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GRAND JURY INNOVATION: TOWARD A FUNCTIONAL MAKEOVER OF THE ANCIENT BULWARK OF LIBERTY

Roger A. Fairfax, Jr.*

INTRODUCTION

The grand jury is a “much maligned” organ of the criminal justice system.¹ Regularly employed in only about half of the states and grudgingly tolerated in the federal system,² the American grand jury for two centuries has been criticized as costly, ineffective, overly-compliant, and redundant. Prescriptions have ranged from reforms designed to improve the grand jury’s performance of its traditional filtering and charging functions to the outright abolition of the grand jury.³ Consequently, much of the scholarly defense of the grand jury seemingly has done little more than attempt to justify its very existence.

This Article seeks to take the grand jury on the offensive. Instead of merely proposing ways to enhance the grand jury’s performance of traditional roles, or defending it against calls for its elimination, this Article sketches a blueprint for the grand jury’s functional makeover. Despite its tattered reputation, the American grand jury boasts an impressive résumé, demonstrating capability far beyond the circumscribed functions it is deemed to perform so poorly today. By illuminating the novel and important functions the ancient “bulwark”⁴ of liberty might perform in the modern

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¹ See, e.g., 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, 1462 (2001) (“The grand jury is much maligned . . .”).

² See 2 SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE §§ 8:1–2 (2d ed. 2008).

³ See Phyllis L. Crocker, *Appointed but (Nearly) Prevented From Serving: My Experiences as a Grand Jury Foreperson*, 2 OHIO ST. J. CRIM. L. 289, 300–02 (2004) (discussing scholarly proposals to reform or abolish the grand jury).

⁴ *United States v. Mandujano*, 425 U.S. 564, 589 (1976) (Brennan, J., concurring); *United States v. Dionisio*, 410 U.S. 1, 17 (1973).

criminal justice system, this Article paints a portrait of an efficacious and relevant twenty-first century grand jury.

Part I of the Article considers the common historical and contemporary critiques of the grand jury. Although the legitimacy of some of these criticisms can be questioned, it must be conceded that there is significant room for improvement in the contemporary grand jury. However, this Part argues that the traditional grand jury reform proposals merely seek to enhance one or both of the grand jury's dual non-investigatory functions—the “adjudicatory” probable cause filtering function,⁵ and the “prosecutorial” discretionary function.⁶ Such proposed changes fall far short of the sort of innovation that would augment the grand jury's contribution to the maintenance and improvement of the modern criminal justice system.

In Part II, the Article begins the shift from the common defensive posture—where the focus is on how to repair the grand jury or justify its existence—to one where the grand jury is employed beyond the narrow functional confines of its modern existence. Under the “Grand Jury 2.0” conception, the ancient body is utilized in novel ways to meet the needs of the modern criminal justice system. Part II responds to anticipated objections to the use of the grand jury for purposes outside of its traditional adjudicatory and prosecutorial roles. Chief among these are concerns about the capacity of the grand jury to perform these novel roles, and potential common law, statutory, and constitutional constraints on grand jury innovation.

Part III then proposes novel ways in which the grand jury might be utilized in modern criminal justice. This Part, for example, imagines the grand jury with a role to play in plea bargaining—the means of disposition of over ninety percent of criminal cases today. In addition, this Part envisions the expansion of the grand jury's functional footprint to infuse criminal sentencing with popular input, to supervise corporate deferred prosecution agreements, and as a tool of alternative dispute resolution with grand jurors performing a facilitating role in the mediation of appropriate criminal cases. Other proposals would employ the grand jury as a vehicle for popular influence in the ever-expanding drug court and problem-solving courts regime and cast the grand jury as a community focus group, before which prosecutors might present a myriad of questions relating to prosecutorial and enforcement priorities, criminal legislation, and the law enforcement needs and preferences of the community. The Article concludes by going a step further and briefly exploring how the grand jury might be utilized as an instrument for the enhancement of democratic deliberation and discourse *outside* of the criminal justice system.

⁵ See Niki Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury*, 94 GEO. L.J. 1265, 1279–80 (2006) [hereinafter Kuckes, *The Democratic Prosecutor*]; see also Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design*, 93 CORNELL L. REV. 703, 720 (2008) [hereinafter Fairfax, *Grand Jury Discretion*] (discussing the view that the grand jury was “designed to operate as a mere probable cause filter”).

⁶ See Fairfax, *Grand Jury Discretion*, *supra* note 5, at 708 n.7; Kuckes, *The Democratic Prosecutor*, *supra* note 5, at 1283–84.

I. GRAND JURY 1.0

A. Classic Grand Jury Critiques

Why retain the grand jury? Given the low esteem in which the grand jury is held in American legal culture,⁷ it is surprising that we have not followed the lead of our English forbearers and abolished the whole enterprise.⁸ Complaints about the grand jury run the gamut from assertions that it imposes unnecessary costs on the system, to the allegation that it is the complete captive of the prosecution.

1. Costliness

Critics since Jeremy Bentham have made the argument that the grand jury is far too costly for whatever benefit it provides.⁹ During the debate in Congress over the utility of the grand jury in the early twentieth century, some lawmakers insisted that the costliness of maintaining the grand jury militated in favor of discarding it in the vast majority of cases.¹⁰ Despite these concerns, there is scant evidence of significant direct economic costs incurred as the result of retaining the grand jury. Of course, there needs to be physical space to house the grand jury, and the marginal cost of lighting and heating the grand jury room, often in the courthouse. Perhaps the courthouse budget must account for the price of refreshments for the grand jurors and per diem payments to grand jurors. Furthermore, there may be deputy marshals or other security personnel specifically assigned to protecting the grand jurors and certain administrative costs associated with the summoning and selection of grand jurors. Even with these various expenses, it is difficult to argue that the financial costs of the grand jury are more than nominal at best. However, even if the costs of the grand jury are not very significant, critics might respond that *no amount* of cost is justified by a weak or ineffective filter.¹¹ Ironically, some of the same grand jury critics inclined to bemoan the manner in which the grand jury places unnecessary obstacles in the way of expedient

⁷ See, e.g., 1 BEALE ET AL., *supra* note 2, § 1:9.

⁸ See Crocker, *supra* note 3, at 300–02 (calling for the abolition of the grand jury); Roger A. Fairfax, Jr., *The Jurisdictional Heritage of the Grand Jury Clause*, 91 MINN. L. REV. 398, 428 (2006) [hereinafter Fairfax, *Jurisdictional Heritage*] (recounting the abolition of the grand jury in the United Kingdom).

⁹ See, e.g., 2 JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 313 (London, Hunt & Clarke 1827) (“[T]he institution is useless: it has been so about these two hundred and fifty years.”); JEREMY BENTHAM, *THE ELEMENTS OF THE ART OF PACKING, AS APPLIED TO SPECIAL JURIES* 26–28 (London, Effingham Wilson 1821).

¹⁰ See, e.g., 76 CONG. REC. 698–99 (1932); Fairfax, *Jurisdictional Heritage*, *supra* note 8, at 435 n.165.

¹¹ See, e.g., Ovio C. Lewis, *The Grand Jury: A Critical Evaluation*, 13 AKRON L. REV. 33, 66 (1979) (asserting that the grand jury is “a pawn in [the] technical game” of the criminal justice system (quoting *United States v. Johnson*, 319 U.S. 503, 512 (1943))).

prosecution¹² also complain, as is discussed below, that the grand jury is an overly-compliant rubber stamp of the prosecutor, willing to indict on command.

2. Ineffectiveness (Over-Compliance)

Another common gripe against the grand jury is that it is an ineffective filter for meritless criminal charges.¹³ Critics bemoan the fact that grand juries return a true bill in over ninety percent of cases presented by prosecutors.¹⁴ A grand jury, the famous saying goes, will “indict a ‘ham sandwich.’”¹⁵ However, there may have been probable cause to believe the ham sandwich committed the crime. Statistics show that in over ninety-five percent of cases indicted by federal grand juries, a conviction follows.¹⁶

¹² Perhaps there are efficiency “costs” to the system in forcing prosecutors to take the time to seek an indictment instead of proceeding directly to trial on an information. Of course, defendants who plead guilty (the method by which nearly all federal criminal cases are disposed of) may waive grand jury indictment. See FED. R. CRIM. P. 7(b); U.S. SENTENCING COMM’N, FINAL QUARTERLY DATA REPORT 42 (2009). Such was not always the case; as recently as sixty years ago, it was still assumed that a defendant could plead guilty to a felony offense only after grand jury indictment. See Fairfax, *Jurisdictional Heritage*, *supra* note 8, at 448–49.

Forgoing grand jury indictment in criminal cases certainly may be more efficient and less exhaustive of limited prosecutorial resources, but so would the withdrawal of many criminal procedural rights.

¹³ See, e.g., William J. Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174, 174 (1973) (“[T]he grand jury is the total captive of the prosecutor who . . . can indict anybody, at any time, for almost anything”); Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1, 2 (2004) [hereinafter Kuckes, *Dangerous Fiction*] (“Most knowledgeable observers would describe the federal grand jury . . . as a handmaiden of the prosecutor”); Gerald B. Lefcourt, *High Time For a Bill of Rights for the Grand Jury*, THE CHAMPION, Apr. 1998, at 5 (quoting a former federal judge as stating, “The grand jury is the total captive of the prosecutor, who, if he is candid, will concede that he can indict anybody, at any time, for almost anything before any grand jury.”).

¹⁴ See Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1, 31–32 (2004) (citing a 1984 report showing a 99.6% indictment rate for federal grand juries nationwide and a 1999 report showing a 94.1% indictment rate for New York state).

¹⁵ *United States v. Navarro-Vargas*, 408 F.3d 1184, 1195 (9th Cir. 2005) (recounting former New York State Chief Judge Sol Wachtler’s statement that “a Grand Jury would indict a ‘ham sandwich’” (quoting *In re Grand Jury Subpoena of Stewart*, 545 N.Y.S. 2d 974, 977 n.1 (N.Y. Sup. Ct. 1989))).

¹⁶ Peter J. Henning, *Prosecutorial Misconduct in Grand Jury Investigations*, 51 S.C. L. REV. 1, 5 & n.24 (1999); Kevin K. Washburn, *Restoring the Grand Jury*, 76 FORDHAM L. REV. 2333, 2370 & n.179 (2008). This figure includes both convictions at trial and convictions resulting from guilty pleas. A fair argument might be made, however, that the fact of grand jury indictment exerts pressure upon a defendant, making it more likely that he will plead guilty to meritless charges. See Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV.

If a petit jury convicts on (or a judge overseeing a guilty plea is convinced that there exists) proof beyond a reasonable doubt, why should it be troubling that a grand jury found probable cause?¹⁷ Indeed, that petit juries overwhelmingly confirm grand juries' earlier probable cause determinations should not be surprising.¹⁸ First, because of stigma associated with the failure to obtain a true bill from a grand jury, many prosecutors work hard to ensure that the case has more than enough evidence to satisfy the probable cause standard employed by grand juries.¹⁹ In fact, federal prosecutors are instructed not to pursue criminal charges until they have obtained or believe they will obtain proof sufficient to survive a motion for judgment of acquittal at trial (proof beyond a reasonable doubt), a much more exacting standard than that required for grand jury indictment.²⁰

1117, 1132–35 (2008) (discussing where it may be advantageous for an innocent defendant to plead guilty).

¹⁷ Of course, the petit jury certainly is not foolproof, and innocent defendants can be convicted even under the higher standard of proof. However, to the extent that false convictions after jury trials are a regular occurrence, the blame should be spread far beyond the grand jury. See, e.g., Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1 (2009) (discussing how invalid forensic testimony can lead to wrongful convictions); Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123 (2005) (suggesting that the pretrial process can distort the gathering and presentation of exculpatory evidence, thereby contributing to wrongful convictions); Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1 (2009) (identifying prosecutorial negligence as a source of wrongful conviction).

¹⁸ Of course, the vast majority of charged criminal cases are disposed of by guilty plea, not trial. See, e.g., Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1150 (2001) [hereinafter Bibas, *Judicial Fact-Finding*] (“Our world is no longer one of trials, but of guilty pleas.”); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 90 (2005) (reporting that, in 2002, 95.2% of federal defendants plead guilty). However, even in the post-indictment guilty plea context, the presiding judge must satisfy herself that the government possesses sufficient admissible evidence to establish a factual basis for the plea. FED. R. CRIM. P. 11(b)(3); *McCarthy v. United States*, 394 U.S. 459, 465 (1969). Therefore, the grand jury’s probable cause determination is affirmed in this context as well. For the suggestion of an innovative role the grand jury can play in the guilty plea process, see *infra* Part III.A.

¹⁹ See *Navarro-Vargas*, 408 F.3d at 1195 n.16 (citing Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 273–78 (1995)).

²⁰ See, e.g., UNITED STATES ATTORNEY’S MANUAL § 9-27.220 (2002); see also ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, 3–3.9 (3d ed. 1993) (“A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction.”). Of course, whenever there is an acquittal at trial on the merits or sufficiency of the evidence, we rightly should question why the grand jury did not filter out the charges earlier. However, as has been noted, the grand jury is not determining proof beyond a reasonable doubt; it is merely screening the government’s allegations for probable cause. See *supra* note 5 and accompanying text.

Furthermore, because the grand jury process is fluid, prosecutors often have the opportunity to poll grand jurors regarding weaknesses in the case.²¹ Given that a prosecutor can take another “bite at the apple”²² with regard to evidence presentation before the grand jury votes whether to indict, cases before the grand jury are strengthened and surprises at the voting stage can be kept to a minimum.²³ Despite the common lore regarding the grand jury, even the grand jury’s harshest critics must concede that, in the broad run of cases, weak or meritless charges largely are screened out by the grand jury.²⁴

3. Redundancy

Cast as an antiquated filter for meritless criminal allegations in a modern criminal justice system replete with professional prosecutors, vigilant judges, near-universal criminal defense representation, and a watchful media, the grand jury is often characterized as redundant.²⁵ When the grand jury operated in the nineteenth century, there were virtually no public prosecutors.²⁶ Victims—either represented by counsel or otherwise—were able to bring their own allegations to trial, subject to the approval of the grand jury.²⁷ As a result, the grand jury was tasked with making decisions whether and what to charge.²⁸ Therefore, the grand jury helped to protect against abuse of the criminal process by private citizens seeking revenge or concession through the filing of criminal charges.²⁹ Furthermore, the lack of a public police force meant that

²¹ See Leipold, *supra* note 19, at 266 (“[G]rand jurors may . . . discuss the case with the prosecutor as evidence is submitted.”).

²² Simmons, *supra* note 14, at 19 (citation omitted).

²³ Granted, if the grand jury were to fulfill its intended role as a “democratic prosecutor,” the proportion of indictments rejected by grand juries may very well grow. See Kuckes, *The Democratic Prosecutor*, *supra* note 5, *passim*; see also Fairfax, *Grand Jury Discretion*, *supra* note 5, *passim* (arguing that the grand jury may have a discretionary role to play in enhancing criminal justice).

²⁴ See, e.g., Scott E. Sundby, *Mapp v. Ohio’s Unsung Hero: The Suppression Hearing as Morality Play*, 85 CHI.-KENT L. REV. 255, 268 n.39 (2010). There is also, as one scholar has noted, the possibility of the underreporting of grand jury rejections of proposed indictments. Simmons, *supra* note 14, at 32–34.

²⁵ Fairfax, *Jurisdictional Heritage*, *supra* note 8, at 429 (discussing a study that criticized the grand jury as “redundant in a system that also had provision for preliminary examination, and claimed that ‘[i]t is no longer needed as a bulwark of our liberties’” (citation omitted)); Kuckes, *Dangerous Fiction*, *supra* note 13, at 2–4 (noting that prosecutorial decisions are implemented consistently without challenge).

²⁶ See Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 411, 422–23 & n.33 (2009) [hereinafter Fairfax, *Delegation*].

²⁷ See Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 292–93 (1989) (noting that citizens presented evidence of crimes directly to the grand jury).

²⁸ See *id.* at 292–93 & n.81.

²⁹ See ALLEN STEINBERG, *THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800–1880*, at 64 (1989).

the grand jury played a substantial role in identifying individuals for criminal accusation.³⁰ Also, the lack of right to counsel in that era meant that the grand jury was the only protection many putative criminal defendants were likely to enjoy.³¹

In the modern criminal justice system, these functions are performed by public prosecutors, public police, and court-appointed defense attorneys. Moreover, in the absence of a grand jury, a judicial officer often will pass upon the accusations to ensure that they are supported by probable cause.³² Thus, the argument goes, there is no longer a need for the grand jury to perform these various roles played by modern institutional players.

However, such critiques fail to recognize that not all probable cause determinations are created equal. In the same way that a magistrate's probable cause determination is given more weight and deference than a police officer's, so too does a grand jury's probable cause determination enjoy greater respect.³³ The reason for this is that the grand jury is not a governmental entity, but the community's representative.³⁴ As such, it serves as a check on government officials (a judge and a prosecutor) who conceivably could collaborate to bring meritless charges against a defendant. The grand jury's added value rebuts the charge of redundancy critics often advance.

B. Grand Jury 1.0 (Service Pack 1): Traditional Grand Jury Reform Proposals

Even though the grand jury may be defended against some of the most common critiques lodged against it, the fact remains that the institution is perceived to have fallen far short of the aspirations the Framers may have had when they included it in the Bill of Rights.³⁵ Sporting a proud heritage of serving as a shield between the colonial,

³⁰ Fairfax, *Delegation*, *supra* note 26, at 422–23 & n.33.

³¹ Cf. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (articulating the right to counsel in state prosecutions for the first time); *Johnson v. Zerbst*, 304 U.S. 458 (1938) (articulating the right to counsel in federal prosecutions); *Patton v. United States*, 281 U.S. 276, 298 (1930) (holding that the constitutional right to a jury trial can be waived in a criminal case); *United States v. Gill*, 55 F.2d 399, 403 (D.N.M. 1932) (holding under *Patton*'s logic that a defendant may waive the Fifth Amendment right to indictment in "capital and other infamous cases").

³² See, e.g., Kuckes, *Dangerous Fiction*, *supra* note 13, at 59 (citation omitted).

³³ For example, when a detained federal defendant is arrested by a law enforcement officer who has found probable cause, the government must still obtain a complaint supported by probable cause found by a magistrate judge. See FED. R. CRIM. P. 5(b). Even after that judicial determination, a defendant is entitled to a preliminary hearing, which is an adversarial probable cause hearing before a judicial officer within a set time-frame. See FED. R. CRIM. P. 5.1(c). If, however, the grand jury returns an indictment against the defendant before the required preliminary hearing takes place, the later judicial finding of probable cause is obviated. See FED. R. CRIM. P. 5.1(a)(2).

³⁴ See *infra* note 96 and accompanying text.

³⁵ See, e.g., Leipold, *supra* note 19, at 323 ("[A]lthough the framers of the Bill of Rights considered grand juries an important protector of individual liberty, time and close scrutiny has shown that they are not.").

state, and federal powers and the individual subject and citizen, the grand jury was held in tremendous esteem by those in the Founding generation.³⁶ Furthermore, the grand jury was a center of civic life and interaction, playing a role in local governance and serving as a mechanism for the exchange and dissemination of ideas on government.³⁷

Those in the Founding generation very well might be shocked at the extent to which the grand jury has become a largely invisible and little respected part of the American government and criminal justice. The Supreme Court's late-nineteenth century determination, in *Hurtado v. California*,³⁸ that grand jury indictment was not essential to due process in the initiation of state criminal proceedings³⁹ revealed the early slippage in the respect accorded the grand jury institution. Perhaps it was this environment which permitted the English movement toward abolition of the grand jury to be entertained seriously in the United States in the early part of the twentieth century.⁴⁰ Although those abolition efforts fell short of their goal, and the federal grand jury right was left intact, calls for *reform* of the grand jury nevertheless remained.

Despite the shortcomings of the most common critiques of the grand jury, there is ample room for improvement. Although criticism of the American grand jury was voiced throughout the twentieth century,⁴¹ the grand jury's perceived shortcomings were thrust onto the main stage of American politics during the investigations into the Watergate break-ins.⁴² As a result of apparent failings of the grand jury during this episode, a number of legislative efforts were undertaken to "reform" the grand jury.⁴³

In 1976, the 94th Congress considered eight bills and one House resolution on the issue of grand jury reform.⁴⁴ One such bill contained many of the leading reform

³⁶ See Fairfax, *Jurisdictional Heritage*, *supra* note 8, at 408–12.

³⁷ See LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 221–23 (1999) (explaining that grand juries had multiple civic functions such as governing localities, investigating the physical conditions of roads, bridges, and ferries, supervising the prices of commodities, and fixing the rates of taxes); Simmons, *supra* note 14, at 4–5 & n.8 (noting that the grand jury was a political body that served many functions).

³⁸ 110 U.S. 516 (1884).

³⁹ *Id.* at 538.

⁴⁰ See Fairfax, *Jurisdictional Heritage*, *supra* note 8, at 428–30 (noting that sharp criticism of the grand jury began in the nineteenth century and continued into the twentieth century).

⁴¹ *Id.*

⁴² See, e.g., KEN GORMLEY, ARCHIBALD COX: CONSCIENCE OF A NATION 293 (1997) ("A group of ordinary men and women [the grand jury] . . . had quietly made one of the most important decisions in the constitutional history of the nation [to subpoena the President of the United States]."); Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 OHIO ST. J. CRIM. L. 369, 419 n.272 (2009) (citing John W. Dean III, *Watergate: What Was It?*, 51 HASTINGS L.J. 609, 611–12 & n.6 (2000)).

⁴³ *Federal Grand Jury: Hearing on H.J. Res. 46, H.R. 1277 and Related Bills, Before the Subcomm. on Immigration, Citizenship, and Int'l Law of the H. Comm. on the Judiciary*, 94th Cong. 2–3 (1976).

⁴⁴ *Reform of the Grand Jury System: Hearing on S. 3274, H.R. 1277, H.R. 6006, H.R. 6207, H.R. 10947, H.R. 11660, H.R. 11870, H.R. 14146, and H.J. Res. 46 Before the Subcomm.*

proposals, including: (1) a reduction of the time limit on civil contempt confinement for witnesses found in contempt of a grand jury subpoena from eighteen months to six months; (2) a requirement that grand jurors be informed during empanelment by the district judge about their independent powers of investigation; (3) empowering the grand jury to retain a “special attorney” who could sign indictments when a prosecutor refused; (4) the right of defense counsel to be present in the grand jury room; and (5) a requirement that the government present exculpatory evidence to the grand jury prior to indictment.⁴⁵ The reform package failed to gain traction.⁴⁶

The 95th Congress picked up the issue after President-Elect Carter’s nominee for Attorney General, Griffin Bell, stated during his confirmation hearing that he would be open-minded regarding grand jury reform.⁴⁷ The package of reform proposals, now styled *The Grand Jury Reform Act of 1978*,⁴⁸ garnered additional support, both within Congress, and from the powerful American Bar Association (ABA).⁴⁹ Hearings before the Senate Judiciary Committee’s Administrative Practice and Procedure Subcommittee were significantly more balanced, if a bit contentious.⁵⁰ In the end, however, the legislative efforts stalled.⁵¹

In 1985, the 99th Congress sought to revive grand jury reform shortly after President Reagan’s landslide re-election.⁵² The witness list was again fairly balanced,⁵³ but the Department of Justice dug in its heels, even proposing changes to the grand jury secrecy rules that were seen by many to cut against the spirit of the reform proposals.⁵⁴

on Constitutional Rights of the S. Comm. on the Judiciary, 94th Cong. (1976) [hereinafter *Senate Grand Jury Reform Hearing 1976*].

⁴⁵ See S. 3274, 94th Cong. §§ 2, 4 (1976).

⁴⁶ In September 1976, the Senate Judiciary Committee heard testimony on the legislation. See *Senate Grand Jury Reform Hearing 1976*, *supra* note 44. The witness list weighed heavily against grand jury reform and the Department of Justice opposed almost all of the proposals. See *id.* In a Presidential election year, reform efforts (unsurprisingly) fizzled out. See Gregory T. Fouts, Note, *Reading the Jurors Their Rights: The Continuing Question of Grand Jury Independence*, 79 IND. L.J. 323, 340 (2004) (discussing the reform package).

⁴⁷ *The Prospective Nomination of Griffin B. Bell, of Georgia, to be Attorney General: Hearing Before the S. Comm. on the Judiciary*, 95th Cong. 83 (1977) (statement of Griffin B. Bell, nominee to be Att’y Gen. of the United States).

⁴⁸ S. 3405, 95th Cong. (1978).

⁴⁹ See Laurie O. Robinson, *Introduction to AM. BAR ASS’N, GRAND JURY POLICY AND MODEL ACT 2–3* (Marcia Christensen ed., 1982) [hereinafter ABA GRAND JURY POLICY].

⁵⁰ See *Grand Jury Reform Act of 1978: Hearing on S. 3405 Before the Subcomm. on Admin. Practice and Procedure of the S. Comm. on the Judiciary*, 95th Cong. (1979).

⁵¹ See Leipold, *supra* note 19, at 272 (noting that numerous proposals to alter the grand jury system were considered, but most were rejected).

⁵² See *Grand Jury Reform Act of 1985: Hearings on H.R. 1407 and Related Bills Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 99th Cong. (1987).

⁵³ See *id.* at iii–iv.

⁵⁴ The Department asked Congress to amend Federal Rule of Criminal Procedure 6(e) to remove obstacles to the sharing of grand jury materials between criminal prosecutors and government civil attorneys. See *id.* at 244.

Once again, the Hill failed to pass grand jury reform legislation.⁵⁵ If the decade after Watergate exposed perceived flaws with the role and function of the grand jury, little, if any, progress was made toward addressing the problems.

The Independent Counsel Statute,⁵⁶ a product of the Watergate era, would renew fervor for grand jury reform at the end of the twentieth century. The investigation into perjury allegations against President William Jefferson Clinton produced a great deal of interest in—and criticism of—the grand jury.⁵⁷ The Independent Counsel's grand jury investigation of criminal allegations against a sitting President of the United States—an episode during which the President himself, and members of the White House staff, testified before the grand jury—once again propelled the ancient grand jury institution into the public consciousness.⁵⁸

A number of private and bar entities became active in pressing for grand jury reform. The ABA, which had long played a role in advocating grand jury reform, continued to advocate the ABA Grand Jury Principles, a collection of thirty recommendations for grand jury reform.⁵⁹ Among the proposed reforms were the right to counsel in the grand jury room, the prosecutorial duty to disclose exculpatory evidence to the grand jury, and the grand jury target's right to testify in the grand jury.⁶⁰

The ABA was joined by the National Association of Criminal Defense Lawyers (NACDL).⁶¹ The NACDL published, in 2000, a "Grand Jury Bill of Rights,"⁶² which set out ten specific reforms for the grand jury, representing many of the more widely-supported proposals produced during the legislative skirmishes of the 1970s and 1980s. Among the NACDL proposals were: (1) presence of counsel for grand jury witness inside of the grand jury room;⁶³ (2) disclosure of exculpatory evidence to the grand

⁵⁵ Kathryn E. White, Comment, *What Have You Done with My Lawyer: The Grand Jury Witness's Right to Consult with Counsel*, 32 LOY. L.A. L. REV. 907, 920 (1999).

⁵⁶ 28 U.S.C. §§ 591–98 (2006).

⁵⁷ See Lefcourt, *supra* note 13, at 5.

⁵⁸ See, e.g., KEN GORMLEY, *THE DEATH OF AMERICAN VIRTUE: CLINTON VS. STARR* 538–52 (2010).

⁵⁹ See ABA GRAND JURY POLICY, *supra* note 49, at 4–5.

⁶⁰ See *id.* at 4.

⁶¹ See Lefcourt, *supra* note 13, at 5. During this same time-frame, the Washington, D.C.-based Council for Court Excellence also published a study of the federal and local District of Columbia grand jury system. COUNCIL FOR COURT EXCELLENCE, *THE GRAND JURY OF TOMORROW: NEW LIFE FOR AN ARCHAIC INSTITUTION* (2001). The report contained a number of proposed reforms, including many which overlap with the NACDL proposals. See *id.*; Michael Waldman, *Grand Jury: Ripe for Reform*, CRIM. JUST., Winter 2002, at 5.

⁶² See NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *FEDERAL GRAND JURY REFORM REPORT & "BILL OF RIGHTS"* (2000) [hereinafter NACDL, *GRAND JURY REPORT & BILL OF RIGHTS*]. The NACDL committee charged with developing and advancing these proposals boasted a number of prominent attorneys, including Elkan Abramowitz, Barbara Bergman, John W. Kecker, Gerald B. Lefcourt, Herbert J. Miller, Jr., Neal R. Sonnett, Brendan Sullivan, Larry D. Thompson, Anton R. Valukas, and Theodore V. Wells, Jr. *Id.*

⁶³ *Id.* at 10.

jury;⁶⁴ (3) prohibition of presentation of evidence to the grand jury the prosecutor knows (because of a court ruling) to be constitutionally inadmissible at trial;⁶⁵ (4) right of a grand jury target or subject to testify before the grand jury;⁶⁶ (5) right of a grand jury witness to receive a transcript of their testimony;⁶⁷ (6) prohibition on naming in an indictment an unindicted co-conspirator;⁶⁸ (7) *Miranda* warnings for all non-immunized subjects or targets called to testify before a grand jury;⁶⁹ (8) 72 hours notice before date of appearance pursuant to a grand jury subpoena;⁷⁰ (9) meaningful legal instructions given to the grand juror on the record, and made available to the accused following indictment;⁷¹ and (10) prohibition on calling a witness to testify when the prosecutor knows the witness intends to invoke the privilege against self-incrimination.⁷²

However, two grand jury reform bills taken up by the Senate in the midst of the impeachment of President Clinton went nowhere.⁷³ Despite hearings in the House Judiciary Committee in 2000,⁷⁴ the Department of Justice was able to ward off any further legislative efforts toward grand jury reform.⁷⁵ Although some proposed grand jury reforms have found support at the state level,⁷⁶ and in court decisions at the federal level,⁷⁷ comprehensive grand jury reform has proved elusive.

In any event, many of the suggestions for improving the grand jury have been directed toward making it a better probable cause filter.⁷⁸ In other words, the focus

⁶⁴ *Id.* at 10–11.

⁶⁵ *Id.* at 11.

⁶⁶ *Id.* at 12.

⁶⁷ *Id.* at 12–13.

⁶⁸ *Id.* at 13–14.

⁶⁹ *Id.* at 14.

⁷⁰ *Id.*

⁷¹ *Id.* at 14–15.

⁷² *Id.* at 15.

⁷³ Grand Jury Reform Act of 1998, S. 2289, 105th Cong. (1998); Grand Jury Due Process Act, S. 2030, 105th Cong. (1998).

⁷⁴ *Constitutional Rights and the Grand Jury: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. (2000). The witnesses for the hearing included Professor Sara Sun Beale, Professor Peter J. Henning, Professor Andrew D. Leipold, Loretta E. Lynch (United States Attorney for the Eastern District of New York), and James K. Robinson (Assistant Attorney General for the Criminal Division of the United States Department of Justice). *Id.* at iii.

⁷⁵ See *id.* at 4 (statement of James K. Robinson, Assistant Att’y Gen.); see also Raju Chebium, *Government Urges Congress to Leave Grand Jury System Alone*, CNN (July 27, 2000), http://articles.cnn.com/2000-07-27/justice/grand.jury_1_grand-jury-witnesses-criminal-justice?_s=PM:LAW.

⁷⁶ See, e.g., John F. Decker, *Legislating New Federalism: The Call for Grand Jury Reform in the States*, 58 OKLA. L. REV. 341, 343 (2005); Lefcourt, *supra* note 13, at 34 (noting various grand jury reforms adopted in New York State).

⁷⁷ See, e.g., *In re Grand Jury*, 490 F.3d 978, 990 (D.C. Cir. 2007) (holding that grand jury witnesses were entitled to transcripts of their grand jury testimony).

⁷⁸ See NACDL, GRAND JURY REPORT & BILL OF RIGHTS, *supra* note 62, at 5 (“The great benefit from the proposed reforms . . . would be that flaws in potential charges might be

of grand jury reform has been to enhance the grand jury's performance of its *judicial* function—that is, determining whether the prosecutor has met the probable cause threshold.⁷⁹ Although such reforms are important, they may reflect too narrow a view of the grand jury's importance and potential. Recently, scholars have argued that the grand jury has a *prosecutorial* role to play as well.⁸⁰ Under this view, the grand jury in effect “partners” with the prosecutor to determine not only whether there is probable cause to believe an individual committed a crime, but also whether that individual *should* be prosecuted.⁸¹

Within our criminal justice system, various actors constantly make discretionary calls as to which lawbreakers will be prosecuted and punished. The “prosecutorial” view simply perceives the grand jury as having the same capacity and authority to exercise discretion as does a law enforcement officer or a prosecutor.⁸² The grand jury's exercises of discretion are acceptable for a number of reasons, including the fact that they are an articulation of community sentiment,⁸³ and yet their decisions are not made final and irreversible by operation of the Double Jeopardy Clause.⁸⁴ Various grand jury reform proposals, including enhanced instructions to the grand jury regarding its role,⁸⁵ would bolster the grand jury in this discretionary role.

However, taking the prosecutorial view does not necessarily help change the perception of the grand jury as an artifact of the criminal justice system. First, grand juries have performed this prosecutorial function throughout United States history.⁸⁶ Also, the notion that the grand jury should perform such a role does not counter claims that the grand jury is redundant. Of course, government attorneys perform the prosecutorial role. Indeed, the very development of the office of the modern public prosecutor was premised in part on the belief that a publicly-funded, professional prosecutor served the ends of justice and efficiency in a way that a private model (with only the grand jury as an arbiter of what would be prosecuted) could not.⁸⁷

exposed at the grand jury stage, and unwarranted prosecutions would be less likely to be brought.”).

⁷⁹ See *supra* Fairfax, *Grand Jury Discretion*, *supra* note 6, at 720; Kuckes, *The Democratic Prosecutor*, *supra* note 6, at 1279-80.

⁸⁰ See Fairfax, *Grand Jury Discretion*, *supra* note 5, *passim*; Kuckes, *The Democratic Prosecutor*, *supra* note 5, *passim*.

⁸¹ See Kuckes, *The Democratic Prosecutor*, *supra* note 5, at 1283-85 (noting the grand jury's role is akin to the charging decision made by a prosecutor).

⁸² See *id.* at 1283-84.

⁸³ See Fairfax, *Grand Jury Discretion*, *supra* note 5, at 760 (“[T]he 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.”).

⁸⁴ See *id.* at 743.

⁸⁵ See, e.g., NACDL, *GRAND JURY REPORT & BILL OF RIGHTS*, *supra* note 62, at 14-15 (listing the grand jury's right to meaningful instructions regarding their duties among the “Grand Jury Bill of Rights”); see also Fairfax, *Grand Jury Discretion*, *supra* note 5, at 761.

⁸⁶ Fairfax, *Grand Jury Discretion*, *supra* note 5, at 729-31; Fairfax, *Jurisdictional Heritage*, *supra* note 8, at 408-12.

⁸⁷ See Fairfax, *Delegation*, *supra* note 26, at 435 (“[T]he public prosecution norm has

In the end, neither of the two central aims of traditional grand jury reform proposals—bolstering the grand jury in its judicial role and enhancing the grand jury’s prosecutorial role—fully ushers in the sort of innovation that would bring the grand jury in line with the needs of modern criminal justice. Part II argues that the grand jury possesses the malleability and potential to serve that role.

II. THE CASE FOR GRAND JURY INNOVATION

Many of the aforementioned reforms would help the grand jury perform both its filtering and discretionary roles in a much more effective way. However, these proposed reforms merely fortify the grand jury in its existing, traditional “judicial” and “prosecutorial” roles. They do not help to make the case that the grand jury is a useful, vital component of the criminal justice system. This Part makes the case that not only *can* the grand jury serve such a role, but that it *should* be utilized in such a manner.

A. The Grand Jury’s Susceptibility to Innovation

It is not obvious the grand jury can be pressed into service for functions beyond the traditional judicial and prosecutorial roles it plays today. Given the grand jury’s long history stretching back to the twelfth century,⁸⁸ there may be a question whether the grand jury is subject to the sort of innovation proposed in this Article. The grand jury is essentially a “creature of the common law,”⁸⁹ with little, if any, guidance as to its core attributes in the Constitution. The grand jury existed in colonial America before the framing of the Constitution.⁹⁰ Although the right to federal grand jury indictment was not established until the Fifth Amendment was ratified, the grand jury was utilized in the former colonies from before the Articles of Confederation until the Bill of Rights.⁹¹ Indeed, the original Constitution contemplated grand jury indictment,⁹² and many early state constitutions included a grand jury provision.⁹³ But for all of its

become closely associated with the legitimate exercise of government power, public confidence in the criminal justice system, and the proper pursuit of justice.”).

⁸⁸ Fairfax, *Jurisdictional Heritage*, *supra* note 8, at 408–09 & n.39.

⁸⁹ Fairfax, *Grand Jury Discretion*, *supra* note 5, at 726.

⁹⁰ Fairfax, *Jurisdictional Heritage*, *supra* note 8, at 409–10.

⁹¹ *Id.* at 410–11.

⁹² See U.S. CONST. art. I, § 3, cl. 7.

⁹³ See, e.g., ALA. CONST. of 1865, art. I, § 9; ARK. CONST. of 1874, art. II, § 8; CAL. CONST. of 1849, art. I, § 8; COLO. CONST. of 1876, art. II, § 23; CONN. CONST. of 1818, art. I, § 9; DEL. CONST. of 1831, art. VI, § 15; FLA. CONST. of 1865, art. I, § 16; GA. CONST. of 1777, art. XLV; ILL. CONST. of 1848, art. XIII, § 10; IOWA CONST. of 1846, art. I, § 11; KAN. CONST. of 1855, art. I, § 10; ME. CONST. of 1820, art. I, § 7; MICH. CONST. of 1835, art. I, § 11; MINN. CONST. of 1857, art. I, § 7; N.J. CONST. of 1844, art. I, § 9; N.Y. CONST. of 1846, art. I, § 6; R.I. CONST. of 1847, art. I, § 7. These historical constitutions are reprinted in BEN PERLEY POORE, *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES* (Lawbook Exch. 2d. ed. 2001) (1887).

heritage and constitutional stature, the grand jury is a “preconstitutional institution”⁹⁴ with few defining characteristics.

As the grand jury has evolved over its six or seven centuries, perhaps the only structural consistency to be found throughout this history is the (somewhat aspirational) notion that the body is meant to represent community sentiment with regard to the object of the inquiry, whether determining the presence of probable cause or making charging decisions.⁹⁵ Regardless of the rules governing its composition or its business, the grand jury always has been considered the “voice of the community.”⁹⁶ However, much of what we consider to be standard grand jury purpose and practice is as malleable as the legislative will to update it to modern needs.

Indeed, the contours of the modern grand jury are defined largely by statute and court rule. For example, the requirement of federal grand jury secrecy is enforced through Rule 6(e) of the Federal Rules of Criminal Procedure.⁹⁷ Likewise, the frequency of grand jury meetings, the length of term, and the number and selection of grand jurors are all defined by statute.⁹⁸ In many instances, these statutes do implement common law, but there is nothing to prevent the legislature from departing from the grand jury’s customary or historical function. That said, it likely would be improper for a statute or court rule to completely undermine the essential function performed by the grand jury at the time the Framers included it in the Bill of Rights.⁹⁹ If we are to give any meaning to the Grand Jury Clause, then the grand jury must retain some semblance of its central role of representing community sentiment in initiating criminal prosecutions in serious criminal cases. However, there is nothing that would prohibit the use of the grand jury for purposes beyond this core function.

⁹⁴ *United States v. Chanen*, 549 F.2d 1306, 1312 (9th Cir. 1977) (describing the grand jury as a “preconstitutional institution”), *cert. denied*, 434 U.S. 825 (1977).

⁹⁵ *See, e.g.*, Fairfax, *Grand Jury Discretion*, *supra* note 5, at 711–12; Kuckes, *The Democratic Prosecutor*, *supra* note 5, at 1300 (citing Judge Learned Hand’s opinion in *In re Kittle*, 180 F. 946, 947 (S.D.N.Y. 1910)).

⁹⁶ Susan W. Brenner, *The Voice of the Community: A Case for Grand Jury Independence*, 3 VA. J. SOC. POL’Y & L. 67, 67 (1995). Of course, given the many discriminatory restrictions on grand jury service throughout American history, the grand jury was arguably never *truly* was the “voice of the community.” *See, e.g.*, *Hale v. Crawford*, 65 F.2d 739, 747 (1st Cir. 1933) (upholding grand jury exclusion based on race), *cert. denied*, 290 U.S. 674 (1933); PATRICIA SULLIVAN, *LIFT EVERY VOICE: THE NAACP AND THE MAKING OF THE CIVIL RIGHTS MOVEMENT* 165–68 (2009).

⁹⁷ FED. R. CRIM. P. 6(e).

⁹⁸ *See, e.g.*, 18 U.S.C. §§ 3321–34 (2006). In Michigan, for instance, a “one-man grand jury” is employed in certain circumstances. George H. Dession, *From Indictment to Information—Implications of the Shift*, 42 YALE L.J. 163, 191–92 (1932); Thaddeus Hoffmeister, *The Grand Jury Legal Advisor: Resurrecting the Grand Jury’s Shield*, 98 J. CRIM. L. & CRIMINOLOGY 1171, 1217 & n.323 (2008).

⁹⁹ *See, e.g.*, Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1498 n.388 (1984).

B. The Grand Jury as an Appropriate Vehicle for Criminal Justice Innovation

Even if the grand jury can be remade, however, why not create or remake a *different* entity to perform the roles proposed for the “new” grand jury? Congress or state legislatures easily can create an entity with the subpoena and investigative power for which the grand jury is celebrated, not to mention the new functions contemplated for “Grand Jury 2.0” in this Article. Although this is undoubtedly true, the grand jury is a superior vehicle for delivering the sort of innovation contemplated in this Article.

First, the grand jury’s historical prestige makes it an ideal vehicle for bringing needed reform to the criminal justice system. Bolstered by centuries of history,¹⁰⁰ the grand jury has a proven track record of operating at the center of the criminal process. In addition, as the result of its long tenure, the grand jury brings credibility to the tasks to which it might be assigned. A brand new, unproven entity is unlikely to have the clout that the grand jury, despite all of its criticism, carries.

Furthermore, certain structural characteristics of the grand jury make it particularly well-suited to perform certain new tasks. The size of the grand jury (typically twenty-three) helps it to represent a cross-section of the community and its diversity of background and experience.¹⁰¹ Also, the fact that the grand jury traditionally sits for relatively lengthy periods allows time for the absorption and exposure necessary to make informed contributions to the administration of criminal justice in many different respects.¹⁰²

Also, the performance of innovative tasks may enhance the already significant benefits that grand jurors can derive from grand jury service. Alexis de Tocqueville famously described the jury as a “free school.”¹⁰³ The grand jury, because of its size and exposure to multiple matters, provides even more of a civic education than does service on the petit jury. If the grand jury, in its traditional roles, can provide citizens an education,¹⁰⁴ the grand jury performing the innovative roles contemplated below can provide a veritable Ph.D. in civic engagement.

Finally, and perhaps most importantly, the grand jury has demonstrated its tremendous potential to contribute beyond the traditional roles assigned to it today. Even within the American experience, the grand jury has served as a pivotal institution in

¹⁰⁰ Fairfax, *Jurisdictional Heritage*, *supra* note 8, at 408–09.

¹⁰¹ See Fairfax, *Grand Jury Discretion*, *supra* note 5, at 745.

¹⁰² *Id.*

¹⁰³ 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 316 (Arthur Goldhammer trans., Library of America 2004) (1835) (“[T]he grand jury] should be seen as a free school, and one that is always open . . .”).

¹⁰⁴ Roger A. Fairfax, Jr., *Harmless Constitutional Error and the Institutional Significance of the Jury*, 76 *FORDHAM L. REV.* 2027, 2054–55 (2008) (“[T]he American jury serves as a vehicle for the education of the citizenry . . .”); see also JOHN GASTIL ET AL., *THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION* (2010).

the civic life of communities.¹⁰⁵ For example, grand juries in colonial America levied taxes, allocated public works spending, appointed government officials, and helped to manage other affairs of local government.¹⁰⁶ Only later did the grand jury begin to be limited to the circumscribed roles it performs today.¹⁰⁷ Nevertheless, the grand jury carries in its DNA the ability to leverage its attributes and add value beyond the traditional judicial and prosecutorial roles.

Once we are convinced that the grand jury might have some utility beyond its traditional functions, and we agree that the grand jury can be altered consistent with constitutional and common law constraints, the question remains—*how* would we use it? The next Part advances an agenda of grand jury innovation.

III. GRAND JURY 2.0: GRAND JURY AS A TOOL TO FACILITATE CUTTING-EDGE CRIMINAL PROCEDURE

So, where would grand jury innovation take us? For what other purposes could we utilize this potentially dynamic body? This Part envisions the grand jury as a tool for injecting popular input into plea bargaining and sentencing, for implementing successful strategies employing cutting-edge alternative dispute resolution and diversion mechanisms in criminal justice, and as an instrument for guiding, regulating, and supporting prosecutors in the important work they do.

The purpose of cataloguing these innovative potential uses for the grand jury is not to establish the merits for their adoption—although some of them might be considered wise criminal justice policy. Rather, the acknowledgment of these potential new uses for the grand jury is crucial to altering the common perception of the grand jury as an artifact of a bygone era. In other words, this Article seeks to begin the re-conceptualization of the grand jury as a mechanism for serving the needs of *modern* criminal justice.

A. Plea Bargaining and Sentencing

1. Plea Bargaining

The guilty plea, not trial, is the primary mechanism for disposition of criminal cases in modern American criminal justice.¹⁰⁸ Recently, many commentators have

¹⁰⁵ See LEVY, *supra* note 37, at 221–23 (citing specific examples of the grand jury's civic role in history); Fairfax, *Jurisdictional Heritage*, *supra* note 8, at 410 n.45 (“[C]olonial grand juries often addressed matters of local concern . . .”).

¹⁰⁶ *Id.*; see, e.g., 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, 10–11 (1996) (noting several examples of grand juries in local affairs); Simmons, *supra* note 14, at 10–11 (“[G]rand juries filled a void created by the scarcity of local representative government.”).

¹⁰⁷ See Brenner, *supra* note 96, at 71–72; Fouts, *supra* note 46, at 329.

¹⁰⁸ See *supra* note 18.

explored guilty pleas and plea bargaining from formerly unexamined angles and contexts.¹⁰⁹ Given that very few charged cases actually go to trial, the shifting scholarly focus from trial procedure to guilty plea procedure is understandable.¹¹⁰ However, this renewed scholarly interest in guilty pleas has not yet accounted fully for the grand jury. Although prosecutors and judges necessarily overshadow and displace petit juries in the “world of guilty pleas,”¹¹¹ this does not mean the *grand* jury has no role to play in a modern criminal justice system dominated by plea bargaining. How might the grand jury serve the plea process?

The extent to which the grand jury is involved in current plea bargaining practice is dependent on the context of the guilty plea, and limited at best. Even where grand jury indictment is required for prosecution of a certain offense, many defendants waive the right to grand jury indictment to facilitate or expedite a guilty plea.¹¹² In these cases, there is no grand jury review of the charges alleged against the defendant. Of course, many guilty pleas are entered after the grand jury has returned an indictment.¹¹³ Therefore, in those cases, the defendant may ultimately plead guilty to allegations that have been screened by a grand jury.¹¹⁴ However, a post-indictment plea deal easily could require a defendant to plead guilty to a count or counts not included in the original indictment.¹¹⁵

Although the allegations to which a defendant pleads guilty (at least) sometimes have been screened for probable cause by a grand jury, the judge—and the judge alone—determines the sufficiency of the defendant’s allocution and the factual basis of the guilty plea necessary for entry of judgment of conviction.¹¹⁶ Furthermore, the

¹⁰⁹ See, e.g., Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004); Erica Hashimoto, *Toward Ethical Plea Bargaining*, 30 CARDOZO L. REV. 949 (2008); Michael M. O’Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407 (2008); Wright, *supra* note 18.

¹¹⁰ See *supra* note 109.

¹¹¹ See Bibas, *Judicial Fact-Finding*, *supra* note 18; Roger A. Fairfax, Jr., *Outsourcing Criminal Prosecution? The Limits of Criminal Justice Privatization*, 2010 U. CHI. LEGAL F. 263, 293.

¹¹² See FED. R. CRIM. P. 7(b). The author elsewhere has explored questions regarding the historical and constitutional basis for waiver of grand jury indictment. See Fairfax, *Grand Jury Discretion*, *supra* note 5, *passim*.

¹¹³ Obviously, this is dependent on whether the jurisdiction requires grand jury indictment for the class of offense in question, or the prosecutor chose to obtain one. Where grand jury indictment is not required for a charged crime, there may be no grand jury action at all in a criminal case. See generally U.S. CONST. amend. V (requiring grand jury indictment only for “capital, or otherwise infamous” federal criminal charges); FED. R. CRIM. P. 6(a) (calling for a grand jury “when public interest so requires”).

¹¹⁴ Indeed, the fact of the grand jury indictment may have even played a role in the defendant’s decision to plea bargain in the first place. See *supra* note 16; see also Fairfax, *Grand Jury Discretion*, *supra* note 5, at 754.

¹¹⁵ See FED. R. CRIM. P. 11(c)(1).

¹¹⁶ See FED. R. CRIM. P. 11(b)(3) & 11(c)(3).

grand jury plays no role whatsoever in approving or supervising the particulars of the plea bargain itself. Where the court has discretion to do so,¹¹⁷ she and she alone may take into account issues such as fairness to the defendant or victim, or vindication of community interests when deciding whether to approve a plea bargain.¹¹⁸

By these accounts, it would seem that the grand jury has little, if any, relevance for the modern regime of plea bargaining. But should it? There is a fair argument that the grand jury could have a role to play in providing community supervision of guilty pleas. Such community input could apply both to a review of the factual basis for the plea and the propriety of the plea bargain itself—tasks currently allocated to the judicial officer presiding over the plea colloquy.¹¹⁹

For example, some defendants plead guilty to crimes they did not commit for the sake of expediency or out of a feeling of inevitability.¹²⁰ For those for whom such a practice is unacceptable, the grand jury's hearing of a defendant's allocution may help to prevent the phenomenon from occurring.¹²¹ Other defendants enter into plea agreements with terms a judge approves but the community would find repugnant. In these situations, a grand jury could push back, or at least be offered a rationale from the prosecutor and/or the defendant as to why the particular plea bargain serves the ends of justice.¹²²

The idea of utilizing the grand jury in this way is not a conceptual outlier. Professor Laura Appleman has proposed a "plea jury," which would oversee the plea process.¹²³ Although Professor Appleman's proposed "plea jury" specifically borrows from the grand jury certain functional elements, such as the duration of service,¹²⁴ and method of selection,¹²⁵ the key innovation is the introduction of the

¹¹⁷ See, e.g., *id.*

¹¹⁸ See O'Hear, *supra* note 109, at 459–60; see also FED. R. CRIM. P. 11(c)(3).

¹¹⁹ See FED. R. CRIM. P. 11(c).

¹²⁰ See Bowers, *supra* note 16, at 1132–34; see also Stephanos Bibas, Response, *Exacerbating Injustice*, 157 U. PA. L. REV. PENUMBRA 53 (2008), <http://www.pennumbra.com/responses/11-2008/Bibas.pdf> (agreeing with the proposition that guilty pleas by innocent defendants are misguided and erode public confidence in the criminal justice system).

¹²¹ Of course, this begs the question whether judges are just as qualified to filter out false pleas. Perhaps, but a group of laypersons with their collective wisdom, life experiences, and common sense, would seem to add some value to the filtering process.

¹²² One of the more notable examples of what some characterize as a "runaway" grand jury can be found in the Rocky Flats grand jury, which was appalled by a plea bargain the government entered into with a company accused of malfeasance in connection with a nuclear waste accident. 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 (1998).

¹²³ Laura I. Appleman, *The Plea Jury*, 85 IND. L.J. 731, 748 (2010) (describing the plea jury "as a cross between a grand jury and a petit jury").

¹²⁴ *Id.* ("Like a grand jury, [the plea jury] would serve more than once, for at least a month at a time.").

¹²⁵ *Id.* ("Like a grand jury, [the plea jury] would be comprised of people randomly selected from the community, with no peremptory or for-cause challenges to shape its ranks.").

community—through a jury-like body—into the guilty plea process, an idea rarely discussed in the literature.¹²⁶ However, the author would offer a friendly amendment to the Appleman proposal. The empowerment of the community in the guilty plea process does not require the creation of a new body. The grand jury could do this work, offering its heritage and credibility to offset some of the potential problems and deficiencies related to Professor Appleman's "plea jury" proposal.¹²⁷

Furthermore, there is nothing in the Constitution that would serve as an obstacle to the adaptation of the grand jury to the purpose of reviewing guilty pleas and plea agreements. Any restrictions on the grand jury performing such a function (such as the waiver rule)¹²⁸ are statutory in nature and, therefore, easily can be altered. Perhaps one might argue that the common law heritage of the grand jury does not support its use in this way. However, much of the grand jury's heritage antedates the modern practice of plea bargaining.¹²⁹ The fact that we have not utilized the grand jury in the plea process in the past is a poor excuse to stifle such grand jury innovation today. Once again, we have an opportunity to adapt the grand jury to the needs of modern criminal justice.

2. Grand Jury as Tool for Increased Popular Input into Criminal Sentencing

There has been increased scholarly exploration of the merits of jury sentencing,¹³⁰ a largely historical practice that has seen renewed interest in the past decade.¹³¹

¹²⁶ Professor Appleman points out that very few scholars have explored the idea of using a jury in this way, and none in any depth. *Id.* at 741 & n.53 (citing Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 141, 144 (2004); Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 874–78 (2003)).

¹²⁷ See *id.* at 768–76 (discussing potential criticism of a "plea jury"). Professor Appleman acknowledges that there are a number of potential limits to the efficacy of a plea jury, including negative impacts on efficiency, the danger that untrained lay jurors will fail to reach reasonable decision regarding proper plea bargains and will contribute to harsh sentencing practices and sentencing disparities, harm to defendants, and difficulties with identifying and relying upon a coherent sense of the "community" that the plea jurors are meant to represent. See *id.*

¹²⁸ FED. R. CRIM. P. 7(b).

¹²⁹ See *supra* notes 88–94 and accompanying text.

¹³⁰ See, e.g., Donald Braman, *Criminal Law and the Pursuit of Equality*, 84 TEX. L. REV. 2097, 2125–31 (2006); Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951 (2003); Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311 (2003); Chris Kemmitt, *Function Over Form: Reviving the Criminal Jury's Historical Role as a Sentencing Body*, 40 U. MICH. J.L. REFORM 93 (2006); Nancy J. King & Rosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885 (2004); Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings About Apprendi*, 82 N.C. L. REV. 621 (2004). For a discussion of the development of jury sentencing in the capital sentencing context, see Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1151–55 (2009).

¹³¹ For a fascinating historical study of the early development of jury sentencing in a number

Although proposals in favor of jury sentencing vary in their rationales,¹³² some, like Adriaan Lanni, emphasize the injection of community wisdom into the sentencing process.¹³³ Professor Lanni deftly outlines the ways in which use of jury sentencing can help “implement[] community justice” while “avoid[ing] many of the pitfalls of current community justice programs.”¹³⁴ To the extent that popular input is the primary reason some have called for the petit jury to take an expanded role in sentencing,¹³⁵ why not use the *grand* jury to supply popular input on sentences handed down to convicted defendants?¹³⁶

The grand jury is equal, if not superior, to the petit jury in terms of the characteristics that serve the community input function.¹³⁷ Although the petit jury determining guilt will be familiar with the evidence presented at trial, perhaps this is reason to avoid utilizing it to influence sentencing.¹³⁸ The grand jury could be more easily walled off from information not relevant (or prejudicial) to the sentencing decision. Also, sentencing arguments could be presented to grand juries that had no involvement with the cases at all.¹³⁹ Furthermore, as is discussed above, very few criminal cases go to trial, so the petit jury’s potential role in sentencing is drastically circumscribed.¹⁴⁰ On the other hand, the grand jury is involved in many cases that ultimately end in a guilty plea.¹⁴¹ To the extent that there is a preference for having a jury previously exposed to the facts of the case, the grand jury is well positioned to play that role even in cases disposed of by guilty plea.

of states, see Nancy J. King, *The Origins of Felony Jury Sentencing in the United States*, 78 CHI.-KENT L. REV. 937 (2003).

¹³² See Adriaan Lanni, *The Future of Community Justice*, 40 HARV. C.R.-C.L. L. REV. 359, 401 (2005) (“[S]cholars have supported jury sentencing through arguments based on deliberative democratic theory, constitutional law, and public policy.” (internal citations omitted)).

¹³³ See, e.g., *id.* at 364 (“[L]ocalized decision-making has the virtue of permitting individual communities to strike their own balance between security and the social costs of harsh law enforcement policies.”); see also Adriaan Lanni, Note, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. 1775, 1775 (1999) (arguing jury sentencing would better “reflect the ‘conscience of the community’”).

¹³⁴ Lanni, *supra* note 132, at 401.

¹³⁵ See generally *id.*

¹³⁶ I thank Professor Rachel Barkow for this suggestion.

¹³⁷ See Fairfax, *Grand Jury Discretion*, *supra* note 5, at 745.

¹³⁸ Cf. Lillquist, *supra* note 130, *passim*.

¹³⁹ Of course, sentencing arguments could be presented to petit juries, but this would clash with the structural characteristics (single case, duration or service, etc.) of these juries, such that they would come to resemble grand juries.

¹⁴⁰ However, Professor Michael Cahill has argued that petit juries should be given greater information regarding the punishment exposure determined by the offenses on which they determine guilt at the conviction stage. Michael T. Cahill, *Punishment Decisions at Conviction: Recognizing the Jury as Fault-Finder*, 2005 U. CHI. LEGAL F. 91.

¹⁴¹ See *supra* notes 113–16 and accompanying text.

B. Diversion and ADR

1. Deferred Prosecution Agreements

Recently, much attention has been focused on the role of deferred prosecution agreements in the war on white-collar crime.¹⁴² These agreements permit defendants (usually corporations) to avoid or delay prosecution (or even formal charging) in exchange for concessions to the government.¹⁴³ The number of deferred prosecution agreements between the government and would-be defendants has increased dramatically in recent years.¹⁴⁴ Deferred prosecution agreements remain a popular prosecutorial tool in large part because they can prompt tangible changes in corporate behavior.¹⁴⁵ However, there are a number of accountability concerns with these agreements, heightened by the lack of judicial oversight.¹⁴⁶ In one notable example, the deferred prosecution agreement provided for the target company to fund an endowed chair in business ethics at the alma mater of the United States Attorney.¹⁴⁷ In fact, Congress recently has taken an interest in regulating deferred prosecution agreements.¹⁴⁸

For those who harbor concerns regarding accountability and transparency with the deferred prosecution agreement regime, the grand jury may be well-positioned to supply the desired oversight. Although negotiation of such agreements may properly be considered an aspect of prosecutorial discretion, the grand jury, by injecting the community's viewpoint, can help the prosecutor to balance important competing considerations.

¹⁴² See, e.g., Peter J. Henning, *Corporate Criminal Liability and the Potential for Rehabilitation*, 46 AM. CRIM. L. REV. 1417, 1431–34 (2009) (discussing deferred prosecution agreements as a tool for corporate rehabilitation); Peter Spivack & Sujit Raman, *Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159 (2008) (discussing the increase in deferred prosecution agreements as a result of change in Department of Justice policy).

¹⁴³ See Henning, *supra* note 142, at 1420; Spivack & Raman, *supra* note 142, at 160.

¹⁴⁴ See, e.g., Marcia Coyle, *Corporate Pretrial Pacts by DOJ Rose Sharply in 2007*, NAT'L L.J., Jan. 21, 2008, at 7.

¹⁴⁵ See Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 894–902 (2007).

¹⁴⁶ But see, e.g., Christopher M. Matthews, *Judge Blasts Compliance Monitors at Innospec Plea Hearing*, MAIN JUSTICE (March 18, 2010, 7:45 PM), <http://wordpress.tsgdomain.com/MainJusticeDemo/2010/03/18/judge-blasts-compliance-monitors-at-innospec-plea-hearing/>.

¹⁴⁷ Dick Thornburgh, *The Dangers of Over-Criminalization and the Need for Real Reform: The Dilemma of Artificial Entities and Artificial Crimes*, 44 AM. CRIM. L. REV. 1279, 1284 (2007) (referring to the provision of the deferred prosecution agreement as “reek[ing] of good old fashioned pork-barrel politics”). In fairness, the endowed chair was meant to promote ethics and good corporate governance, which is a positive result. However, perhaps the perception would have been aided had a grand jury approved the deferred prosecution arrangement.

¹⁴⁸ See, e.g., Carrie Johnson, *Mukasey Had Been Overseer Finalist*, WASH. POST, Jan. 30, 2008, at D1.

Of course, as it stands now, many of these deferred prosecution agreements are struck in the shadow of the grand jury.¹⁴⁹ Some of these agreements are reached right at the point before the prosecutor will ask the grand jury to return an indictment.¹⁵⁰ In those cases, there may have been a thorough grand jury investigation, utilizing the resources and subpoena power of the grand jury. Some of these deferred prosecution agreements will be struck *after* an indictment has been returned.¹⁵¹ Although a grand jury indictment is not considered a formal charging document until the prosecutor signs it,¹⁵² the returned indictment is the grand jury's expression of probable cause that the target entity is guilty of criminal wrongdoing.¹⁵³

Also, it should be acknowledged that deferred prosecution agreements and non-prosecution agreements are ubiquitous in the "blue-collar" criminal area as well. Prosecutors will, as a matter of course, extract some sort of restitution, promise, or change in behavior in exchange for a deferral or dismissal of criminal charges.¹⁵⁴ Such arrangements are sometimes pursuant to formal statutory programs,¹⁵⁵ but just as often are done informally.¹⁵⁶ The uneven exercise of discretion to forbear prosecution and recommend diversion to similarly-situated defendants is one of the chief areas of concern for those critical of broad prosecutorial discretion.¹⁵⁷ The grand jury can help to inform prosecutorial and judicial discretion as to which defendants are appropriate candidates for such diversion programs.

¹⁴⁹ See Spivack & Raman, *supra* note 142, at 160.

¹⁵⁰ See, e.g., *id.* at 167 n.42.

¹⁵¹ As previously noted, an individual criminal defendant may plead guilty after an indictment. See *supra* notes 113–16 and accompanying text. For an example of a corporation that entered into a deferred prosecution agreement after indictment, see James B. Jacobs & Ronald Goldstock, *Monitors & IPSIGS: Emergence of a New Criminal Justice Role*, 43 CRIM. L. BULL. 217, 233–34 & nn.52–53, and accompanying text (recounting the New York Racing Association's entering into a deferred prosecution agreement premised on accepting all the conduct alleged in its indictment).

¹⁵² FED. R. CRIM. P. 7(c)(1).

¹⁵³ E.g., *United States v. Saussy*, 802 F.2d 849, 852 (6th Cir. 1986), *cert. denied*, 480 U.S. 907 (1987).

¹⁵⁴ See Benjamin M. Greenblum, Note, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1866–71 (2005) (discussing the use of deferred prosecution agreements in criminal law prior to their application in the corporate context).

¹⁵⁵ See 18 U.S.C. § 3154 (2006); BARRY MAHONEY ET AL., NAT'L INST. OF JUSTICE, PRETRIAL SERVICES PROGRAMS: RESPONSIBILITIES AND POTENTIAL 53 (2001), available at <http://www.ncjrs.gov/pdffiles1/nij/181939.pdf> ("Pretrial diversion programs provide an option of deferred prosecution for certain categories of defendants . . .").

¹⁵⁶ See Charles W. Thomas & W. Anthony Fitch, *Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 507, 530 (1976) ("Pretrial diversion is a relatively new name for a traditional manifestation of prosecutorial discretion.").

¹⁵⁷ Michael Edmund O'Neill, *When Prosecutors Don't: Trends in Federal Prosecutorial Declinations*, 79 NOTRE DAME L. REV. 221, 224 (2003) (citing Darryl K. Brown, *Third-Party Interests in Criminal Law*, 80 TEX. L. REV. 1383, 1399–1401 (2002)).

2. Drug Courts and Problem-Solving Courts

Drug courts are an outgrowth of the larger “problem-solving courts” movement in criminal justice over the past twenty years.¹⁵⁸ These problem solving courts address a wide variety of social ills giving rise to criminal conduct.¹⁵⁹ Drug courts generally offer a drug-addicted offender an attractive pre- or post-guilty plea diversion alternative.¹⁶⁰ In exchange for successfully completing a drug treatment and rehabilitation regimen under a court’s close supervision, the offender has her charges dismissed or significantly reduced.¹⁶¹ Sanctions are imposed by the court for missteps along the way, and ultimate failure to complete the program is often punished with incarceration.¹⁶²

The grand jury conceivably has a role to play in facilitating courts’ implementation of the core principles advanced by drug courts. To the extent that resource constraints limit the number of drug-addicted offenders who might be able to take advantage of drug courts, the grand jury could be in a position to recommend which defendants should be extended the opportunity. Also, because defendants who successfully complete the program often escape traditional punishment for crimes they may have committed,¹⁶³ the grand jury can extend the community’s imprimatur on the court’s decision to permit such diversion.

Even within the drug court’s operation, the grand jury may be in a position to add value. For example, Eric Miller proposes a “drug grand jury”¹⁶⁴ which would “replace the drug court judge, and thus the hierarchical relation between judge on the one hand, and community and offender on the other, with a grand jury made up of randomly selected members of the community.”¹⁶⁵ Armed with training from drug treatment

¹⁵⁸ See, e.g., Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205, 1206 (1998); Michael C. Dorf & Jeffrey A. Fagan, *Problem-Solving Courts: From Innovation to Institutionalization*, 40 AM. CRIM. L. REV. 1501, 1502 (2003); Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL’Y REV. 417, 420–24 (2009); Michael M. O’Hear, *Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice*, 20 STAN. L. & POL’Y REV. 463, 463–65 (2009).

¹⁵⁹ Dorf & Fagan, *supra* note 158, at 1507 (citing specialized courts directed at “mentally ill offenders, drunk drivers, parole or probation violators, gun carriers, [and] domestic violence offenders”); see also Tamar M. Meekins, “Specialized Justice”: *The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, 40 SUFFOLK U. L. REV. 1, 2–3 (2006).

¹⁶⁰ See, e.g., Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783, 784 (2008).

¹⁶¹ Drug courts have faced increasing criticism from some commentators who see them as ineffective and potentially harmful to more vulnerable defendants in drug cases. See, e.g., *id.* at 786–90; Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479 (2004). Nevertheless, many jurisdictions around the country trumpet the success of their drug court programs. See, e.g., Aruna Jain, *For Drug Offenders, A Second Chance*, WASH. POST, Dec. 14, 2006, at T3.

¹⁶² See Bowers, *supra* note 160, at 784–85.

¹⁶³ See *id.* at 784.

¹⁶⁴ Miller, *supra* note 158, at 450.

¹⁶⁵ *Id.* at 450–51.

professionals, and representatives of the court, prosecutors' offices, and defenders' offices,¹⁶⁶ the proposed drug grand jury would recommend treatment programs for drug-addicted offenders and supervise offender compliance.¹⁶⁷ Upon an offender's successful completion of these programs, the drug grand jury would decline indictment.¹⁶⁸ Professor Miller's proposal specifically seeks to leverage the unique features of the grand jury, including its cross-sectional representation¹⁶⁹ and its norm of secrecy.¹⁷⁰

3. Criminal Alternative Dispute Resolution: Victim-Offender Mediation

The study and use of alternative dispute resolution in the criminal process has grown dramatically over the last several decades.¹⁷¹ Sentencing circles, peacemaking circles, restorative justice, and victim-offender mediation, are all examples of the application of ADR to criminal justice.¹⁷² Certainly, the grand jury's aforementioned attributes and grounding in the community position it well to serve as a tool of community justice, one of the complementary aims of the use of alternative dispute resolution in criminal cases.¹⁷³

One specific utilization might be found in victim-offender mediation. Victim-offender mediation is a process by which offenders and victims voluntarily meet face-to-face with the assistance of a neutral mediator.¹⁷⁴ The mediator helps each party identify their key interests and facilitates a recognition of how those interests prompted, or were impacted by, the incident which led to the criminal conduct.¹⁷⁵ A successful mediation results in an agreement resolving the issues and conflict

¹⁶⁶ *Id.* at 455.

¹⁶⁷ *Id.* at 452–53.

¹⁶⁸ *See id.*

¹⁶⁹ *See id.* at 458. However, Professor Miller seeks to enhance the representativeness of the the drug grand jury (particularly in disadvantaged communities) by removing traditional filters from the juror selection process. *See id.* (“[M]y position is that grand jurors should not be excluded for [past] criminal activity unless such activity intimidates the equal participation of the other members of the grand jury.”).

¹⁷⁰ *See id.* at 460.

¹⁷¹ *See, e.g.,* Carol Izumi, *The Use of ADR in Criminal and Juvenile Delinquency Cases*, in AM. BAR ASS'N, *ADR HANDBOOK FOR JUDGES* 195 (Donna Stienstra & Susan M. Yates eds., 2004) (examining the use of ADR with adult and juvenile offenders); Maggie T. Grace, *Criminal Alternative Dispute Resolution: Restoring Justice, Respecting Responsibility, and Renewing Public Norms*, 34 VT. L. REV. 563 (2010); Uday Shankar & Vinayak Mishra, *Exploring Viability of Introducing ADR in Criminal Law*, 7 ICFAI U. J. ALT. DISP. RES. 37 (2008).

¹⁷² *See, e.g.,* Izumi, *supra* note 171, at 195–203; Shankar & Mishra, *supra* note 171, at 41–45.

¹⁷³ Professor Adriaan Lanni has proposed that the grand jury could serve the community justice movement, which she feels is ill-served by other traditional criminal justice mechanisms. *See Lanni, supra* note 132, at 360–64.

¹⁷⁴ Izumi, *supra* note 171, at 196.

¹⁷⁵ *Id.*

underlying the criminal conduct,¹⁷⁶ and a plan for prospective avoidance of repeat incidents.¹⁷⁷ If such an agreement is reached and complied with by the offender, the charges typically are dismissed (or never brought in the first place).¹⁷⁸ Victim-offender mediation is often employed in misdemeanor and property offenses, but it also has been used in serious assaultive felonies as well.¹⁷⁹ Although victim-offender mediation presents profound substantive and procedural questions about the role of restorative justice in criminal law,¹⁸⁰ it, where implemented, has proven to be very successful and well-received by victims and offenders alike.¹⁸¹

However, a shortcoming of victim-offender mediation has been the relatively low utilization rate despite the degree of success realized when the approach is employed.¹⁸² Typically, a prosecutor or police agency is responsible for referring cases to community victim-offender mediation programs.¹⁸³ Such referrals involve a tremendous amount of discretion on the part of the prosecutor.¹⁸⁴ The cases referred for mediation are typically meritorious, in that there exists probable cause to believe a crime has been committed and the facts are fairly clear. Many prosecutors may be reluctant to refer to a community mediation program for disposition those cases in which they likely could easily win conviction. This is particularly so given that victim-offender mediation is viewed as non-traditional and unfamiliar in most circles.¹⁸⁵ The grand jury can help prosecutors make the early-stage decisions regarding which cases are appropriate for mediation. This would both increase the utilization of the practice and add the community's imprimatur upon these referrals of cases outside the traditional criminal process.

¹⁷⁶ See, e.g., Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1265 (1994).

¹⁷⁷ See Linda G. Mills, *The Justice of Recovery: How the State Can Heal the Violence of Crime*, 57 HASTINGS L.J. 457, 504 (2006) (explaining that victim-offender mediation “engages [participants] in creating a plan, or ‘social compact,’ for addressing that behavior and the underlying problems that can initiate it”).

¹⁷⁸ See Brown, *supra* note 176, at 1248–49.

¹⁷⁹ See *id.* at 1262.

¹⁸⁰ See *id.* at 1291–1301.

¹⁸¹ See Izumi, *supra* note 171, at 196–97.

¹⁸² Mark William Bakker, *Repairing the Breach and Reconciling the Discordant: Mediation in the Criminal Justice System*, 72 N.C. L. REV. 1479, 1507 & n.207 (1994).

¹⁸³ See Brown, *supra* note 176, at 1265.

¹⁸⁴ See Jody Lyneé Madeira, *When It's So Hard to Relate: Can Legal Systems Mitigate the Trauma of Victim-Offender Relationships?*, 46 HOUS. L. REV. 401, 462–63 (2009) (noting that in the vast majority of states, victim-offender mediation is left to the discretion of the authorities).

¹⁸⁵ See Gordon Bazemore, *The “Community” in Community Justice: Issues, Themes, and Questions for the New Neighborhood Sanctioning Models*, 19 JUST. SYS. J. 193, 195 (1997) (“[Victim-offender mediation]s are still unfamiliar to some mainstream criminal justice audiences and marginal to the court process in many jurisdictions where they do operate.”).

Another criticism of victim-offender mediation is the fact that agreements reached between victims and offenders following mediation are subject to very little court supervision.¹⁸⁶ These agreements will often include not only a formal apology and promise to cease and desist certain behavior, but also might include restitution designed to make the victim whole, a release of liability claims, and promises to seek counseling or treatment.¹⁸⁷ Although in the broad run of matters, there will be nothing objectionable contained in the agreements, there may be a perceived need for review aside from that provided by the prosecutor's office, particularly because victim-offender mediation programs often discourage the presence and participation of attorneys for either party.¹⁸⁸ The grand jury could serve as that additional set of eyes, ensuring that agreements reached between victim and offender are compatible with the community's sense of fairness and justice, and that neither the victim nor the offender is taken advantage of in the process.

C. Guiding and Regulating Prosecutors

1. Guiding Prosecutorial Priorities

Many have struggled with how to enhance accountability among prosecutors.¹⁸⁹ One frequent suggestion is the development of prosecutorial guidelines to help channel the discretion of prosecutors in individual cases and with regard to broader prosecutorial priorities.¹⁹⁰ Although the grand jury has the ability to—and, in the opinion of the author, was designed to—guide the discretion of the prosecutor in these ways in the context of its traditionally understood function,¹⁹¹ it often falls short of this goal.¹⁹² While a number of proposals aimed at enhancing the grand jury's traditional functions seek to empower the grand jury to better guide prosecutorial discretion in individual

¹⁸⁶ See, e.g., Brown, *supra* note 176, at 1271.

¹⁸⁷ See, e.g., Izumi, *supra* note 171, at 196.

¹⁸⁸ See Zvi D. Gabbay, *Holding Restorative Justice Accountable*, 8 CARDOZO J. CONFLICT RESOL. 85, 107 (2006).

¹⁸⁹ See, e.g., Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959 (2009) (asserting that efforts to increase prosecutorial accountability through legislation and ex post review cannot adequately address the issue and arguing that empowering various stakeholders and reforming the internal structure, culture, and incentives of prosecutors' offices is a better approach).

¹⁹⁰ See, e.g., Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 291 (1980) ("There are a number of procedural devices that have been suggested as means for controlling prosecutorial discretion, including . . . promulgation of written rules or guidelines for the exercise of discretion . . .").

¹⁹¹ See Fairfax, *Grand Jury Discretion*, *supra* note 5, at 705–06.

¹⁹² See *id.* at 761–62.

cases,¹⁹³ not much has been proposed to help the grand jury give feedback to prosecutors on community preferences regarding broad prosecutorial priorities.¹⁹⁴

But what if the grand jury were used as a sort of focus group to give prosecutors feedback from the community on enforcement priorities? The author has noted elsewhere that the feedback the grand jury can give prosecutors can help it serve as a “sounding board” in individual cases.¹⁹⁵ Rather than waiting until the petit jury stage where a negative reaction to the merits or framing of the case could lead to an acquittal, the prosecutor can receive early feedback from the grand jury.¹⁹⁶ The grand jury, to the extent it features a cross-section of the population,¹⁹⁷ provides a rich collection of voices and opinions on how prosecutors should allocate law enforcement resources.

¹⁹³ See *supra*, Part I.B.

¹⁹⁴ The author has suggested that the grand jury’s robust exercise of discretion could serve such a purpose. See, e.g., Fairfax, *Grand Jury Discretion*, *supra* note 5, at 755–56. However, as has been acknowledged, such a use of grand jury discretion can be accompanied by certain noise (i.e., does the prosecutor get the message?) and efficiency costs that might be avoided under the current proposal. See *id.* at 708, 712 n.31, 748.

¹⁹⁵ See *id.* at 757.

¹⁹⁶ Such grand jury feedback is superior to that from the petit jury (in the form of an acquittal or hung jury) for a number of reasons. First, the prosecutor can ask questions of the grand jurors and engage in a conversation in a way that cannot happen at the petit jury stage. See *supra* note 21 and accompanying text. Therefore, the information flows in two directions, rather than in the vague, unilateral manner represented by a jury verdict. Also, at the grand jury stage, there is still time to address flaws in the case. A prosecutor can obtain additional evidence, call or recall witnesses, or explain to the grand jurors why the prosecutor’s office exercised its discretion to bring the case. See *supra* Part I.A.2. Finally, and most importantly, the Double Jeopardy Clause does not apply to grand jury decisions not to indict. See Fairfax, *Grand Jury Discretion*, *supra* note 5, at 743–44.

¹⁹⁷ However, as Dean Kevin Washburn has noted, there are serious challenges to the grand jury’s service of the cross-sectional ideal. See Washburn, *supra* note 16, at 2373–76. On the federal level, for example, the grand jury typically is drawn from an entire judicial district. As a result, even if the pool of eligible grand jurors reflects the geographic diversity of the district, a particular grand jury may not. See *id.* at 2375–76. Obviously, no individual grand or petit jury can be fully representative of the larger community, but this certainly limits the utility of the grand jury as a true “focus group.” Another challenge is the fact that although community input may be useful in a particular case, the particular grand jury considering it may not have any grand jurors from the affected community. See *id.* at 2376. As a result, different communities within the same district may impose their own attitudes and views on other communities. See *id.*

Thus, some scholars have argued that we should enhance the commonality of interests of the community being represented by the grand jury. One such proposal has been advanced by Adriaan Lanni, who has advocated a reduction in the size of the grand jury’s “catchment” area. See, e.g., Lanni, *supra* note 132, at 394–95. Such a reduction, Professor Lanni argues, would enable the grand jury to be a tool for furthering the aims of community justice. *Id.* In this same vein, Kevin Washburn has proposed that grand juries be neighborhood-based. See, e.g., Washburn, *supra*, at 2378–79. According to Dean Washburn, a grand jury based on tighter jurisdictional boundaries will be more engaged and responsive. *Id.* at 2377.

A grand jury might be empanelled, for instance, to give prosecutors advice on whether to focus on certain quality-of-life crimes, or how best to tackle the drug trade in certain communities. The secrecy of the grand jury would protect grand jurors from outside pressure or intimidation, and would give them the liberty to express opinion without outside scrutiny. The mandate of grand jury service would compel the citizens to show up and participate.

One objection might be that voters already play this role at each election. After all, most of the chief prosecutors in the United States are directly elected and those who are not (such as in the federal system) serve at the pleasure of an official who is.¹⁹⁸ A number of recent studies have shown that electoral politics do not provide a sufficient vehicle for prosecutorial accountability, however.¹⁹⁹ The grand jury could provide the sort of focused, considered popular judgment that may be lacking in general elections.

Another potential objection is that, given the prosecution's traditional monopoly over information made available to the grand jury, the grand jury would simply tell the prosecutor what she wants to hear.²⁰⁰ First, although modern grand jury practice obscures the fact, the grand jury possesses the power to compel production of almost anything, from almost anyone.²⁰¹ Certainly, information the grand jury might want could be obtained quite easily in the form of oral or written testimony from experts or others with knowledge.²⁰² Although grand jurors could be informed of this power, some may remain skeptical that grand juries would actually exercise it, particularly if a prosecutor is present. For those concerned about the impact of the presence of prosecutors on balanced consideration by the grand jury, there is no reason a prosecutor has to be present. For those who lack confidence that grand jurors will seek information on their own, perhaps some sort of neutral grand jury legal adviser—a

Although there are legitimate questions regarding whether the grand jury represents a cross-section of the community (and the difficulty of defining "community"), they should not fully diminish the role the grand jury could play in modern criminal justice.

¹⁹⁸ See Fairfax, *Delegation*, *supra* note 26, at 443 (citing ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 10–11 (2007)).

¹⁹⁹ See Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 439–43 (2001); Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 583 (2009).

²⁰⁰ See, e.g., Fairfax, *Grand Jury Discretion*, *supra* note 5, at 705 ("[T]he familiar perception of the modern grand jury [is that of] a body that, after passively receiving from the prosecutor just enough evidence . . . to satisfy the probable cause threshold, reflexively and without critical analysis votes to indict, just as the prosecutor requested." (citations omitted)).

²⁰¹ See *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) ("It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly" (quoting *Blair v. United States*, 250 U.S. 273, 282 (1919))); see also Fairfax, *Grand Jury Discretion*, *supra* note 5, at 746–47 ("[T]he grand jury can use its tremendous subpoena power to seek any information it desires—whether or not the prosecutor concurs.").

²⁰² Such testimony could be either invited or subpoenaed. See Fairfax, *Grand Jury Discretion*, *supra* note 5, at 747.

proposal made for the enhancement of the grand jury's traditional functions²⁰³—would address their concerns.

2. Regulating Prosecutorial Conduct

Another proposal central to efforts to enhance prosecutorial accountability is the establishment of prosecutorial review boards.²⁰⁴ These review boards seek to impose external oversight of prosecutorial decision-making, as a means to keep prosecutors accountable.²⁰⁵ Although some who propose such external review boards would prefer that they be composed of attorney experts drawn from the criminal justice system,²⁰⁶ others believe such external review boards also would be well-served by the participation of non-attorney citizens.²⁰⁷ For those in the latter camp, the grand jury can be an appropriate vehicle for having the community serve as a check on prosecutorial decision-making.

The grand jury could be the ideal vehicle for such oversight. Premitting the oversight the grand jury might exercise in individual cases,²⁰⁸ grand juries could function as the prosecutor review boards proposed by many commentators. In fact, under current practice, allegations of police and other official misconduct often are investigated by the grand jury in many jurisdictions.²⁰⁹ Also, some grand juries, such as “special grand juries” in the federal system, are structured to issue reports of findings.²¹⁰ Furthermore, even those who propose an expert (rather than a citizen) review board recognize the need for the kind of subpoena power the grand jury already wields.²¹¹

Also, some have advocated a public reporting requirement for prosecutorial decisions made, including declinations.²¹² To the extent that such a requirement would raise concerns over privacy of would-be defendants and the revealing of sensitive law enforcement strategy, such reporting can be directed to the grand jury. In this way,

²⁰³ See, e.g., Hoffmeister, *supra* note 98.

²⁰⁴ See, e.g., DAVIS, *supra* note 198, at 184–86.

²⁰⁵ *Id.* at 184–85.

²⁰⁶ See, e.g., JOHN F. TERZANO ET AL., THE JUSTICE PROJECT, IMPROVING PROSECUTORIAL ACCOUNTABILITY: A POLICY REVIEW 14 (2009) (“The review board should be comprised of individuals within the criminal justice system who present a broad range of interests and an understanding of the unique responsibilities of prosecutors, including judges, prosecutors, and criminal defense attorneys.”), available at <http://www.thejusticeproject.org/wp-content/uploads/pr-improving-prosecutorial-accountability1.pdf>; Stephanos Bibas, *Rewarding Prosecutors for Performance*, 6 OHIO ST. J. CRIM. L. 441, 444–45 (2009).

²⁰⁷ See, e.g., Davis, *supra* note 199, at 462–64; Fairfax, *Delegation*, *supra* note 26, at 453.

²⁰⁸ See Fairfax, *Grand Jury Discretion*, *supra* note 5.

²⁰⁹ See, e.g., Leonard Post, *A Bill Offers a Peek Inside Grand Juries*, NAT’L L.J., Sept. 1, 2003, at 4.

²¹⁰ See 18 U.S.C. §§ 3331–34 (2006) (federal special grand juries).

²¹¹ See TERZANO ET AL., *supra* note 206, at 14.

²¹² See, e.g., Fairfax, *Delegation*, *supra* note 26, at 453 & n.146.

there would be community review of prosecutorial activity while the sensitive information would be protected by grand jury secrecy. Again, given its attributes and powers, the grand jury is already situated to perform the roles contemplated for the regulation and review of prosecutorial conduct.

CONCLUSION

Once we relinquish our cramped conception of the grand jury's functional value, there is no limit to how we might use it. Indeed, there is no reason the utility of the grand jury must be confined to the criminal justice realm. In fact, "Grand Jury 3.0" could be an instrument for the enhancement of democratic deliberation and discourse *outside* of the criminal justice system. The grand jury, as a cross-section of the community,²¹³ represents a potentially vital and energetic vehicle for feedback from the citizenry on a wide variety of issues. Under this more robust view of its functional value, the grand jury, for example, could give legislators and government officials community input on contemplated measures and policies, increase transparency surrounding large public expenditures, or serve in a designated watchdog role, guarding against waste, fraud, and abuse.²¹⁴

The foregoing is meant to change the tone and trajectory of conventional grand jury reform discourse, which is far too narrow. Although the improvement of the grand jury's performance of its traditional functions remains important, we must begin to expand our conception of the grand jury's functional value. The grand jury's heritage, structure, and representative capacity render it a tremendous, though untapped and underappreciated, resource. Rather than focusing on the grand jury's shortcomings related to its traditional functions, this Article has sought to catalyze discussion of how we can employ the ancient bulwark of liberty as a vehicle for serving the needs of modern criminal justice.

²¹³ See *supra* note 197 and accompanying text.

²¹⁴ See, e.g., Ronald F. Wright, *Why Not Administrative Grand Juries?*, 44 ADMIN. L. REV. 465, 520–21 (1992).