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ESSAY

Should the American Grand Jury Survive Ferguson?

ROGER A. FAIRFAX, JR.*

The grand jurors deliberated in secret, as the masses demanded the indictment of the would-be defendants. Ultimately, the grand jury would refuse to indict, enraging the many who believed justice had been denied.

This is a story inspired not by recent events in Ferguson and Staten Island, but by the seventeenth century royal prosecutions of Stephen Colledge and the Earl of Shaftesbury, who had grappled with King Charles II over religious influence.¹ The London grand jurors' resistance of the monarchy established the grand jury's reputation as a robust check on governmental power.² By the time the grand jury crossed the Atlantic and was used to resist loyalist prosecutions of American colonists, it had earned the prestige worthy of enshrinement in the Bill of Rights.³ That was then.

Today's grand jury is the target of tremendous criticism. Typecast by competing narratives of pliant ineffectiveness and unaccountable power, the grand jury has long been a frequent whipping boy within

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1. See 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, 9 (1996); see also Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design*, 93 CORNELL L. REV. 703, 721–22 (2008).

2. See Roger A. Fairfax, Jr., *The Jurisdictional Heritage of the Grand Jury Clause*, 91 MINN. L. REV. 398, 409 (2006).

3. See *id.* at 410–12; Roger A. Fairfax, Jr., *Grand Jury Innovation: Toward a Functional Makeover of the Ancient Bulwark of Liberty*, 19 WM. & MARY BILL RTS. J. 339, 345–46 (2010).

the legal profession and academic circles.⁴ Recent cases now have thrust the grand jury squarely into the American public consciousness.

On November 24, 2014, St. Louis County Prosecuting Attorney Robert P. McCulloch held a press conference to announce that the grand jury in that case had declined to indict Officer Darren Wilson in the shooting death of an unarmed African-American teenager, Michael Brown.⁵ A little over a week later, a grand jury in Richmond County, New York likewise declined to indict Officer Daniel Pantaleo in the asphyxiation death of an unarmed forty-three-year-old African-American Staten Island man named Eric Garner.⁶ In the latter case, the tragic encounter between police and the victim had been caught on video.⁷

As a result of widespread outrage in the wake of these two high-profile cases, politicians, pundits, scholars, and lawyers alike have renewed calls for an end to the grand jury in the United States.⁸ This

4. See, e.g., Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1, 1–2 (2004); Phyllis L. Crocker, *Appointed but (Nearly) Prevented from Serving: My Experiences as a Grand Jury Foreperson*, 2 OHIO ST. J. CRIM. L. 289, 289–90 (2004); Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 261, 263 (1995); William J. Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174, 174 (1973). See generally 2 JEREMY BENTHAM, *RAISONALE OF JUDICIAL EVIDENCE* (London, Hunt & Clarke 1827).

5. Chico Harlan et al., *Ferguson Police Officer Won't Be Charged in Fatal Shooting*, WASH. POST (Nov. 25, 2014), http://www.washingtonpost.com/politics/grand-jury-reaches-decision-in-case-of-ferguson-officer/2014/11/24/de48e7e4-71d7-11e4-893f-86bd390a3340_story.html.

6. J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES, Dec. 3, 2014, http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html?_r=0.

7. Ken Murray et al., *Staten Island Man Dies After NYPD Cop Puts Him in Chokehold* –, N.Y. DAILY NEWS (July 17, 2014), <http://www.nydailynews.com/new-york/staten-island-man-dies-puts-choke-hold-article-1.1871486>.

8. See, e.g., Jason Hancock, *Missouri Lawmaker Wants to Abolish Grand Jury System*, KANSAS CITY STAR (Jan. 19, 2015), <http://www.kansascity.com/news/government-politics/article/7632827.html>; Rachel Van Cleave, *Time to Abolish the 'Inquisitorial' Grand Jury System*, THE RECORDER (Dec. 31, 2014), <http://www.therecorder.com/printerfriendly/id=1202713700114>; James C. Harrington, *Abolish Grand Jury System*, SAN ANTONIO EXPRESS-NEWS (Dec. 21, 2014), <http://www.mysanantonio.com/opinion/commentary/article/Abolish-grand-jury-system-5969702.php>; George E. Curry, *U.S. Should Abolish Grand Jury System*, PHILA. TRIBUNE, (Dec. 10, 2014), http://www.phillytrib.com/commentary/u-s-should-abolish-grand-jury-system/article_f5fe10e1-ca23-5adb-a9cc-4d0cdeee4423.html; LaDoris Hazzard Cordell, *Grand Juries Should Be Abolished*, SLATE (Dec. 9, 2014), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/12/abolish_grand_juries_justice_for_eric_garner_and_michael_brown.html; Caleb Pilgrim, *Let's Abolish the Grand Jury System*, NEW HAVEN REGISTER (Dec. 9, 2014), <http://www.nhregister.com/opinion/20141209/caleb-pilgrim-lets-abolish-the-grand-jury-system>. Indeed, California recently passed a law prohibiting grand juries from involvement in most cases involving law enforcement killings of arrestees or detainees. See Melanic Mason, *Gov. Brown Signs Law Barring Grand Juries in Police Deadly Force Cases*, L.A. TIMES (Aug 11, 2015), <http://www.latimes.com/local/political/la-me-pc-brown-grand-juries-20150811-story.html> (noting that

movement for abolition of the American grand jury is not a new phenomenon.⁹ After all, even Mother England abandoned the grand jury in the 1930s.¹⁰ However, attempts to bring about a similar fate for the American grand jury have fallen short for a number of reasons—including constitutional edict and path dependency.¹¹

The Ferguson and Garner cases have renewed the debate over the usefulness of the grand jury and have spawned many thoughtful arguments for its abolition.¹² Furthermore, these arguments seem to have garnered *popular* support among the many Americans frustrated and saddened by the outcomes of the grand jury processes in those two cases. However, the grand jury decisions not to indict Darren Wilson and Daniel Pantaleo, while raising troubling issues, do not represent an appropriate rationale to do away with the grand jury.

Many laypeople, unsurprisingly, lack a thorough understanding of what the grand jury is and what it does. While the petit, or trial, jury is readily observed in action in public courthouses as well as in durable television serials such as *Law and Order*, the grand jury is rarely seen or depicted.¹³ That the grand jury labors in the shadows, shielded by secrecy rules from scrutiny, frustrates popular comprehension of its already enigmatic character.¹⁴

Simply put, the grand jury, in the federal system and in about half of the states, is designed to act as a check on the prosecutor's ability to

the bill's sponsor, Sen. Holly Mitchell, was motivated by the experiences with the Ferguson and Staten Island grand juries).

9. See, e.g., Ovio C. Lewis, *The Grand Jury: A Critical Evaluation*, 13 AKRON L. REV. 33, 33 (1979); James P. Whyte, Jr., *Is the Grand Jury Necessary?*, 45 VA. L. REV. 461, 461 (1959); George Lawyer, *Should the Grand Jury System be Abolished?*, 15 YALE L.J. 178, 187 (1906); Sol Wachtler, *Grand Juries: Wasteful and Pointless*, N.Y. TIMES, Jan. 6, 1990, <http://www.nytimes.com/1990/01/06/opinion/grand-juries-wasteful-and-pointless.html?pagewanted=print>.

10. See Richard D. Younger, *The Grand Jury Under Attack* (pts. 1–3), 46 J. CRIM. L. & CRIMINOLOGY & POLICE SCI. 26, 37, 217 (1955); Albert Lieck, *Abolition of the Grand Jury in England*, 25 J. CRIM. L. & CRIMINOLOGY 623, 623 (1934).

11. Fairfax, *The Jurisdictional Heritage*, *supra* note 2, at 428–30.

12. See *supra* note 8 and accompanying text.

13. Although popular culture depictions of the grand jury in action are relatively rare, there were storylines related to the grand jury in episodes of popular cable and network television series *The Wire* (HBO), *The Sopranos* (HBO), *The West Wing* (NBC), and *Empire* (FOX).

14. A key aspect of grand jury practice is the secrecy of the proceedings. See Fed. R. Crim. P. 6(e)(2). Grand jury secrecy performs a number of functions, including guarding against reputational harm to targets of the investigation, protecting the identity and safety of grand jurors and witnesses, and preventing the obstruction of, and flight to avoid, justice. See Fairfax, *Grand Jury Discretion and Constitutional Design*, *supra* note 1, at 748. This secrecy is sometimes in tension with other important goals, such as transparency, as one Ferguson grand juror's recent lawsuit illustrates. See Elias Isquith, "Not the Way We Do Democracy!" *Why Is a Ferguson Grand Juror Being Silenced?*, SALON (Jan. 15, 2015), http://www.salon.com/2015/01/15/not_the_way_we_do_democracy_why_is_a_ferguson_grand_juror_being_silenced/.

bring serious criminal charges to trial.¹⁵ At minimum, the prosecutor has to demonstrate to these lay people (typically numbering between 12 and 23 individuals) that there is at least probable cause to believe that the crime was committed and that the particular target committed it.¹⁶

However, probable cause is a modest threshold to reach relative to the 'proof beyond a reasonable doubt' standard at trial.¹⁷ When meeting that lesser burden before the grand jury, the prosecutor may present a case unencumbered by most of the evidentiary, procedural, and constitutional rules that govern the petit jury's consideration at trial.¹⁸ Furthermore, the grand jury's robust subpoena power can be utilized to compel testimony and the production of evidence, and the prosecutor alone typically decides which witnesses will testify and what evidence will be presented to the grand jury.¹⁹

In other words, the deck is stacked in favor of the government and if, even with all of these advantages, the government cannot produce enough evidence to establish probable cause before the grand jury, then the accused is not required to endure the legal, financial, and reputational slings and arrows of formal criminal accusation and trial.

Critics complain that the grand jury is far too willing to indict; that prosecutors rarely, if ever, are rebuffed in their attempts to bring a case forward to trial.²⁰ Recent statistics on the federal level show only a handful of indictments are formally rejected by grand juries each year.²¹ The truth is that prosecutors do have significant control

15. See Fairfax, *Grand Jury Discretion and Constitutional Design*, *supra* note 1 at 743–45.

16. See Fed. R. Crim. P. 6(a)(1) (describing the number of grand jurors required); Fairfax, *Grand Jury Discretion and Constitutional Design*, *supra* note 1, at 719–20 (discussing the probable cause standard).

17. See Fairfax, *Grand Jury Innovation: Toward a Functional Makeover of the Ancient Bulwark of Liberty*, *supra* note 3, at 343 n.20 (“[T]he grand jury is not determining proof beyond a reasonable doubt; it is merely screening the government’s allegations for probable cause.”).

18. R. Michael Cassidy, *Toward A More Independent Grand Jury: Recasting and Enforcing the Prosecutor’s Duty to Disclose Exculpatory Evidence*, 13 GEO. J. LEGAL ETHICS 361, 363 (2000).

19. See *id.* at 362 (citing *Blair v. United States*, 250 U.S. 273, 282 (1919)).

20. Fairfax, *Grand Jury Innovation: Toward A Functional Makeover of the Ancient Bulwark of Liberty*, *supra* note 3, at 342 (“A grand jury, the famous saying goes, will ‘indict a ham sandwich.’”).

21. See, e.g., BUREAU OF JUSTICE STATISTICS, FEDERAL JUSTICE STATISTICS 2010 – STATISTICAL TABLES 12 (Dec. 2013) (showing that federal grand juries declined to indict in only eleven cases in 2010); Ben Casselman, *It’s Incredibly Rare for a Grand Jury to Do What Ferguson’s Just Did*, FIVE THIRTY EIGHT (Nov. 24, 2014), <http://fivethirtyeight.com/datalab/ferguson-michael-brown-indictment-darren-wilson/> (“U.S. attorneys prosecuted 162,000 federal cases in 2010 . . . Grand juries declined to return an indictment in 11 of them.”).

over grand jury proceedings and, therefore, can engineer outcomes if they desire.²²

However, given the low evidentiary standard and the limited purpose of the grand jury's preliminary scrutiny of criminal allegations, high rates of indictment should not be remarkable. Also, when one considers the fact that a prosecutor likely will only ask the grand jury to vote on an indictment once she is confident that the grand jurors are satisfied that they have seen enough evidence to establish probable cause, the grand jury may not be as permissive as the indictment statistics may suggest.²³

Nevertheless, if the story were to end there, the grand jury's necessity would be questionable at best. After all, a judge could test a potential case for probable cause at a preliminary hearing, as is the regular practice in half of the states.²⁴ Furthermore, the legislature could transfer the grand jury's investigative power to compel testimony and the production of evidence directly to the prosecutor.

However, much of the grand jury's value lies in what it represents and its capabilities. A lay entity, the grand jury can function as the voice and conscience of the community.²⁵ Our constitutional system's view of the jury prefers the wisdom of common citizens to the professional competence of judges and prosecutors.²⁶ By having its say in what charges might be visited upon an accused,²⁷ the grand jury preserves the popular perspective in the administration of criminal jus-

22. See, e.g., Roger A. Fairfax, Jr., *Time for U.S. to Junk Grand Juries? Evidence Shows System Needs Mending, Not Ending*, ORLANDO SENTINEL, Dec. 26, 2014, at A24. Indeed, after the aforementioned seventeenth century London grand jurors declined to indict Stephen Colledge, another grand jury simply was drawn from Crown-friendly Oxford and dutifully approved the charges. Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1, 9 (2002). See also Kadish, *supra* note 1, at 9–10.

23. See Fairfax, *Grand Jury Innovation*, *supra* note 3, at 342–44.

24. See *id.* at 345; Kuckes, *supra* note 4, at 59;

25. See generally Susan W. Brenner, *A Voice of the Community: A Case for Grand Jury Independence*, 3 VA. J. SOC. POL'Y & L. 67 (1995) (arguing that “we should pursue simple measures to enable grand juries to achieve their potential role as an important voice of the community”); Adriaan Lanni, *Implementing the Neighborhood Grand Jury*, in GRAND JURY 2.0: MODERN PERSPECTIVES ON THE GRAND JURY (Roger A. Fairfax, Jr. ed., 2011) (arguing for a more robust and representative local grand jury). Recognition of the community representation function of the grand jury was at the heart of the efforts to fight racial discrimination in the selection of grand juries. See Roger A. Fairfax, Jr., *Batson's Grand Jury DNA*, 97 IOWA L. REV. 1511, 1514, 1518, 1530 (2012).

26. See Roger A. Fairfax, Jr., *Harmless Constitutional Error and the Institutional Significance of the Jury*, 76 FORDHAM L. REV. 2027, 2052–60 (2008).

27. See, e.g., Niki Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury*, 94 GEO. L.J. 1265, 1283–84 (2006).

tice—particularly given that most criminal cases today result in a guilty plea and are never presented to a trial jury.²⁸

More than serving as a mere filter for probable cause, however, the grand jury can function as a sounding board of sorts for the political structure.²⁹ Indeed, early American grand juries did much more than review criminal charges; they approved public works projects, oversaw tax policy, and inspected the conditions of prisons and other public institutions.³⁰ There is nothing to prevent today's grand jury from being employed to advise and hold government officials accountable.

Perhaps the grand jury's enduring value is best captured by the benefits received by the grand jurors themselves. Alexis de Tocqueville, the great nineteenth century observer of American political and civic institutions, once remarked that the jury acts as a "free school" for those citizens who, through their jury service, are educated about the inner-workings of government and the power it wields.³¹ If Tocqueville's musings are valid with regard to the petit jury, it is certainly the case that *grand* jurors are positioned to bolster their civic identity and understanding of the broader political system.³²

To be sure, the grand jury is a flawed feature of a flawed criminal justice system. As a central player in both the Ferguson and Staten Island cases, the grand jury deservedly has been the subject of intense scrutiny.³³ However, as one of the last remnants of popular participation in criminal justice, the grand jury is worth preserving. Of course, reforms designed to enhance the grand jury's independence and effectiveness—particularly in cases such as Ferguson and Staten Island—

28. See, e.g., *Missouri v. Frye*, 132 S. Ct. 1399 (2012) (holding the Sixth Amendment's protections to include adequate assistance of counsel at plea bargaining and noting that "plea bargains have become so central to the administration of the criminal justice system"); see also Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1150 (2001).

29. See, e.g., Fairfax, *Grand Jury Innovation*, *supra* note 3, at 364–67; Fairfax, *Grand Jury Discretion*, *supra* note 1, at 755–56.

30. See, e.g., LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 221–23 (1999); Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1, 4, 10–11 (2002); Kadish, *supra* note 1, at 10–11.

31. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 316 (Arthur Goldhammer trans., Library of America 2004) (1835).

32. See Fairfax, *Grand Jury Innovation*, *supra* note 3, at 353.

33. See, e.g., Letter from Sherrilyn A. Ifill, Director-Counsel, NAACP Legal Defense and Educational Fund, Inc., to Judge Maura McShane, 21st Judicial Circuit, Clayton, MO (Jan. 5, 2015), available at http://www.naacpldf.org/files/case_issue/NAACP%20LDF%20Open%20Letter%20to%20Judge%20Maura%20McShane.pdf; Goodman, *supra* note 6.

should be considered seriously and perhaps implemented.³⁴ But rather than calling for the grand jury's abolition, we should consider both what the institution has been, and what it might yet become.

34. Indeed, the chief judge of New York's highest court, The Honorable Jonathan Lippman, has made a number of bold proposals in this vein. See JONATHAN LIPPMAN, *ACCESS TO JUSTICE: MAKING THE IDEAL A REALITY, THE STATE OF THE JUDICIARY 2015*, at 2–4 (Feb. 17, 2015); see also Jesse McKinley, *Head of New York's Top Court Says Judges Should Oversee Grand Juries in Deaths Involving Police*, N.Y. TIMES, Feb. 17, 2015, <http://www.nytimes.com/2015/02/18/nyregion/head-of-new-yorks-top-court-says-judges-should-oversee-grand-juries-in-deaths-involving-police.html>. One of Chief Judge Lippman's more controversial proposals is to have a judge preside over grand jury proceedings in homicide cases involving a police defendant. LIPPMAN, *supra*, at 2. Some of Chief Judge Lippman's other proposals echo some of the reforms urged by others in the wake of the Ferguson and Staten Island cases. Included among these are relaxing grand jury secrecy requirements to permit disclosing transcripts of witness testimony and legal instructions given to the grand jury to ensure greater transparency in police killing cases, and the appointment of a special prosecutor in cases in which police officers are defendants in criminal cases. See *id.* at 3–4; Steven M. Witzel, *Grand Jury Practice, Protests and Reform*, N.Y. L.J. (Jan. 15, 2015), <http://www.newyorklawjournal.com/id=1202715176527/Grand-Jury-Practice-Protests-and-Reform>; German Lopez, *Grand Juries Usually Don't Indict Police Officers. Should They Be Changed?*, VOX (Dec. 31, 2014), <http://www.vox.com/2014/12/31/7468775/grand-jury>. It should also be noted that a number of broader reform recommendations have come out of these events, focused on policing and racial and community relations in Ferguson and in the United States more generally. See U.S. DEP'T OF JUSTICE, *INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT* 90, 102 (Mar. 4, 2015); PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, *FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING* 1–4, 69–70 (May 2015).

