers in some fashion in the neighborhood grand jury. Prosecutors can cloak themselves in moral authority, and frequently do. We can expect that the prosecutor who stands before the grand jury will encourage the grand jury to do “the right thing,” even in cases in which community prejudices run high. Indeed, increasing the trust between the prosecutor and the community is one of the benefits of the neighborhood grand jury proposal.

Furthermore, the general impact of a false negative is weak. The grand jury’s ability to guard and preserve community norms of criminal justice is, in some senses, very limited and easily circumscribed. The only real action available to the grand jury is obstruction. A determined prosecutor may

231. See id.
present the same case to the same grand jury again in the future or to a succeeding grand jury in hopes of obtaining an indictment. 

Judging from the conventional historical narrative of the grand jury, however, the use of discretion seems to be a primary raison d'être of the grand jury. While the grand jury’s exercise of discretion might undermine the rule of law, and it could be used for purposes that people outside the community would call illegitimate, the very existence of the grand jury suggests that a felony may not be prosecuted legitimately in any community until the local community effectively approves it through issuance of a grand jury indictment. In other words, while a criminal law exists formally when the state or national legislature enacts it, it is not enforceable until the local prosecutor and the local community approves its application in any particular case. While this model occasionally will produce an unfortunate result, it is a fundamental assumption of American constitutional justice that it is not the community that should be feared, but rather it is the government and the threat of abuse of governmental authority. Indeed, the remedy for problems related to racial discrimination in the South was not to lessen the community role in criminal justice but to increase its role, through the jury, just as suggested here.

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

In general, the neighborhood grand jury, as guided by a prosecutor, is likely to follow the law in most cases. While occasionally a grand jury may behave in a dysfunctional fashion or act for illegitimate reasons, the system

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

234. If community grand juries are unwilling to indict in such cases, and justice fails to materialize for the victims of such offenses, the recent prosecutions in the South remind us that no one may be able to remain beyond the reach of law and justice forever. While a defendant may be effectively insulated from prosecution for a violent act temporarily, such protection could vanish as the racial demographics of the neighborhood change. In other words, the defendant will remain potentially subject to “retrospective justice,” such as that which has happened in the South in recent years. The term is borrowed from Margaret Russell, who discusses the propriety of prosecuting old cases of racial violence, such as the murder of Medgar Evers. Margaret M. Russell, Cleansing Moments and Retrospective Justice, 101 Mich. L. Rev. 1225, 1226–27 (2003).


236. See generally Nancy J. King, Duncan v. Louisiana: How Bigotry in the Bayou Led to Federal Regulation of State Juries, in Criminal Procedure Stories 261 (Carol Steiker ed., 2006) (explaining the development of the application of the Sixth Amendment to require juries in state proceedings and the broader context of Duncan v. Louisiana).
must be designed to function in a manner that works well in the vast majority of cases, not in the highly unusual cases. In most cases, if succeeding grand juries refuse to indict, then that refusal may well be a righteous manifestation of local popular sovereignty.

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

If the justification for the neighborhood grand jury is legitimate, then many of the other proposals for grand jury reform are wide of the mark. If the grand jury is intended to serve a political or policy function, not a factual or adjudicative function, then the grand jury does not necessarily need to be presented with facts in a more formalized fashion in each individual case.237

Likewise, constructing the grand jury entirely of lawyers with special expertise, as Professor Leipold has suggested,238 would be counterproductive because it would undermine the populist nature of the institution. Indeed, the real value of the grand jury is in representing local interests, not in offering specialized expertise. After all, a judge could provide much more specialized expertise than a jury.239 Indeed, if Professor Leipold’s argument is correct, then perhaps members of Congress and state legislators should also be required to be attorneys. That cannot be so.

On the other hand, some proposals for reform are consistent with the quasi-political nature of the grand jury and ought to be reconsidered. Perhaps the grand jury ought to be informed, for example, about the range of punishment that might apply in any given case.240 If the grand jury has the responsibility to consider whether it should apply a given law within its community by considering broader questions about the fairness of a law, then such information may be relevant in a grand jury’s deliberations. Likewise, the notion that grand jury indictment ought not be waivable, as suggested by Professor Roger Fairfax, may be more compelling once we see the importance of the community’s role in prosecutions.241

One common concern about the proposal expressed here is that the cost of implementing such a proposal may be too high. There are ways to limit the costs, however. Given the number of public institutions, such as libraries and community centers, in many jurisdictions, however, there may

237. See, e.g., Simmons, supra note 6, at 24 (suggesting that suspects be allowed to testify in certain cases).
238. Leipold, supra note 3, at 264 (stating that the primary cause of the grand jury’s failure to screen prosecutorial decisions effectively is the jurors’ lack of competence to perform their task).
239. This is why judicial review of prosecutorial charges, through the information and preliminary hearing process, cannot achieve the same level of legitimacy that a grand jury can offer. Simmons, supra note 6, at 75 (noting that the grand jury provides the criminal justice system with a critical input of real-life experience and thereby helps to provide legitimacy).
241. See generally Fairfax, supra note 50.
already be adequate infrastructure to return instruments of justice to the community in this way. Prosecutors may need to “ride circuit” in some sense, but this need not be an overwhelming expense and it may be well justified by the outcomes of having a prosecutor more familiar with the community for which she works. Court reporters are commonly used, but electronic recording of sessions may be appropriate in some lighter venues. In short, though criminal justice is an enormously expensive undertaking, this proposal need not increase costs substantially.

CONCLUSION

The grand jury has the potential to help restore greater legitimacy to criminal justice in the United States. It must first be restored itself, however, so that it will be able to serve, as it once did, as the voice of the community. Because criminal justice is a local endeavor with primarily local effects, the local community must be involved much more substantially in its processes. Citizen participation in criminal justice must be fostered, but not in a way that dilutes diversity and drowns the voices of minority communities. The grand jury ought to be an institution where local communities can make themselves heard.

The grand jury indeed requires reform, though in the way it is constructed, not necessarily in the way it functions. In a highly segregated society, the grand jury should not reflect a much diluted diversity based on the entire jurisdiction and should instead be constructed so that it carefully represents a real community. The most expedient way to match the grand jury to the community is to dramatically decrease the geographic scope of the community from which the grand jury is drawn. Each neighborhood should have a grand jury that can serve as its voice in criminal justice and exercise the powers that justified inclusion of the grand jury in the Bill of Rights and in several state constitutions.