Reforming the Grand Jury to Protect Privacy in Third Party Records

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ARTICLES

REFORMING THE GRAND JURY TO PROTECT PRIVACY IN THIRD PARTY RECORDS

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** Professor of Law, the University of Oklahoma College of Law; B.S. in Electrical Engineering, University of California at Davis; J.D., Yale Law School. I am grateful to Jeffrey Vogt and Nathan Hall for outstanding research assistance, and for reminding me via stellar class performance and general good nature that it is a privilege to teach. I also appreciate Christopher Slobogin helping me think through this Article’s unique co-authorship, and all that he has contributed not only to the ABA Standards but to Fourth Amendment and privacy scholarship more generally. And I am thankful to David H. Kaye for providing insights into existing subpoena law and to Lawrence Rosenthal for providing a typically honest critique that keeps me honest and (hopefully) responsive to other well-informed perspectives.

γ This Article requires a brief explanation, and please forgive me (Stephen) as I turn to the informal first person to appropriately explain. Andy originally intended to include this Article in an Oklahoma Law Review symposium reviewing the American Bar Association Standards for Criminal Justice on Law Enforcement Access to Third Party Records. See Stephen E. Henderson, A Dedication to Andrew E. Taslitz: “It’s All About the Egyptians,” and Maybe Tinkerbell Too, 66 OKLA. L. REV. 693 (2014). Before he died, Andy asked me to help him finish the Article. Thus, with the gracious support of his wife, Patty, I have now done so and am very pleased to publish it in Andy’s “home” law review. One need only consult the Oklahoma Law Review dedication to
In late 2014, two grand juries returned controversial no bill decisions in police killings, one in Ferguson, Missouri, and one in New York City. These outcomes have renewed calls for grand jury reform, and whatever one thinks of these particular processes and outcomes, such reform is long overdue. One logical source of reform to better respect privacy in records, which would have incidental benefits beyond this privacy focus, would be the newly enacted American Bar Association Standards for Criminal Justice on Law Enforcement Access to Third Party Records (LEATPR). But LEATPR exempts from its requirements access to records via a grand jury subpoena, and, perhaps more surprisingly, potentially exempts access via a "functionally equivalent prosecutorial subpoena." The impetus for this exemption was a concern that applying LEATPR's requirements to the grand jury, or even to its functional equivalent, is unnecessary and might radically undermine longstanding systems of criminal investigation in perhaps unforeseeable ways.

This Article addresses whether this exception can be justified by reviewing each of the four main regulatory mechanisms of LEATPR and examining whether grand jury procedures provide an adequate substitute. In finding that they do not, this Article indicates how to improve the grand jury process. These improvements would of course not resolve the very difficult and multifaceted social ills reflected in the controversy over recent grand jury decisions, but they could begin to restore the legitimacy of this once-revered but now-maligned institution.

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OVERVIEW

On August 9, 2014, a white police officer in Ferguson, Missouri, fatally shot a black teenager. After an unusually extensive consideration, a grand jury decided not to indict the officer. Less than a month prior to the Ferguson incident, on July 17, 2014, a white police officer in New York City used a chokehold in arresting a black man, likewise killing him. A grand jury decided not to indict. Both outcomes resulted in anger and protest, unfortunately including significant violence in Ferguson. And together the outcomes have renewed calls for grand jury reform.

The grand jury performs both shield and sword roles, the shield being its ability to refuse indictment as occurred in these cases, and the sword being its ability to obtain vast information in the investigation of crime. Many of the perceived problems in the exercise of its shield role, including prosecutorial dominance and lack of transparency and accountability, are also evident in its investigatory function. Thus, improving one will naturally improve the other. And while it is not implicated in these two recently prominent grand juries, given the massive and ever-increasing amounts of private information recorded and stored today, grand jury access to private information is of significant concern.

A logical source of reform to better respect privacy in records would be the newly enacted ABA Standards for Criminal Justice on Law Enforcement Access to Third Party Records (LEATPR). LEATPR is designed to fill a constitutional hole in federal privacy

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2. See id.
4. See id.
8. ABA STANDARDS FOR CRIMINAL JUSTICE: LAW ENFORCEMENT ACCESS TO THIRD PARTY RECORDS 2 (5d ed. 2013) [hereinafter LEATPR STANDARDS].
protection created by the third party doctrine. Though that doctrine has some exceptions and inconsistencies, its core idea is that what information a person has shared with even one other person or institution loses privacy protection under the Fourth Amendment to the United States Constitution as to law enforcement access from that person or institution. The doctrine is based on the idea that privacy equates to secrecy and is an all-or-nothing concept.

We and others have written about the illogic of this approach. Sound philosophical ideas of privacy and social science studies of expectations lead to a very different idea of privacy as control over information about the self. Privacy is thus not typically present or absent but most often exists in degrees and varies in quality. People should and do care about to whom they present information, for what purposes, and what happens to that shared information. They justifiably believe that information shared, for example, with a good friend about a highly personal matter should not result in the world


10. See Henderson, After United States v. Jones, supra note 9, at 434–47 (explaining both relevant changes in technology and the Supreme Court’s conflicted jurisprudence over the last quarter century); Henderson, The Timely Demise, supra note 9, at 40–45 (similar).

11. See id.; LEATPR STANDARDS, supra note 8, Standard 25-4.1(a) cmt.


at large being entitled to know that information. Nor does sharing
information with one’s bank mean, without more, that it is thereby
fairly accessible to the police conducting criminal investigations.\(^{15}\)
Yet the result of the third party doctrine has been that, absent
occasional and checkered statutory protection, simple law
enforcement requests, or at most easy-to-obtain subpoenas, are all
that law enforcement needs to access information about bank
accounts, shopping preferences, viewing habits, communications,
Internet usage, and a host of other matters.\(^ {16}\)

LEATPR adopts four methods for protecting against too-ready
government access to information about individuals held in third
party institutional records. First, LEATPR requires some level of
justification for law enforcement access to such records in the
investigatory stage of criminal cases.\(^ {17}\) This level of justification is not
uniform. To the contrary, the level varies with the degree of privacy
held in the information contained in the record.\(^ {18}\) Records can be
highly private, moderately private, minimally private, or not private.\(^ {19}\)

Highly private information requires a warrant based on probable
cause, moderately private information a court order based on
reasonable suspicion (or relevance), minimally private information a
prosecutor determination of relevance, and not-private information
merely a legitimate law enforcement purpose.\(^ {20}\) Legislatures are free
to consider more demanding restraints for highly private
information, such as additional administrative approval or greater

\(^ {15}\) Contra United States v. Miller, 425 U.S. 435, 443–45 (1976) (holding that
bank customers have no reasonable expectation of privacy in their own bank
accounts under the Fourth Amendment).


\(^ {17}\) LEATPR STANDARDS, supra note 8, Standard 25-5.3.

\(^ {18}\) Id. Standard 25-5.3(a).

\(^ {19}\) Id. Standard 25-4.1. Factors determining the degree of privacy protection
include the extent to which:

(a) the initial transfer of such information to an institutional third party
is reasonably necessary to participate meaningfully in society or in
commerce, or is socially beneficial, including to freedom of speech and
association;

(b) such information is personal, including the extent to which it is
intimate and likely to cause embarrassment or stigma if disclosed, and
whether outside of the initial transfer to an institutional third party it is
typically disclosed only within one’s close social network, if at all;

(c) such information is accessible to and accessed by non-government
persons outside the institutional third party; and

(d) existing law, including the law of privilege, restricts or allows access
to and dissemination of such information or of comparable information.

\(^ {20}\) Id. Standards 25-5.2, 25-5.3.
investigative need.²¹ And legislatures may consider lowering a category’s required justification if applying full protection would significantly interfere with solving and punishing a category of crime.²² For example, a record otherwise entitled to probable cause protection might require only proof of reasonable suspicion. The justification-level protection is thus varied, is flexible, and accounts for the degree of privacy protection and the needs of law enforcement. Nevertheless, some level of justification is required, unlike the general situation under current law,²³ and for highly or moderately protected information LEATPR requires supervision by an independent magistrate.²⁴

Second, for moderately and highly protected information, LEATPR requires providing notice—or, in some cases, delayed notice—to the focus of the record, meaning to the person whom the information concerns.²⁵ That notice recalibrates the perspective of the focus, provides some accountability, and enables the focus to raise whatever legal challenges might be available to limit or control the spread, use, and retention of the information.

Third, all records obtained must be protected against unauthorized access and distribution.²⁶ Such distribution is typically limited to those involved in the investigation for which the records were obtained and only to the extent necessary to further the investigation.²⁷ Moderately and highly protected records require audit logs noting access and must be destroyed according to an established schedule.²⁸ These requirements limit the dissemination of information to those with a need to know and create temporal limits on who may use the information and for what purposes. Disclosure is permitted (1) where required by discovery rules²⁹ or (2) where needed in another government investigation provided that, if the information is being transferred to a different government agency, that agency provides an official certification of relevance.³⁰

21. Id. Standard 25-5.3(b).
22. Id. Standard 25-4.2(b).
24. See LEATPR Standards, supra note 8, Standards 25-5.2(a) cmt., 25-5.3(a) cmt.
25. Id. Standards 25-1.1(c), 25-5.7(b)–(d).
29. Id. Standard 25-6.2(a).
30. Id. Standard 25-6.2(b). Provision is also made for inter-agency disclosure in exigent circumstances upon law enforcement officer or prosecutor request. Id.
Fourth, the legislature must create accountability mechanisms. Although LEATPR merely provides a laundry list of such mechanisms rather than recounting details, these mechanisms include, as most relevant here, “appropriate periodic review and public reporting.” Rephrased, LEATPR requires some level of transparency and critical accountability reporting in order for the system of access to protected information to continue.

LEATPR provides exceptions to many or all of its requirements. Among those exceptions is “access to records via a grand jury subpoena, or in jurisdictions where grand juries are typically not used, a functionally equivalent prosecutorial subpoena.” During drafting, one primary justification for this exception was that the grand jury historically played a unique role in our criminal justice system. Although its shield (indictment) and sword (subpoena) roles might often be conflated in that history and in public consciousness, the latter role allegedly requires that a grand jury have few limits imposed on its investigatory authority. To limit that role,
it was feared, might radically undermine longstanding systems of criminal investigation in perhaps unforeseeable ways. Moreover, grand jury secrecy provisions and judicial supervision already provide some privacy protection. Yet the exception is not limited to grand jury subpoenas but extends to "functionally equivalent prosecutorial subpoena[s]" in jurisdictions where grand juries are not used. LEATPR makes little effort in its text or commentary to define what "functionally equivalent" means, and prosecutorial subpoenas look very little like the traditional grand jury, obviously lacking—at the very least—lay participation and direction. The exception therefore has the potential to dramatically limit LEATPR's scope, undermining many of the Standards' purposes.

By reviewing each of LEATPR's four main regulatory mechanisms and examining whether grand jury procedures provide an adequate into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred. As a necessary consequence of its investigatory function, the grand jury paints with a broad brush. A grand jury investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed. United States v. R. Enters., Inc., 498 U.S. 292, 297 (1991) (internal quotation marks and citations omitted). And again,

[i]t is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime.

Blair v. United States, 250 U.S. 273, 282 (1919). In some jurisdictions, only this "sword" investigatory function remains. See 3 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 8.1(a) (5th ed. 2007).

37. Cf. SLOBOGIN, supra note 14, at 146 ("Without the ability readily to obtain the records of corporations, partnerships, and other entities, government agencies would be frustrated in their efforts to ensure that corporate tax laws, bank laws, securities laws, and a host of other regulatory statues were enforced."). Professor Taslitz was a member of the task force that began drafting LEATPR and of the ABA Criminal Justice Council that approved the near-final version of LEATPR. Professor Henderson was the Reporter. These arguments were made, most often by some prosecutors, as part of those debates.


39. LEATPR STANDARDS, supra note 8, Standard 25-2.1(c).

40. For an explanation of this omission (unsatisfying though it may be), see Henderson, Our Records Panopticon, supra note 7, at 716–18. The Commentary provides this limited guidance: "Legislatures, courts, and administrative agencies should be careful, however, to strictly cabin this exception to means for which (1) there is historical practice that has not been discredited and that remains relevantly applicable, and (2) that historical practice includes privacy safeguards equivalent to those of the federal grand jury." LEATPR STANDARDS, supra note 8, Standard 25-2.1(c) cmt.

41. See LAFAVE, supra note 36, § 8.1(c) (comparing and contrasting prosecutorial subpoenas with grand jury investigations).

42. For an argument hoping this will not happen, see Henderson, Our Records Panopticon, supra note 7, at 716–18.
substitute, this Article addresses whether LEATPR’s grand jury exception can be justified. Part I addresses levels of justification, Part II notice provisions, Part III access limitations, and Part IV accountability mechanisms. In determining that the exception is not justified, the Article suggests some important improvements to the modern grand jury. Perhaps, given contemporary events, it will finally be possible to restore some luster to this once-revered but now maligned institution.

I. LEVELS OF JUSTIFICATION

Probable cause and reasonable suspicion, the traditional standards of justification used as prerequisites to police searches and seizures, serve several important purposes. Notably, they require proof of individualized suspicion. Such proof prevents police from invading privacy on fishing expeditions that are based upon unsupported hunches, stereotypes, or simple biases. Instead, police must have evidence that this individual engaged in criminal activity. This requirement is part and parcel of respect for persons. Persons are judged based upon their individual behavior, not on their membership in a group, not on residence in a particular neighborhood, and not for generally being disliked by members of law enforcement. Moreover, the proof may not be speculative but must, in the case of probable cause, hover around a preponderance of the evidence, thus setting a relatively familiar standard to guide police.

Furthermore, the police do not themselves determine levels of justification, at least ultimately. Rather, an independent magistrate must make these determinations. That separation reduces the

46. See Taslitz, Individualized Suspicion, supra note 44, at 146.
48. Even if it is one of the many police decisions that today does not require judicial preclearance, a magistrate will review the police determination if there is a
inevitable bias in favor of one’s self-perceived wisdom. Moreover, because police must articulate specific reasons to justify their beliefs to an acceptable level of proof, police must account for their actions—that is, literally be answerable for them.\footnote{See Taslitz, \textit{Individualized Suspicion}, supra note 44, at 189.} Social science research demonstrates that an awareness that one will need to justify her actions to a third party reduces the chance of error.\footnote{See Andrew E. Taslitz, \textit{Police Are People Too: Cognitive Obstacles to, and Opportunities for, Police Getting the Individualized Suspicion Judgment Right}, 8 Ohio St. J. Crim. L. 7, 31–32, 64–66 (2010) [hereinafter Taslitz, \textit{Police Are People Too}].} LEATPR’s “relevance” standard for minimally protected information makes this justification easy to satisfy for that category, but some accountability is nevertheless required.\footnote{See \textit{LEATPR Standards}, supra note 8, Standard 25-5.3(a)(iii). The Federal Rules of Evidence define relevant evidence as evidence likely to change the probability of an element of a crime, claim, or defense’s existence by any nonzero amount. \textit{FED. R. EVID. 401; STEVEN I. FRIEDLAND, PAUL BERGMAN & ANDREW E. TASLITZ, EVIDENCE LAW AND PRACTICE} 46–50 (5th ed. 2012) (explaining this definition’s meaning).} And LEATPR proceeds from the assumption that where less is at stake—that is, where privacy interests are less—a lower level of justification is acceptable to give law enforcement more leeway.\footnote{See supra text accompanying notes 17–24 (explaining the sliding scale of privacy protections under LEATPR).}

Yet courts have rarely imposed any justification requirement upon grand jury records subpoenas, or at least not any meaningful one. Grandly proclaiming that “the public . . . has a right to every man’s evidence,”\footnote{Branzburg v. Hayes, 408 U.S. 665, 688 (1972) (quoting United States v. Bryan, 339 U.S. 323, 331 (1950)).} but never explaining how that alleged right comports with the Fourth Amendment’s limited-government norm, the modern Supreme Court has failed to meaningfully regulate grand jury subpoenas.\footnote{\textit{DOYLE}, supra note 38, at 2 (“The grand jury may begin its examination even in the absence of probable cause or any other level of suspicion that a crime has been committed within its reach.”); \textit{SLOBOGIN}, supra note 14, at 140–41 (describing the general lack of regulation).} Although that upshot is clear, the Court’s jurisprudence in this area is frustratingly opaque.

As explained in LaFave’s treatise,\footnote{LaFave et al., supra note 36, \S 8.7(a).} in 1886, the Court took the very strong position in \textit{Boyd v. United States}\footnote{116 U.S. 616 (1886).} that compelling the motion to suppress and will also decide whether there is probable cause warranting any sustained jailing and ultimate prosecution. This is not to say, of course, that an after-the-fact decision is necessarily equivalent to one \textit{ex ante}. See Henning et al., \textit{The Investigatory Stage}, supra note 25, at 02 (discussing hindsight bias).
production of one’s private papers was per se unreasonable under the Fourth Amendment.57 Twenty years later, in *Hale v. Henkel*,58 the Court did away with that absolute rule, but in an opinion that required continued Fourth Amendment scrutiny59—indeed a context-specific scrutiny that fits nicely within the modern jurisprudence of Fourth Amendment reasonableness. But forty years after *Hale*, in *Oklahoma Press Publishing Co. v. Walling*,60 the Court stated that subpoenas “present no question of actual search and seizure.”61 Yet the *Oklahoma Press* Court nonetheless evaluated the subpoenas for overbreadth,62 and on several occasions since the Court has recognized this protection against overbreadth as a requirement of the Fourth Amendment.63

So, perhaps ordinary subpoenas do not require Fourth Amendment justification.64 Under this view, only overly broad or unduly burdensome subpoenas are Fourth Amendment searches, and given modern data duplication technology, those are extremely rare.65 Or, perhaps the Fourth Amendment reasonableness criterion does regulate all subpoenas, especially because the Court’s developmental cases all addressed subpoenas of business records as opposed to more private personal records.66 Under this view, courts could impose a meaningful justification requirement when subpoenas seek private records. But to date they have only done so for subpoenas seeking a physical intrusion into the body.67 Thus,
even courts requiring some Fourth Amendment justification for all
records subpoenas might hold that reasonableness in this context has
no more teeth than the Supreme Court’s interpretation of the
reasonableness requirement of Federal Rule of Criminal Procedure
17(c), which renders a subpoena unacceptable only when “there is
no reasonable possibility that the category of materials the
Government seeks will produce information relevant to the general
subject of the grand jury’s investigation.”

A prosecutor using a grand jury subpoena can therefore currently
be confident that she will prevail even if someone raises an objection;
at worst she will narrow the request and thereby avoid meaningful
review. Moreover, the institutional third party, for example Verizon,
receives the subpoena. The account holder will likely never learn of
its issuance. Verizon may have little incentive on its own to combat,
potentially at significant expense, a subpoena that leads to
information incriminating an individual subscriber.

The Fifth Amendment’s privilege against compelled self-
incrimination similarly has little to no impact in the context of
subpoenas for third party records. First, there is no privilege based
upon privacy but rather only upon incrimination. Nor is there Fifth
Amendment protection for pre-existing records—those for which the
government did not compel creation. There can, of course, be Fifth
Amendment protection for the act of producing pre-existing
records. When an individual responds to a subpoena by turning
over requested records, he is admitting that the records exist, that
they are in his possession, and that they are authentic—they are what
they purport to be, namely, accurate originals or copies of the items
(collecting and describing cases). There is no principled reason to restrict grand
jury subpoenas for minimal physical intrusions (e.g., a DNA cheek swap or
fingerprint) but not for major privacy intrusions (e.g., a diary, email records, or
invasive questioning). Thus, while these cases relating to physical intrusion do not
directly inform this Article’s concern with access to third party records, they could
provide a springboard for similarly restricting invasive records subpoenas.

69. There can, of course, be applicable statutory restrictions. See, e.g., 18 U.S.C.
§ 2703 (2012) (regulating government access to stored electronic communications).
Amendment protects against compelled self-incrimination, not [the disclosure of]
private information.” (second alteration in original) (internal quotation marks omitted)).
71. See id. at 409–10; see also 2 Peter J. Henning et al., Mastering Criminal
Procedure: The Adjudicatory Stage 34 (2012); LaFave et al., supra note 36,
§ 8.12(f). Most records, including most business records, were not compelled in
their creation. See Taslitz, Paris & Herbert, supra note 9, at 816–18; see also United
records is voluntary, no compulsion is present” and the Fifth Amendment privilege
does not apply).
the government requested. Yet this limited protection is not available when these facts can be independently proven; when, in short, they are a "foregone conclusion." Although it is not sufficient that a type of record is commonly kept, the mere existence, location, and authenticity of records are often readily provable by other means. Most important, the Fifth Amendment only applies when the person who is compelled (subpoenaed) is the person who will be incriminated. With third party records, however, the institutional third party receives the subpoena but the subscriber or customer is typically incriminated, leaving no Fifth Amendment protection.

In theory, the grand jurors would themselves act as a screening device, refusing to issue subpoenas that unnecessarily infringe upon privacy rights. In practice, however, grand juror power is limited. Grand jurors assemble at the direction of the prosecutor and, once gathered, are told by the prosecutor whom to subpoena, or merely receive the results of the prosecutor-issued subpoena. The

74. See id. at 411 (explaining that compelling a taxpayer to produce tax documents is not incriminating because the documents' existence and the taxpayer's control of them is a "foregone conclusion"); see also Robert P. Mosteller, Cowboy Prosecutors and Subpoenas for Incriminating Evidence: The Consequences and Correction of Excess, 58 WASH. & LEE L. REV. 487, 508–10 (2001) (elaborating on the meaning of "foregone conclusion").
75. See United States v. Hubbell, 530 U.S. 27, 44–45 (2000) (rejecting "the overbroad argument that a businessman . . . will always possess general business and tax records").
76. But see Mosteller, supra note 74, at 518–19, 523–30 (arguing that it is becoming harder for prosecutors to prove that finding subpoenaed evidence is, independent from the subpoena, a foregone conclusion). Where the act-of-production facts are not a foregone conclusion, the government can compel production by granting act-of-production immunity that will not itself directly immunize the content of the records. Doe I, 465 U.S. at 617 n.17. But the grant might nonetheless have that practical effect. See LAFAVE ET AL., supra note 36, § 8.13(c).
78. See Doyle, supra note 38, at 1 (“But the exclusive power to accuse is also the power not to accuse and early on the grand jury became both the 'sword and the shield of justice.'” (quoting United States v. Cox, 342 F.2d 167, 186 n.1 (5th Cir. 1965) (Wisdom, J., concurring))).
80. See Doyle, supra note 38, at 5 (noting that prosecutors generally decide whom to subpoena, the order in which to call witnesses, the questions to ask them, the law given to the grand jurors, and the language of the indictment); LAFAVE ET AL., supra note 36, § 8.2(c) (additionally noting that the prosecutor advises regarding any objections raised by witnesses, decides whether to prosecute for contempt, and decides whether to seek immunity). In a few states, grand juries apparently have genuine input and perhaps even control. See 1 SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 6:2 (2d ed. 2013). On the other hand, some federal prosecutors
prosecutor tells the grand jurors the law and, given heavy case loads, presses the grand jurors to work quickly, a pressure that makes deliberation over subpoenas difficult and unlikely. Nobody informs grand jurors of their full powers or independence. Indeed, grand jurors who have spoken about their experience have expressed confusion regarding their role and frustration with their passivity in the face of enormous prosecutor power. Grand jurors complained about prosecutor control over witness questioning, inability to hear exculpatory evidence, inability to independently interpret the law, lack of clarity as to the role of hearsay, sense of an inability to nullify prosecutor overreaching, and overwork that gave them little time to exercise prosecutorial oversight.

The widespread use of hearsay certainly limits grand jury independence. Often, there is only a single grand jury witness: a detective. The detective summarizes selected witness statements and police investigations. Even if there were cross-examination—which there is not—it would be difficult to cross-examine a single witness merely reading from a report about the reliability or truthfulness of some other witness’ statements. As one commentator put it,

using hearsay results in a dramatic decrease in the length, detail, and persuasive value of the presentation made by the prosecutor. When grand jurors are repeatedly subjected to such performances, they grow less likely to exercise their independent judgment in the

pre-screen witnesses to determine whether they will even appear before the grand jury, all under the auspices of the grand jury subpoena authority. See Susan W. Brenner, Grand Jurors Speak, in GRAND JURY 2.0, supra note 35, at 25, 39–40 [hereinafter Brenner, Grand Jurors Speak] (sharing emails from a grand juror expressing frustration with the number of complex investigations occurring at once).


See Brenner, Grand Jurors Speak, supra note 81, at 27–40.

See Brenner, supra id. at 242–43.


See Simmons, supra note 85, at 225–26.

See id.
cases brought before them, and more likely summarily to accept what they are given.\footnote{Id. at 226.}

There is, theoretically, judicial supervision of the grand jury. But once the grand jury is charged it will operate without a judge present,\footnote{DOYLE, supra note 38, at 5.} and that—combined with the limited grounds for challenging subpoenas in the first place—makes judicial supervision of grand jury hearings generally, and of subpoenas specifically, minimal.\footnote{Cf. Sara Sun Beale & James E. Felman, Enlisting and Deploying Federal Grand Juries in the War on Terrorism, in GRAND JURY 2.0, supra note 35, at 3, 15 (recommending “return of the traditional role of the judiciary in supervising the disclosure of grand jury materials that relate to terrorism . . . and threats of attack”). The Supreme Court has generally restricted the federal courts’ supervisory authority over grand juries. See United States v. Williams, 504 U.S. 36, 45–47, 55 (1992) (holding that federal courts lack the authority to regulate prosecutorial conduct before the grand jury independent of statute or rule of criminal procedure).} Only very few jurisdictions provide for judicial review of a grand jury transcript to ensure the correctness of a grand jury decision to indict.\footnote{Simmons, supra note 85, at 227. For a review of the history regarding judicial review of grand jury evidence, see Kuckes, supra note 85, at 139–42.}

The lack of judicial review leads to the perception that grand jury proceedings are lesser lights of the justice system, entitled to less vigorous due process protections because judicial involvement at any subsequent trial will cure any grand jury hearing defects.\footnote{See Costello v. United States, 350 U.S. 359, 363–64 (1956) (rejecting any evidentiary sufficiency challenge to an indictment because a trial will follow); Simmons, supra note 85, at 227 (concluding that courts place higher significance on the procedural safeguards associated with all other pre-trial proceedings).} Yet only a tiny fraction of prosecutions ever reach trial, well over ninety percent resulting in guilty pleas.\footnote{See Matthew R. Durose & Patrick A. Langan, Felony Sentences in State Courts, 2004, BUREAU JUST. STAT. BULL., July 2007, at 1, available at http://www.bjs.gov/content/pub/pdf/fssc04.pdf (stating that “94% of felony convictions occurred in state courts,” and of those, 95% were guilty pleas); Mark Motivans, Federal Justice Statistics, 2010, BUREAU JUST. STAT. BULL., Dec. 2013, at 1, available at http://www.bjs.gov/content/pub/pdf/fjst10.pdf (stating that 91% of federal felony convictions were guilty pleas).} For those prosecutions that do make it to trial, the grand jury decision to indict causes a frightening and uncertain experience that is enormously burdensome even for those ultimately acquitted, and to a prosecution that a vigilant representative of the people might have blocked on policy and
fairness grounds. Because no-bill decisions, rare as they are, permit a prosecutor to try again before another grand jury, the prosecutor does not worry about her ability to eventually indict. This too contributes to the prosecutor viewing the grand jury as a mere procedural hurdle at best, or at worst a tool for obtaining information, rather than a restraint on her office.

Witnesses are fairly powerless before the grand jury. Although a number of states have recently changed course, witnesses are traditionally not allowed to have attorneys with them in the grand jury room. And while witnesses may leave to consult with counsel, a prosecutor may, intentionally or not, intimidate a witness from frequently exercising that right. Thus, witnesses provide little restraint to prosecutorial power.

LEATPR’s requirement that the prosecutor provide some evidence that an institutional third party has material in its possession implicating a particular individual in a crime offers at least a mild obstacle to willy-nilly invasions of privacy. The justification

94. See Roger A. Fairfax, Jr., Does Grand Jury Discretion Have a Legitimate (and Useful) Role to Play in Criminal Justice?, in GRAND JURY 2.0, supra note 35, at 57, 57–84 [hereinafter Fairfax, Grand Jury Discretion] (defending the grand jury’s right to nullify even prosecutions supported by probable cause on numerous grounds, including sound public policy and democratic representation).

95. See Adriaan Lanni, Implementing the Neighborhood Grand Jury, in GRAND JURY 2.0, supra note 35, at 171, 180 (explaining the “no-bill” procedure); DOYLE, supra note 38, at 21 (discussing the prosecutor’s power to resubmit for indictment to the same or a different grand jury).

96. Peter H. White, Let’s Make a Deal: Negotiating and Defending Immunity for “Targets and Subjects,” LITIGATION, Fall 2002, at 44, 45 (2002) (“Notwithstanding the protective role the grand jury was initially intended to serve in our system, it has evolved into an investigative tool for the prosecution, a virtual extension of the U.S. Attorney’s office.”).

97. See DOYLE, supra note 38, at 5 (“The grand jury meets behind closed doors with only the jurors, attorney for the government, witnesses, someone to record testimony, and possibly an interpreter present.”); BEALE ET AL., supra note 80, § 6:28; LAFAVE ET AL., supra note 36, §§ 8.3(d), 8.14(b).

98. BEALE ET AL., supra note 80, § 6:28.

99. But see Bennett L. Gershman, PROSECUTORIAL MISCONDUCT § 2:10 (2d ed. 2014) (recognizing that berating a witness for exercising the right to counsel constitutes prosecutorial misconduct).

100. Grand jurors are often ignorant of their right to call witnesses independently from those selected by the prosecutor, thus further limiting grand jury and witness power. See ANGELA DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 26 (2009). Moreover, while that grand juror right seemingly continues in the federal system despite abolishment of the presentment, see Hale v. Henkel, 201 U.S. 43, 60 (1906), it no longer exists in some states, see LAFAVE ET AL., supra note 36, § 8.4(b).

101. This “obstacle” is in sharp contrast to current law. As one expert put it, [r]esistance is ordinarily futile. Absent self-incrimination or some other privilege, the law expects citizens to cooperate with efforts to investigate crime. In the name of this expectation a witness may be arrested, held for bail, and under some circumstances incarcerated. Even when armed with an
requirement avoids fishing expeditions,\textsuperscript{102} requires the state to justify its invasions of privacy,\textsuperscript{103} and compels at least some deliberation about the factual and policy wisdom of seeking to obtain certain information.\textsuperscript{104} Extending this requirement to grand juries would be a minimal hoop for law enforcement to jump through. Yet, like with a burning hoop in a circus, the hoop’s mere existence would compel prosecutors to greater care and humility, better protecting privacy while still enabling the critical law enforcement investigative function.

This is not to say that the justification standard for a grand jury subpoena necessarily should match that for other methods of process, nor be consistent across all types of investigations. If, for example, law enforcement could present a compelling case that certain corporate or financial investigations absolutely require greater leeway—perhaps insider trading investigations that otherwise cannot get off the ground—it would be reasonable for a court or legislature to accommodate that, especially given that third party record subpoenas do not threaten physical confrontation and other harms present in other searches. Our argument is merely that there is no cause for entirely exempting the grand jury from LEATPR’s justification requirements.

II. NOTICE

Notice is a fundamental requirement of due process\textsuperscript{105} that serves several purposes. One is that notice reduces the impact of a frightening surprise. In \textit{Zurcher v. Stanford Daily},\textsuperscript{106} police executed a
search warrant at the offices of a student newspaper, seeking photographs of demonstrators who had allegedly assaulted police. The newspaper challenged the search on the grounds that the police should have used a subpoena, given the newspaper’s non-suspect status and given the First Amendment concerns inherent in the search of a newspaper office. Implicit in that first argument were the dangers inherent in surprise. Surprise is emotionally unsettling and does not permit time to adjust to the State’s invasion. While in Zurcher the alternative was a subpoena, the notice benefit does not necessarily require that process. In the context of modern electronic records, even when responding to a warrant, the non-suspect record holder will typically itself identify potentially responsive records.

Notice also gives the searchee an opportunity to challenge the legal grounds of the search before it occurs. In Zurcher, a subpoena would have provided the newspaper time to challenge the search on First Amendment grounds. Use of a warrant, however, meant that the search occurred and items were seized immediately, leaving only after-the-fact solutions. The Court ultimately upheld the search in Zurcher, but Congress was not pleased. It quickly passed a statute protecting the media from law enforcement use of search warrants in a wide array of circumstances, permitting only the use of subpoenas.

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107. Id. at 551–52.
108. See id. at 553 (non-suspect status); id. at 563 (First Amendment).
109. See Brief for Respondents at 8–9, Zurcher, 436 U.S. 547 (Nos. 76-1484, 76-1600), 1977 WL 189744 (discussing lack of notice and implications thereof); id. at 18–19 (discussing interference and disruption); id. at 28–29 (noting only mode of resistance to search warrant is violence); id. at 46–47 (emphasizing value of challenge prior to execution).
111. See 18 U.S.C. § 2703(g) (2012) (permitting execution of search warrant without officer presence); Vindu Goel & James C. McKinley, Jr., Facebook Bid to Shield Data From the Law Fails, So Far, N.Y. TIMES, June 27, 2014, at B1 (describing Facebook’s attempt to derail mass 381-warrant search); Google, Way of a Warrant, YOUTUBE (Mar. 27, 2014), https://www.youtube.com/watch?v=McRRHscjfh0 (explaining how Google responds to search warrants requesting customer data).
112. See Brief for Respondents, supra note 109, at 25–31.
When, upon notice, an individual challenges a state action, such challenge prompts initiation of adversary system procedures.\textsuperscript{116} Those procedures, involving briefs, hearings, oral argument, and testimony, slow down the entire process to permit deliberation about its wisdom.\textsuperscript{117} Deliberation, if it takes into account many points of view, often leads to better decisions.\textsuperscript{118} Party input in deliberations also increases the perception that fair procedures are being followed, thus improving the legitimacy of the system.\textsuperscript{119} Indeed, in some instances time and publicity alone are sufficient to demonstrate error, as when the mayor of Houston recently retracted broad subpoenas issued to area clergy.\textsuperscript{120} Were search warrants used, the harm would already be complete.

Notice also demonstrates respect for the potential searchee as an individual. Unlike in Kafka’s famous novel \textit{The Trial},\textsuperscript{121} in which a man is arrested and convicted but never told the charges or evidence against him—thus dehumanizing him—notice treats the individual involved as someone who deserves an explanation. The State is answerable to him as a human being, even if he has done wrong.\textsuperscript{122}

Sometimes the law “delays notice,” eliminating some of notice’s virtues.\textsuperscript{123} Taking an action and only later telling its subject that it has occurred does not permit pre-action challenge or as effectively reduce surprise. Delayed notice should be permitted only in exceptional circumstances, such as when notice might lead to violence against witnesses or destruction of evidence.\textsuperscript{124} Nevertheless, delayed notice still makes the State answerable to the individual, still

\textsuperscript{116} For an understanding of the nature of those procedures, see, for example, \textsc{Stephen Landman}, \textit{The Adversary System: A Description and Defense} (1984), and \textit{The Adversary System: Who Wins? Who Loses?}, in \textsc{West’s Encyclopedia of American Law} 136 (Jeffrey Lehman & Shirelle Phelps eds., 2d ed. 2005).


\textsuperscript{119} See \textit{Taslitz, Democratic Deliberation}, supra note 118, at 322, 324.


\textsuperscript{121} \textsc{Franz Kafka}, \textit{The Trial} (Breon Mitchell trans., Schocken Books 1998) (1925).

\textsuperscript{122} On the general idea of respect for persons and its role in criminal procedure, see generally \textit{Taslitz, Respect and the Fourth Amendment}, supra note 45, at 15–16.


\textsuperscript{124} See, e.g., \textsc{Leatpr Standards}, supra note 8, Standard 25-5.7(c).
recalibrates the individual regarding what personal information has been shared, and still permits at least post-action challenge and deliberation—a chance for second thoughts.125 Even where such deliberation cannot or does not take place in the courtroom, notice allows it to take place in the public sphere through news reporting, petitioning, and public debate. Late notice is better than no notice.

So, subpoenas provide notice, and notice has many important benefits. But notice, advance or delayed, is best directed at the individual, group, or entity most affected by the government’s action. The person potentially incriminated has the most incentive to challenge the acquisition, ex ante or ex post. Moreover, as a matter of simple fairness, it is that person, the data originator, who suffers a privacy harm at the government’s hand.126 To give your next door neighbors notice that the government plans to sell your house at auction does you no good when the auctioneers show up to your surprise. Such covert action cannot be viewed as an instance of fair procedure. Yet, that is what ordinarily happens with subpoenas directed to institutional third parties.127

An investigation into the affairs of a Verizon or AT&T subscriber ordinarily does not implicate the telecommunications provider in any crime. Perhaps Verizon has a business incentive to resist a government subpoena to please its customers, but there are also legal expenses involved in such resistance, and Verizon has every reason not to draw government fire in its direction. A subpoena directed solely to Verizon for records involving customer X may never reach customer X. Indeed, the law sometimes forbids such disclosure,128 and federal and state prosecutors encourage recipients like Verizon not to disclose.129 If Verizon decides not to challenge the subpoena,

125. See id. Standard 25-5.7 cmt.
126. An analogous principle underlies the Fifth Amendment rule that the privilege against self-incrimination applies only to the person who is compelled to produce the information and only if he is thereby incriminated. Fisher v. United States, 425 U.S. 391, 397 (1976); see TASLITZ, PARIS & HERBERT, supra note 9, at 817–18.
128. See, e.g., 18 U.S.C. § 1510(b) (criminalizing customer notice of a grand jury subpoena in the banking context).
Verizon will produce the information for the State, potentially with no notice to the person most affected. LEATPR fixes this problem. All of that said, LEATPR’s is a gentle fix, making it that much less disruptive to the grand jury process. LEATPR requires notice for only certain types of records, permits delayed notice for cause as described above, and permits a court to prohibit the third party from itself providing customer notice during that delay period. A court may also limit, or even eliminate, the notice requirement in a particular case in which it would be unduly burdensome, though of course the privacy intrusion must be considered in that calculus. Most generously, and indeed perhaps too generously, LEATPR effectively always provides for delayed notice by requiring only that “notice should generally occur within thirty days after acquisition.” Nonetheless, such ultimate notice would still have important utility, and it would not be inimical to the beneficial aspects of grand jury secrecy.

III. RETENTION AND DISCLOSURE

A. Grand Jury Secrecy

Whereas the traditional grand jury fails to provide the first two LEATPR methods in the third party records context (levels of justification and notice), it does provide the third: protection against unauthorized access and distribution. Indeed, from a privacy perspective, the strongest argument in favor of treating grand jury subpoenas as a special case is the longstanding rule of grand jury secrecy.
Federal Rule of Criminal Procedure 6(e) prohibits, with appropriate—if somewhat complicated—exceptions, disclosure of matters occurring before the grand jury, and almost all states have similar restrictions.

To be precise, it is non-witness participants who, as a general matter, “must not disclose [any] matter occurring before the grand jury.” And disclosure by non-witnesses is permitted in several sets of circumstances, sometimes requiring a court order or at least court notification, and usually directed to other government attorneys or agencies for the purpose of enforcing federal criminal law or some other criminal, civil, and national security laws. Additionally, a court may order disclosure upon finding “a strong showing of particularized need” for the information in connection with a judicial proceeding or to a criminal defendant upon a showing “that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury.” Thus, grand jury secrecy is not absolute, but it is significant.

This commitment to secrecy, the Supreme Court has explained, serves these central functions:

First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as inducements. There would also be the risk that those indicted would flee, or would try

139. See Beale et al., supra note 80, §§ 5:3–5:4; LaFave et al., supra note 36, § 8.5(b).
140. Fed. R. Crim. P. 6(e)(2)(B) (listing and therefore restricting all grand jury participants other than witnesses); see United States v. Sells Eng’g, Inc., 463 U.S. 418, 425 (1983) (“Witnesses are not under the prohibition unless they also happen to fit into one of the enumerated classes.”). Some states do seek to restrict witness disclosure, but such restrictions raise First Amendment complications. See Beale et al., supra note 80, § 5:5; LaFave et al., supra note 36, § 8.5(d).
141. Fed. R. Crim. P. 6(e)(3); see, e.g., 18 U.S.C. § 3322 (2012) (allowing disclosure to government attorney for federal civil forfeiture and, upon court order, to federal and state financial regulating agencies). For full treatment of the secrecy limitations, see Beale et al., supra note 80, §§ 5:1–5:36; LaFave et al., supra note 36, § 8.5.
142. Sells Eng’g, 463 U.S. at 443 (interpreting what is now Fed. R. Crim. P. 6(e)(3)(E)(i)); see Beale et al., supra note 80, § 5:12; LaFave et al., supra note 36, § 8.5(b).
143. Fed. R. Crim. P. 6(e)(3)(E)(ii); see Beale et al., supra note 80, § 5:13. A court may similarly order disclosure at the request of the government in order to enforce foreign criminal law, state or Indian tribal criminal law, or military criminal law. See Fed. R. Crim. P. 6(e)(3)(E)(iii)–(v).
to influence individual grand jurors to vote against the indictment.

Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.\(^{144}\)

We know of no empirical data supporting concerns about witness safety and honesty in the usual case. Indeed, a number of authors have challenged the rules providing for limited discovery in criminal cases—which are based on similar concerns—as simply not rooted in reality.\(^{145}\) Most states use preliminary hearings rather than grand juries in the run-of-the-mill case,\(^{146}\) yet preliminary hearings are not protected by special secrecy rules.\(^{147}\) These concerns are, however, surely valid in individual cases where threats or bribes have been made or seem likely for case-specific reasons. And grand jury secrecy rules have value in protecting innocent persons from public ridicule, even if the rules might not always function very well given the witnesses’ freedom to disclose. Indeed, such public ridicule is not deserved even by the guilty, at least not before a trial has determined such guilt, especially as that ridicule or condemnation can influence the jury pool and thus the very guilt/innocence decision.\(^{148}\) Secrecy is part of what privacy is all about.

\(^{144}\) Douglas Oil Co. of Cal. v. Petrol Stops Nw., 441 U.S. 211, 219 (1979); see also United States v. Amazon Indus. Chem. Corp., 55 F.2d 254, 261 (D. Md. 1931) (articulating the list that would be adopted by the Supreme Court).

\(^{145}\) See Stephen A. Saltzburg & Daniel J. Capra, American Criminal Procedure: Cases and Commentary 1071–74 (10th ed. 2014) (addressing arguments for and against broad criminal discovery); Justice William J. Brennan, Jr., The Criminal Prosecution: Sporting Event or Quest for Truth, 1963 Wash. U. L. Q. 279, 285–88 (arguing that trial judges can act to protect witnesses shown to be in danger of criminal discovery); Alafair S. Burke, Revisiting Prosecutorial Disclosure, 84 Ind. L. J. 481, 515 (2009) (arguing that the risks of broad disclosure are overstated because several states and the European continental justice system mandate broad disclosure); Peter J. Henning, Defense Discovery in White Collar Criminal Prosecutions, 15 Ga. St. U. L. Rev. 601, 646–49 (1999) (arguing for greater discovery in white collar prosecutions); Wm. Bradford Middlekauff, What Practitioners Say About Broad Criminal Discovery Practice: More Just—or Just More Dangerous?, 9 Crim. Just. 14, 16 (1994) (noting that “the vast majority of academic commentators and numerous judges . . . have endorsed broad criminal discovery” and that while many states have since 1970 expanded discovery, none have moved the other way). Middlekauff articulates prosecutor concerns regarding witness intimidation, but jurisdictions that have expanded discovery have found that expansion to be manageable and beneficial. See id. at 18–19, 55–58.

\(^{146}\) LaFave et al., supra note 85, §§ 14.2(c)–(d), 15.1(d)–(g); see Hurtado v. California, 110 U.S. 516, 520–21, 538 (1884) (holding that due process does not require that a grand jury initiate a state felony prosecution).


\(^{148}\) See Model Rules of Prof’l Conduct R. 3.8(f) (2013) (advising prosecutors to refrain from making “extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused”); Andrew E. Taslitz, Information Overload, Multi-Tasking, and the Socially Networked Jury: Why Prosecutors Should Approach the Media Gingerly, 37 J. LEGAL PROF. 89, 125–29 (2012) (explaining how the Internet and constant television news cycles can influence grand jurors); Andrew E. Taslitz,
But secrecy is not everything that privacy is about, nor of course is disclosing information to prosecutors and grand jurors preserving total secrecy. Privacy is fundamentally a right to control what information about us is available to others, and for what purposes. As discussed earlier, there is an obvious difference between sharing information with your spouse, friend, or counselor and with the police or a prosecutor. What third parties do with information matters to us, and it should so matter.

Controlling information about ourselves is key to creating intimate relationships. We share some things with some people because they are close to us. Even when, as is typically the case, that information imposes no criminal or civil liability, the limitation of the information to a narrow chosen circle is precisely part of what marks them as close friends, lovers, or relatives. Even the most patriotic of individuals—perhaps Captain America excepted—do not love an amorphous and powerful government in the way that they love a spouse, best friend, or endearing colleague.

Control of information about ourselves also helps to define our very identities. Each of us has complex, multidimensional personalities. We wear different masks in different circumstances. It is hard for any person to get to know another in all her complexity, especially if they meet rarely and under formal or contentious circumstances. Yet each of us fears being misjudged—a piece of ourselves or our behavior being given too much weight in assessing our entirety. We thus reveal only selected parts of ourselves. We have one mask at work, another at school, and another at home. These are not lies but ways to protect how others assess us, and humans hold other-assessment dear. We want to be seen for whom we think we are, but we also know that esteem matters, because it is

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The Incautious Media, Free Speech, and the Unfair Trial: Why Prosecutors Need More Realistic Guidance in Dealing with the Press, 62 Hastings L.J. 1285, 1291–93 (2011) (arguing that modern society is less likely to question the media and is therefore more likely to be prejudiced against a defendant).

149. See LEATPR STANDARDS, supra note 8, Standard 25-3.3 cmt.; Henderson, Expectations of Privacy, supra note 13, at 232–33; Taslitz, Human Emotions, supra note 13, at 131, 153–57.

150. See supra notes 13–16 and accompanying text.


152. See id. at 209–18.

153. Id. at 8 (“True knowledge of another person is the culmination of a slow process of mutual revelation. It requires the gradual setting aside of social masks, the incremental building of trust, which leads to the exchange of personal disclosures. It cannot be rushed . . . .”); see Taslitz, Human Emotions, supra note 13, at 153–57.

154. See Rosen, supra note 151, at 9.

155. See id. at 8, 210.
valuable in itself and can bring social resources and power.\footnote{156} Furthermore, how we believe others understand us affects how we understand ourselves.\footnote{157} We are not islands.

The secrecy of the grand jury unquestionably protects some privacy interests by limiting the circle of persons and groups who learn information about us. But, for the reasons noted above, it does not resolve all privacy concerns. Revelation to grand jurors, court reporters, and prosecutors, and the risk of later revelation to others via secrecy exceptions or breaches, matter because they represent a loss of control over the self, over the setting apart of intimate relationships, and over the masks that help to maintain social esteem. Such limited revelation may be necessary to serve the State’s interests in public safety and retribution against criminal wrongdoers. But the State should have to justify believing there is a danger to safety or a need for retribution that merits damaging privacy. Again, LEATPR’s flexible justification requirements serve just that purpose. Indeed, during drafting one person repeatedly insisted that secrecy sometimes \textit{substitute} for levels of justification and notice. But LEATPR rejects such a model, instead always requiring all three.

\textbf{B. Secrecy Versus Transparency}

As explained above, grand jury secrecy serves multiple objectives, including providing some limited privacy protection. But because the grand jury is a government function, it is important to note that the secrecy of grand juries also has important social costs. Secrecy is the very absence of transparency,\footnote{158} and transparency promotes accountability.\footnote{159} With transparency, actors know that others will examine their errors. They fear punishment—even if only denial of a merit benefit, public reprimand, or harm to reputation. Social science demonstrates that actors believing they will be held accountable are more likely to work carefully and less likely to engage


\footnote{158} See Luna, supra note 33, at 1164 ("\textit{Transparency} is the ability of the citizenry to observe and scrutinize policy choices and to have a direct say in the formation and reformulation of these decisions.").

\footnote{159} Id. at 1108–12. For an argument that traditional grand jury secrecy has been turned on its head to now shield prosecutorial abuse, see Roger Roots, \textit{Grand Juries Gone Wrong}, 14 RICH. J.L. & PUB. INT. 331, 351–55 (2010).
in error, and thus are more likely to make sound decisions and less likely to make irrational or ill-informed ones.\textsuperscript{160}

Transparency also permits commentary, critique, and conversation, again improving the likely quality of decisions. Moreover, transparency promotes democratic values. It allows citizens to watch what the government is doing, to feel a sense of participation just by being kept in the know, to act to change government action or advocate for new laws, or to make informed electoral decisions.\textsuperscript{161}

In theory, however, secrecy can improve grand jury deliberation in a way that transparency would not. As one leading commentator on the grand jury explains,

\textit{[s]ecrecy . . . shields the grand jury’s exercise of discretion from public glare, thereby minimizing the possibility that grand jury members will feel compelled to base their decisions on concerns about immediate public backlash in a given case. Thus, secrecy can lead to greater reflection and richer, more sincere deliberation.}\textsuperscript{162}

This argument is similarly used to justify secret petit jury deliberation.\textsuperscript{163} But there is a major difference between the two. Petit juries operate in an adversarial environment, and their fact-finding process, the trial, is closely regulated at every stage by a judge and is viewable by the public. The grand jury operates without a presiding judge, without defense counsel, and without outside observers, and then quickly makes decisions largely under prosecutorial control.\textsuperscript{164} Secrecy thus does not encourage lengthier,
richer deliberations but merely protects the prosecutor’s degree of control over the proceedings. By exposing the inner workings of the grand jury, transparency could lead to corrective processes promoting more informed, independent grand jury decisions as a result of public criticism.165

Moreover, when subpoenas are directed at institutional third parties, there is less reason to be concerned that public pressure will affect such a grand jury decision. With such subpoenas, the grand jury—if it is the decision making body—is simply deciding whether to seek information from one witness and, if so, what information. And

grand juries are passive entities whose existence burdens judicial efficiency and needlessly drains federal funds.

See Wayte v. United States, 470 U.S. 598, 607 (1985) (“In our criminal justice system, the Government retains ‘broad discretion’ as to whom to prosecute . . . . This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review.”); Peter Krug, Prosecutorial Discretion and Its Limits, 50 AM. J. COMP. L. 643, 645 (2002) (“noting the ‘nearly unfettered independence’ that prosecutors have in charging decisions”); Luna, supra note 33, at 1139–41 (“noting that prosecutors have “virtually unlimited discretion” on enforcement of laws”); Robert L. Misner, Recasting Prosecutorial Discretion, 86 J. CRIM. L. & CRIMINOLOGY 717, 728–59 (1996) (“explaining the history of the local prosecutor and the vast discretion afforded to local police and prosecutors”); Taslitz, Democratic Deliberation, supra note 118, at 296–315 (“listing the host of decisions where prosecutors exercise discretion”).


And desirable or not, its existence alone cannot justify expansive, unreviewable, secret grand jury activities. The grand jury’s structure must be justified on its own.
the witness is a third party witness rather than a principal player. It is an important decision, but not as likely to garner public backlash as the ultimate decision of whether to proceed against a person as an offender, meaning whether to indict.

If the desired closer supervision of subpoenas would be done by a judge, rather than the grand jurors, the grand jury is thereby freed from any outside political pressures. Judges are affected by politics, too, albeit in a more indirect, complex way. But our system assumes that judges can resist overt public pressures of this sort and that it is not in the interest of society for judges to act in secret. They are expected to explain the reasons for their decisions fully, defending them in written opinions.

The grand jury system, if reformed in certain ways, could be an effective democratic deliberating body. Grand juries have the power to gain access to a wide array of information. They are drawn locally and are relatively small in size. Although ordinary citizens in everyday politics frequently act from ignorance, the power to obtain information could theoretically be used to remove grand juror ignorance. If the proceedings were solemn and slow, they would impress grand jurors with their own power under these circumstances, motivating them to do the hard work of both obtaining information and processing it in order to understand it.

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169. See Fairfax, Grand Jury Discretion, supra note 94, at 73.

170. See Doyle, supra note 38, at 3–4 (noting that panels usually have between sixteen and twenty-three jurors).


Grand jurors would feel their power to interpret the law independently and to nullify it when it does an injustice. They might view their deliberations as having weighty consequences. Indeed, petit jurors engaging in lengthy deliberations over complex and serious criminal charges often feel so empowered that they become politically active for the first time.  

A powerful, diverse, independent grand jury might be trusted to decide when to issue subpoenas that breach privacy, and when not to do so.  

But that is not the grand jury we have, however much it may be the grand jury that many reformers want.  

The nation recently experienced a rare and poignant example of transparency in the grand jury process. The state of Missouri released, in only slightly redacted form, the grand jury materials relating to the no bill decision for Ferguson police officer Darren Wilson in the shooting death of Michael Brown.  

Although this is not the place for an examination of their contents, which are highly unusual in their length and scope, and although obviously this transparency did not in this instance prevent another unfortunate round of violence, the release has allowed, and will continue to allow, divergent commentators to make an educated assessment and critique not only of that grand jury process but also of the underlying police investigation.  

And because the grand jurors were told

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173. See John Gastil et al., The Jury and Democracy: How Jury Deliberation Promotes Civic Engagement and Political Participation 9–11 (2010) (showing through empirical study how jury service caused jurors to vote more, pay closer attention to the news, engage more with their neighbors about community issues, and participate more in charitable organizations); Andrew E. Taslitz, The People’s Peremptory Challenge and Batson: Aiding the People’s Voice and Vision Through the “Representative” Jury, 97 IOWA L. REV. 1675, 1678 (2012) [hereinafter Taslitz, The People’s Peremptory Challenge].


176. See Davey & Fernandez, supra note 5.

upfront that the release would be made, it may have solemnized their still-secret deliberations. There is no doubt that there is a tension between, on the one hand, transparency and the norms it promotes (including accuracy and accountability), and, on the other hand, secrecy.

All that said, we are not making a brief for ending grand jury secrecy. That secrecy has important benefits. Our point is merely that it also has costs. And our argument is simply that, on balance, secrecy neither renders privacy protections unnecessary for the focus of subpoenas directed to institutional third parties, nor serves social goals so important as to outweigh privacy protection. To (1) embrace prior notice (absent particularized evidence of a safety or destruction of evidence danger) to the focus of a records subpoena (the person or group who is the original source or who may suffer as a result of the information’s revelation to the government), (2) give the focus standing to challenge that subpoena, and (3) require the State to establish some level of justification for the subpoena, are small incursions on grand jury secrecy which serve a greater privacy good. In the routine case, and perhaps in many other cases, secrecy provides little reason to carve out a grand jury exception to LEATPR.

IV. OTHER ACCOUNTABILITY MECHANISMS

LEATPR requires that a legislature provide means of accountability “via appropriate criminal, civil, and/or evidentiary sanctions, and appropriate periodic review and public reporting.” As already described above, and as with the other LEATPR methods, there is no reason to entirely exempt grand juries from such accountability.


179. While we hope to have made a persuasive case, given the social value of privacy, the “burden of proof” should lay with the supporters of the grand jury exception, not its opponents. Note, too, that any fears that the modest secrecy breach will harm an individual’s reputation are partly addressed because the person facing potential harm—the focus of the record—chooses to go to court to challenge the subpoena. The focus thus voluntarily agrees to revelation—at least to the judge—for the purpose of protecting other privacy interests and other kinds of secrecy, namely the secrecy of the content of the records at issue. Any new rule of procedure might make the judicial proceedings closed ones at the request of the focus or, if the government shows safety danger, at the request of the prosecution, keeping in mind the secrecy-transparency tradeoff.

180. LEATPR STANDARDS, supra note 8, Standard 25-7.1.
mechanisms. Nor are they currently exempt. For example, the Federal Rules of Criminal Procedure provide that a knowing violation of grand jury rules may be punished as a contempt of court, and there may be a private civil remedy as well.

The easiest accountability mechanisms to justify are those requiring public reporting and periodic review. Unlike the more nuanced discussion above of whether to publicize, even in a limited manner, the particulars of a grand jury request—for example, that the grand jurors wish to examine the bank records of Andrew Taslitz—there is almost no risk and tremendous advantage in publishing composite statistics regarding the following: how often grand juries are convened and for what purposes (for example, what crimes are considered), how often they return true bills, how often they return no bills, how often matters are otherwise declined, and how often and in what quantities they access given types of records. Much like the reporting concerning other methods of access required by existing legislation, such aggregate data will permit informed and engaged debate regarding the proper role of the grand jury in our criminal justice system.

It seems farfetched that access to such aggregate data would meaningfully inform lawbreakers in a manner that renders future prosecution more difficult, or at least any such effect should be offset by a potential increase in deterrence. Statistics are published even for the extremely secretive Foreign Intelligence Surveillance Court and have, in fact, been used to argue that the court does not provide a meaningful check on national security surveillance. Informed debate cannot occur without such data, and there could be a mechanism for a prosecutor or department to urge the extremely rare circumstance in which disclosure would be substantially detrimental.

Some statistical evidence is currently published. The United States Attorneys’ Annual Statistical Report includes the number of criminal

182. See LaFave et al., supra note 36, § 8.5(i) (discussing conflicting jurisprudence regarding a private civil remedy for violation of the secrecy requirements).
183. For these purposes, the relevant “convening” is of course how often a grand jury is considering a certain type of illegality or impropriety, not merely how many grand juries are currently empanelled and thus theoretically could be so engaged.
matters in which grand jury proceedings were conducted and the number of work hours so dedicated.\textsuperscript{187} And, from 1959 to 1991, these reports included the number of “no true bills,” disclosing how often federal grand juries refused a prosecutorial offer to indict (Table One).\textsuperscript{188} But when that number settled at astoundingly low levels around 1991 (a 99.9\% indictment success rate), the number of no true bills ceased to be included.\textsuperscript{189} However, data from the Bureau of Justice Statistics (BJS) indicate that the number of no bills has not increased since that time (Table Two).\textsuperscript{190} Even taking into account the relatively low indictment threshold (as compared to the beyond a reasonable doubt standard required for conviction), achieving a 99.9\% success rate is remarkable. This is especially so when one considers that some no true bills might be urged by a prosecutor who is either surprised by how the evidence turned out (though this is likely very rare, as the prosecutor controls the presentation and in any event could simply decline to present charges) or as a “solution” to a politically difficult matter, including to deflect pressure from victims or other interest groups.\textsuperscript{191} That allegation is certainly being made in the recent no bill decisions in both Ferguson, Missouri and New York City.\textsuperscript{192} But whatever the case in those instances, the bottom line is simply that were the grand jury an effective check on prosecutorial power, nobody could be that good.\textsuperscript{193}

\begin{fancyvspace}{1.5cm}
\begin{fancyquote}


189. See id. (providing the statistical reports for the years 1959–2013).


192. See Jonsson, supra note 6.

193. Cf. \textit{The Devil’s Advocate} (Regency Enterprises 1997) (“It was a nice run, Kevin. Had to close out some day. Nobody wins them all.”).
\end{fancyquote}
\end{fancyvspace}
### TABLE ONE

Data from U.S. Attorneys’ Annual Statistical Report

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Grand Jury Proceedings</th>
<th>Indictments</th>
<th>No True Bills</th>
<th>U.S. Attorney Success Rate (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1959</td>
<td>15,397</td>
<td>14,673</td>
<td>724</td>
<td>95.30</td>
</tr>
<tr>
<td>1960</td>
<td>14,646</td>
<td>14,088</td>
<td>558</td>
<td>96.19</td>
</tr>
<tr>
<td>1961</td>
<td>15,100</td>
<td>14,565</td>
<td>535</td>
<td>96.46</td>
</tr>
<tr>
<td>1962</td>
<td>15,826</td>
<td>15,285</td>
<td>541</td>
<td>96.58</td>
</tr>
<tr>
<td>1963</td>
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<td>15,591</td>
<td>530</td>
<td>96.71</td>
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<tr>
<td>1964</td>
<td>16,480</td>
<td>16,061</td>
<td>419</td>
<td>97.46</td>
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<tr>
<td>1965</td>
<td>17,511</td>
<td>16,950</td>
<td>561</td>
<td>96.80</td>
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<tr>
<td>1966</td>
<td>17,709</td>
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<td>645</td>
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<tr>
<td>1967</td>
<td>19,197</td>
<td>18,663</td>
<td>534</td>
<td>97.22</td>
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<tr>
<td>1968</td>
<td>18,891</td>
<td>18,569</td>
<td>322</td>
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<tr>
<td>1969</td>
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<td>22,209</td>
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<td>1970</td>
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<td>1971</td>
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<td>220</td>
<td>99.25</td>
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<tr>
<td>1972</td>
<td>32,033</td>
<td>31,840</td>
<td>193</td>
<td>99.40</td>
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<tr>
<td>1973*</td>
<td>30,235</td>
<td>30,015</td>
<td>220</td>
<td>99.27</td>
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<tr>
<td>1974</td>
<td>25,786</td>
<td>25,595</td>
<td>191</td>
<td>99.26</td>
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<tr>
<td>1975</td>
<td>27,222</td>
<td>27,067</td>
<td>155</td>
<td>99.43</td>
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<tr>
<td>1976**</td>
<td>—</td>
<td>—</td>
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</tr>
<tr>
<td>1977</td>
<td>21,531</td>
<td>21,412</td>
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<td>1978</td>
<td>19,509</td>
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<td>1979</td>
<td>16,446</td>
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<td>1980</td>
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<td>1984</td>
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<td>17,419</td>
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<td>1985</td>
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<td>17,051</td>
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<td>99.75</td>
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<tr>
<td>1986</td>
<td>20,111</td>
<td>20,045</td>
<td>66</td>
<td>99.67</td>
</tr>
<tr>
<td>1987</td>
<td>19,263</td>
<td>19,224</td>
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<td>99.80</td>
</tr>
<tr>
<td>1988</td>
<td>20,184</td>
<td>20,156</td>
<td>28</td>
<td>99.86</td>
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<tr>
<td>1989</td>
<td>23,203</td>
<td>23,172</td>
<td>31</td>
<td>99.87</td>
</tr>
<tr>
<td>1990</td>
<td>23,925</td>
<td>23,914</td>
<td>11</td>
<td>99.95</td>
</tr>
<tr>
<td>1991***</td>
<td>25,943</td>
<td>25,927</td>
<td>16</td>
<td>99.94</td>
</tr>
</tbody>
</table>

* The 1973 data is internally inconsistent, reporting 30,015 indictments and 220 no bills, but a total of 30,215 grand jury proceedings. For purposes of this table we have assumed the latter number is incorrect, but of course it could be any of the three.
***  The Executive Office for U.S. Attorneys has not included the number of “no true bills” in its annual statistical reports since 1991.

### TABLE TWO

*Data from BJS Federal Justice Statistics*

<table>
<thead>
<tr>
<th>Year</th>
<th>Suspects Received by the U.S. Attorney</th>
<th>Total Suspects Declined</th>
<th>Total Suspects Declined due to No True Bill</th>
</tr>
</thead>
<tbody>
<tr>
<td>1993</td>
<td>110,286</td>
<td>33,678</td>
<td>50</td>
</tr>
<tr>
<td>1994</td>
<td>99,251</td>
<td>34,424</td>
<td>38</td>
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<tr>
<td>1995</td>
<td>102,220</td>
<td>35,896</td>
<td>39</td>
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<tr>
<td>1996</td>
<td>97,776</td>
<td>32,832</td>
<td>41</td>
</tr>
<tr>
<td>1997</td>
<td>110,034</td>
<td>29,069</td>
<td>15</td>
</tr>
<tr>
<td>1998</td>
<td>115,692</td>
<td>28,786</td>
<td>33</td>
</tr>
<tr>
<td>1999</td>
<td>117,994</td>
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<td>2000</td>
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<td>2001</td>
<td>121,818</td>
<td>32,250</td>
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<td>2002</td>
<td>124,335</td>
<td>33,674</td>
<td>23</td>
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<td>2003</td>
<td>130,078</td>
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<td>2004</td>
<td>141,212</td>
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<tr>
<td>2005</td>
<td>137,590</td>
<td>29,755</td>
<td>11</td>
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<tr>
<td>2006</td>
<td>133,935</td>
<td>29,677</td>
<td>15</td>
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<tr>
<td>2007</td>
<td>138,410</td>
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<td>2008</td>
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<td>2009</td>
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<tr>
<td>2010</td>
<td>187,916</td>
<td>30,670</td>
<td>11</td>
</tr>
</tbody>
</table>

In the last few years, a number of private entities have begun publishing “transparency reports” to provide data on how often they release information to law enforcement.\footnote{194. See, e.g., Google Transparency Report, GOOGLE, http://www.google.com/transparencyreport (last visited Dec. 30, 2014).} The government should itself provide consistent and thorough aggregate data on the use of the grand jury’s investigative and accusative functions.
CONCLUSION

"The grand jury is a ‘much maligned’ organ of the criminal justice system,"195 and recent events have renewed and intensified criticism. Perhaps at least some criticism is inevitable for any institution that seeks both to investigate in order to accuse and to protect from accusation. But the criticism is appropriate when the modern grand jury seems to have put all of its energies, and few meaningful checks, into its investigatory function, allowing its shield function to atrophy. Or at least that shield function has generally been subject to atrophy but, ironically, might remain strong in the unique circumstance of potential charges against police. It is telling that the grand jury right is the only criminal procedure provision in the Bill of Rights that has been held not to apply as against the states.196

This Article can certainly be read in that critical tradition. The modern grand jury simply does not live up to common and historic aspirations. But as with much of that critical literature, we aim at least in the first instance to improve the constitutionally-ensconced institution, not to eliminate or belittle it. There could come a day in which the people once again depend not only upon the grand jury’s ultimate “shield” function for their liberty, but also upon its potential to limit harmful and inappropriate investigation while initiating its own investigation unpopular to those in power.197 Perhaps we have seen a glimpse of that recently, and that chance might be reason enough to preserve it.

The ABA’s Criminal Justice Standards on Law Enforcement Access to Third Party Records provides a helpful vehicle, in that its four protective mechanisms could be used not only to better respect the privacy of third party records obtained via grand jury subpoena but to improve the functioning of that institution more generally. It is thus unfortunate that the grand jury, both in its historic form and in the form of prosecutorial “equivalents,” was exempted from LEATPR’s provisions. Hopefully the legislation LEATPR inspires, as well as future iterations of those Standards, will instead thoughtfully apply to the grand jury.198

197. See LAFAVE ET AL., supra note 36, § 8.2(b) (describing the grand jury of the early American experience as well as, very briefly, some of its demise).
198. See United States v. Williams, 504 U.S. 36, 55 (1992) (recognizing that legislatures, in this case Congress, can modify the grand jury function).