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Grand Jury Discretion and Constitutional Design

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GRAND JURY DISCRETION AND CONSTITUTIONAL DESIGN

Roger A. Fairfax, Jr^f

The grand jury possesses an unqualified power to decline to indict—despite probable cause that alleged criminal conduct has occurred. A grand jury might exercise this power, for example, to disagree with the wisdom of a criminal law or its application to a particular defendant. A grand jury might also use its discretionary power to “send a message” of disapproval regarding biased or unwise prosecutorial decisions or inefficient allocation of law enforcement resources in the community. This ability to exercise discretion on bases beyond the sufficiency of the evidence has been characterized pejoratively as “grand jury nullification.” Grand jury nullification, like its well-known cousin, petit jury nullification, is controversial. The dominant substantive critiques of grand jury nullification attack the grand jury’s discretion in this regard as bad criminal justice policy at best and subversive of the rule of law at worst. Any acknowledgement of the grand jury’s discretionary power often is accompanied by concerns regarding the damage that critics perceive it to levy upon the criminal process. This Article argues that such concerns largely are unfounded and derive from a fundamental misunderstanding of the scope of the grand jury’s discretion and its function in the constitutional structure. The Article defends grand jury discretion against the critique that it is necessarily inconsistent with the rule of law. It contends instead that grand jury discretion actually buttresses the rule of law by facilitating the grand jury’s structural role in the constitutional design as a check on the three branches of government and as a moderator of criminal law federalism. In addition, the Article maps the spectrum of discretion that is exercised by various actors throughout the criminal process and argues that the grand jury’s discretionary power represents an appropriate, if not optimal, allocation of that discretion. Finally, the Article argues that grand jury

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discretion is desirable because it can enhance the administration of criminal justice—not only from an individual rights perspective but also from crime control and efficiency perspectives. The Article concludes that the grand jury’s robust discretionary role in the criminal justice process not only is consistent with but also implements constitutional design.

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INTRODUCTION

A grand jury in northern California refuses to indict a community activist for federal narcotics offenses even though the activist admitted distributing free marijuana to AIDS patients at a local clinic.

A grand jury in the District of Columbia informs an Assistant United States Attorney (AUSA) that it will not return an indictment in any nonviolent drug offense case until the AUSA investigates a high-ranking city official whom many community members believe to be taking bribes from a large public works contractor.

A grand jury in Texas refuses to indict for past nonviolent property crimes a twenty-five-year-old community college student who has recently broken ties with his gang, made restitution, and turned his life around.

A grand jury in Colorado refuses to indict a decorated Desert Storm veteran for a firearms possession crime stemming from his use of a banned, modified weapon during a family hunting trip.

Each of these hypothetical scenarios exemplifies the grand jury's power to exercise its discretion whether to indict on bases other than sufficiency of the evidence. These portrayals, in which a grand jury moves beyond the function of determining whether probable cause exists to proceed to trial, sit in stark contrast with the familiar perception of the modern grand jury—a body that, after passively receiving from the prosecutor just enough evidence (usually in the form of unchallenged hearsay testimony) to satisfy the probable cause threshold, reflexively and without critical analysis votes to indict, just as the prosecutor requested.¹

This critique, which has enjoyed traction since Jeremy Bentham's early-nineteenth-century call for the abolition of the grand jury,² views the grand jury as a weak, passive, and, for some, unnecessary screening organ designed to determine simply whether probable cause exists before a case proceeds to trial. Although constitutional mandate and the potent investigative power of the grand jury necessitate its continued existence, changes in substantive criminal law and in criminal procedure have worked symbiotically over the past two-hundred years to render the portrait of marginalization from which the grand jury

¹ See, e.g., 1 SARA SUN BEALE ET AL., *GRAND JURY LAW AND PRACTICE* § 1:9 (2d ed. 2005); Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1, 2 (2004); Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 294–304 (1995) (arguing that lay grand jurors are ill-equipped to make the legal conclusion that probable cause exists in a given case and therefore will accept a prosecutor's recommendation to indict).

² See JEREMY BENTHAM, 1 *RATIONALE OF JUDICIAL EVIDENCE* 524 (1827); JEREMY BENTHAM, 2 *THE WORKS OF JEREMY BENTHAM* 139–40 (John Bowring ed., 1843).

suffers today.³ It is a self-fulfilling prophecy: the greater the perception that the grand jury does little to protect individual rights or to improve the efficient administration of justice, the more society will allow the institution to be marginalized. And the underlying premise of this negative perception is that the grand jury's defining purpose is to test the sufficiency of the evidence by determining whether probable cause exists.

To the contrary, the grand jury was never designed as a mere sounding board to test the sufficiency of the evidence, nor is it limited to that basic, albeit important, function today. Where the grand jury truly adds value is through its ability to exercise robust discretion *not* to indict where probable cause nevertheless exists—what might be termed “grand jury nullification.”⁴ Understandably, some may be troubled by concerns that grand jury discretion undermines the rule of law, is somehow unwarranted, or hinders the administration of justice—all arguments often lodged against petit jury nullification. This Article, however, contends that such concerns are misplaced in the context of the grand jury.

Grand jury discretion not only is consistent with the rule of law, but it buttresses the rule of law in significant ways by, *inter alia*, facilitating the grand jury's hidden structural role within our constitutional democracy. Furthermore, the grand jury's discretionary power is consistent with an appropriate allocation of discretion among actors in the criminal process. Finally, from a normative standpoint, the grand jury's ability to exercise discretion on bases beyond sufficiency of the evidence can actually contribute to the effective administration of the criminal justice system—both enhancing crime control and protecting individual rights. Although the grand jury's robust discretion is not without its drawbacks and limitations, it is the defining characteristic of a grand jury that fully performs its intended function in the criminal justice system.

Part I of this Article unpacks the value-laden grand jury “nullification” characterization and places in proper historical and analytical context the grand jury's power to exercise discretion not to indict despite the existence of probable cause. Questioning the definitional judgments that underlie the concept of nullification, Part I grapples with some of the major conceptual difficulties that confront a normative embrace of the grand jury's discretion to consider factors beyond

³ See Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1, 30–32 (2002).

⁴ Cf. Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1150 (1997) (defining “jury nullification” as “a jury's ability to acquit a criminal defendant despite finding facts that leave no reasonable doubt about violation of a criminal statute”). As I discuss below, *see infra* note 10, the term “grand jury nullification” deserves careful definition and is more properly characterized as “grand jury discretion.”

the sufficiency of the evidence, including the desires to ensure that legitimate law enforcement is not frustrated and to minimize ignoble motivations. Part II argues that the grand jury's robust discretion fortifies rather than subverts the rule of law and that it can function wholly consistently with constitutional design. Highlighting the significance of the grand jury's discretion for the implementation of criminal law federalism and the separation and checking of powers in our tripartite system of government, Part II also casts doubt on the rule-of-law critique's premise that the grand jury's function is confined to measuring sufficiency of the evidence. In Part III, the Article maps the vast discretion of the various decision makers in the criminal process and argues that, given its history and purpose, the grand jury not only deserves its robust discretion but is also uniquely equipped to exercise such discretion. Part IV describes the benefits of this robust discretion and suggests that the grand jury's ability to employ that discretion actually may enhance the administration of criminal justice, including crime-control efforts.

I

CONTEXTUALIZING GRAND JURY DISCRETION

A. Defining and Identifying Grand Jury "Nullification"

The Fifth Amendment's Grand Jury Clause mandates that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."⁵ The Constitution thus requires that the government obtain a grand jury's consent before prosecuting a capital or other felony offense.⁶ The dominant modern conception is that such consent rests solely upon

⁵ U.S. CONST. amend. V. The Grand Jury Clause has not been incorporated to apply to the states, which may choose to initiate felony criminal proceedings in other ways consistent with the Due Process Clause. See *Hurtado v. California*, 110 U.S. 516, 537 (1884). Although this Article focuses primarily on the federal grand jury, it will periodically discuss state grand juries, as the overwhelming majority of criminal law enforcement takes place at the state level, see Darryl K. Brown, *Democracy and Decriminalization*, 86 TEXAS L. REV. 223, 260 n.184 (2007), and about half of the fifty states have some form of grand jury requirement. See 2 BEALE ET AL., *supra* note 1, § 8.2.

⁶ The federal grand jury is a body of sixteen to twenty-three people, summonsed for service in much the same way as petit jurors, and selected and empanelled with the participation of both a judge and the prosecutor. See FED. R. CRIM. P. 6. Sitting for eighteen months or more, the grand jury typically hears evidence presented by the prosecutor in a variety of cases, this evidence having been subpoenaed to the grand jury in the form of testimony, documents, or physical evidence. See *id.* The grand jury issues its consent in the form of an indictment, which is a statement of charges against the accused. See FED. R. CRIM. P. 7(c)(1) ("The indictment . . . must be a plain, concise, and definite written statement of the essential facts constituting the offense charged . . ."); 1 BEALE ET AL., *supra* note 1, § 1.8.

the grand jury's assessment of the sufficiency of the evidence.⁷ In other words, the modern conception assumes that the grand jury should indict if the government presents enough evidence to establish probable cause that the accused committed the alleged crimes.⁸ In this view, grand jury nullification occurs if the grand jury, despite receiving sufficient evidence to establish probable cause, "exercises its own political, moral, and social judgment in reviewing the prosecutor's decision to bring the case"⁹ and declines to indict.¹⁰

Although the definition of grand jury nullification is relatively straightforward, identifying when such nullification has occurred is not nearly as clear. Like attempts to identify petit jury nullification, attempts to identify specific instances of grand jury nullification suffer from the difficulty—if not impossibility—of determining whether a particular decision was based on an impartial weighing of the evidence or on some other ground.¹¹ For example, in the petit jury con-

⁷ This dominant view assumes that the grand jury is performing a quasi-judicial function in passing upon probable cause. See Model Grand Jury Charge: Approved by the Judicial Conference of the United States, March 2005, <http://www.uscourts.gov/jury/charge.html> (last visited Mar. 7, 2008) [hereinafter Model Grand Jury Charge] ("The purpose of the Grand Jury is to determine whether there is sufficient evidence to justify a formal accusation against a person—that is, to determine if there is 'probable cause' to believe the person committed a crime. . . . [Y]ou should vote to indict where the evidence presented to you is sufficiently strong to warrant a reasonable person's belief that the person being investigated is probably guilty of the offense charged."). In her insightful article, Professor Niki Kuckes illuminates difficulties arising from the Supreme Court's lack of commitment to either a 'judicial' or 'prosecutorial' characterization of the grand jury's constitutional function and advances a resolution that casts the grand jury as a "democratic prosecutor"—a vehicle for citizen participation within the prosecution function. See Niki Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury*, 94 GEO. L.J. 1265, 1300 (2006).

⁸ See, e.g., ADMIN. OFFICE OF THE U.S. COURTS, HANDBOOK FOR FEDERAL GRAND JURORS 3 (1999) (instructing grand jurors that if they "find[] probable cause to exist, then [they] will return a written statement of the charges called an 'indictment'"); AM. BAR ASS'N, JUDICIAL ADMIN. SECTION, FEDERAL GRAND JURY HANDBOOK 8 (1958) (noting that an indictment is "voted by the Grand Jury when evidence is found to sustain the charge").

⁹ Simmons, *supra* note 3, at 46.

¹⁰ The term "grand jury nullification" is somewhat of a misnomer because it assumes that the grand jury's discretion is confined to sufficiency of the evidence. As is discussed below, see *infra* subpart II.B, this is far too cramped a conception of the grand jury's discretionary role. Also, the term has pejorative connotations, see Kuckes, *supra* note 7, at 1269, does not capture the essence of the enterprise of the grand jury's exercise of discretion, cf. David C. Brody, *Sparf and Dougherty Revisited: Why the Court Should Instruct the Jury of Its Nullification Right*, 33 AM. CRIM. L. REV. 89, 91 (1995), and unfairly yokes grand jury discretion with petit jury nullification without careful consideration. See *infra* subpart I.C. Accordingly, a more appropriate characterization than "grand jury nullification" is the grand jury's "exercise of robust discretion." This Article will use both characterizations to describe instances where the grand jury determines whether to indict on bases other than the sufficiency of the evidence.

¹¹ See, e.g., HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 429–33 (1966) (listing nonevidentiary factors upon which petit juries rest decisions regarding whether to convict or acquit, including the personal characteristics of the defendant, propriety of the prosecutorial decision, and the wisdom of the law allegedly violated).

text, one might suspect that nullification motivated a particular jury verdict.¹² Unless the petit jurors publicly and truthfully reveal their reasons for acquitting, however, one cannot confirm that nullification has occurred.¹³

Even if we agree that jury nullification occurs when a prosecutor presents a jury with a quantum of un rebutted evidence sufficient to satisfy the relevant standard of proof yet that jury fails to convict or indict, who determines whether the evidence was sufficient? The evidence may overwhelmingly and credibly persuade the observer of a trial that each element of a charged crime has been satisfied. Certainly, such an observer would conclude that the jury has nullified unless it convicts. The jury, however, might view the evidence through a lens different from that of mere observers or active participants in the trial. Also, different juries may view the same evidence differently, as might individual jurors on the same jury. There is no absolute truth with regard to sufficiency of the evidence.¹⁴ To be sure, courts sometimes second-guess (or first-guess) juries when assessing sufficiency of the evidence on appeal or in the context of a motion for a judgment of acquittal. Most often, however, the task of these courts is simply to opine what a reasonable or rational jury might have done.¹⁵ Thus,

¹² See, e.g., *id.*

¹³ See NORMAN J. FINKEL, COMMONSENSE JUSTICE: JURORS' NOTIONS OF THE LAW 41–46 (1995). One possible exception, of course, may include “public confession” cases in which an individual violates a law publicly to protest a policy related to the law or the legitimacy of the law itself. One may reasonably identify jury nullification in jury acquittals in such civil disobedience cases—such as Vietnam-era draft card burning in violation of federal law—where there is no doubt (and often a confession) as to the violation of a criminal statute. See, e.g., Lawrence W. Crispo et al., *Jury Nullification: Law Versus Anarchy*, 31 LOY. L.A. L. REV. 1, 13–16 (1997) (discussing *United States v. Moylan*, 417 F.2d 1002 (4th Cir. 1969)); David N. Dorfman & Chris K. Iijima, *Fictions, Fault, and Forgiveness: Jury Nullification in a New Context*, 28 U. MICH. J.L. REFORM 861, 876–77 (1995) (discussing Vietnam War resister cases). A context in which it may be less difficult to determine that a jury has relied on non-evidentiary grounds is that of strict liability offenses where there is an admission by the defendant. For example, former New York magistrate judge Morris Ploscowe has suggested that grand juries frequently refused to indict in statutory rape prosecutions involving young couples. See MORRIS PLOSCOWE, *SEX AND THE LAW* 178 (Ace Books 1962) (1951). This pattern of grand jury forbearance presumably would hold even where the young defendant publicly admits to the conduct violating the statute.

¹⁴ As one anonymous seventeenth-century pamphleteer noted on the subject of occasions when public perception might differ from the grand jury's assessment of the evidence, “a man cannot see by another's Eye, nor hear by another's Ear; no more can a Man conclude or infer things to be resolved, by another's Understanding or Reasoning” BARBARA J. SHAPIRO, “BEYOND REASONABLE DOUBT” AND “PROBABLE CAUSE”: HISTORICAL PERSPECTIVES ON THE ANGLO-AMERICAN LAW OF EVIDENCE 66 (1991) (quoting a dialogue between “Indifference” and “Prejudice” in *Ignoramus Vindicated*).

¹⁵ See FED. R. CRIM. P. 29(a); *Jackson v. Virginia*, 443 U.S. 307, 326 (1979); *Am. Tobacco Co. v. United States*, 328 U.S. 781, 787 n.4 (1946); see also Roger A. Fairfax, Jr., *Harmless Constitutional Error and the Institutional Significance of the Jury*, 76 FORDHAM L. REV. 2027 (2008) (discussing appellate harmless-error review of jury verdicts based upon constitutionally flawed jury instructions).

determining when jury nullification has taken place is an inexact science at best.¹⁶

The stringent secrecy restrictions on grand jurors' communications present and exacerbate the difficulties in identifying grand jury nullification.¹⁷ Whereas petit jurors may expose the substance of jury deliberations after trial, thus helping an assessment of whether petit jurors nullified, grand jurors are forbidden, under penalty of contempt, from disclosing any information about matters that occurred before the grand jury—even after the grand jury has disbanded.¹⁸

Secrecy rules also impede public disclosure of the evidence—inculpatory or exculpatory—that a prosecutor presented to a grand jury, thus frustrating an informed assessment of whether the grand jury nullified.¹⁹ Grand jury secrecy requirements also shield the identity of grand jury witnesses.²⁰ If one discovers that a particular witness testified before the grand jury and that witness recounts the substance of that witness's testimony (as is that witness's right²¹), the outside observer has no way to assess the witness's truthfulness or thoroughness of recollection. Even where trial discovery obligations prompt the disclosure of certain witnesses' grand jury testimony transcripts,²² the cold record does not convey the witness's appearance, mannerisms, or other factors that would inform an attendant observer's credi-

¹⁶ Further complicating the problem is the fact that juries may (and often do) reach compromise verdicts, where inconsistencies in the verdict signal that the jury may have disregarded evidence sufficient to satisfy one or more counts as a compromise to reach agreement on conviction on other counts. Often, this occurs when jurors seek to limit the possible punishment to which the defendant might be exposed. See, e.g., Diane E. Cour-selle, *Struggling with Deliberative Secrecy, Jury Independence, and Jury Reform*, 57 S.C. L. REV. 203, 220–21 (2005); Ethan J. Leib, *Supermajoritarianism and the American Criminal Jury*, 33 HAS-TINGS CONST. L.Q. 141, 184–85 (2006). A recent study demonstrates that some judges might succumb to the same temptation, particularly given the constraints on their sentencing discretion. See Andrew D. Leipold, *Why Are Federal Judges So Acquittal Prone?*, 83 WASH. U. L.Q. 151, 200–18 (2005) (evaluating the hypothesis that judges may acquit more frequently when faced with having to impose severe sentences compelled by strict sentencing guidelines regimes).

¹⁷ See Leipold, *supra* note 1, at 288.

¹⁸ See FED. R. CRIM. P. 6(e)(2)(B)(i); *United States v. Marcucci*, 299 F.3d 1156, 1163 (9th Cir. 2002).

¹⁹ See Leipold, *supra* note 1, at 287–88, 310. The prosecutor has the best sense of the scope of evidence that the grand jury received but is perhaps the least neutral assessor of whether the grand jury has nullified. Cf. *id.* at 275 (explaining that prosecutors are likely to bring those cases where the prosecutor expects the grand jury will issue an indictment and to decline to bring those cases that the grand jury will reject).

²⁰ See AM. BAR ASS'N, *supra* note 8, at 17.

²¹ See *Butterworth v. Smith*, 494 U.S. 624, 634–35 (1990) (finding a statute that prohibited a grand jury witness from publicly recounting one's own testimony to violate the First Amendment).

²² See, e.g., 18 U.S.C. § 3500 (2000); FED. R. CRIM. P. 26.2; *Brady v. Maryland*, 373 U.S. 83, 86–87 (1963) (holding that the state violates a criminal defendant's due process rights when it suppresses information that is material and favorable to the defendant's case).

bility assessment.²³ Also, the outside observer may not be aware of testimony given by other witnesses, nor will such an observer know of other evidence that the grand jury considered—documentary or physical—that contradicts a known witness's testimony.

Furthermore, unlike those of the petit jury, grand jury instructions are largely shielded from the public view. Although many grand juries receive general instructions based on the Model Grand Jury Charge,²⁴ which is available for public review,²⁵ the specific instructions that prosecutors give to specific grand juries are shrouded in secrecy.²⁶ Thus, a grand jury may decide not to indict based on incorrect or confusing instructions on the applicable law rather than on disregard of the evidence.²⁷

Attempts to identify instances of grand jury nullification inherently involve a fair amount of uncertainty. Even where the strength of the evidence or the circumstances surrounding a case strongly indicate that a grand jury has nullified by declining to indict, certainty is fleeting. Although it may seem unsatisfactory to rely on a "you know it when you see it" approach in classifying a grand jury's action as nullification, a better metric is elusive.²⁸

B. Categorizing Grand Jury "Nullification"

Even tolerating the uncertainty attendant to framing our notions of *when* a grand jury has nullified, there remain the questions of *why* it has nullified and what might such action attempt to achieve. Some

²³ See Chet K.W. Pager, *Blind Justice, Colored Truths and the Veil of Ignorance*, 41 WILLAMETTE L. REV. 373, 375–77 (2005) (discussing the view that a witness's demeanor may affect a juror's credibility assessment).

²⁴ Cf. *United States v. Marcucci*, 299 F.3d 1156, 1163 (9th Cir. 2002) ("[W]e have no indication that the standard charge generally has not been given to federal grand juries . . .").

²⁵ Model Grand Jury Charge, *supra* note 7.

²⁶ Indeed, it is difficult even for a defendant seeking to raise objections to a prosecutor's instructions to a grand jury to obtain a transcript. See FED. R. CRIM. P. 6(e)(3)(E)(ii) (conditioning disclosure of grand jury matters upon a defendant's showing that "a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury"); *id.* 16(a)(3) (excluding grand jury transcripts from the discovery obligations imposed by this rule); Benjamin E. Rosenberg, *A Proposed Addition to the Federal Rules of Criminal Procedure Requiring the Disclosure of the Prosecutor's Legal Instructions to the Grand Jury*, 38 AM. CRIM. L. REV. 1443, 1448 (2001) (proposing a revision of the Federal Rules of Criminal Procedure to provide arraigned defendants with a transcript of the legal instructions given to the grand jury).

²⁷ See Leipold, *supra* note 1, at 288 n.142.

²⁸ Related to the question of *when* grand jury nullification has occurred is the question of *how often* it occurs. Although the factors mentioned above frustrate an accurate and complete quantitative assessment, the existence of significant motive and opportunity for the grand jury's exercise of its robust discretion provides a basis for concluding that the phenomenon occurs, even though there are barriers to cataloguing specific instances in a comprehensive manner. See Leipold, *supra* note 1, at 308 n.217; *infra* subpart II.B–Part III.

instances of grand jury nullification merely seek to frustrate an individual prosecution from going forward;²⁹ others reflect an empowered grand jury, acting as the voice of the community, which intends to send a message directly to the government regarding its views of the criminal laws or their application.³⁰ Indeed, a grand jury might decline to indict despite probable cause in a particular case for more than one reason.³¹ The various rationales for grand jury nullification, though sometimes overlapping, are divisible into four categories.³²

1. *Unjust or Unconstitutional Law*

A grand jury might nullify in response to a criminal law that the jurors find contrary to their sense of justice or outside the sovereign's criminalization power.³³ For example, members of a nineteenth-century grand jury who shared the belief that every person has a human right to education might have nullified a prosecution of an individual for violating laws against teaching enslaved African Americans to read—regardless of the quantum of evidence against the accused. Likewise, a grand jury might determine that a criminal statute violates the Constitution and refuse to indict the accused under that law.³⁴

²⁹ See Simmons, *supra* note 3, at 49 (summarizing examples of cases in which the grand jury may have rejected the prosecutor's decision to prosecute a "borderline" case).

³⁰ See Susan W. Brenner, *The Voice of the Community: A Case for Grand Jury Independence*, 3 VA. J. SOC. POL'Y & L. 67, 121 (1995); Simmons, *supra* note 3, at 46, 51. Also, the grand jury does not necessarily need to return a no true bill to achieve its aims. The very threat of the no true bill in a particular case, or in a category of cases, may be sufficient to communicate the grand jury's message. See Leipold, *supra* note 1, at 308 n.217; *infra* Part II.

³¹ See, e.g., *United States v. Marcucci*, 299 F.3d 1156, 1163 (9th Cir. 2002) ("It would be impossible to tell whether the motivation not to indict was, for example, based on local politics, racial or other discrimination, or anti-government sentiment . . .").

³² In their thought-provoking works on petit jury nullification, both Professor Darryl Brown and Professor Nancy Marder have delineated categories of nullification-provoking scenarios that are helpful organizing tools in the grand jury nullification context. See Brown, *supra* note 4, at 1171–96; Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 887–902 (1999). Professor Marder has sketched out categories of petit jury nullification: (1) refusal to apply the law to a particular defendant; (2) refusal to apply a law with which the jurors disagree; (3) response to extra-legal factors such as unsatisfactory social conditions; and (4) hybrids of the first three categories. See Marder, *supra*, at 887–902. Professor Brown has outlined four categories, comprising nullification in response to: (1) uncorrected rule violations; (2) unjust laws or norm violations; (3) biased or unjust application of law; and (4) desires to uphold illegal or immoral community norms. See Brown, *supra* note 4, at 1171–96.

³³ Cf. Brown, *supra* note 4, at 1178–79 (describing this motivation in the petit juror context); Gerard N. Magliocca, *The Philosopher's Stone: Dualist Democracy and the Jury*, 69 U. COLO. L. REV. 175, 178 (1998) (same).

³⁴ The historical record indicates that the concept of petit jury review—the prerogative of juries to declare a statute unconstitutional—has been embraced at various times in America. See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 239–42 (2005); Harris G. Mirkin, *Judicial Review, Jury Review & the Right of Revolution Against Despotism*, 6 POLITY 36, 55–63 (1973). Certainly, a grand jury might determine that a criminal law contravenes the Constitution of the United States and decline to return an indictment for that reason.

2. *Unwise Law or Application of Law*

Similarly, a grand jury might nullify based on its opinion on the perceived wisdom (or lack thereof) of a criminal law or its application. A grand jury might decide that a particular statute criminalizes conduct that the criminal law *should not* proscribe.³⁵ Even when a grand jury does not take issue with the wisdom of a criminal law generally, it might determine that its application to a particular defendant or in a particular community is unwise.³⁶ For example, a grand jury might understand the need for a federal law banning a certain type of high-powered hunting rifle, but the grand jury might nevertheless question the law's necessity in its rural community where hunting is ubiquitous and local game requires a particular gauge of weapon. A grand jury might also decide that it should not apply a criminal law to a defendant's conduct in a particular case.³⁷ For example, a grand jury might refuse to indict a hospice manager for violating a statute outlawing distribution of a recreational drug that terminally ill patients widely use for its therapeutic effects. Despite a belief in aggressive narcotics enforcement and clear evidence that the accused violated the statute by distributing the contraband to patients, the grand jury might disapprove of applying the statute in the particular case.

3. *Biased or Unwise Allocation of Prosecutorial Resources*

A grand jury might nullify in response to what it perceives to be an unfair or unwise allocation of limited prosecutorial resources. For example, a grand jury might decline to indict based on the belief that the defendant is being targeted because of prosecutorial bias.³⁸ Likewise, if it were well known that an elected prosecutor with higher political aspirations deliberately targeted potential opponents for investigation and prosecution, then a grand jury might refuse to cooperate, regardless of the would-be defendants' culpability. In addition, a grand jury might determine that a matter is better handled in a civil action or that an offense should be prosecuted by a different sover-

³⁵ See Leipold, *supra* note 1, at 288.

³⁶ See Simmons, *supra* note 3, at 16 ("Throughout history, the grand jury maintained and enhanced its reputation because it was acting as the political voice of the people in the community. . . . [T]he grand jury wielded that power to bring about an outcome consistent with the majority view of the community at that time and place, regardless of the strength of the case or the prevailing legal standard.").

³⁷ Cf. Brown, *supra* note 4, at 1183-85 (examining particular circumstances that could prompt petit jury nullification).

³⁸ Cf., e.g., Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 678 (1995) (suggesting the prosecution of Washington D.C. Mayor Marion Barry as an example of a perceived biased prosecution that arguably prompted petit jury nullification); Elsa Walsh & Barton Gellman, *Chasm Divided Jurors in Barry Drug Trial*, WASH. POST, Aug. 23, 1990, at A1 (describing racial dynamics of juror deliberations in the Barry trial).

eign; for example, a federal grand jury might refuse to indict because the conduct also is covered by state criminal law. A grand jury also might decide that the thrust of the government's enforcement program represents a poor allocation of resources. For instance, a grand jury might object to a prosecutor's decision to pursue nonviolent drug offenders when that prosecutor might redirect resources to prevent violent offenses in the community.³⁹ A grand jury in that same community might decline to indict an elderly resident for illegal possession of a handgun, considering that the resident lives alone in a high-crime area with inadequate police presence.

4. *Improper Motivation*

This final category describes a motivation that even proponents of nullification would consider illegitimate—a motivation that Professor Darryl Brown describes as the desire to uphold immoral community norms.⁴⁰ For example, a grand jury might decline to indict in the face of sufficient evidence for trivial reasons, such as because the defendant is a celebrity⁴¹ or simply because the prosecutor displays a disagreeable or abrasive personality.⁴² Furthermore, despite grand juries' secrecy and anonymity, they might nevertheless encounter outside influences and nullify due to corruption, intimidation, or inappropriate consideration of sympathetic public sentiment for a particular defendant.⁴³

Likewise, a grand jury might nullify out of bias or prejudice,⁴⁴ refusing to indict a defendant because he belongs to a favored race or because the alleged victim belongs to a disfavored race.⁴⁵ Indeed, of the types of nullification motives in this category, the one with the most ignoble history in this country is racial prejudice.⁴⁶ Grand and

³⁹ See Butler, *supra* note 38, at 715–16 (advocating race-based petit jury nullification for nonviolent offenses but arguing for conviction of violent offenders); see also Ed Burns et al., *Saving Cities, and Souls*, TIME, Mar. 17, 2008, at 50 (espousing petit jury nullification in cases involving non-violent drug offenses).

⁴⁰ See Brown, *supra* note 4, at 1191–96.

⁴¹ See LEROY D. CLARK, *THE GRAND JURY: THE USE AND ABUSE OF POLITICAL POWER* 20 (1975).

⁴² See Leipold, *supra* note 1, at 288 n.142, 309; Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1457 (2004).

⁴³ See, e.g., Charge to Grand Jury, 30 F. Cas. 992, 994–95 (C.C.D. Cal. 1872) (No. 18,255).

⁴⁴ See Leipold, *supra* note 1, at 288; Judith M. Beall, Note, *What Do You Do with a Runaway Grand Jury?: A Discussion of the Problems and Possibilities Opened up by the Rocky Flats Grand Jury Investigation*, 71 S. CAL. L. REV. 617, 629 (1998) (“Grand jurors frequently reflected the prejudices of their community, indicting the unpopular and the politically powerless.”).

⁴⁵ Cf. Marder, *supra* note 32, at 888 (discussing the role of racial animus in the context of petit jury nullification).

⁴⁶ See CLAY S. CONRAD, *JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE* 167 (1998).

petit juries alike have furthered the invidious racial violence and oppression that plagued communities in the United States.⁴⁷ For instance, as Professor Owen Fiss highlights:

In the 1960s the risk of jury nullification was particularly pronounced in southern communities, where the human rights victim typically was black and the accused white. The racial polarization of the community could easily be exploited to devalue the life of the black victims or to exonerate or excuse the defendant.⁴⁸

This improper potential motivation for grand jury discretion, though regrettable and unavoidable,⁴⁹ can—and often does—overlap

⁴⁷ See, e.g., Clay S. Conrad, *Scapegoating the Jury*, 7 CORNELL J.L. & PUB. POL'Y 7, 21–34 (1997).

⁴⁸ OWEN FISS, *The Awkwardness of the Criminal Law*, in *THE LAW AS IT COULD BE* 133, 136 (2003) (discussing petit jury nullification).

⁴⁹ Professor Fiss, of course, raises a significant challenge to the normative case for grand jury discretion. As Judge John Minor Wisdom noted, however, the ability of some grand juries to use their power for these purposes is an unavoidable by-product of the grand jury's independence. See *United States v. Cox*, 342 F.2d 167, 190 (5th Cir. 1965) (Wisdom, J., concurring specially); see also *United States v. Marcucci*, 299 F.3d 1156, 1167 (9th Cir. 2002) (Hawkins, J., dissenting) (“[R]egardless of its apparent virtues and vices, the requirement of the grand jury's independent exercise of its discretion is a fixed star in our constitutional universe.”). Additionally, in communities where racial prejudice might infect the votes of a majority of grand jurors, other actors in the criminal justice system may share similar biases. See, e.g., Brown, *supra* note 4, at 1194–95. While this may be of little comfort, it does support the notion that grand jury deliberations are not necessarily more susceptible to bias than other exercises of unreviewable discretion throughout the criminal process. Cf. Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 366–67 (2005) (“Room for the exercise of discretion also can give opportunity to malevolent influences such as racism, sexism, and the like.”). Indeed, there were instances in the Jim Crow South in which grand juries returned indictments for crimes committed against African Americans but the petit jury declined to convict. See, e.g., GAIL WILLIAMS O'BRIEN, *THE COLOR OF THE LAW: RACE, VIOLENCE, AND JUSTICE IN THE POST-WORLD WAR II SOUTH* 185 & n.14 (1999) (noting the “first lynching indictment” secured from a grand jury in Mississippi, which ended without a guilty verdict at trial); Conrad, *supra* note 47, at 32–33. Perhaps the most prominent example is the infamous Emmet Till case, in which an all-white jury acquitted the defendants in just over an hour. See *Bad News for NAACP*, JACKSON DAILY NEWS, Sept. 8, 1955, reprinted in *THE LYNCHING OF EMMETT TILL: A DOCUMENTARY NARRATIVE* 40 (Christopher Metress ed. 2002); James L. Kilgallen, *Defendants Receive Handshakes, Kisses*, MEMPHIS COM. APPEAL, Sept. 24, 1955, reprinted in *THE LYNCHING OF EMMETT TILL: A DOCUMENTARY NARRATIVE* 104 (Christopher Metress ed., 2002). Furthermore, the monumental changes in grand juror selection prompted by the 1968 Jury Selection and Service Act have spurred progress toward the cross-sectional ideal. See Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1821, 1861–1869, 1871 (2000) (affording litigants rights to juries that are representative of the community and prohibiting discrimination against potential jurors). There is no longer a “key-man” system under which grand jurors are handpicked. See *id.* §§ 1861, 1863. Grand jurors are now more likely to be representative of their community. See *id.* §§ 1861–1863; Kevin K. Washburn, *Restoring the Grand Jury*, 76 FORDHAM L. REV. 2333, 2369 & n.178 (2008) (noting that although “the countermajoritarian nature of the grand jury can have troubling consequences, . . . these dire consequences occurred only because significant portions of the relevant communities were denied participation as jurors in criminal justice processes”). But see FISS, *supra* note 48, at 136 (arguing that “even when the [petit] jury more adequately reflected a cross section of the community [the nullification] problem was not entirely

with the motivations for grand jury discretion described in the other categories above.⁵⁰

C. Beyond the Normative Debate

Perhaps one's normative view of grand jury nullification differs with the circumstances that surround a particular exercise of discretion. One might countenance a grand jury's having mercy on a sympathetic defendant in an individual case.⁵¹ Another might tolerate grand jury nullification only where the grand jury acted out of concern that the prosecutor was applying the law unevenly and unfairly.⁵² Yet another might condemn grand jury nullification for any reason other than the grand jury's shared belief that a law was unjust.⁵³ One might tolerate grand jury nullification for any reason other than political beliefs, religious convictions, or other biases that grand jurors might hold against the government or the victim.⁵⁴ Finally, one might consider grand jury nullification to be dangerous and illegitimate in all circumstances, precisely because grand juries can nullify in any

eliminated" because "a conviction could be blocked by one or two jurors"). See generally Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 VAND. L. REV. 353, 360–65 (1999) (explaining the advantages of representative juries). Of course, in the grand jury context, it typically would take twelve of the twenty-three grand jurors to block an indictment. See *infra* note 156.

⁵⁰ See, e.g., Marder, *supra* note 32, at 892. For example, one may approve of grand jury nullification in an attempted criminal prosecution under the oppressive nineteenth-century slave codes but disapprove of grand juries exercising that same discretion when refusing to indict Ku Klux Klan members for clear violations of criminal civil-rights statutes. See, e.g., BLANCHE DAVIS BLANK, *THE NOT SO GRAND JURY: THE STORY OF THE FEDERAL GRAND JURY SYSTEM* 6 (1993); CONRAD, *supra* note 46, at 167–90; cf. Editorial, *When Jurors Ignore the Law*, N.Y. TIMES, May 27, 1997, at A16 ("Nullification . . . kept fugitive slaves from being sent back to the South, when juries refused to enforce fugitive-slave laws before the Civil War. But history is also replete with examples of shameful acts of nullification, like the hung juries in the 1964 trials for the murder of Medgar Evers, the civil rights leader."). However, an observer presumably might characterize either grand jury as nullifying laws that the jurors genuinely perceived as unjust or unwise, or thwarting prosecutions the jurors subjectively believed were borne of bias. See Leipold, *supra* note 1, at 288 & n.142, 309. This, along with Professor Fiss's observation, see Fiss, *supra* note 48, at 136, illustrates perhaps the central difficulty with the normative case for exercises of discretion by grand juries.

⁵¹ See Markel, *supra* note 42, at 1456–59; see also Stephanos Bibas, *Forgiveness in Criminal Procedure*, 4 OHIO ST. J. CRIM. L. 329, 341 (2007). See generally Carol S. Steiker, *Tempering or Tampering? Mercy and the Administration of Criminal Justice*, in FORGIVENESS, MERCY, AND CLEMENCY 16 (Austin Sarat & Nasser Hussain eds., 2007) (exploring the conceptual role of mercy in discretionary judgments made in the criminal justice system); Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. (forthcoming 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1019071 (discussing how certain exercises of mercy, including jury nullification, are weakened in the administrative state).

⁵² See Brown, *supra* note 4, at 1171–96; Butler, *supra* note 38, at 705–12.

⁵³ See Brown, *supra* note 4, at 1183–91; Marder, *supra* note 32, at 888–93.

⁵⁴ See Leipold, *supra* note 1, at 308–09.

kind of case and for any reason at all—even for reasons we find repulsive.⁵⁵

The knotty normative questions that grand jury nullification presents are further complicated by the long shadow cast by petit jury nullification. To be sure, the term “jury nullification” carries significant baggage. The question of whether petit juries should nullify has been hotly debated in many volumes of academic and judicial commentary, and deep skepticism about both the legitimacy and desirability of petit jury nullification animates much of the scholarship and case law.⁵⁶ Critiques of petit jury nullification include concerns that the practice is counterdemocratic,⁵⁷ frustrates justice in the individual case,⁵⁸ and diminishes public safety by hindering the effective enforcement of the criminal law.⁵⁹ As a result of the skepticism over *petit* jury nullification, even commentators who recognize the grand jury’s potential role in giving voice to the community’s conscience might shy away from considering the grand jury’s exercise of discretion as a legitimate expression of that conscience. This apparent incongruity results, in part, from the fact that grand jury nullification remains laden with the baggage that renders petit jury nullification so odious to many, even though grand jury nullification is analytically and historically distinct in many ways.

Although this Article does not claim to settle the normative debate over petit and grand jury nullification, it does seek to challenge the dominant substantive critiques of grand jury discretion: (1) grand jury discretion subverts the rule of law;⁶⁰ (2) the grand jury possesses

⁵⁵ See *id.* at 309 (noting the potential for grand jury nullification to serve as a “potent force for frustrating legitimate societal objectives”). However, as is discussed below, see *infra* subpart III.A, virtually every other discretion-wielding actor in the criminal justice system can make decisions on any of these bases—even those many might consider illegitimate. For an intriguing study of possible links between perceived petit jury nullification, community disrespect, and diminished compliance with the law, see Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399 (2005).

⁵⁶ Compare Crispo et al., *supra* note 13, at 3–4 (arguing strongly against petit jury nullification, as it leads to “inconsistent application of laws, allows bad law to remain on the books, and permits juries to disregard the law without accountability”), with LYSANDER SPOONER, AN ESSAY ON THE TRIAL BY JURY 189–91 (1852) (arguing that a juror must have complete discretion to render any verdict, regardless of the defendant’s potential guilt), and Jack B. Weinstein, *Considering Jury “Nullification”: When May and Should a Jury Reject the Law to Do Justice?*, 30 AM. CRIM. L. REV. 239, 240–41 (1992) (arguing that “judges can and should exercise their discretion to allow nullification by flexibly applying the concepts of relevancy and prejudice and by admitting evidence bearing on moral values”). See generally Teresa Conaway et al., *Jury Nullification: A Selective, Annotated Bibliography*, 39 VAL. U. L. REV. 393 (2004) (listing scores of articles and other commentary debating the merits of petit jury nullification).

⁵⁷ See Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 297–99 (1996).

⁵⁸ See *id.* at 306–09.

⁵⁹ See *id.* at 260–63.

⁶⁰ See *infra* Part II.

unwarranted discretion relative to other actors in the criminal justice system;⁶¹ and (3) grand jury discretion necessarily detracts from the effectiveness of the criminal justice system.⁶² In questioning the criticism that the grand jury's exercise of robust discretion necessarily amounts to lawlessness and undermines the efficiency and efficacy of criminal justice, this Article reveals important features of the nature and role of the grand jury in the constitutional and procedural framework of our system of criminal justice.

II

THE COMPATIBILITY OF GRAND JURY DISCRETION WITH CONSTITUTIONAL DESIGN AND THE RULE OF LAW

The most powerful and potentially damning substantive critique of grand jury discretion is the charge that the practice is subversive of the rule of law. Although a taxonomy of the many complexities of the rule-of-law concept is beyond the scope of this Article,⁶³ "[a]t the heart of the rule of law is the powerful idea that it is law that should govern society and not that the arbitrary will of particular persons—a government of laws, not persons."⁶⁴ While consensus regarding the conceptual contours of the rule of law may be fleeting, the mainstream American reaction to perceived violations of the rule of law is condemnation.⁶⁵

Premitting formulations of the rule-of-law ideal that emphasize substantive notions of justice,⁶⁶ a hallmark of the rule of law is the avoidance of arbitrariness and the cabining of the discretion of government actors.⁶⁷ Nowhere is such discretion and potential for arbi-

⁶¹ See *infra* Part III.

⁶² See *infra* Part IV.

⁶³ See, e.g., DONALD L. DOERNBERG, SOVEREIGN IMMUNITY OR THE RULE OF LAW: THE NEW FEDERALISM'S CHOICE 179–83 (2005); Judith N. Shklar, *Political Theory and the Rule of Law*, in THE RULE OF LAW: IDEAL OR IDEOLOGY 1, 1–16 (Allan C. Hutchinson & Patrick Monahan eds., 1987).

⁶⁴ Allan C. Hutchinson, *The Rule of Law Revisited: Democracy and Courts*, in RECRAFTING THE RULE OF LAW: THE LIMITS OF LEGAL ORDER 196 (David Dyzenhaus ed., 1999) (emphasis omitted).

⁶⁵ See, e.g., James L. Gibson, *Changes in American Veneration for the Rule of Law*, 56 DEPAUL L. REV. 593, 593 (2007) ("[American] support for the rule of law is widespread—especially compared to other nations—and . . . has not diminished in the last decade."); Joseph Raz, *Formalism and the Rule of Law*, in NATURAL LAW THEORY 309, 309 (Robert P. George ed., 1992) ("Though not uncommonly it will be disputed whether a violation occurred, hardly anyone will actually argue that it was justified if it took place.").

⁶⁶ See, e.g., RONALD A. CASS, THE RULE OF LAW IN AMERICA 15 (2001); DOERNBERG, *supra* note 63, at 190–97; GEOFFREY DE Q. WALKER, THE RULE OF LAW: FOUNDATION OF CONSTITUTIONAL DEMOCRACY 11–14 (1988).

⁶⁷ See, e.g., John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 212 (1985) ("The rule of law signifies the constraint of arbitrariness in the exercise of government power."); see also FRANCIS A. ALLEN, THE HABITS OF LEGALITY: CRIMINAL JUSTICE AND THE RULE OF LAW 14 (1996) ("The notion of the rule of

trariness as far ranging as in the enforcement of the criminal law.⁶⁸ One of the several principles philosopher Joseph Raz has delineated as derived from the rule of law is that “discretion of the crime-preventing agencies should not be allowed to pervert the law.”⁶⁹ As Raz explains, prosecutors and law enforcement officials subvert the rule of law when they exercise discretion or allocate resources in attempts to avoid enforcing certain criminal laws or pursuing certain classes of offenders.⁷⁰

Concern over the rule of law likewise renders nullifying juries subject to scrutiny. The traditional rule-of-law critique of petit jury nullification⁷¹—and, by extension, grand jury nullification—is that “[n]ullification entails the rule of [jurors] . . . arbitrarily deciding to resolve a case according to their own political and moral beliefs rather than applying the general rule that has governed other, comparable cases.”⁷² Even where one deems the rationale for nullification acceptable in a given context, the rule of law still condemns its exercise.⁷³

Under this rule-of-law critique, a grand jury must indict where a prosecutor has presented sufficient evidence that the accused committed the alleged crimes.⁷⁴ When the government has met its burden of demonstrating probable cause, the argument goes, the grand jury should indict the accused if it is to act consistently with the rule of law.⁷⁵ Failing to indict in such a situation, regardless of the normative

law is one that seeks to impose limits on and provide guidance for the exercise of official power.”).

⁶⁸ See, e.g., Robinson, *supra* note 49, at 344–45 (considering judicial discretion and observing that “[t]he danger is not just arbitrary application by judges but . . . arbitrary application by other decisions makers in the criminal justice process, with ‘the potential for arbitrary and discriminatory enforcement of the penal law’” (citation omitted)).

⁶⁹ JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 218 (1979).

⁷⁰ See *id.*

⁷¹ See, e.g., Butler, *supra* note 38, at 705–06 (1995) (“The idea that jury nullification undermines the rule of law is the most common criticism of the doctrine.”). Professor Butler observes that rule of law critiques of jury nullification are moral rather than legal, given the irrefutable power of the petit jury to acquit contrary to the evidence. See *id.* at 705.

⁷² Brown, *supra* note 4, at 1159. However, as Professor Darryl Brown persuasively explained, a post-realist conception of the rule of law, which features among its attributes an expanded notion of legitimate law-giving sources and their use in a contextual interpretation of legal rules, may accommodate the compatibility of jury nullification with the rule of law. See *id.* at 1159–71; see also Butler, *supra* note 38, at 705–14 (responding to rule-of-law critiques of principled jury nullification); Michael T. Cahill, *Punishment Decisions at Conviction: Recognizing the Jury as Fault Finder*, 2005 U. CHI. LEGAL F. 91, 117 (2005) (citing Brown’s argument that petit jury nullification need not be seen as lawlessness).

⁷³ See, e.g., Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 18 (1910) (characterizing jury nullification as “the great corrective of law in its actual administration” but nonetheless referring to it as “[j]ury lawlessness”).

⁷⁴ See Brown, *supra* note 4, at 1160.

⁷⁵ See *id.*

appeal of the grand jury's rationale, signals disregard for this clear rule and, ultimately, subverts the rule of law.⁷⁶

Adherence to the rule of law, however, does not prohibit all discretion. Rather, the rule of law condemns the exercise of *unwarranted* discretion.⁷⁷ Where a government of laws yields a process that affords appropriate discretion to certain actors, the exercise of such discretion can be consistent with the rule of law.⁷⁸

This Part challenges the premise that the rule of law is incompatible with the grand jury's robust discretion to decide on bases beyond sufficiency of the evidence. Such discretion can comply with the rule of law both because the grand jury is not limited—by either tradition or constitutional design—to merely screening criminal cases for probable cause and because the grand jury's robust discretion enhances its ability to perform its *intended* constitutional role—facilitating horizontal separation of powers through checks and balances and moderating criminal law federalism. In this way, grand jury nullification is not only consistent with the rule of law, but it buttresses the rule of law in an important manner.

A. Redefining Terms: Contours of the Rule of Law

The rule-of-law critique of grand jury discretion rests on the premise that the grand jury was designed to operate as a mere probable cause filter.⁷⁹ Although probable cause is the current evidentiary standard,⁸⁰ the applicable standard has shifted considerably, often changing in response to dominant political views regarding the appropriate role of the grand jury.⁸¹ Indeed, today's probable cause standard is

⁷⁶ Cf. *State v. Ragland*, 519 A.2d 1361, 1372 (N.J. 1986) (declaring that “[j]ury nullification is an unfortunate but unavoidable power”). Professors Kaimi Wenger and David Hoffman have described ways in which petit jury nullification might perform certain functions—protective, equitable, and participatory—consistent with the rule of law. See Kaimipono David Wenger & David Hoffman, *Nullificatory Juries*, 2003 WIS. L. REV. 1115, 1149–56 (2003). Professor Paul Butler has questioned the conceptual legitimacy of the rule of law, arguing that “[i]f the rule of law is a myth . . . the criticism that jury nullification undermines it loses force.” Butler, *supra* note 38, at 708.

⁷⁷ See, e.g., SAMUEL WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE, 1950–1990*, at 23–25 (1993).

⁷⁸ See, e.g., *id.*

⁷⁹ See, e.g., Brenner, *supra* note 30, at 100–01.

⁸⁰ See *id.*

⁸¹ See SHAPIRO, *supra* note 14, at 42 (“The history of grand jury [evidentiary] standards . . . is marked by frequent, and essentially political, conflicts over the proper role of the institution itself.”). For more than four centuries, evidentiary standards governing the grand jury's inquiry evolved from mere rumor and “suspicion” to “probable evidence” to “satisfied belief” to “prima facie” to the current “probable cause” standard. See *id.* at 47–48, 58–59, 78–86, 96–98. At their core, these debates in England and America were as much about the role, power, and independence of the grand jury as they were about evidentiary standards, with many attempting to frame the institution by shaping its discretion and nullification power. See, e.g., *Bushell's Case*, (1670) 124 Eng. Rep. 1006, 1011–12 (C.P.) (rul-

distinct from the significantly more robust “truth of the accusation” standard used when the grand jury right was enshrined in the Bill of Rights.⁸² However, regardless of the standard that grand juries used at any given time, they have always exercised power to decline to indict despite evidence satisfying the governing standard.⁸³ Even when the evidentiary threshold was more exacting than probable cause, grand juries were not bound to indict when the prosecutor presented evidence satisfying that prevailing standard.⁸⁴

Since the formative stages of the grand jury in England, grand juries have engaged in nullification. Almost all contemporary historical accounts of the grand jury’s development treat the late-seventeenth-century *Colledge*⁸⁵ and *Shaftesbury*⁸⁶ cases as the turning point in the life of the English grand jury—where it began to transform from an exclusive tool of the monarchy to a protector of subjects against the power of the Crown.⁸⁷ These two cases focused on the attempted royal prosecution of Stephen Colledge and Anthony Ashley Cooper, the Earl of Shaftesbury, for high treason.⁸⁸ Both men were accused of conspiring to diminish Roman Catholic influence over the monarchy.⁸⁹ The grand juries in both cases refused to indict the Protestant defendants, despite significant pressure from the Crown and rigging of the grand jury process against the accused.⁹⁰ As a result, the *Colledge* and *Shaftesbury* cases stand as a symbolic turning point for the grand jury in England, after which the grand jury ceased to be a

ing that courts were powerless to jail or fine grand and petit jurors who reached decisions contrary to the court’s view of the evidence). For an overview of *Bushell’s Case* and its historical and political context, see Simon Stern, Note, *Between Local Knowledge and National Politics: Debating Rationales for Jury Nullification After Bushell’s Case*, 111 YALE L.J. 1815, 1822–27 (2002).

⁸² See JOSEPH CHITTY, 1 A PRACTICAL TREATISE ON THE CRIMINAL LAW 261 (1819); Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortion and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 WAKE FOREST L. REV. 239, 427–28 (2002) (noting that the framing-era grand jury “did not merely assess whether there was probable cause for a prosecution; rather, at common law, grand jurors were usually instructed not to indict unless they were persuaded, based on the prosecutor’s evidence, of the ‘truth’ of the accusation”); Thomas Y. Davies, *What Did the Framers Know and When Did They Know It?: Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105, 210–12 & n.333 (2005).

⁸³ Chief Justice John Roberts recently affirmed this principle. See Transcript of Oral Argument at 16–17, *United States v. Resendiz-Ponce*, 127 S. Ct. 782 (2007) (No. 05-998) (“[H]istorically a significant role for the grand jury has been not to indict people even though the Government had the evidence to indict them.”).

⁸⁴ See *id.*

⁸⁵ 8 How. St. Tr. 549 (1681).

⁸⁶ 8 How. St. Tr. 759 (1681).

⁸⁷ See GEORGE J. EDWARDS, JR., *THE GRAND JURY* 28–30 (1906).

⁸⁸ See *id.*

⁸⁹ See *id.*

⁹⁰ See *Shaftesbury’s Case*, 8 How. St. Tr. 759; *The Trial of Stephen Colledge*, 8 How. St. Tr. 549; SHAPIRO, *supra* note 14, at 62–65.

passive facilitator for criminal prosecutions by the Crown and began to assume a more robust role.⁹¹

The American colonial grand jury, the direct descendant of these English grand juries, played a part in expressing colonists' dissatisfaction with the exercise of monarchical power as it aggressively issued "angry and well-publicized presentments and indictments" against representatives of the monarchy and nullified attempted prosecutions of critics of the Crown.⁹² For example, a 1743 grand jury refused to indict New York publisher Peter Zenger for seditious libel against the Royal Governor of New York, even though Zenger was technically guilty for publishing stories critical of the governor.⁹³ Colonial grand juries famously resisted prosecutions under the British trade and navigation laws and refused to indict colonial protesters of British laws whose prosecutions were thought to be unfair; for example, in 1765 a Boston grand jury declined to indict the Stamp Act rioters.⁹⁴ Following the American Revolution and the ratification of the Grand Jury Clause in the Bill of Rights,⁹⁵ grand juries nullified prosecutions under the Alien and Sedition Acts⁹⁶ and under the Fugitive Slave Act and Reconstruction-era civil rights laws.⁹⁷

As these historical accounts reveal, probable cause is merely an evidentiary standard and not a framework for the grand jury's defining purpose.⁹⁸ The probable cause standard does not describe the grand jury's power to render a decision on bases beyond sufficiency of the evidence.⁹⁹ The grand jury's robust discretionary power was a pri-

⁹¹ See EDWARDS, *supra* note 87, at 28–30; SHAPIRO, *supra* note 14, at 62–65.

⁹² See Renée B. Lettow, Note, *Reviving Federal Grand Jury Presentments*, 103 YALE L.J. 1333, 1337 (1994); see also SHAPIRO, *supra* note 14, at 87; Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. U. L. REV. 1, 11 (1996); Ronald F. Wright, *Why Not Administrative Grand Juries?*, 44 ADMIN. L. REV. 465, 469 (1992) ("These [colonial] grand juries did not refuse to indict because of a lack of proof that the accused had violated a criminal statute. Rather, they refused because they fundamentally disagreed with the government's decision to enforce these laws at all.").

⁹³ See Robert D. Rucker, *The Right to Ignore the Law: Constitutional Entitlement Versus Judicial Interpretation*, 33 VAL. U. L. REV. 449, 452–53 (1999). The government then side-stepped the grand jury and charged Zenger by information. See *id.* A petit jury later acquitted, despite the fairly clear evidence of Zenger's technical guilt. See *id.*; see also Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 871–74 (1994).

⁹⁴ See, e.g., SHAPIRO, *supra* note 14, at 87.

⁹⁵ U.S. CONST. amend. V.

⁹⁶ See, e.g., RICHARD D. YOUNGER, *THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634–1941*, at 49–52 (1963). See generally *United States v. Navarro-Vargas*, 408 F.3d 1184, 1191–94 (9th Cir. 2005) (discussing the role of the colonial grand jury).

⁹⁷ See, e.g., YOUNGER, *supra* note 96, at 103–05, 118–33; see also *Navarro-Vargas*, 408 F.3d at 1199.

⁹⁸ See, e.g., Kuckes, *supra* note 7, at 1303. As Professor Kuckes points out, the "judicial" model, which conceptually limits the grand jury to the probable cause determination, invites one to negatively characterize the grand jury's exercise of discretion. See *id.* at 1269.

⁹⁹ See *id.*

mary feature of the institution emblazoned on the consciousness of the Founders as they drew from the lessons of the colonial experience in constructing American democracy.¹⁰⁰ Today, the grand jury retains its power to exercise robust discretion on bases beyond sufficiency of the evidence.

The Supreme Court recognized the grand jury's robust discretion when it acknowledged that "[t]he grand jury does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not."¹⁰¹ In *Vasquez v. Hillery*, the Court explained that "[t]he grand jury is not bound to indict in every case where a conviction can be obtained."¹⁰² The Court's recognition of the grand jury's discretionary power parallels that of a number of prominent jurists. Judge John Minor Wisdom recognized "the power of the grand jury to shield suspected law violators"¹⁰³ and the grand jury's "unchallengeable power to shield the guilty, should the whims of the jurors or their conscious or subconscious response to community pressures induce twelve or more jurors to give sanctuary to the guilty."¹⁰⁴ Judge Henry Friendly noted that the grand jury's discretionary ability to grant mercy to accused who are likely guilty is "implicit in [the grand jury's] role."¹⁰⁵ Other jurists have affirmed the notion that the grand jury has an unqualified power to decline to indict regardless of the evidence placed before it.¹⁰⁶

¹⁰⁰ See SHAPIRO, *supra* note 14, at 87.

¹⁰¹ *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986).

¹⁰² *Id.* (quoting *United States v. Ciambrone*, 601 F.2d 616, 629 (2d Cir. 1979) (Friendly, J., dissenting)). To be sure, the Court has sent mixed messages in this regard, more recently implying that a grand jury may have a *duty* to indict when there is evidence sufficient to establish probable cause. See *United States v. Cotton*, 535 U.S. 625 (2002).

¹⁰³ *United States v. Cox*, 342 F.2d 167, 189 (5th Cir. 1965) (Wisdom, J., concurring specially).

¹⁰⁴ *Id.* at 190.

¹⁰⁵ *Ciambrone*, 601 F.2d at 629 n.2 (Friendly, J., dissenting).

¹⁰⁶ See, e.g., *United States v. Marcucci*, 299 F.3d 1156, 1168–69 (9th Cir. 2002) (Hawkins, J., dissenting); *Gaither v. United States*, 413 F.2d 1061, 1066 n.6 (D.C. Cir. 1969) ("Since it has the power to refuse to indict even when a clear violation of law is shown, the grand jury can reflect the conscience of the community in providing relief where strict application of the law would prove unduly harsh." (quoting 8 MOORE'S FEDERAL PRACTICE § 6.02(1) (1968))); *United States v. Asdrubal-Herrera*, 470 F. Supp. 939, 942 (N.D. Ill. 1979) ("Just as a prosecutor can, in the exercise of discretion, decline prosecution in the first instance, a grand jury can return a true bill or no bill as they deem fit."). Professor Herbert Wechsler, in support of a proposal to include a *de minimis* "defense" (Section 2.12) to the Model Penal Code, noted that "[n]othing is more common in criminal law enforcement, of course, than the exercise on the part of the prosecuting attorney, to some extent—grand juries where there are grand juries—of a kind of unarticulated authority to mitigate the general provisions of the criminal law to prevent absurd applications" Discussion of the Model Penal Code, 39 A.L.I. PROC. 61, 105 (1962). For more on *de minimis* statutory provisions, see Stanislaw Pomorski, *On Multiculturalism, Concepts of Crime, and the "De Minimis" Defense*, 1997 BYU L. REV. 51 (1997); Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 211 (1982).

While many recognize the grand jury's *power* to nullify, the legal culture seems unready or unwilling to fully accept that the grand jury role implicitly includes a discretionary function. Advocates and courts seeking to minimize the grand jury's nullification power often distinguish between the "power" and the "right."¹⁰⁷ They are willing to concede—as they must—that the grand jury possesses the *power* (or the ability) to nullify, as no mechanism exists to prevent or remedy the practice.¹⁰⁸ Judge Learned Hand, for example, described grand jury nullification as "an irresponsible utterance of the community at large, answerable only to the general body of citizens, from whom they come at random, and with whom they are again at once merged."¹⁰⁹ Nevertheless, they contend that the grand jury has no *right* to nullify.¹¹⁰ By arguing that a nullifying grand jury is doing something it has no right to do, these advocates and courts essentially characterize grand jury nullification as lawless.¹¹¹

This "lawless" view is problematic for a number of reasons. First, substantial evidence indicates that the grand jury's *power* exists by design.¹¹² The nullification power is an intended feature of the grand jury's robust discretion—not a mere accident borne of a flawed insti-

¹⁰⁷ Cf. *Sparf v. United States*, 156 U.S. 51, 78–83 (1895) (distinguishing between the power of a petit jury to nullify and its right to do so); Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 588–89 (1938).

¹⁰⁸ See, e.g., Brief for the United States at 28, *United States v. Cotton*, 535 U.S. 625 (2002) (No. 01-687). As the U.S. Solicitor General argued in a brief on the merits in a recent Supreme Court case, grand jury nullification is "a power that courts must tolerate for reasons of public policy" rather than "a right that courts must encourage." *Id.*

¹⁰⁹ *In re Kittle*, 180 F. 946, 947 (S.D.N.Y. 1910) (L. Hand, J.).

¹¹⁰ See, e.g., *United States v. Kerley*, 838 F.2d 932, 938 (7th Cir. 1988) (stating that the ability to nullify is "just a power, not also a right"); Todd E. Pettys, *Evidentiary Relevance, Morally Reasonable Verdicts, and Jury Nullification*, 86 IOWA L. REV. 467, 503 (2001) ("While readily conceding that juries have the *power* to nullify, therefore, the courts have insisted that juries do not have the *right* to nullify."). Professor Paul Butler, who advanced a case for race-based petit jury nullification in certain circumstances, see Butler, *supra* note 38, at 678, does seem to require a moral justification for the petit jury's exercise of its nullification power. See Paul D. Butler, *Race-Based Jury Nullification: Case-in-Chief*, 30 J. MARSHALL L. REV. 911, 918 (1997) ("[I]t is not enough to say that there is a power to nullify; there also has to be some moral basis for this power."); see also ALLEN, *supra* note 67, at 14 (1996) ("We can conceive of exertions of governmental authority that are legal in the sense of being authorized by law but that offend the rule-of-law concept.").

¹¹¹ Cf. *Strickland v. Washington*, 466 U.S. 668, 694–95 (1984) (stating that a court, when determining whether an attorney error prejudiced the defendant, "should presume . . . that the judge or jury acted according to law" and that "[a] defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed"). See also Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 257 n.41 (1988).

¹¹² See, e.g., *United States v. Ciambrone*, 601 F.2d 616, 629 n.2 (2d Cir. 1979) (Friendly, J., dissenting).

tutional blueprint.¹¹³ Given the Framers' experience with the grand jury and its role in nullifying unjust colonial criminal laws and prosecutions,¹¹⁴ there is good reason to believe that the grand jury's nullification power is exactly what the Framers intended. The Framers were well aware that colonial grand juries communicated dissent to the central royal authorities and checked those individuals making, interpreting, and enforcing colonial laws.¹¹⁵ If the Framers did not want federal grand juries to retain that same power, they easily could have established a mechanism for judicial review of grand jury decisions. That they did not establish such a mechanism supports the view that the grand jury's exercise of discretion on bases beyond the sufficiency of the evidence is consistent with the grand jury's intended role.

Additionally, the use of the "rights" language surrounding grand jury discretion misunderstands the nature of the grand jury in the first instance. As discussed below, the grand jury is a preconstitutional entity that predates the establishment of the three branches of government.¹¹⁶ Although the Grand Jury Clause cemented the grand jury's position as a central mechanism of individual liberty,¹¹⁷ the preconstitutional status of the grand jury suggests that it was akin to a central organ of government and not simply a vehicle for applying a criminal procedural requirement. Presumably, constitutional limitations could curtail the grand jury's nullification prerogative in this regard, as could procedural practice, common law, or statutory law.¹¹⁸ In the absence of such a constraint, however, the grand jury does not need the "right" to exercise its discretion on bases beyond sufficiency of the evidence. Shedding the fictions that surround the proper role of the

¹¹³ Cf. Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 46–65 (2003).

¹¹⁴ See, e.g., YOUNGER, *supra* note 96, at 49–52, 103–05, 118–33.

¹¹⁵ See, e.g., Lettow, *supra* note 92, at 1337.

¹¹⁶ See discussion *infra* section II.B.1.

¹¹⁷ See *United States v. Asdrubal-Herrera*, 470 F. Supp. 939, 942 (N.D. Ill. 1979).

¹¹⁸ Indeed, one such limitation on the prerogative of the grand jury surfaced when criminal defendants asserted that the Fifth Amendment right to grand jury indictment contemplates that grand juries not be instructed that they "should" vote to indict where the government establishes probable cause, an argument that the Ninth Circuit recently considered and rejected over vigorous dissent. See, e.g., *United States v. Navarro-Vargas*, 408 F.3d 1184, 1199 (9th Cir. 2005); *United States v. Rivera-Sillas*, 376 F.3d 887, 893–94 (9th Cir. 2004); *United States v. Adams*, 343 F.3d 1024, 1027 n.1 (9th Cir. 2003); *United States v. Marcucci*, 299 F.3d 1156, 1159–65 (9th Cir. 2002) (consolidating three identical challenges). Ultimately, the Ninth Circuit held that the Constitution does not mandate that the grand jury receive instruction that it may decline to indict even where it finds probable cause. See, e.g., *Navarro-Vargas*, 408 F.3d at 1199. For commentary on the Ninth Circuit skirmishes over the model grand jury charge, see Kuckes, *supra* note 7, at 1299–1300 (endorsing the dissenters' reasoning); Gregory T. Fouts, Note, *Reading the Grand Jurors Their Rights: The Continuing Question of Grand Jury Independence*, 79 IND. L.J. 323, 334–40 (2004) (commenting on the *Marcucci* case); Laurie L. Levinson, *Grand Jury Nullification*, NAT'L L.J., June 14, 2004, at 14.

grand jury fosters greater recognition that the grand jury's discretion is consistent with the rule of law.

B. The Structural Role of Grand Jury Discretion

While the modern conception of the grand jury relegates it to a mere probable cause filter for serious criminal charges, the grand jury actually plays a hidden *structural* role in our constitutional design—it serves both as a check on the three branches of government and as a moderator of criminal law federalism. The characteristics of the grand jury uniquely equip it to serve as a conduit for communication between the national government and local communities on issues of criminal justice policy. The grand jury's robust discretion—its ability to determine the propriety of indictments on bases beyond sufficiency of the evidence—enhances this function.

1. *Separation of Powers/Checks and Balances*

Contrary to popular belief, and despite its usual physical location in the courthouse and its reliance on the process and compulsion power of the courts, the grand jury is not a part of the judicial branch.¹¹⁹ Likewise, the grand jury is not an arm of the Executive even though the prosecutor wields a great deal of (at least perceived) power over the grand jury.¹²⁰ While modern grand jury practice may not evidence the fact, the grand jury is its own constitutional entity, which checks each of the three branches of government.¹²¹ Although not mentioned in the original written constitution, the grand jury was a creature of the common law, understood as an independent constitutional entity and intended to play a *structural* role:¹²²

[U]nder the constitutional scheme, the grand jury is not and should not be captive to any of the three branches. The grand jury is a pre-constitutional institution, given constitutional stature by the Fifth Amendment but not relegated by the Constitution to a position within any of the three branches of the government.¹²³

¹¹⁹ See Brenner, *supra* note 30, at 76–77 (describing confusion over institutional status of the grand jury); see also FED. R. CRIM. P. 17 (establishing subpoena power); *In re* Report and Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to the House of Representatives, 370 F. Supp. 1219, 1222 (D.D.C. 1974).

¹²⁰ See, e.g., Brenner, *supra* note 30, at 68–72; Kuckes, *supra* note 1, at 28–30.

¹²¹ See, e.g., Kuckes, *supra* note 1, at 28.

¹²² See *United States v. Cox*, 342 F.2d 167, 178 (5th Cir. 1965) (Rives, Gewin & Bell, J.J., concurring in part and dissenting in part) (“[T]he grand jury originated long before the doctrine of separation of powers was made the constitutional basis of our frame of government. . . . Its authority is derived from none of the three basic divisions of our government, but rather directly from the people themselves.” (internal quotations omitted)).

¹²³ *United States v. Chanen*, 549 F.2d 1306, 1312 (9th Cir. 1977) (internal citation omitted).

As the Supreme Court explained in *United States v. Williams*,¹²⁴ the grand jury “is a constitutional fixture in its own right. In fact, the whole theory of its function is that it belongs to no branch of the institutional Government, serving as kind of a buffer or referee between the Government and the people.”¹²⁵

Not only is the grand jury independent of the three branches of government, but it serves as a check on them.¹²⁶ In the context of the judicial branch, Article III provides that “[t]he judicial power shall extend to all Cases . . . arising under . . . the Laws of the United States.”¹²⁷ Although Congress vested the federal courts with jurisdiction over cases arising under criminal statutes,¹²⁸ this jurisdiction cannot be exercised in felony and capital cases without the grand jury’s consent.¹²⁹ Pursuant to the common law traditions that informed the Framers and the mandate of the Grand Jury Clause, a felony or capital criminal case cannot proceed to trial except upon the indictment or presentment of a grand jury.¹³⁰ In addition, the grand jury limits courts’ ability to sentence criminal defendants after a guilty verdict or plea.¹³¹ Thus, the grand jury performs a structural role as gatekeeper of the federal courts’ exercise of subject matter jurisdiction in criminal cases.¹³² The grand jury’s robust discretion to limit the cases that

¹²⁴ 504 U.S. 36 (1992).

¹²⁵ *Id.* at 47 (internal citations and quotations omitted).

¹²⁶ See *United States v. Navarro-Vargas*, 408 F.3d 1184, 1199 (9th Cir. 2005) (quoting *United States v. Chanen*, 549 F.2d 1306, 1312 (9th Cir. 1977)).

¹²⁷ U.S. CONST. art. III, § 2.

¹²⁸ See 28 U.S.C. § 3231 (2000) (“The district courts of the United states shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.”).

¹²⁹ See FED. R. CRIM. P. 7(a) (“An offense (other than criminal contempt) must be prosecuted by an indictment if it is punishable: (A) by death; or (B) by imprisonment for more than one year.”). Of course, a defendant may waive the right to grand jury indictment and allow a court to try and sentence upon an information. See *Id.* 7(b). There is some doubt associated with the constitutionality of this waiver provision. See generally Roger A. Fairfax, Jr., *The Jurisdictional Heritage of the Grand Jury Clause*, 91 MINN. L. REV. 398, 430–38 (2006).

¹³⁰ See U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .”).

¹³¹ See, e.g., HOWARD C. JOYCE, TREATISE ON THE LAW GOVERNING INDICTMENTS WITH FORMS § 32 (1908) (“[W]here there has been no presentment of . . . a bill of indictment, the fact that a person confesse[d] in court to being guilty of a crime which requires an indictment or presentment, confers no power upon the court to sentence him to imprisonment . . .”). Although in most cases the sentencing judge’s ability to render punishment will be limited to that prescribed by the legislature for crimes outlined in the grand jury’s indictment, the Supreme Court has sometimes strayed from that ideal. See, e.g., *United States v. Cotton*, 535 U.S. 625, 633–34 (2002) (finding no plain error where the district court sentenced the defendant for conduct not charged in the indictment).

¹³² Although a twentieth-century jurisprudence influenced by progressive criminal law reform and a diminished respect for the efficacy of the grand jury right largely obscured this function, the jurisdictional heritage of the grand jury demonstrates the way in which

courts may hear enhances its checking function with regard to the judicial branch.

The grand jury also checks the executive branch by sometimes barring prosecution of federal crimes. Article II charges the Executive with the duty to "take Care that the Laws be faithfully executed."¹³³ A grand jury must determine whether sufficient evidence exists to justify a trial, and an affirmative decision will subject a criminal defendant to the economic, personal, reputational, and psychological costs of standing trial and defending against the indictment's charges.¹³⁴ Unless and until a grand jury assents, the Executive cannot press its case.¹³⁵ The grand jury's robust discretion allows it to check the executive branch on bases beyond sufficiency of the evidence.¹³⁶ The grand jury may frustrate the Executive's efforts to prosecute an individual where it suspects that the prosecutor has targeted that individual because of bias or caprice.¹³⁷ Further, the grand jury may exercise its discretion to send the Executive a message about its preferred allocation of law enforcement and prosecutorial resources. This discretion also can be brought to bear on exercises of prosecutorial discretion in specific cases.¹³⁸ The grand jury's robust discretion enhances its ability to check the tremendous power of the Executive in fulfilling its Article II duties related to criminal law enforcement and prosecution.

Furthermore, the grand jury checks the legislative branch by determining when conduct that Congress has proscribed will be subject to criminal prosecution. The Legislature relies on the Executive and Judiciary performing their respective constitutional duties of enforcing criminal statutes and entertaining cases arising therefrom.¹³⁹ Because the grand jury's discretion can derail the performance of these duties,¹⁴⁰ it represents another significant check on the legislative branch. Not only is the grand jury in a position to decline to allow a prosecution under a particular criminal statute, it also can influence the Executive to enforce criminal statutes it otherwise would not.¹⁴¹

the grand jury was designed to play a checking role on the judicial branch. *See generally* Fairfax, *supra* note 129.

¹³³ U.S. CONST. art. II, § 3.

¹³⁴ *See* United States v. Williams, 504 U.S. 36, 51 (1992) ("It is axiomatic that the grand jury sits not to determine guilt or innocence, but to assess whether there is adequate basis for bringing a criminal charge.").

¹³⁵ *See* FED. R. CRIM. P. 7(a).

¹³⁶ *See* Simmons, *supra* note 3, at 16.

¹³⁷ *See, e.g.,* Butler, *supra* note 38, at 678.

¹³⁸ *See id.*

¹³⁹ *See* U.S. CONST. art. II, § 3 & art. III, § 2.

¹⁴⁰ *See* FED. R. CRIM. P. 7.

¹⁴¹ In fact, at the time of the Founding, the power of grand juries to present or initiate charges for federal crimes without the prompting or participation of the prosecutor was well established. While the Presentment Clause of the Fifth Amendment's Grand Jury

As discussed above, the grand jury might consider a particular criminal statute to be ill-considered or ill-suited and refuse to indict a defendant under it. Whether motivated, for example, by the perceived severity of the punishment, the disproportionality of the punishment to the alleged crime, or the dubious constitutionality of the criminal statute, the grand jury is well situated to check the Legislature's power to proscribe certain conduct and to prescribe criminal sanctions.

This system of checks and balances was central to the Founders' ideal of a government that would not trample individual rights.¹⁴² Although the grand jury is not commonly considered an independent constitutional entity, it plays an important structural role in criminal law, where individual rights are particularly subject to encroachment.¹⁴³ Just as constitutional structure provides each of the branches with the prerogative to check the others,¹⁴⁴ the grand jury, with its robust discretion, checks the judicial, executive, and legislative branches and represents a structural protection of individual rights.

2. *Federalism*

The grand jury's robust discretion also allows it to play a structural role by moderating federalism in the criminal law arena. The grand jury serves as a forum for local communities to express their views about federal criminal laws and enforcement priorities.¹⁴⁵ The English experience was instructive for the American framers. The English grand jury, once a vehicle for the hegemony of centralized government, gradually became a vehicle of local input and power.¹⁴⁶ Although criminal prosecutions were undertaken pursuant to the laws of the royal central government, grand juries were composed of members from the local community¹⁴⁷ and "wielded tremendous authority in their power to determine who should and who should not face

Clause has not been repealed, the practice has fallen into obsolescence. *See, e.g.,* Fairfax, *supra* note 129, at 412 n.55; *see also* Lettow, *supra* note 92.

¹⁴² *See* THE FEDERALIST NO. 51 (James Madison).

¹⁴³ *See, e.g.,* Kuckes, *supra* note 7, at 1302 ("[T]he power to 'nullify' valid charges has been described by influential commentators as 'arguably . . . the most important attribute of grand jury review from the perspective of those who insisted that a grand jury clause be included in the Bill of Rights.'" (quoting 4 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 15.2(g) (2d ed. 1999))). Interestingly, the separation of powers argument has been advanced in support of petit jury nullification as well. *See, e.g.,* Nancy J. King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 U. CHI. L. REV. 433, 454–58 (1998).

¹⁴⁴ *See* THE FEDERALIST NO. 51 (James Madison); Letter from Thomas Jefferson to William Duane (May 23, 1801), in 8 THE WRITINGS OF THOMAS JEFFERSON, 1801–1806, at 54 (Paul Leicester Ford ed., New York, G.P. Putnam's Sons 1897); *see also* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1011–20 (2006).

¹⁴⁵ *See* Brenner, *supra* note 30, at 71.

¹⁴⁶ *See* SHAPIRO, *supra* note 14, at 42–43.

¹⁴⁷ *See id.* at 43.

trial.”¹⁴⁸ The colonial experience demonstrated that grand juries could recalibrate the balance of power between the central government and the colonies; colonial grand juries had a rich history of resisting perceived unjust expressions of royal authority through criminal prosecutions.¹⁴⁹ Because of their discretionary power, colonial grand juries “enforced or refused to enforce laws as they saw fit.”¹⁵⁰

For those of the founding generation concerned about the potential aggrandizement of central governmental authority, the grand jury, much like the petit jury,¹⁵¹ represented a significant check on the federal criminal prosecution power.¹⁵² A grand jury could refuse to allow the prosecutor to enforce federal law because no prosecution could proceed within the confines of the grand jury’s district without its consent.¹⁵³ For example, because no prosecutor could bring a serious federal criminal charge against a Virginian without an indictment from a grand jury of Virginians, there was a strong, localized counter to the power of the federal government. Thus, the grand jury offered local communities a say in how the federal criminal law would be used.¹⁵⁴ Justice James Wilson recognized this very function when he described the late-eighteenth-century grand jury as “a great channel of communication, between those who make and administer the laws, and those for whom the laws are made and administered.”¹⁵⁵ Grand

¹⁴⁸ YOUNGER, *supra* note 96, at 26.

¹⁴⁹ See SHAPIRO, *supra* note 14, at 87 (noting politicization of grand juries shortly before the Revolution and stating that “[g]rand juries provided a means of frustrating the policies of imperial authorities. They sometimes refused to indict political offenders and prevented the enforcement of unpopular laws.”); YOUNGER, *supra* note 96, at 28–29 (recounting instances of grand jury nullification in the colonies during the decades before the Revolution); *supra* notes 92–94 and accompanying text.

¹⁵⁰ YOUNGER, *supra* note 96, at 26; see also LEONARD W. LEVY, *THE PALLADIUM OF JUSTICE: ORIGINS OF TRIAL BY JURY* 66–67 (1999).

¹⁵¹ See, e.g., *United States v. Datcher*, 830 F. Supp. 411, 413 (M.D. Tenn. 1993) (describing founding-era attitudes toward jury nullification), *overruled by* *United States v. Chesney*, 86 F.3d 564 (6th Cir. 1996).

¹⁵² See YOUNGER, *supra* note 96, at 45–46; Washburn, *supra* note 49, at 2368–69.

¹⁵³ See John P. Kaminski & C. Jennifer Lawton, *Duty and Justice at “Every Man’s Door”: The Grand Jury Charges of Chief Justice John Jay, 1790–1794*, 31 J. SUP. CT. HIST. 235, 242 (2006) (noting that, in the late 18th century, “[t]he district of the jurors was commensurate with the borders of the state”).

¹⁵⁴ See Brenner, *supra* note 30, at 127 (“Grand juries are by nature parochial . . . and were designed to import a local, lay perspective on the legal significance of [local] activity.”); Pound, *supra* note 73, at 18 (“The will of the state at large imposed on a reluctant community . . . find[s] the same obstacle in the local jury that formerly confronted kings and ministers.”).

¹⁵⁵ James Wilson, *The Subject Continued—Of Juries*, in 2 *THE WORKS OF JAMES WILSON* 503, 537 (Robert Green McCloskey ed., 1967). To be sure, this communication channel worked both ways, as founding-era jurists utilized the grand jury charge as an opportunity to lecture captive audiences of prominent local citizens on political issues of the day. See YOUNGER, *supra* note 96, at 47; cf. Kaminski & Lawton, *supra* note 153, at 240–50 (describing Chief Justice John Jay’s early grand jury charges).

juries can send a message that a law or its application contradicts local values.¹⁵⁶ Today, although views on federalism have shifted,¹⁵⁷ there certainly remains some benefit to giving local communities input into federal criminal law enforcement priorities.

If the grand jury did not comfort those Framers concerned about use of federal criminal law as a tool for central government encroachment on state and local prerogatives, it should have. Indeed, the right to indictment by grand jury was a topic of discussion among states considering ratification of the Constitution partly because of fear of the central government's power.¹⁵⁸ At the time of the Founding, the grand jury was (and, at least in theory, it remains) a moderator of criminal law federalism. The grand jury's robust discretion helps it serve this structural role.

As this Part reveals, grand jury nullification is not only consistent with the rule of law, but also buttresses the rule of law in important ways. The grand jury's robust discretion did not result from historical accident; it is in the grand jury's DNA and helps it to perform its intended role in the constitutional design.

¹⁵⁶ Cf. Wenger & Hoffman, *supra* note 76, at 1153–56 (discussing how petit jury nullification can perform a communicative function). However, it must be conceded that there are certain limits to the efficacy of this communicative function. As discussed below, it can be difficult to discern *why* a grand jury declined to indict in a given case. Certain features of the grand jury, such as secrecy restrictions and the lack of double jeopardy protection, can hinder the actual dissemination of such a message beyond the prosecutors charged with enforcing the law. See *infra* section III.B.4. Furthermore, the lack of a requirement of unanimity (twelve of the twenty-three grand jurors can derail an indictment) may frustrate efforts to discern what, if anything, one can learn from a divided grand jury's failure to indict. See *infra* subpart III.B.

¹⁵⁷ There are obvious dangers posed to a federal system when local grand juries are in a position to nullify congressional statutes. See, e.g., *United States v. Navarro-Vargas*, 408 F.3d 1184, 1203–04 (9th Cir. 2005). Concerns arise when a local grand jury is in a position to frustrate national enforcement priorities or even the protection of oppressed minorities in local communities. While the author shares those concerns, grand juries, by their design and very nature, do have that power, whether it is one we think, from a normative standpoint, should be exercised in a given case. Also, there are certain features of the grand jury, such as the ability of prosecutors to obtain review by a subsequent grand jury, that make grand jury nullification less worrisome than petit jury nullification in this regard. See *infra* section III.B.1.

¹⁵⁸ See CLARK, *supra* note 41, at 19–20 (“The federal Constitution’s provisions were adopted not only because the grand jury had a key role in the Revolution but also because many colonists were fearful of creating a powerful central government that could arbitrarily use the criminal process against its political enemies.”); YOUNGER, *supra* note 96, at 45–46 (describing how ratifying conventions in Massachusetts, New York, and New Hampshire recommended amendment to include a grand jury requirement, which became part of the Fifth Amendment); Simmons, *supra* note 3, at 12 (“When the original Constitution made no provision for grand juries, eight of the thirteen original states recommended that it be amended to ensure the right to a grand jury.”).

III

OPTIMIZING THE EXERCISE OF DISCRETION IN
CRIMINAL JUSTICE

Another primary critique claims that the grand jury possesses unwarranted discretion relative to that of other actors in the criminal justice system. To the contrary, the grand jury's discretion is at least as appropriate as the discretion afforded to other community justice actors. Furthermore, the grand jury is well equipped—in contrast to the petit jury and other discretion-wielding criminal justice actors—to exercise this sort of discretion.

A. Inventorying Discretion in Criminal Justice

Discretion is the backbone of the criminal justice system. The administration of criminal justice is not wooden and mechanical—there are far too many criminal laws and far too many offenders for society's limited police, prosecutorial, judicial, and penological resources.¹⁵⁹ Therefore, actors in the criminal justice system must exercise some discretion in deciding which individuals to arrest, prosecute, convict, and punish.¹⁶⁰ In order to map the contours and relative advantages of the grand jury's robust discretion, this subpart briefly explains how discretion, though subject to statutory and constitutional limits, undergirds the criminal justice process from beginning to end.

1. *Executive Criminal Enforcement Policymaking*

The Executive exercises tremendous discretion in setting policy regarding enforcement priorities. This takes two forms. First, the Executive may set policy on the criminalization of a certain type of conduct and work to persuade the Legislature to proscribe that conduct. Second, the Executive—from both a law enforcement and a prosecutorial standpoint—determines which criminal laws to enforce.¹⁶¹ For instance, a presidential administration hostile to laissez-faire approaches to market regulation might vigorously enforce anti-

¹⁵⁹ George C. Thomas, III, *Discretion and Criminal Law: The Good, the Bad, and the Mundane*, 109 PENN ST. L. REV. 1043 (2005) (stating that discretion in the criminal justice system is inevitable but that socially unacceptable applications of this discretion may be subject to constraint).

¹⁶⁰ See ALLEN, *supra* note 67, at 57–77 (describing the fragmented and discretion-laden American criminal justice apparatus); Joseph B. Kadane, *Sausages and the Law: Juror Decisions in the Much Larger Justice System*, in INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING 229, 230–31 (Reid Hastie ed., 1993) (outlining many decisions made regarding a case progressing through the justice system in addition to those by jurors); James Vorenberg, *Narrowing the Discretion of Criminal Justice Officials*, 1976 DUKE L.J. 651 (proposing reductions in the discretion of criminal justice officials).

¹⁶¹ See CONG. QUARTERLY INC., *POWERS OF THE PRESIDENCY* 61 (2d ed. 1997) (discussing the President's role “as [a] policy-maker[]” concerning law enforcement and noting that

trust laws to the detriment of other enforcement priorities. Likewise, an Executive with a strong gun-control position might exercise discretion to focus enforcement and prosecutorial resources on gun crimes.

2. *Law Enforcement Discretion*

Although investigating certain types of criminal activity involves collaboration between law enforcement officials and prosecutors, prosecutors will often be unaware of potentially criminal conduct until law enforcement officials bring it to their attention after an investigation is underway or even complete. Law enforcement personnel, therefore, exercise tremendous discretion to determine whether to investigate an individual or entity in the first place and, if they discover criminal conduct, whether to bring it to the prosecutor for a charging decision.¹⁶² Any criminal procedure hornbook recounts the discretion law enforcement officers wield in determining who to stop and frisk, question, or ask for consent to conduct more invasive searches. Although the Constitution and statutes highly regulate the manner in which law enforcement personnel conduct investigations,¹⁶³ the decision to investigate an individual in the first instance is unchecked.¹⁶⁴

Once law enforcement personnel have investigated a person of interest, they must decide whether to detain and/or seek charges against that person.¹⁶⁵ This exercise of discretion has perhaps the most profound impact on a putative defendant because it comes at the point when the person will or will not be entered into the “system.”¹⁶⁶ Even where other actors exercise discretion later in the criminal justice process in the individual’s favor, the stigma of the investigation and arrest, many times memorialized in an arrest record, can have lasting effects. And while indications of possible criminal conduct—enough to satisfy the probable cause standard—will often

the President determines “what types of offenses merit the greatest attention, what resources will be allocated, and what cases will be prosecuted”).

¹⁶² See, e.g., WALKER, *supra* note 77, at 23–25; Alexandra Natapoff, *Underenforcement*, 75 *FORDHAM L. REV.* 1715 (2006) (arguing that discretion to not enforce the law sometimes is used too frequently); Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 *COLUM. L. REV.* 749 (2003) (examining dynamics of interaction between federal prosecutors and law enforcement agents); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 *MICH. L. REV.* 505, 579–82 (2001) (considering prosecutorial and police discretion).

¹⁶³ Additionally, with respect to state law enforcement, prosecution, and trial, state constitutions may provide greater protection than the U.S. Constitution. See Robert F. Utter, *State Constitutional Law, The United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub?*, 64 *WASH. L. REV.* 19, 27 & n.54 (1989).

¹⁶⁴ See generally Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 *YALE L.J.* 543 (1960) (proposing oversight of the discretion that police exercise).

¹⁶⁵ See, e.g., Thomas, *supra* note 159, at 1047–48.

¹⁶⁶ See, e.g., *id.* at 1048–49.

determine whether law enforcement will present a case to a prosecutor for a charging decision, other factors unrelated to the sufficiency of the evidence might drive this discretion. These factors include whether the individual might be a valuable asset to other investigatory activity, whether the individual is a prominent member of society, whether litigating the case would expose unconstitutional officer conduct to scrutiny, whether the case would advance the career of the investigating officer, and whether the case has received publicity.¹⁶⁷ These and any number of other nonevidentiary factors, legitimate and illegitimate, may guide the virtually unfettered and unreviewable discretion of law enforcement officials.

3. *Prosecutorial Discretion*

Perhaps the broadest exercise of discretion occurs at the crucial charging stage.¹⁶⁸ Prosecutors in individual cases exercise discretion when deciding whether to charge a defendant in the first instance,¹⁶⁹ and such discretion is virtually unfettered.¹⁷⁰ The prosecutor can decide whether to charge an individual on any number of grounds. Often whether there is, or will likely be, enough admissible evidence to obtain a conviction will factor prominently in the prosecutor's decision to charge. For example, the resolve of a whistleblower or complaining witness, the credibility of the investigating law enforcement officer, or the availability of documentary, forensic, or other physical evidence will drive the prosecutor's discretion.

However, prosecutors just as often will decide whether to charge based on factors other than the sufficiency of the evidence.¹⁷¹ In ex-

¹⁶⁷ See, e.g., ALLEN, *supra* note 67, at 66–70.

¹⁶⁸ See, e.g., Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 299–300 (1983); Kadane, *supra* note 160, at 234 (“If I had to single out one decision as the most important in the entire system I would point to the decision made by prosecutors fairly early in the sequence about whether or not to prosecute at all.”); Weinstein, *supra* note 56, at 246 (“By far the greatest nullification takes place as a result of decisions not to prosecute or reduce charges.”).

¹⁶⁹ See, e.g., Donald A. Dripps, *Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies*, 109 PENN ST. L. REV. 1155, 1175–76 (2005); L.B. Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 LAW & CONTEMP. PROBS. 64, 83 (1948); Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1410–13 (2003).

¹⁷⁰ See, e.g., *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *Bordenkircher v. Hayes*, 434 U.S. 357, 368 n.2 (1978); *United States v. Nixon*, 418 U.S. 683, 693 (1974) (describing the Executive's “exclusive authority and absolute discretion to decide whether to prosecute a case”); KENNETH C. DAVIS, *DISCRETIONARY JUSTICE* 189–214 (1969); Vorenberg, *supra* note 160, at 678 (“The prosecutor's decision whether and what to charge is the broadest discretionary power in criminal administration.”).

¹⁷¹ See, e.g., *United States v. Navarro-Vargas*, 408 F.3d 1184, 1213 (9th Cir. 2005) (Hawkins, J., dissenting); *United States v. Navarro-Vargas*, 367 F.3d 896, 900–02 (9th Cir. 2004) (Kozinski, J., dissenting), *vacated en banc*, 382 F.3d 920 (9th Cir. 2004); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965) (“The discretionary power of the attorney for the

exercising discretion whether to charge a defendant, a prosecutor might ask a host of nonevidentiary questions including whether the defendant is a recidivist or is likely to offend again, whether the prosecutor has a heavy caseload at the time, whether the type of case is career advancing, whether the case has received publicity, whether the victim is vocal and empowered, whether the investigating law enforcement agency is pleasant to work with, whether the case has jury appeal, whether a matter is more appropriately prosecuted by a different sovereign or handled as a civil matter, and whether the criminal conduct is a priority area for the prosecutor's superiors. While some of these bases seem more legitimate than others,¹⁷² all are typical grounds for prosecutors' exercise of their unfettered charging discretion.¹⁷³

Beyond that initial decision *whether* to charge, prosecutors make many other important discretionary judgments.¹⁷⁴ Obviously, where a defendant's conduct implicates multiple criminal statutes, a prosecutor must decide which crimes to charge.¹⁷⁵ And once the prosecutor

United States in determining whether a prosecution shall be commenced or maintained may well depend upon matters of policy wholly apart from any question of probable cause."); Thomas, *supra* note 159, at 1044-45; see also FRANK W. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 154-280 (1969) (discussing various nonevidentiary bases for the exercise of prosecutorial discretion); Wayne R. LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532, 533-35 (1970) (same). One commentator has considered a "mechanism for tying the exercise of prosecutorial discretion to the availability of prison resources." See Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 720 (1996).

¹⁷² See ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 33-39 (2007) (discussing possible differences in how prosecutors decide whether to charge); Sandra Caron George, Note, *Prosecutorial Discretion: What's Politics Got to Do With It?*, 18 GEO. J. LEGAL ETHICS 739, 751-56 (2005) (discussing the role of politics in prosecutorial discretion).

¹⁷³ The U.S. Department of Justice has internal guidelines to guide the discretion of federal prosecutors. See U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, § 9-27.000 (1997) [hereinafter U.S. ATTORNEYS' MANUAL]. However, the guidelines make clear that their existence creates no right of action or review in any external party or entity. See *id.* § 9-27.150; see also Ellen S. Podgor, *Department of Justice Guidelines: Balancing "Discretionary Justice"*, 13 CORNELL J.L. & PUB. POL'Y 167 (2004) (advocating reforms designed to enhance compliance with internal guidelines). An additional check on prosecutorial discretion is found in the Hyde Amendment, 18 U.S.C. § 3006A (2000), which extends a cause of action to a prevailing criminal defendant for "a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith." Pub. L. No. 105-119, tit. VI, § 617, 111 Stat. 2440, 2519 (1997) (codified at 18 U.S.C. § 3006A); see also Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757 (1999) (considering legislative control of prosecutorial discretion).

¹⁷⁴ See, e.g., WALKER, *supra* note 77, at 89-92; Andrew Horwitz, *Taking the Cop Out of Copping a Plea: Eradicating Police Prosecution of Criminal Cases*, 40 ARIZ. L. REV. 1305, 1307 (1998).

¹⁷⁵ See, e.g., *United States v. Batchelder*, 442 U.S. 114, 123-24 (1979) ("[W]hen an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants."); Cahill, *supra* note 72, at 118. Indeed, prosecutors may "nullify" a criminal statute by refusing to enforce it. See

charges the defendant with those crimes, it is within the discretion of the prosecutor to decide whether to dismiss some or all of the charges previously lodged.¹⁷⁶ As with the decision to charge, each of these later prosecutorial decisions is marked by discretion that is, in most instances, unreviewable.¹⁷⁷

4. *Petit Jury Discretion*

As discussed above, the petit jury in a criminal case is tasked with determining whether the government has proven each element of the crimes charged beyond a reasonable doubt, but also has the power to acquit on bases other than the sufficiency of the evidence.¹⁷⁸ Several features of this power bear repeating. Although judges instruct petit juries on the law and acting contrary to such instruction is generally disfavored, there are effectively no controls on a petit jury's ability to exercise its discretion on bases beyond sufficiency of the evidence.¹⁷⁹ Therefore, even where the government has presented evidence establishing the defendant's guilt beyond a reasonable doubt, a petit jury can nevertheless use its discretion to acquit.¹⁸⁰ Petit juries, like grand juries, can exercise this discretion for virtually any reason at all, from disagreement with the wisdom or fairness of the criminal statute to bias toward the accused or hatred of the victim.¹⁸¹ Also, a sole member of a petit jury can frustrate a prosecution, as the federal system and most states require unanimity for conviction.¹⁸² Most impor-

generally Arthur E. Bonfield, *The Abrogation of Penal Statutes by Nonenforcement*, 49 IOWA L. REV. 389 (describing the "nullification by nonenforcement" phenomenon).

¹⁷⁶ Dismissal of charges before trial can result from an assessment of the strength (or weakness) of evidence in a case, a decision to allow some sort of pretrial diversion of the defendant, *see, e.g.*, Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205, 1255 (1998), or a determination that the government should agree to a plea bargain. *See* U.S. ATTORNEYS' MANUAL, *supra* note 173, § 9-27.400.

¹⁷⁷ *See, e.g.*, James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1523 (1981). *But see* MILLER, *supra* note 171, at 5 (describing prosecutorial discretion as "nearly uncontrolled" save for "the fact that the prosecutor is typically an elected official and thus responsive to community opinion").

¹⁷⁸ *See supra* subpart I.A.

¹⁷⁹ *See generally* Renée B. Lettow, *New Trial for Verdict Against Law: Judge-Jury Relations in Early Nineteenth-Century America*, 71 NOTRE DAME L. REV. 505 (1996) (examining increased judicial control over civil juries in early nineteenth-century America).

¹⁸⁰ *See* State v. Ragland, 519 A.2d 1361, 1372 (N.J. 1986) (declaring that "[j]ury nullification is an unfortunate but unavoidable power").

¹⁸¹ *See* Brown, *supra* note 4, at 1171-96; Marder, *supra* note 32, at 887-902; *see also* Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1485 & n.68 (2001) (noting that petit juries might choose "to convict of a lesser offense despite clear proof of guilt on a higher offense," a practice Blackstone referred to as "'pious perjury'" (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES *238-39 (1769))); *supra* text accompanying note 32.

¹⁸² *See* FED. R. CRIM. P. 31(a) (mandating that in a federal criminal jury trial, "[t]he verdict must be unanimous"); Leib, *supra* note 16, at 141-42. Although the Constitution does not require unanimity, *see* Apodaca v. Oregon, 406 U.S. 404, 406 (1972), most states

tantly, because the Double Jeopardy Clause prohibits retrial following acquittal,¹⁸³ the petit jury can forever shield a defendant from liability for an alleged crime.¹⁸⁴ The petit jury's discretion in this regard is unfettered and unreviewable.

5. *Judicial Discretion*

Judicial officers—magistrate judges, trial judges, and sentencing judges—also exercise significant discretion in the criminal justice process. Although the discretion of judicial officers based on nonevidentiary bases is, in many ways, much more constrained than that of law enforcement officers, prosecutors, and petit juries, some characteristics of judicial discretion deserve mention.

Magistrate judges must decide whether the government has presented sufficient evidence for probable cause to support an arrest warrant and for charges to proceed.¹⁸⁵ In cases not requiring grand jury indictment,¹⁸⁶ this may be the only determination regarding the sufficiency of the evidence prior to the fact finder at trial reaching a verdict of conviction or acquittal. Although the law explicitly charges magistrate judges with determining whether the government has presented evidence sufficient to satisfy probable cause,¹⁸⁷ magistrate judges can ground such findings on bases other than the sufficiency of the evidence. Perhaps a magistrate judge doubts the credibility of the investigating officer or the prosecutor even though the magistrate judge has no specific knowledge of misconduct in the case at bar. The magistrate judge can simply find that the government has not met its burden of probable cause. Or a magistrate judge could dismiss charges because of disagreement with the enforcement priorities of the law enforcement agency or prosecutor's office, or belief that the particular defendant should not be prosecuted for reasons unrelated

do require unanimous verdicts in criminal cases. See, e.g., JAMES Q. WHITMAN, *THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL* 22 (2008); Edward P. Schwartz & Warren F. Schwartz, *And So Say Some of Us . . . What To Do When Jurors Disagree*, 9 S. CAL. INTERDISC. L.J. 429, 429 (2000).

¹⁸³ See, e.g., *Smith v. Massachusetts*, 543 U.S. 462, 466–67 (2005).

¹⁸⁴ Of course, pursuant to the “dual sovereignty” doctrine, a second sovereign may bring a successive prosecution for acquitted conduct. See, e.g., *Bartkus v. Illinois*, 359 U.S. 121, 132–34 (1959). However, the U.S. Department of Justice has internal guidelines, commonly referred to as the “Petite Policy,” to guide federal prosecutorial discretion with regard to the decision to initiate a prosecution for conduct previously prosecuted under the law of another sovereign. See, e.g., *Rinaldi v. United States*, 434 U.S. 22, 27–29 (1977); U.S. ATTORNEYS’ MANUAL, *supra* note 173, § 9-2.031 (discussing the policy on dual and successive prosecution).

¹⁸⁵ See FED. R. CRIM. P. 3, 4, 5.1, 41.

¹⁸⁶ In capital and other felony cases, where the Grand Jury Clause requires indictment, the magistrate judge often may be called upon to make a probable cause determination should the grand jury not issue an indictment within a certain time frame. See, e.g., *id.* 5.1.

¹⁸⁷ See *id.* 5.1(e).

to the quality and quantity of the evidence. To be sure, the prosecutor has some recourse and can simply present the case to another judicial officer or seek an indictment from a grand jury to obviate the need for the judicial officer's finding.¹⁸⁸ Prosecutors are often loathe to resort to these techniques, however. They are often repeat players before magistrate judges and may wish to avoid sidestepping their authority out of fear of alienating them.¹⁸⁹

Arguably, trial judges sitting as fact finders in bench trials have the same power to nullify that petit juries have.¹⁹⁰ In fact, because trial judges have such broad experience across numerous cases in both fact-finding and sentencing roles, they may perceive themselves as better equipped to make "just" decisions on bases beyond sufficiency of the evidence.¹⁹¹ Even a trial judge presiding over a jury trial has the discretion to grant a motion for judgment of acquittal or enter judgment of acquittal *sua sponte*.¹⁹² While such "directed verdicts" are supposed to be based solely on the quantum of evidence presented by the government, a judge could acquit a defendant on one or all charges on bases other than the sufficiency of the evidence. A judge who acquits a defendant during a bench trial or enters a judgment of acquittal in a jury trial exercises unfettered and unreviewable discretion¹⁹³ because of the strictures of the Double Jeopardy Clause.¹⁹⁴

¹⁸⁸ See *id.* 5.1.

¹⁸⁹ Cf. George R. Nock, *The Point of the Fourth Amendment and the Myth of Magisterial Discretion*, 23 CONN. L. REV. 1, 28–29 (1990) (considering the highly regarded position of magistrate judges). Setting bail and concomitant conditions of release is also highly discretionary, even within the "guided discretion" framework erected by many bail reform statutes of the latter half of the twentieth century. See WALKER, *supra* note 77, at 54–80; HOWARD ABADINSKY, *DISCRETIONARY JUSTICE: AN INTRODUCTION TO DISCRETION IN THE CRIMINAL JUSTICE SYSTEM* 65–66 (1984).

¹⁹⁰ See, e.g., Paul Butler, *When Judges Lie (and When They Should)*, 91 MINN. L. REV. 1785, 1785–87 (2007); M.B.E. Smith, *May Judges Ever Nullify the Law?*, 74 NOTRE DAME L. REV. 1657, 1661 (1999).

¹⁹¹ See, e.g., Leipold, *supra* note 16, at 200–18 (evaluating the hypothesis that judges may acquit more frequently when faced with having to impose severe sentences compelled by strict sentencing guidelines regimes). However, as Professor Robinson points out, there are barriers associated with the socioeconomic and educational background and institutional role of most judges that may make them less well equipped to make such normative judgments. See Paul H. Robinson, *Legality and Discretion in the Distribution of Criminal Sanctions*, 25 HARV. J. ON LEGIS. 393, 416–419 (1988).

¹⁹² See FED. R. CRIM. P. 29(a).

¹⁹³ See Leipold, *supra* note 16. Indeed, a proposed amendment to the Federal Rules of Criminal Procedure is designed to rein in this discretion. See FED. R. CRIM. P. 29 (Proposed Amendments 2006), available at http://www.uscourts.gov/rules/Excerpt_CR_Report_Pub.July%202006.pdf#page=7 (permitting government appeal of preverdict judgments of acquittal).

¹⁹⁴ See *Smith v. Massachusetts*, 543 U.S. 462, 466–67 (2005). Generally, the government cannot appeal a judgment of acquittal entered by a trial judge. The only exception is when the trial judge enters a judgment of acquittal after a jury has voted to convict. In that instance, the government can appeal the judgment of acquittal. See *id.* at 467.

Furthermore, the sentencing judge has an obvious discretionary role to play.¹⁹⁵ Although the legislatively prescribed limits of punishment cabin this discretion, sentencing discretion has, for much of the nation's history, given judges broad latitude to determine sentences.¹⁹⁶ Indeed, the perceived unfairness of the broad discretion inherent in indeterminate sentencing was an impetus for the promulgation of the Federal Sentencing Guidelines in the 1980s.¹⁹⁷ Now that the Supreme Court has rendered those guidelines advisory,¹⁹⁸ judges have regained discretion to sentence convicted criminal defendants within statutory confines.¹⁹⁹

¹⁹⁵ See WALKER, *supra* note 77, at 117–18; Easterbrook, *supra* note 168, at 322–25. In addition to the initial sentencing decision, judges in the federal and some state systems have discretion to revisit the imposed sentence after a period of time. See, e.g., FED. R. CRIM. P. 35(b)(1) (allowing judges to modify a sentence for a defendant's "substantial assistance" with other criminal investigations); Md. R. § 4-345 (allowing court to reduce a sentence within a set period of time).

¹⁹⁶ See, e.g., Easterbrook, *supra* note 168, at 322–25 (arguing, prior to the promulgation of the Federal Sentencing Guidelines, that "[t]here is as much discretion in sentencing as anywhere else in criminal procedure"); Joseph E. Kennedy, *Making the Crime Fit the Punishment*, 51 EMORY L.J. 753, 758–59 (2002) (noting the pre-Guidelines sentencing discretion of federal trial judges); see also WALKER, *supra* note 77, at 112–17; Robinson, *supra* note 191, at 404 (1988) (noting that even within guidelines sentencing regimes, "[s]entencing judges, who are accustomed to nearly absolute sentencing discretion, may attempt to subvert guidelines sentences that they believe are improper"); Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 225–26 (1993).

¹⁹⁷ See, e.g., Laura I. Appleman, *Retributive Justice and Hidden Sentencing*, 68 OHIO ST. L.J. 1307, 1348–49 (2007); Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693, 699 (2005); Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105, 107 (1994); see also MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5 (1973) (noting that "the almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law"); Lisa M. Fairfax, *Trust, the Federal Sentencing Guidelines, and Lessons From Fiduciary Law*, 51 CATH. U. L. REV. 1025, 1056 n.220 (2002).

¹⁹⁸ See *United States v. Booker*, 543 U.S. 220, 233–34 (2005) (rendering the federal Sentencing Guidelines advisory due to their incompatibility with the Sixth Amendment right to jury trial); see also Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1316–17 (2005).

¹⁹⁹ Shortly after *Booker*, it remained to be seen how much discretion the Supreme Court had returned to sentencing judges, as sentences still were subject to appellate review for "reasonableness." See, e.g., Nancy J. King, *Reasonableness Review After Booker*, 43 Hous. L. REV. 325, 325–26 (2006) (accounting for sentences that fall within or without the Guidelines range). In 2007, the Court, in what fairly can be characterized as two landmark decisions, made clear that district judges indeed enjoyed much greater sentencing discretion after *Booker*. See *Gall v. United States*, 128 S. Ct. 586, 597 (2007) (holding that appellate courts must apply more deferential abuse-of-discretion standard when reviewing sentences for reasonableness, whether or nor the sentence is within the advisory Guidelines range); *Kimbrough v. United States*, 128 S. Ct. 558, 574 (2007) (holding that the crack versus powder cocaine disparity contained in the advisory Guidelines is not mandatory and reasonably may be considered by the judge when fashioning an out-of-Guidelines sentence); Kate Stith, *Arc of the Pendulum: The Exercise of Discretion in Sentencing*, 117 YALE L.J. (forthcoming 2008); Linda Greenhouse, *Justices Restore Judges' Control over Sentencing*, N.Y. TIMES,

6. *Executive Mercy Discretion*

Finally, the Executive also exercises unchecked discretion through its clemency and pardon power. Parole boards, often appointed by (and loyal to) the Executive, possess broad discretion to shorten the sentences of convicted defendants.²⁰⁰ Executive clemency is perhaps the starkest example of absolute discretion in the criminal justice process. In the federal system and in many states, the Executive has the unconditional power to commute the sentence of a criminal defendant—even one condemned to death.²⁰¹ When deciding whether to pardon a defendant or grant clemency, the executive branch often relies on recommendations of a formal commission or informal advisors,²⁰² and decides on a careful weighing of factors such as evidence of the defendant's redemption, views of the victim or the victim's family, and the public interest.²⁰³ Pardons often come with strings attached and require the pardoned individual to comply with certain conditions.²⁰⁴ However, the decision to pardon, entrusted to the President by Article II in the federal system,²⁰⁵ can be made for any reason at all.²⁰⁶ Although the Executive's decision to exercise (or not exercise) the pardon and clemency powers often encounter great

Dec. 11, 2007, at A1. Coincidentally, the day after the decisions came down, the U.S. Sentencing Commission voted unanimously to give retroactive effect to a recent amendment to the Federal Sentencing Guidelines reducing the sanction for crack cocaine offenses. See Press Release, U.S. Sentencing Comm'n, U.S. Sentencing Comm'n Votes Unanimously to Apply Amendment Retroactively for Crack Cocaine Offenses (Dec. 11, 2007), available at <http://www.ussc.gov/PRESS/rel121107.htm>; Darryl Fears, *Panel May Cut Sentences for Crack—Thousands Could Be Released Early*, WASH. POST, Nov. 13, 2007, at A1.

²⁰⁰ See, e.g., Victoria J. Palacios, *Go and Sin No More: Rationality and Release Decisions by Parole Boards*, 45 S.C. L. REV. 567, 567–68 (1994).

²⁰¹ See, e.g., Samuel T. Morison, *The Politics of Grace: On the Moral Justification of Executive Clemency*, 9 BUFF. CRIM. L. REV. 1, 14 (2005); Mark Strasser, *Some Reflections on the President's Pardon Power*, 31 CAP. U. L. REV. 143, 143–45 (2003).

²⁰² See Palacios, *supra* note 200, at 568.

²⁰³ See *White v. Ind. Parole Bd.*, 266 F.3d 759, 766 (7th Cir. 2001); Palacios, *supra* note 200, at 568, 578–80. Considerations of mercy may also play a part in the executive clemency decision. See, e.g., Daniel T. Kobil, *Should Mercy Have a Place in Clemency Decisions?*, in FORGIVENESS, MERCY, AND CLEMENCY 36, 39–45 (Austin Sarat & Nasser Hussain eds., 2007) (considering the appropriateness of mercy as a basis for executive clemency); Barkow, *supra* note 51, (manuscript at 14–15) (arguing that the rise of administrative law is detrimental to the executive prerogative to grant mercy through the clemency function).

²⁰⁴ See Harold J. Krent, *Conditioning the President's Conditional Pardon Power*, 89 CAL. L. REV. 1665, 1676–79 (2001).

²⁰⁵ See U.S. CONST. art. II, § 2; Todd D. Peterson, *Congressional Power Over Pardon and Amnesty: Legislative Authority in the Shadow of Presidential Prerogative*, 38 WAKE FOREST L. REV. 1225, 1226 (2003) (stating that the Pardon Clause in the Constitution is “often described as an example of an unconfined constitutional grant of authority”).

²⁰⁶ See, e.g., *Ex parte Grossman*, 267 U.S. 87, 120–21 (1925); Strasser, *supra* note 201, at 144.

controversy,²⁰⁷ this exercise of discretion cannot be reviewed or overturned.²⁰⁸

A close look at the discretion that the criminal justice system affords to other actors reveals that the grand jury's robust discretion is not unusual.²⁰⁹ In many ways, the grand jury's discretion is no greater than that of the law enforcement officer, the prosecutor, or the judge.²¹⁰ Many of these other criminal justice actors are empowered to make dispositive decisions based on considerations beyond a bare sufficiency of the evidence analysis.²¹¹ As noted above, various nonevidentiary considerations may compel a certain decision when actors exercise discretion at other points during the criminal justice process.²¹² Although one may find greater comfort, for instance, in exercises of discretion by law enforcement and prosecutors than in the dispositive discretionary choices made by fact-finding judges and juries, the fact remains that significant discretion is a common and integral feature of the entire criminal justice process.

Furthermore, many of these dispositive exercises of discretion are completely unreviewable or at least not reviewable in any meaningful sense. Attempts to review petit jury acquittals, judicial acquittals, and executive pardons are futile; the Constitution, by operation of the Double Jeopardy Clause and the pardon power, renders these deci-

²⁰⁷ See, e.g., Leonard B. Boudin, *The Presidential Pardons of James R. Hoffa and Richard M. Nixon: Have the Limitations on the Pardon Power Been Exceeded?*, 48 U. COLO. L. REV. 1, 1-2 (1976).

²⁰⁸ See King, *supra* note 143, at 455 & nn. 95-96; Markel, *supra* note 42, at 1458.

²⁰⁹ See, e.g., ROSCOE POUND, *CRIMINAL JUSTICE IN CLEVELAND* 569 (1922) (placing the "power of the grand jury to ignore the charge" among all the other discretionary judgments made throughout the criminal process).

²¹⁰ See, e.g., *United States v. Asdrubal-Herrera*, 470 F. Supp. 939, 942 (N.D. Ill. 1979) ("Just as a prosecutor can, in the exercise of discretion, decline prosecution in the first instance, a grand jury can return a true bill or a no bill as they deem fit."); Robert T. Hall, *Legal Tolerance of Civil Disobedience*, 81 ETHICS 128, 132-35 (1971) (discussing the different forms of discretion for law officers, prosecutors, and judges); Thomas, *supra* note 159, at 1044-45 (discussing the broad discretion of police officers and prosecutors); Weinstein, *supra* note 56, at 246-47 ("Compared to prosecutorial nullification, grand jury refusal to indict . . . [is] of minor significance.").

²¹¹ Cf. Brown, *supra* note 4, at 1189-90. As Professor Brown explains in the context of petit jury nullification:

We fully accept that prosecutors have discretion to apply criminal law or not according to their own judgment, into which they are readily allowed to consider moral or social policy factors well beyond the facts' relation to the statutory elements. Rare is the contention that prosecutorial discretion is "lawless," as opposed to merely ill-advised. Yet a jury making essentially the same judgment—thus double-checking the prosecutor's choice by deciding whether it finds compelling reasons to nullify rather than endorse the prosecutor's application of law—faces the traditional objections of bias, irrationality, or subversion of the democratic process.

Id.

²¹² See *supra* notes 202-03.

sions unreviewable.²¹³ Also, while the Executive answers to the citizenry through the ballot, the structure of the professional civil service means that career law enforcement agents and prosecutors exercise most on-the-ground discretion.²¹⁴ Even considering the setting of broad criminal justice policy, which is more likely to bear the strong imprint of elected decision makers sensitive to political consequences, the nature of the democratic process may not lend itself to meaningful policy dialogue between those in power and the populace.²¹⁵

And even where review is theoretically available within the judicial process, as with pretrial probable cause determinations²¹⁶ and sentencing decisions,²¹⁷ barriers to review often exist in all but the most extraordinary cases. When appeals are available, they are often slow and require great resources—sometimes more than government actors are willing to devote. As mentioned above, law enforcement investigatory and prosecutorial charging decisions are largely unregulated, as well.²¹⁸ Although the Fourth Amendment and the Equal Protection Clause provide some parameters for this discretion, numerous hurdles exist. For example, the Supreme Court has been fairly rigid and formalistic in responding to attempts to limit discretion with regard to racial profiling.²¹⁹ Even where the source of a remedy for an unconstitutional exercise of discretion clearly exists, it is difficult to achieve redress. Equal protection challenges to exercises of prosecutorial and investigatory discretion are notoriously difficult to bring and to prove; many would consider even gaining access to dis-

²¹³ See *Smith v. Massachusetts*, 543 U.S. 462, 466–67 (2005) (holding that the Double Jeopardy Clause “prohibits reexamination of a court-decreed acquittal to the same extent it prohibits reexamination of an acquittal by a jury verdict”); *Conn. Bd. of Pardons v. Dumachat*, 452 U.S. 458, 464 (1981) (“[P]ardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review.”).

²¹⁴ See Goldstein, *supra* note 164, at 178 (“Police decisions not to invoke the criminal process largely determine the outer limits of law enforcement.”). But see Bruce A. Green & Fred C. Zacharias, “*The U.S. Attorneys Scandal and the Allocation of Prosecutorial Power*,” 69 OHIO ST. L.J. (forthcoming 2008) (manuscript at 6–7), available at <http://ssrn.com/abstract=1015026> (discussing control of subordinate career prosecutors by political superiors). It should be noted, as Professor Fiss reminds, that although United States Attorneys are appointed by the President, they typically are put forward by the home-state Senators, who are elected at the state level. Therefore, the United States Attorneys “are very responsive to local politics.” Fiss, *supra* note 48, at 137.

²¹⁵ See, e.g., SPENCER OVERTON, *STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION* 43–64 (2006) (discussing obstacles to full and fair democracy in the United States).

²¹⁶ FED. R. CRIM. P. 5.1.

²¹⁷ See FED. R. CRIM. P. 35.

²¹⁸ See *supra* sections III.A.2, III.A.3.

²¹⁹ See, e.g., *Whren v. United States*, 517 U.S. 806, 816–18 (1996); see also Russell L. Weaver, *Investigation and Discretion: The Terry Revolution at Forty (Almost)*, 109 PENN ST. L. REV. 1205, 1214–15 (2005).

covery a victory.²²⁰ Furthermore, tort actions against decision makers are often futile in the face of high litigation costs, discovery restrictions, and qualified or absolute immunity.²²¹

B. The Grand Jury as a Locus of Robust Discretion

Therefore, many *dispositive* exercises of discretion by criminal justice actors are or can be based on considerations other than the sufficiency of the evidence. Furthermore, these exercises of robust discretion are not reviewed and, in some cases, *cannot* be reviewed. Given the amount of unchecked discretion that other actors in the criminal justice system enjoy, query whether we should be concerned about the grand jury exercising such discretion. Indeed, in many ways the grand jury is the best equipped of all the criminal justice actors to exercise such discretion.

1. Safety Valve

First, an important feature attendant to the grand jury's robust discretion is that grand jury decisions, unlike those of the petit jury, do not enjoy Double Jeopardy Clause protection. Generally, a grand jury's decision not to indict a potential defendant is not dispositive.²²² Assuming there are no statute of limitations concerns,²²³ the prosecutor can simply present the case to another grand jury and attempt to obtain an indictment.²²⁴ While prosecuting agencies may self-regulate their abilities to present cases to successive grand juries,²²⁵ no constitutional provision prohibits such actions.²²⁶

One cannot overstate the importance of the fact that a subsequent grand jury may review a prior grand jury's decision to decline indictment. Whether a grand jury acts from an improper motive or simply frustrates a law enforcement priority, the grand jury's nullifica-

²²⁰ See, e.g., *United States v. Armstrong*, 517 U.S. 456, 463–64 (1996); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13, 18 (1998).

²²¹ See, e.g., *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993) (holding that prosecutors enjoy absolute immunity surrounding charging decisions).

²²² See, e.g., 2 *BEALE ET AL.*, *supra* note 1, § 8:6 (2005 & Supp. 2007); GEORGE J. EDWARDS, JR., *THE GRAND JURY* 42 (1906) (“[I]f the grand jury improperly reject a bill, it is still competent for the district attorney to lay the matter before a subsequent grand jury, which may act otherwise. The ability of the grand jurors to work harm by the abuse of their power is, therefore, more fancied than real.”).

²²³ See, e.g., 18 U.S.C. § 3282 (2000) (“[N]o person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found . . . within five years next after such offense shall have been committed.”).

²²⁴ See *United States v. Williams*, 504 U.S. 36, 49 (1992) (“The Double Jeopardy Clause of the Fifth Amendment does not bar a grand jury from returning an indictment when a prior grand jury has refused to do so.”).

²²⁵ See U.S. ATTORNEYS’ MANUAL, *supra* note 173, § 9-11.120(A) (requiring approval by a United States Attorney before resubmission of the matter to a new grand jury).

²²⁶ See *Williams*, 504 U.S. at 49.

tion may send a message to the government but does not permanently block a prosecution.²²⁷ This represents a significant difference from the petit jury's nullification power because the Double Jeopardy Clause shields an accused individual from criminal liability for the alleged conduct forever.²²⁸ Therefore, the grand jury features a concomitant safety valve to protect against gross abuse of its discretion.

2. *Enhanced Deliberation of the Grand Jury*

Also, the grand jury's unique characteristics may offer higher quality deliberation than that of other actors in the criminal justice system. Because the grand jury sits for an extended period of time and has no oversight of its pace of decision making, it does not have the time pressures that other criminal justice actors face.²²⁹ A law enforcement agency may respond to public pressure to quickly apprehend an individual, and a prosecutor may feel the need to charge a suspect promptly. Executive clemency and pardon decisions often occur in the last days of a chief executive's term, amidst a whirlwind of other activity.²³⁰ Even a petit jury knows that the court and the parties are waiting for a verdict; a court often will interpret extended jury deliberations as a sign of futility or deadlock.²³¹ In contrast, the grand jury may deliberate on the merits of the prosecution for as long as it desires—limited only, perhaps, by the prosecutor's patience²³² or the expiration of the grand jury's term.²³³ This lack of pressured, heat-of-the-moment decision making may enhance the quality of the grand jury's deliberation.²³⁴

²²⁷ As discussed below, the fact that a prosecutor may press ahead with a prosecution through another grand jury may somewhat dilute the grand jury's communicative ability. See *infra* Part III.

²²⁸ See, e.g., *Smith v. Massachusetts*, 543 U.S. 462, 466–67 (2005). But see *Leipold*, *supra* note 57, at 259 (arguing for “error-correcting procedures” in jury trials, including a right of appeal from acquittals).

²²⁹ See 1 BEALE ET AL., *supra* note 1, § 4:12.

²³⁰ See Gregory C. Sisk, *Suspending the Pardon Power During the Twilight of a Presidential Term*, 67 MO. L. REV. 13, 16, 21 (2002).

²³¹ See, e.g., *Allen v. United States*, 164 U.S. 492, 501 (1896) (endorsing a charge to a deadlocked jury designed to prompt resolution of deliberations).

²³² See 1 BEALE ET AL., *supra* note 1, § 4:12. Of course, the prosecutor does have considerable influence by regulating the pace at which the grand jury hears the evidence. See *id.*

²³³ See FED. R. CRIM. P. 6(g). Even when a grand jury's term expires, the prosecutor may present the matter to a new grand jury. One can find a recent example of this in the empanelment of a successor grand jury believed to be investigating circumstances surrounding baseball great Barry Bonds after the first grand jury's term expired in July 2006 amidst much anticipation. See Dave Sheinin, *A New Grand Jury Impaneled for Bonds*, WASH. POST, July 21, 2006, at E5. The government empaneled a successor grand jury to continue the investigation. See *id.*

²³⁴ Of course, this is not to say that a grand jury may not be cognizant of the same public pressures that bear on other criminal justice actors. See CLARK, *supra* note 41, at 23. (“The grand juries in more recent times have continued to reflect responsiveness to . . . executive pressure that labels one or another group as . . . deserving of indictment.”).

Closely related to the luxury of time is the fact that grand jurors work together for a significant period, in some instances twenty-four months.²³⁵ Unlike petit juries, which join together for one discrete case and then disband, grand juries meet consistently for an extended period of time.²³⁶ This contact certainly generates synergies and familiarity that can enhance the decision-making process.²³⁷ When jurors spend more time together, they may create an environment in which the deliberating grand jury recognizes and considers each juror's unique perspective.²³⁸ Unlike most discretion-wielding actors in the criminal process, grand juries are drawn from the citizenry and represent the voice of the community.²³⁹ Furthermore, the grand jury, which is roughly twice the size of the traditional petit jury,²⁴⁰ might benefit more from the cross-sectional ideal of deliberative juries than does the trial jury.²⁴¹

Grand jurors considering an indictment associated with a notorious criminal act, such as the killing of a child or terrorist activity, may feel the same compulsion of expediency that other actors who usually operate under more substantial and direct time constraints also feel.

²³⁵ See FED. R. CRIM. P. 6(g).

²³⁶ See 1 BEALE ET AL., *supra* note 1, § 4:12.

²³⁷ See Robinson, *supra* note 191, at 416 (noting that the fact that petit juries sit for only one case and then disband is an obstacle to "consistently applying abstract, normative standards").

²³⁸ See Brenner, *supra* note 30, at 81 ("The frequency with which grand juries are convened carries implications for . . . enhanced community voice.").

²³⁹ See, e.g., *id.*

²⁴⁰ See FED. R. CRIM. P. 6(a)(1).

²⁴¹ See, e.g., JOHN GUINTEH, *THE JURY IN AMERICA* 89–95 (1988) (surveying empirical studies concerning sources of trial jury bias); Jeffrey Abramson, *Two Ideals of Jury Deliberation*, 1998 U. CHI. LEGAL F. 125, 125 (referencing the jury as an institution often considered to "embod[y] the ideal of using collective reasoned discussion to attain a common verdict"); Forde-Mazrui, *supra* note 49, at 360–61 (1999) (discussing benefits of representative juries); Jason Mazzone, *The Justice and the Jury*, 72 BROOK. L. REV. 35, 59 (2006) (querying whether larger juries might bring about a net gain in "participatory" benefits); *cf.* Ballew v. Georgia, 435 U.S. 223 (1978) (reviewing scholarly studies on petit jury size); GUINTEH, *supra*, at 76 (describing criticism that smaller petit juries are "less representative of the community"). *But see* GUINTEH, *supra*, at 78–79 (noting research suggesting that smaller juries have smoother and more cordial deliberations). Even with the larger number of jurors, however, there may be a concern that a grand jury may not be sufficiently representative to claim to be the voice of the community. See Jon Van Dyke, *The Grand Jury: Representative or Elite?*, 28 HASTINGS L.J. 37, 41–44 (1976) (discussing potential grand jury manipulation). Historically, society has considered the grand jury an elite body of (usually) men, chosen by a "key man" who recommended each grand juror for service. See JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 99–100 (Harvard Univ. Press 2000) (1994). Although reforms have abolished such a system, *see* 28 U.S.C. § 1861 (2000), questions remain as to whether practical impediments stand in the way of true cross-representation in the grand jury. For example, the length of time that many grand juries must serve—eighteen months—conceivably could limit the demographic group from which grand jurors are drawn; even though grand juries meet only a few days each month, missed workdays may have a harsher impact on those lower on the economic scale. Also, the fact that grand jurors are drawn from far-ranging geographic areas means that they do not represent a "community" in any meaningful sense. *See gener-*

3. *Enhanced Access and Exposure to Information*

Another benefit of grand juries' extended service relates not to its length of service but rather to its volume of cases. While there are grand juries essentially dedicated to the investigation of a single category of alleged criminal conduct or to the investigation of a single individual or entity, most grand juries gain exposure to a wide array of criminal cases during a term of service.²⁴² Because grand juries are repeat players, they may obtain a broad sense of important issues, including the government's enforcement priorities, the characteristics of a sample of the individuals whom the prosecutor refers for indictment, and the prosecutor's charging decisions over a large group of cases.²⁴³ In this way, the grand jury, unlike the petit jury, is well positioned to see the big picture regarding criminal justice policy in a particular jurisdiction and to factor that policy into its decision making in a more informed manner.²⁴⁴

The grand jury also enjoys access to a broader swath of evidence than do most other criminal justice actors.²⁴⁵ One of the criticisms of petit jury nullification claims is that evidentiary rules deny jurors access to all of the information that a reasoned nullification decision requires.²⁴⁶ However, as the Supreme Court famously recounted, the grand jury, on behalf of the public, "has a right to every man's evi-

ally Washburn, *supra* note 49 (proposing "neighborhood grand juries" to enhance the grand jury's representative nature and effectiveness). Additionally, the fact that the grand jury does not require unanimity may work against the notion that the decision not to indict in a given case expresses the community's voice. Cf. JAMES WILSON, *Of Juries*, in *THE WORKS OF JAMES WILSON*, 162, 205 (James DeWitt Andrews ed., 1896) (arguing that unanimity is central to the jury's authority as the delegate of the broader community). Because twelve grand jurors can block the other eleven from returning an indictment, a grand jury can nullify although the panel is virtually evenly divided, a concern not typically present in the context of petit jury nullification via acquittal. For insightful treatment of the petit jury unanimity rule from historical-analysis, theological, and democratic-theory perspectives, see WHITMAN, *supra* note 182, at 22-23, 204 (reconsidering origins of the factual proof function of a unanimity rule); Richard A. Primus, *When Democracy Is Not Self-Government: Toward a Defense of the Unanimity Rule for Criminal Juries*, 18 *CARDOZO L. REV.* 1417 (1997) (mapping the implications of "interest-based" and "deliberative" democratic theories related to the unanimity rule and the jury's democratic role).

²⁴² See Brenner, *supra* note 30, at 81-82, 90-91 & n.119.

²⁴³ See *id.* But see Easterbrook, *supra* note 168, at 308 (asserting that grand jurors "lack the information needed to make intelligent comparative decisions about who should be prosecuted").

²⁴⁴ See Brenner, *supra* note 30, at 90-91 (asserting that grand jury term lengths create an "independent existence [that] enhances a grand jury's ability to serve as a voice of the community and to distinguish itself from the prosecutor's office"). Obviously, however, a grand jury in the middle or latter part of its term would have a much better sense of the big picture than would a neophyte grand jury.

²⁴⁵ See 1 BEALE ET AL., *supra* note 1, § 4:14.

²⁴⁶ See, e.g., Andrew D. Leipold, *Race-Based Jury Nullification: Rebuttal (Part A)*, 30 *J. MARSHALL L. REV.* 923, 924 (1997) (arguing that "juries are incapable of making reasoned nullification decisions" because much of the necessary information is inadmissible at trial).

dence.”²⁴⁷ The grand jury may subpoena any person to testify about any subject and to produce any item.²⁴⁸ No hearsay restrictions limit the evidence that the grand jury can hear.²⁴⁹ Furthermore, there are very few constitutional barriers to a grand jury’s reception of evidence. Unlike how it operates in the petit jury context, the exclusionary rule does not suppress evidence to be submitted to the grand jury.²⁵⁰ Also, although constitutional and some common law privileges are valid against a grand jury subpoena for testimony and tangible evidence, these can be (and often are) defeated by the provision of immunity to the subpoenaed witness.²⁵¹ Most importantly, although anecdotal evidence compels the conclusion that the grand jury often passively receives the evidence that the prosecutor wants it to see,²⁵² the grand jury can use its tremendous subpoena power to seek any information it desires—whether or not the prosecutor concurs.²⁵³ Potential access to unlimited and unfiltered information certainly places the grand jury in a unique position to exercise robust discretion.²⁵⁴

²⁴⁷ *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972).

²⁴⁸ See 1 BEALE ET AL., *supra* note 1, § 4:14 (2005 & Supp. 2007).

²⁴⁹ See *Costello v. United States*, 350 U.S. 359, 363 (1956); see also Brenner, *supra* note 30, at 83–85 (describing divergent applications of evidentiary rules in federal and state grand juries).

²⁵⁰ See *United States v. Calandra*, 414 U.S. 338, 349–52 (1974). Furthermore, the Supreme Court has declined to extend to the grand jury subpoena context the relevancy, specificity, and admissibility requirements associated with trial subpoenas. See *United States v. R. Enters., Inc.*, 498 U.S. 292, 298–99 (1991).

²⁵¹ See 18 U.S.C. §§ 6002, 6003 (1994).

²⁵² See, e.g., Brenner, *supra* note 30, at 99–100 (describing grand juries that act as the “passive collaborator of a prosecutor”). Grand jury subpoenas are technically issued under the auspices of the grand jury. See 1 BEALE ET AL., *supra* note 1, § 6:2. However, prosecutors typically issue grand jury subpoenas to witnesses *sua sponte* without the input of the grand jury. See Brenner, *supra* note 30, at 68 (“American grand jurors generally rely on a prosecutor to present evidence to them . . .”).

²⁵³ See 1 BEALE ET AL., *supra* note 1, § 4:14. The question remains how the grand jury is to learn that it has this broad subpoena power. Also, one should note that the grand jury has to rely on the contempt power of the judiciary to enforce its subpoenas, as the grand jury has no independent means of compelling compliance. See FED. R. CRIM. P. 17(g).

²⁵⁴ See Brenner, *supra* note 30, at 83–86. A seventeenth-century observer of the grand jury noted that it was much better situated than the petit jury to exercise discretion because of its ability to “send for persons, or Papers.” SHAPIRO, *supra* note 14, at 70 (quoting JOHN SOMERS, *THE SECURITY OF ENGLISH-MEN’S LIVES: OR THE TRUST, POWER AND DUTY OF GRAND JURIES OF ENGLAND* 86 (London, J. Almon 1761) (1681)). Although no known study examines how often self-initiated grand jury investigative requests occur, the process of grand jury requests for additional evidence can be fairly informal and requests often are simply routed through the prosecutor. Occasionally, instances of grand jury investigative initiative come to light despite the opacity of grand jury secrecy barriers; such motivated grand juries often will draw the pejorative label “runaway grand jury.” See, e.g., Beall, *supra* note 44, at 617.

4. *Secrecy*

Finally, the secrecy of the grand jury's deliberations enhances the quality of its decision making. The Federal Rules of Criminal Procedure cloak the grand jury in complete secrecy; nonwitness participants may not disclose any aspect of the grand jury's work, including the identity of the grand jurors and any "matter[s] occurring before the grand jury."²⁵⁵ This secrecy rule performs a number of functions by preserving the integrity and confidentiality of criminal investigations and protecting the identity, safety, and reputation of witnesses, targets, and unindicted subjects.²⁵⁶ Secrecy also shields the grand jury's exercise of discretion from public glare, thereby minimizing the possibility that grand jury members will feel compelled to base their decisions on concerns about immediate public backlash in a given case.²⁵⁷ Thus, secrecy can lead to greater reflection and richer, more sincere deliberation.

Of course, grand jury secrecy also raises a number of problems. Rules against disclosure of grand jury matters can frustrate the communicative function of the grand jury's discretion.²⁵⁸ Messages that the grand jury intended for various parts of the governmental structure might be lost in the web of secrecy regulations or not passed to higher-ranking decision makers by the prosecutor.²⁵⁹

Furthermore, we have come to expect transparency and accountability in a free and democratic society. The same secrecy that can enhance the quality of deliberations also reduces accountability and transparency—core values associated with legitimate discretionary judgments.²⁶⁰ Certainly, it is fair to argue that grand jurors have no accountability whatsoever because they are unelected and operate in secret. Furthermore, the secrecy of their deliberations runs counter to our preference for transparency in the judgments of discretion-

²⁵⁵ FED. R. CRIM. P. 6(e)(2); PAUL S. DIAMOND, *FEDERAL GRAND JURY PRACTICE AND PROCEDURE* § 10.01(B) (4th ed. 2001).

²⁵⁶ See 1 BEALE ET AL., *supra* note 1, § 5:1; Daniel C. Richman, *Grand Jury Secrecy: Plugging the Leaks in an Empty Bucket*, 36 AM. CRIM. L. REV. 339, 352–53 (1999) (citing *Douglas Oil Co. v. Petrol Oil Stops NW.*, 441 U.S. 211, 219 n.10 (1979)).

²⁵⁷ See, e.g., *United States v. Navarro-Vargas*, 408 F.3d 1184, 1201 (9th Cir. 2005). Of course, grand jurors are often cognizant of strong public sentiment about the desirability of a certain prosecution and may act accordingly. However, were a grand jury to resist this pressure, it would do so knowing that the identities of the grand jurors would remain secret. See *id.*

²⁵⁸ See *id.* at 1201–02.

²⁵⁹ See *id.*

²⁶⁰ See, e.g., Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 916 (2006) (explaining how a lack of transparency "impairs outsiders' faith in the law's legitimacy and trustworthiness"); Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 910 (2006) (discussing the tensions between transparency and secrecy in a democratic government).

wielding actors.²⁶¹ Despite our preference for transparency and accountability, however, the grand jury was meant to operate in secrecy and to be unaccountable—if not to the community,²⁶² then certainly to the governmental structure.²⁶³ Indeed, these features of the American grand jury were part of its original design.

Accountability concerns exist regarding other criminal justice actors with similar discretion. Although the grand jury certainly does not have the direct or indirect electoral accountability of other criminal justice actors,²⁶⁴ that electoral accountability is often fairly detached—if it exists at all. Law enforcement officers answer to publicly accountable political appointees at the top of the organizational chart, but the average law enforcement officer does not face such pressure on a daily basis.²⁶⁵ Much of the same can be said with regard to line prosecutors.²⁶⁶ Federal judges and some state judges enjoy life tenure and, therefore, are not subject to electoral accountability at

²⁶¹ See Fenster, *supra* note 260, at 910–11. The cover of secrecy might empower a grand jury nullifying for so-called improper motives to do so without public scrutiny or accountability. The grand jury has certainly been a two-edged sword in this regard. For example, secrecy rules can enable jurors to act contrary to broader public opinion and avoid decisions motivated by race prejudice, something that might be difficult for petit jurors to do because their identities and decisions are exposed to the community. Cf. O'BRIEN, *supra* note 49, at 185 & n.14 (noting swiftness of the grand jury proceedings and grand jurors' isolation from the broader community during deliberation as central factors to securing a rare indictment in a 1942 Mississippi lynching case). Likewise, the grand jury's anonymity and unqualified power to decline to indict has created a situation ripe for manipulation by those who would use the nullification power to protect those accused of using murder and violence to oppress racial minorities. See *United States v. Cox*, 342 F.2d 167, 190 (5th Cir. 1965) (Wisdom, J., concurring specially); BLANCHE DAVIS BLANK, *THE NOT SO GRAND JURY* 6 (1993) ("[M]embers of the Ku Klux Klan were often protected by Southern grand juries against indictment under the Civil Rights Acts"); Brown, *supra* note 4, at 1171; Leipold, *supra* note 1, at 309.

²⁶² At certain times, grand jurors were chosen for service in ways that may have affected the grand jury's accountability. Under one such method, the "key man" system, individuals (mainly men) were specifically selected for service on the grand jury because of their stature in the community. See ABRAMSON, *supra* note 241, at 99–100. The Jury Selection and Service Act, passed by Congress in 1968, rendered the "key man" method illegal. See 28 U.S.C. § 1861 (2000).

²⁶³ See *supra* Part II. Indeed, the Framers were likely familiar with the late seventeenth-century English experience of judges fining and jailing grand juries with whose decisions they did not agree. See SHAPIRO, *supra* note 14, at 55–56.

²⁶⁴ See *United States v. Navarro-Vargas*, 408 F.3d 1183, 1203 (9th Cir. 2005) (observing that executive, prosecutorial, and court-made determinations that certain laws are unwise or unconstitutional are public and subject to review).

²⁶⁵ See Bibas, *supra* note 260, at 923 (explaining that "[m]uch of the criminal justice system is hidden from [the public's] view" and noting that the public is unaware of many of the decisions that law-enforcement officers make on a daily basis).

²⁶⁶ See, e.g., *Navarro-Vargas*, 367 F.3d at 902 (Kozinski, J., dissenting) (describing the lack of electoral accountability for federal prosecutors). Perhaps the policy pronouncements from the Deputy Attorney General in the wake of the politically sensitive corporate scandals of the late 1990s provide a counterexample. See, e.g., Memorandum from Larry D. Thompson, Deputy Attorney Gen., to the Heads of Dep't Components, U.S. Attorneys (Jan. 20, 2003), available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm (set-

all.²⁶⁷ Petit juries, of course, have no electoral accountability either.²⁶⁸ And while executive policymaking in the criminal justice area is theoretically subject to electoral accountability, concrete discretionary judgments, such as late, final-term pardons, are often timed to avoid such accountability.²⁶⁹ The grand jury, though not accountable to the electorate in any concrete sense, is no less accountable than many of the criminal justice actors who wield similar discretion.²⁷⁰

Furthermore, given the grand jury's unique role, one can make a colorable argument that its lack of electoral accountability is desirable. The grand jury's independence from electoral politics might best complement its role of checking the three branches of government and providing cross-sectional feedback on the wisdom of criminal justice policy. Recent scholarship has illuminated many impediments to the political structure's ability to pass effective and prudent crime-control measures—or to repeal bad ones.²⁷¹ As it can in other areas, special interest advocacy in criminal justice policymaking sometimes diminishes the influence of voters.²⁷² Perhaps the grand jury's freedom from electoral accountability enhances its distinctive function of helping to shape criminal justice policy with greater input from the citizenry.

Although the grand jury's secrecy renders its exercises of discretion nontransparent, the discretion of other criminal justice actors likewise lacks significant transparency. The public is typically not privy to law enforcement decisions whether to investigate, apprehend, or refer an individual for charges.²⁷³ Sometimes law enforcement maintains investigative notes and records that the public can conceiva-

ting forth a revised set of principles for prosecutors deciding whether to bring charges against a business organization).

²⁶⁷ See ERWIN C. SURRENCY, *HISTORY OF THE FEDERAL COURTS* 390–91 (2002) (noting that the Constitution gives federal judges life tenure); Michael W. Bowers, *Public Financing of Judicial Campaigns: Practices and Prospects*, 4 NEV. L.J. 107, 107 (2003) (noting that Massachusetts, New Hampshire, and Rhode Island afford judges life tenure).

²⁶⁸ See GUINTEHER, *supra* note 241, at xiii, 47 (explaining that a petit jury is composed of a group of "strangers" representing a cross section of the community and noting that the members of a jury have "no continuing function" beyond returning a verdict).

²⁶⁹ See, e.g., Sisk, *supra* note 230, at 18.

²⁷⁰ But see *Navarro-Vargas*, 408 F.3d at 1203 (arguing that prosecutors and courts are accountable for their actions because they act transparently when determining that a law is unwise or unconstitutional).

²⁷¹ See, e.g., Symposium, *Overcriminalization: the Politics of Crime*, 54 AM. U. L. REV. 541 (2005). But see Bonfield, *supra* note 175, at 390 (noting "reluctance among legislators to repeal existing enactments"); Brown, *supra* note 5, at 256–61 (noting that policymakers in the state systems, where the vast majority of American criminal law enforcement takes place, are more democratically responsive than their counterparts in the federal system); Craig S. Lerner, *Legislators as the "American Criminal Class": Why Congress (Sometimes) Protects the Rights of Defendants*, 2004 U. ILL. L. REV. 599, 613, 622–27 (2004).

²⁷² See Brown, *supra* note 5, at 232–33.

²⁷³ See *supra* section III.A.2.

bly review through a Freedom of Information Act request²⁷⁴ or a litigation discovery request.²⁷⁵ In most nonlitigation instances, however, the discretionary judgments of law enforcement officials never receive any public scrutiny.²⁷⁶ Similarly, prosecutors often make discretionary judgments about whether and what to charge without disclosing their rationale or, in cases where they decline to prosecute, their conclusion.²⁷⁷ Although well-publicized cases exist as obvious exceptions, prosecutors make the vast majority of their charging decisions without any opportunity for public review.²⁷⁸

The public cannot force petit juries to discuss their deliberations, and it is difficult to obtain information regarding jury deliberations even where there exists suspicion of jury tampering or misconduct.²⁷⁹ Therefore, unless individual jurors voluntarily discuss their thought processes, their collective exercise of discretion—aside from the ultimate conclusion—is completely nontransparent. Likewise, judges who acquit defendants in bench trials or enter a judgment of acquittal in jury trials may render their judgments without stating the reasons underlying the decision, except for a reference to the governing standard of proof.²⁸⁰ Here again, although the evidence in the case is obviously public, the decision to acquit (and thus forever shield from criminal liability) a particular defendant is nontransparent.

Although executive criminal policymaking is potentially more transparent than discretionary criminal investigations and prosecutions, such policymaking often occurs behind closed doors. While the Executive may solicit public input and media coverage of the policy discussion, the nature of the political process often shields compromises and concessions from public knowledge.²⁸¹ Even in the case

²⁷⁴ 5 U.S.C. § 552 (2000).

²⁷⁵ FED. R. CIV. P. 26.

²⁷⁶ See, e.g., Bibas, *supra* note 260, at 923.

²⁷⁷ See *id.* at 912 (noting that prosecutors, along with others, “decid[e] which cases to charge, which crimes and defendants should receive probation, and what prison sentences are appropriate. They reach many of these decisions in private negotiating rooms and conference calls; in-court proceedings are mere formalities that confirm these decisions.”).

²⁷⁸ See *id.*

²⁷⁹ See FED. R. EVID. 606(b) (prohibiting juror testimony about jury deliberations or a particular juror’s mental processes during deliberations).

²⁸⁰ See *Fong Foo v. United States*, 369 U.S. 141, 143 (1962) (holding that the Double Jeopardy Clause bars retrial even if a trial judge’s “acquittal was based upon an egregiously erroneous foundation”); *Mannes v. Gillespie*, 967 F.2d 1310, 1316 (9th Cir. 1992) (holding that the Double Jeopardy Clause bars retrial if a trial judge dismissed the charges against a defendant because of “insufficient evidence”); *United States v. Giampa*, 758 F.2d 928, 929 (3d Cir. 1985) (holding that a court cannot review a lower court acquittal without violating the Double Jeopardy Clause).

²⁸¹ See Matthew Lynch, *Closing the Orwellian Loophole: The Present Constitutionality of Big Brother and the Potential for a First Amendment Cure*, 5 FIRST AMENDMENT L. REV. 234, 271 (2007) (“Because the laws do not open all political transactions and communications to the public eye, politicians may still make corrupt deals behind closed doors.”).

of executive pardons, which typically receive much press coverage, the public only knows that which the Executive discloses regarding the process of deliberation and the justification for the ultimate decision.

Again, the lack of transparency that surrounds the grand jury's robust discretion is not remarkable when compared to other criminal justice actors wielding significant discretion. Moreover, given the other safeguards and advantages associated with the grand jury, its secrecy may be less of a concern than the secrecy that shrouds other exercises of discretion. The grand jury's discretion to decide on bases beyond the sufficiency of the evidence does not differ in kind, or even in degree, from the discretion of other criminal justice actors. In addition, one can fairly argue that the grand jury is also better equipped than other criminal justice actors—including the petit jury—to exercise such robust discretion. For example, grand jury deliberations may be of higher quality because of the grand jury's structure, access to evidence, and secrecy. Rather than bemoan the grand jury's discretion, we should acknowledge that its nature and unique role in our constitutional structure position it to exercise the sort of robust discretion that the criminal justice system freely extends to other actors.

IV

ENHANCING THE ADMINISTRATION OF CRIMINAL JUSTICE

Even if the grand jury's exercise of discretion on grounds beyond sufficiency of the evidence neither subverts the rule of law nor allocates to the grand jury undue discretion, the question remains whether it is desirable from a normative standpoint. For those who are unconvinced that grand jury discretion is consistent with the rule of law, the undermining influence the practice has on our commitment to "government of laws, not persons" outweighs any of its potential benefits.²⁸² However, even for those who are persuaded that the grand jury's robust discretion is legitimate, it is important to highlight how the grand jury's robust discretion may enhance the administration of justice. Indeed, regardless of whether one approves of the grand jury's exercise of robust discretion, the unquestionable potential for its occurrence should prompt an examination of its positive and negative consequences from the perspectives of various constituencies in the criminal justice system.

A. Crime Control

Effective law enforcement is of paramount importance in a functioning society. At first blush, it would seem that grand jury discretion necessarily hinders crime-control efforts. When law enforcement in-

²⁸² Hutchinson, *supra* note 64, at 196 (emphasis omitted).

vestigates a case and prosecutors seek to take it to trial and secure a conviction, a grand jury's refusal to indict can frustrate their efforts to bring a perpetrator to justice. While the grand jury's filtering obviously will derail at least some cases that the prosecutor presents for indictment, the grand jury's refusal to indict may particularly disrupt prosecutorial efforts when it bases its decision on grounds other than sufficiency of the evidence. Where a prosecutor presents sufficient evidence to establish probable cause, a grand jury's refusal to indict clearly represents an obstacle to the prosecution and punishment of criminal offenders.²⁸³ Assuming that the grand jury's nature, role, and its discretionary power will sometimes frustrate the government's capacity to control crime, it might be useful to look to the other side of the ledger—how might such discretion *enhance* the administration of criminal justice from a crime-control perspective? How might prosecutors harness the grand jury's discretionary power as an asset to effective law enforcement?

The ability of the grand jury to exercise its robust discretion might actually strengthen cases against criminal defendants. A grand jury may filter out cases that meet the bare probable cause threshold but lack real jury appeal. Of course, prosecutors will sometimes decide to dismiss a case postindictment, either because flaws in the evidence have developed or other issues have revealed weaknesses in the case. However, if prosecutors become immersed in a case's details, particularly where the facts strongly indicate a defendant's guilt,²⁸⁴ then prosecutors may not see these all-important flaws and weaknesses in the same way that the grand jury members might. Such insights from the grand jury may spill over to nonevidentiary considerations that would draw the attention of a petit jury later in the process. Thus, the grand jury can assist the government by counseling the prosecutor to change course in a flawed case—either by dismissing the case outright or revising the charges—before the case ever reaches trial.²⁸⁵ Regardless of one's views on nullification, grand jury

²⁸³ See *supra* subpart I.B.

²⁸⁴ Although some might argue that one can never be completely certain of a defendant's guilt, a prosecutor's estimation of a defendant's guilt may be stronger than that of a petit jury because of the prosecutor's other evidence. For example, a prosecutor may know of unconstitutionally obtained evidence or plea proffers that are inaccessible to the petit jurors.

²⁸⁵ See *United States v. Navarro-Vargas*, 408 F.3d 1184, 1193–95 (9th Cir. 2005) (discussing the traditional “screening function of the grand jury”). It should be noted that, in certain cases, the prosecutor may *welcome* a grand jury's exercise of discretion, see, e.g., HOWARD W. GOLDSTEIN, *GRAND JURY PRACTICE* § 4.02[2], at 4-9 (2007), particularly where action by the grand jury insulates the prosecutor from political pressure in favor of, or in opposition to, a potential prosecution. Cf., e.g., Bob Kemper, *Grand Jury Refuses to Indict McKinney*, ATLANTA J.-CONST., June 17, 2006, at A1; *McKinney Won't Be Indicted in March Incident with Capitol Police, Grand Jury Decides*, CONG. Q. WKLY., June 19, 2006, at 1721.

nullification would seem to be preferable to petit jury nullification after a full trial because early nullification prevents the waste of tremendous and precious resources.²⁸⁶

Aside from filtering cases or individual counts that are less likely to result in conviction at trial, the grand jury's exercise of robust discretion can strengthen the government's already formidable bargaining position in postindictment plea negotiations. Where there is a general perception that the grand jury passively approves indictments upon receipt of a bare minimum of proof, the grand jury's indictment does not significantly enhance the government's bargaining position; if a grand jury will "indict a ham sandwich,"²⁸⁷ the indictment says little, if anything, about the strength of the government's case.²⁸⁸ If, however, it were common knowledge that the grand jury not only possessed robust discretion but also exercised it when appropriate, the prosecutor could point to an indictment as a strong affirmation of the government's case and as a significant indicator that a petit jury will be less likely to acquit so long as the prosecution meets its evidentiary burden.

Also, a putative defendant may be more willing to waive the Fifth Amendment privilege against self-incrimination and testify before the grand jury when that client knows of the grand jury investigation and the grand jury is aware of its robust discretion and willing to exercise it in appropriate cases.²⁸⁹ Although this allows the defendant to at-

²⁸⁶ See *United States v. Navarro-Vargas*, 367 F.3d 896, 900, 902-03 (9th Cir. 2004) (Kozinski, J., dissenting), *vacated en banc*, 382 F.3d 920 (9th Cir. 2004) (arguing that the grand jury is a check on prosecutorial discretion and "may consider the wisdom of the law in deciding whether to indict"). Grand jury discretion might actually serve to *reduce* the amount of petit jury nullification in the system. Where grand juries are cognizant of their robust discretion and, more importantly, citizens are familiar with and endorse the legitimacy of such discretion, so-called nullification might actually occur at the grand jury stage rather than the petit jury stage. Recognition of the grand jury's unique role and robust discretion may have the impact of ensuring greater fidelity by petit juries to deciding cases based solely on the evidence. Under this view, the grand jury would be the forum for considerations such as the wisdom of a law, justice ideals, or the redeeming qualities of a defendant; once the grand jury declines to derail the prosecution on such grounds, the petit jury's function is simply to test the sufficiency of the evidence and to convict a defendant if the government carries its burden of proof. See Robinson, *supra* note 191, at 403 ("Studies on jury nullification indicate that jurors frequently exercise their nullification power to circumvent specific rules when they believe that applying them would conflict with broad normative notions of justice.").

²⁸⁷ David Margolick, *Law Professor to Administer Courts in State: Appointed by Wachtler to Supervise System*, N.Y. TIMES, Feb. 1, 1985, at B2 (internal quotations omitted) (quoting Chief Judge Sol Wachtler of the New York Court of Appeals).

²⁸⁸ Of course, indictment itself adversely impacts the defendant. Indictment may diminish a defendant's bargaining power in the criminal justice system and levy a reputational, social, economic, and psychological toll upon an accused.

²⁸⁹ See Simmons, *supra* note 3, at 24 (stating that testimony of the potential defendant before the grand jury "makes sense if the grand jury is actually performing a broader, more political role"). If a defendant has been charged with a felony prior to grand jury indict-

tempt to influence that grand jury to make a decision on bases other than the sufficiency of the evidence, many prosecutors would likely take that risk in exchange for the chance to question a defendant before the grand jury.²⁹⁰ Prosecutors regularly send “target” letters to potential defendants, informing them that the grand jury investigations are concluding and inviting them to testify before the grand jury.²⁹¹ Potential defendants rarely accept these invitations,²⁹² no doubt because acceptance would require waiving the privilege against self-incrimination,²⁹³ because defense counsel generally cannot be present in the grand jury room, and because evidentiary restrictions do not limit the questions that a prosecutor can ask a witness before a grand jury.²⁹⁴ The (perhaps overly optimistic) hope that the benefits of persuading the grand jury to exercise its robust discretion will outweigh the dangers of testifying might prompt more defendants to accept their invitations to testify.²⁹⁵

Finally, grand jury discretion may enhance community involvement and positively impact law enforcement strategies. The active, robust participation of grand juries in shaping enforcement priorities helps to foster community buy-in—a phenomenon that can enhance overall crime-control efforts.²⁹⁶ Community participation via the grand jury can create and nurture incentives for community members

ment and arrested or summonsed, a defendant is obviously on notice that grand jury action is forthcoming. Even in cases in which the grand jury investigation precedes any contact with the target, a target may be placed on notice because witnesses are not bound by the same strict secrecy rules that cover almost all other aspects of a grand jury investigation. *See* FED. R. CRIM. P. 6(e). As a result, defendants will often become aware of a grand jury investigation through a confederate who has been subpoenaed to testify before the grand jury.

²⁹⁰ *See* Simmons, *supra* note 3, at 38 (explaining that prosecutors benefit from disclosure of the defendant’s theory of the case so early on in the process).

²⁹¹ *See* U.S. ATTORNEYS’ MANUAL, *supra* note 173, § 9-11.153.

²⁹² *See* Simmons, *supra* note 3, at 37 & n.173.

²⁹³ *See id.* at 37–38 (noting that a prosecutor may later use anything a defendant said in the grand jury proceeding).

²⁹⁴ *See* U.S. ATTORNEYS’ MANUAL, *supra* note 173, § 9-11.152.

²⁹⁵ *See* Simmons, *supra* note 3, at 23–25. Recent trends indicate that in systems in which a defendant has the right to make a presentation to the grand jury, more grand jury targets take the opportunity to attempt to persuade the grand jury to reject charges. *See, e.g.,* William Glaberson, *New Trend Before Grand Juries: Meet the Accused*, N.Y. TIMES, June 20, 2004, at N1. The absence of a double jeopardy rule in federal grand jury practice, however, makes a defendant’s testimony before a federal grand jury dangerous. Even if one grand jury refuses to indict, the government could seek an indictment from a second grand jury and use any of a defendant’s potentially incriminating statements from the defendant’s earlier grand jury testimony.

²⁹⁶ *Cf.* Dan M. Kahan, *Reciprocity, Collective Action, and Community Policing*, 90 CAL. L. REV. 1513, 1538–39 (2002) (arguing that reciprocity and the promotion of trust, rather than traditional deterrence-based punishment, secure “socially desirable behavior”); Tracey L. Meares, *Praying for Community Policing*, 90 CAL. L. REV. 1593, 1595–96 (2002) (explaining that although critics of community policing contend that the alignment of police and community interests may compromise individual criminal rights, this alignment may

to work with law enforcement to develop crime-prevention and crime-control initiatives in their communities.²⁹⁷ Indeed, the integration of the community in enforcement design perhaps portends a more direct and tangible crime-control benefit than the aforementioned features of robust grand jury discretion.

B. Efficiency

From an efficiency standpoint, the grand jury's robust discretion may offer some benefits. Whatever one thinks about the merits of petit jury nullification, its costs in wasted time and court resources are immense.²⁹⁸ A trial requires the government to devote one or more of its attorneys for an often-intense period of trial preparation.²⁹⁹ This preparatory period is then followed by the trial itself, which can range from hours to months. Given the caseloads of many prosecutors, a trial that results in petit jury nullification represents a tremendous waste of time and energy.³⁰⁰ Witnesses, both government and civilian, must expend time, miss work or leisure commitments, and travel sometimes great distances to the place of trial. The court itself transfers scarce resources to the trial of a matter, from blocks of time on the judge's calendar to court security personnel assigned to the courtroom.

For these reasons, it would seem that a case that will ultimately result in nullification is better nullified at the grand jury stage than at the petit jury stage. Of course, there is no guarantee that a petit jury would inevitably nullify a case that a grand jury deems appropriate for nullification. Although both grand and petit juries are drawn from the same pool,³⁰¹ their ultimate members will consist of different individuals with different perspectives and, as was discussed above, the petit jury likely will be exposed to a narrower slice of the available

also enable residents to "hold law enforcers accountable in order to better guide their exercise of discretion").

²⁹⁷ Cf. Kahan, *supra* note 296, at 1538-39 (concluding that fostering trust and reciprocal cooperation between the citizenry and police officers more effectively controls crime than standard policing methods do alone).

²⁹⁸ Cf. Edward Brunet, *A Study in the Allocation of Scarce Judicial Resources: The Efficiency of Federal Intervention Criteria*, 12 GA. L. REV. 701, 710 (1978) (asserting that increasingly important efficiency goals often lead to less accurate decision making).

²⁹⁹ Of course, in busy jurisdictions, it is not unheard of for a prosecutor to be assigned to try the case in the courtroom as the judge is taking the bench. Although these trials obviously do not receive the same amount of preparation as others, witness and court-personnel time are still a considerable cost.

³⁰⁰ See F. Andrew Hessick, III & Reshma M. Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense, and the Judge*, 16 BYU J. PUB. L. 189, 193 (2002) (asserting that jury nullification indicates that "the prosecutor has misallocated his resources and time in deciding to prosecute the case").

³⁰¹ See Jury Selection and Service Act of 1968 § 101, 28 U.S.C. § 1861 (1968).

information.³⁰² For those cases where a grand jury and a petit jury are likely to respond similarly to presented evidence, however, earlier disposition can help to avoid wasting time and resources.

Another efficiency benefit of the grand jury's robust discretion is that it may increase early pleas or dispositions of criminal cases.³⁰³ Because the grand jury has such broad entitlement and access to information, it is in a key position to illuminate for the government certain paths to conclusion that may not be readily apparent. A grand juror who has become fully informed through questioning key witnesses and reviewing information received in the grand jury might suggest to the prosecutor an alternate set of charges or civil settlement that a defendant might find amenable while still imposing the appropriate amount of societal condemnation.³⁰⁴ In this way, the grand jury can function almost as a sounding board for prosecutors or an alternative dispute resolution tool in certain criminal cases. Where the grand jury prompts alternate sanctions and means of restitution or guides the prosecutor's plea bargaining strategy, the grand jury, in its exercise of robust discretion, enhances the efficiency of the criminal justice process by facilitating pretrial disposition of criminal cases.

Finally, the grand jury's robust discretion may calibrate the discretion of other criminal justice actors, leading to more careful and deliberative decision making elsewhere in the system. Because the grand jury is the choke point in the stream of cases flowing from the investigative stage to the prosecution stage,³⁰⁵ the grand jury is uniquely situated to review and shape the otherwise unchecked discretion of other actors in the criminal justice system. For example, a prosecutor might tire of receiving disorderly conduct cases from the local police for charging and papering. Believing the cases to involve minimal criminal conduct and to be an inefficient use of prosecutorial resources, the prosecutor may simply tell the police department that he or she will no longer pursue those types of cases—regardless of the amount of evidence that supports the defendant's guilt. Although the police may not agree with the prosecutor's position, they will most likely alter their enforcement priorities and may better exercise discretion regarding the individuals whom they arrest

³⁰² See *supra* section III.B.3. Conceivably, a petit jury could actually be exposed to *more* information than a grand jury because of the development of additional evidence during the postindictment investigation or because the prosecutor will hold back—and the grand jury may fail to request—the full portfolio of available inculpatory evidence at the time of indictment.

³⁰³ Of course, one may fairly argue that a public trial of the accused serves socially useful ends, even if petit jury nullification is likely to occur.

³⁰⁴ See Kuckes, *supra* note 7, at 1317 (concluding that recognizing the grand jury's function as a "democratic prosecutor" creates room for community values to influence prosecutorial charging decisions).

³⁰⁵ See *supra* subpart I.A.

for disorderly conduct. Similarly, a grand jury's exercise of its discretion can create ripple effects on the exercises of discretion of other criminal justice actors, thus increasing the overall efficiency of the criminal justice process.

C. The Grand Jury and Individual Rights

The ability to exercise discretion also benefits the grand jury itself and, by extension, enhances the protection of individual rights. While the reporters and scholarly pages are replete with references to the grand jury as a shield between the power of the government and the liberty of the individual,³⁰⁶ many nevertheless perceive the grand jury as having strayed from its moorings as an active and vigilant protector of individual rights.³⁰⁷ However, the grand jury's robust discretion can cut against this notion and serve as the basis for a more vigorous institution that performs its protective function and adds value to the administration of criminal justice. Recognition of the grand jury's discretion may very well strengthen the grand jury as an institution, and a fortified grand jury may enhance the individual liberties it serves to protect.

This enhancement begins with the grand jurors themselves—they must recognize their own robust discretion. Presumably, if the grand jury exercises this discretion, grand jurors would take greater ownership of their investigations and demand answers to questions regarding the merits of individual cases. This mode of behavior runs contrary to the common view of the grand jury as passively receiving hearsay evidence that the government packages and presents for uncritical consumption and acceptance.³⁰⁸ In this way, the grand jury's discretion enhances citizen participation in the criminal justice system—participation that the system sorely lacks in this age of ubiquitous guilty pleas.³⁰⁹ The grand jury's robust discretion allows for direct community guidance of law enforcement and prosecutorial re-

³⁰⁶ See, e.g., *United States v. Calandra*, 414 U.S. 338, 343 (1974) (“[T]he Founders thought the grand jury so essential to basic liberties that they provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by a presentment or indictment of a Grand Jury.” (internal citations and quotations omitted)); *Ex parte Bain*, 121 U.S. 1, 12 (1887), *overruled by* *United States v. Cotton*, 535 U.S. 625 (2002); [pt. 3 vol. 1] BERNARD SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES 84 (1968); SURRENCY, *supra* note 267.

³⁰⁷ See, e.g., Kuckes, *supra* note 1, at 1–2; Leipold, *supra* note 1, at 286–88.

³⁰⁸ See Leipold, *supra* note 1, at 263 (“The grand jury is frequently criticized for failing to act as a meaningful check on the prosecutor’s charging decisions; according to the clichés it is a ‘rubber stamp,’ perfectly willing to ‘indict a ham sandwich’ if asked to do so by the government.” (citations omitted)); see also Peter J. Henning, *Prosecutorial Misconduct in Grand Jury Investigations*, 51 S.C. L. REV. 1, 4–6 (1999) (considering critiques of the grand jury’s lack of independence from the prosecutor).

³⁰⁹ See Bibas, *supra* note 260, at 912; Kuckes, *supra* note 7, at 1307–08; Adriaan Lanni, *The Future of Community Justice*, 40 HARV. C.R.-C.L. L. REV. 359, 369–70 (2005) (discussing

source allocation as well as feedback on criminal legislation. As citizens take greater ownership in the grand jury, they strengthen the institution.

In turn, greater engagement of grand jurors enhances the benefits that accused individuals enjoy from the grand jury's protective function. Certainly, where the grand jury exercises its discretion on bases beyond mere sufficiency of the evidence, it expands the inquiry beyond whether a case *may* proceed to trial to whether it *should* proceed to trial.³¹⁰ Whether or not one agrees with its appropriateness, this expanded view provides greater protection to criminal defendants than does the bare sufficiency of the evidence view. Furthermore, central to the protective function is the idea that the grand jury will ensure that prosecutors do not pursue meritless charges, given the tremendous economic, psychological, social, and reputational costs that accompany a trial. In cases where the petit jury or trial judge likely would have eventually acquitted on grounds other than the sufficiency of the evidence or a sentencing judge likely would have spared the defendant any serious punishment,³¹¹ the grand jury's exercise of discretion spares defendants the ordeal of trial, public shame, and reputational damage.

The grand jury's robust discretion also highlights the value of the grand jury in an era when many believe that it serves no real function. Some argue that the modern grand jury's probable cause determination function is unnecessary and redundant.³¹² In the federal system, for example, a judicial officer will make a probable cause determination that supports the arrest warrant or summons of the defendant.³¹³ Most defendants then will have probable cause determined by a judicial officer—a magistrate or district judge—at a preliminary examination, during which defense counsel may cross-examine the government's witnesses.³¹⁴ The typical felony case will require that a grand jury determine the existence of probable cause—a prerequisite to an indictment.³¹⁵ Although the grand jury can disagree with these earlier judicial probable cause determinations and decline to indict,

"community prosecution" that "permit[s] local citizens to influence law enforcement and charging decisions traditionally left to the prosecutor's discretion").

³¹⁰ See *supra* subpart I.B.

³¹¹ Of course, whether a petit jury or judge would have done such a thing in a given case is a matter of conjecture.

³¹² See, e.g., Margolick, *supra* note 287, at B2.

³¹³ See FED. R. CRIM. P. 4.

³¹⁴ See FED. R. CRIM. P. 5.1.

³¹⁵ See FED. R. CRIM. P. 6(f); ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 8, at 3 (noting that "[i]f the grand jury finds probable cause to exist, then it will return a written statement of the charges called an 'indictment'").

its approval of an indictment is dispositive on the question of probable cause for all other purposes.³¹⁶

Because other actors also determine probable cause,³¹⁷ some see the grand jury as a "superfluous" vestige of an era before the development of a professional police force and court system to ensure pretrial screening of charges for merit.³¹⁸ Others argue that lay grand jurors are ill-equipped to balance the complex considerations inherent in determining whether evidence reaches the legal threshold of probable cause.³¹⁹ Judicial officers, the argument goes, can better recognize when the legal definition of probable cause is satisfied and therefore are more effective.³²⁰

This view is problematic for a few reasons. First, the fact that both judicial officers and grand juries can determine the existence of probable cause does not mean they are performing overlapping roles.³²¹ Historical evidence shows that evidentiary standards have shifted over time, and the probable cause on which the grand jury currently operates does not indicate that the grand jury was to perform the same function as judicial officers.³²² Also, the fact that grand jury indictment is required, even though the Constitution guarantees a probable cause determination for arrested individuals, indicates that the grand jury plays an additional role in the justice system. Finally, from a more practical standpoint, an indictment often will allege charges that the initial complaint did not, meaning that the judicial officer who presided over the preliminary hearing did not review such charges for probable cause. Thus, the grand jury alone reviews those allegations for probable cause.

However, apart from one's opinion on the issue of the grand jury's role in determining probable cause, the grand jury's robust discretion to consider bases beyond the sufficiency of the evidence counters the claim of redundancy and inadequacy. The grand jury, sitting as a body of the accused's peers and representing the voice of the community, is uniquely positioned to exercise such discretion. Some

³¹⁶ For example, a grand jury indictment before arrest obviates the need for a probable cause determination related to the complaint, and a grand jury indictment returned before a preliminary examination obviates the need for a probable cause determination at that stage. See FED. R. CRIM. P. 5.1(a)(2), 9(a); see also Kuckes, *supra* note 7, at 1281-82 (noting that courts view preliminary hearings following grand jury indictment as duplicative).

³¹⁷ It remains important to note that new charges may develop by the time a case reaches the indictment stage. As a result, the grand jury often passes upon counts that judicial officers have not reviewed.

³¹⁸ See EDWARDS, *supra* note 87, at 35.

³¹⁹ See Leipold, *supra* note 1, at 294-304.

³²⁰ See *id.*

³²¹ See Kuckes, *supra* note 7, at 1294-99.

³²² See *supra* subpart II.B.

argue that the grand jury's power to nullify represents the only "meaningful screening function"³²³ that it performs. Even if we assume that grand juries are deficient in screening cases on grounds associated with the sufficiency of the evidence, the argument stands. By exercising discretion, the grand jury adds value to the indictment process and distinguishes itself from judicial officers tasked with making bare probable cause determinations.

Regardless of whether one believes that the grand jury is of diminished value and utility, the grand jury's discretion potentially can energize and engage grand jurors, enhance the grand jury's protective function, and provide a greater role for ordinary citizens in the criminal justice process. In this way, the grand jury's discretion also demonstrates its added value to the administration of criminal justice.

Assuming that the grand jury's nullification power is consistent with the rule of law and enhances the administration of criminal justice, a question remains: how should grand jurors be informed of their discretion? One method might be civic education, either under the auspices of the government or through private organizations. Of course, the most direct method would involve informing the grand jurors of their discretion when they are empanelled and sworn at the beginning of their terms of service. An empanelling judge will typically charge the grand jurors that if they find *probable cause* in a case, they *should* indict.³²⁴ A simple shift to language informing grand jurors that they *may* indict if they find probable cause would enhance the grand jury's discretionary role.³²⁵ Furthermore, along with the discretion instruction, grand jurors would need a reminder of their own investigative prerogative and the limits on the role of the prosecutor in the grand jury.

Once the grand jury is fully equipped with knowledge of its role and power, the aforementioned benefits of robust grand jury discretion may be realized. Such realization would restore the grand jury as an engine of criminal justice, rather than merely a vehicle.

³²³ Leipold, *supra* note 1, at 307.

³²⁴ See Model Grand Jury Charge, *supra* note 7 ("The purpose of the Grand Jury is to determine whether there is sufficient evidence to justify a formal accusation against a person—that is, to determine if there is 'probable cause' to believe the person committed a crime. . . . [Y]ou should vote to indict where the evidence presented to you is sufficiently strong to warrant a reasonable person's belief that the person being investigated is probably guilty of the offense charged.").

³²⁵ Cf. KALVEN, *supra* note 11, at 498 (1966) ("Perhaps one reason why the [petit] jury exercises its very real power [to deviate from the judge] so sparingly is because it is officially told it has none."); Brody, *supra* note 10, at 91–93. However, it remains to be seen whether resistance—on both policy and constitutional grounds—to the notion that grand juries should exercise discretion on bases beyond sufficiency of the evidence will prevent such instructions from being implemented voluntarily or deemed mandatory under the Fifth Amendment's Grand Jury Clause. See *United States v. Navarro-Vargas*, 408 F.3d 1184, 1210–11 (9th Cir. 2005) (Hawkins, J., dissenting); *supra* note 118.

CONCLUSION

One prominent scholar has queried “whether the [grand jury’s] power to nullify is consistent with the constitutional command, and whether it is a desirable part of a rational criminal justice system.”³²⁶ This Article answers both questions affirmatively. The grand jury, by design, serves a structural role in our constitutional system as a check on the three branches of government and moderator of criminal law federalism. Given its characteristics, the grand jury is uniquely equipped to serve as a conduit for communication between the people and the governmental structure, as well as between the national government and local communities, on issues of criminal justice policy. The grand jury’s robust discretion—its ability to determine the propriety of indictments on bases beyond sufficiency of the evidence—enhances this communicative function.

Furthermore, the grand jury’s discretion can and does operate as part of a rational system of criminal justice. The discretion implicit in the nullification power is appropriately lodged in the grand jury—a body better equipped for it than other discretion-wielding actors within the criminal justice system. Additionally, and perhaps more importantly, the availability of this discretion can positively impact the administration of criminal justice from efficiency and crime-control perspectives. At the same time, the grand jury’s ability to exercise its discretion can enhance individual rights, our participatory democracy, and the institution of the grand jury itself.

To be sure, grand jury discretion also poses significant difficulties. The rule of law critique and discretion-allocation issues aside, a number of questions are left unanswered. One question asks whether grand jury nullification actually fulfills its claimed structural and communicative role when double jeopardy protections do not prevent prosecutors from empanelling another grand jury that may be more willing to indict. Also, as discussed above, the concerns presented by the grand jury’s discretionary power—such as the lack of transparency and accountability, potential for oppression of disfavored groups, and frustration of law enforcement—are important and should not be cast aside.

Nevertheless, the grand jury’s discretionary power, properly viewed, is consistent with the rule of law, prudent allocation of discretion, and efficient and wise administration of criminal justice. This recognition is a necessary first step to unlocking the nature and role of the grand jury in our constitutional democracy and criminal justice system. Rather than reflexively condemning the grand jury’s discretion, we should acknowledge how it allows the grand jury to play its

³²⁶ Leipold, *supra* note 1, at 310.

intended and important function in our constitutional design. In fact, the grand jury's ability to exercise robust discretion may reveal its full necessity and value.

