

The Grand Jury: Historical Roots, Contemporary Operation and Calls for Reform

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A primary criticism often leveled at the grand jury system lies in the notion that "prosecutorial control" is exercised over various jury members as well as the screening process that occurs within the grand jury process. Critics of this system contend that grand juries acquiesce to the prosecuting attorney's wishes by essentially "rubber stamping" indictments that are sought by prosecutors. The accusation that grand juries simply do the bidding of prosecutors by rubber stamping indictments - thus failing to exercise independent judgment in their deliberations - is strikingly tautological: evidence of "prosecutorial dominance" is found in exceptionally high indictment rates, and high indictment rates are taken as evidence that grand juries rubber stamp requests for indictments. This article demonstrates why such claims do not realistically appraise the current grand jury system, providing instead a misleading and pessimistic view of a system that, in fact, fulfills its function in an efficient and ethical manner, regardless of claims to the contrary.

Origins and Evolution of the Grand Jury

The origins of today's grand jury system are traceable to the Assize of Clarendon, a decree having the force of law issued by King Henry II in 1166. The royal edict provided that a jury of 12 "good and lawful" men¹ from every township or village be periodically assembled for the purpose of informing the king's justices whether they knew or suspected any persons of having committed robbery, murder, theft, arson, forgery, harboring a criminal and other crimes affecting their community (Segal, Spivack, & Costilo, 1961). Since there were no organized law enforcement agencies at the time, these early grand juries functioned as watchmen ("public watchdogs") who were required to furnish, under oath, the names of community members personally known, reputed or rumored to have committed the list of crimes read to them by the king's justices. The criminal charges initiated by these original accusatory (or "presenting") grand juries based on their own knowledge of community affairs were in the form of non-technical written statements called *presentments*. A presentment represented the community's collective view of the subject's guilt and was usually followed by the arrestee's "trial by ordeal." In England, the most common form of ordeal was trial by cold water, where the accused was briefly submerged into a pond with a rope attached to his body. If the accused floated to the surface (an "unnatural" result), it was taken as a sign by God that he was guilty because only a sinner whose body was possessed by the spirit of Satan could defy the law of gravity. Those who sank were declared innocent because the water had "received them" with God's blessing and they were quickly fished out. Especially prevalent in witchcraft trials, trial by cold water ordeal was discontinued in 1215 when the church forbid clergy from participating in any more ordeals, which in England led to the introduction of the criminal trial jury (Johnson, 1988; Chambliss, 1969).

Grand jurors who were not forthcoming in reporting wrongdoers, and jury panels which did not issue a sufficient number of presentments, faced substantial fines by the king. The early grand jury's function was likened to a "sword" in that a group of ordinary citizens who knew the local scene was relied

upon to identify villains in the area, press charges, and pass judgment on the wrongdoers. By the end of the seventeenth century the grand jury began to shed its historic sword (accusatory) function of rooting out crime, signaling a shift to contemporary *indicting* grand juries who act as a protective “shield” by standing between the prosecutor and the accused in order “to determine whether the charge is founded upon credible testimony or is dictated by malice or personal ill will” (*Hale v. Henkel*, 1906, p. 59). Eighteenth century English grand juries consisted of 23 persons who, acting in secret, were not only able to initiate charges on their own via presentments, but also to charge (indict) based on a prosecutor’s recommendation.¹

Viewing the grand jury as a “bulwark against oppression,” the framers of the American Constitution often employed grand juries to charge British soldiers and other royal officers with crimes against the citizenry, refused to indict colonists for perceived “political” crimes, and frequently issued reports critical of England’s colonial policies (Whitebread & Slobogin, 2000; Rosenblatt, 1991). So it was that the constitutional architects immortalized the institution in the Fifth Amendment of the U.S. Constitution, which provides that “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.” (“Infamous” crimes are felonies or any offense punishable by more than one-year imprisonment.) The grand jury clause requires that all federal prosecutions of serious crimes be brought through grand jury indictment as the sole charging instrument. The states, however, are not similarly bound because the grand jury clause is one of the few Bill of Rights guarantees which has not been made applicable to them through the Fourteenth Amendment. In *Hurtado v. California* (1884), the Supreme Court held that the states are not constitutionally obliged to utilize grand jury review before proceeding to trial if the accused is afforded some other form of pretrial screening of the charges, such as the preliminary hearing used in California at the time. Nonetheless, 19 states require that *all* felonies be prosecuted solely by indictment, 23 use it for capital offenses, and 30 other states² make it optional--the vast majority of states have retained grand jury review for certain types of felonies (Whitebread & Slobogin, 2000; LaFave, Israel & King, 2004; Beale, Bryson, Felman & Elston, 2001; Brenner, 1995).

Contemporary grand juries are generally classified as being either “investigative” or “indicting.” Indicting (charging) grand juries review the evidence and screen charges formulated by prosecutors on crimes for which arrests have usually already been made. Indicting grand juries do little if any actual “investigation” of their own; when reference is made to their “investigative” powers, it connotes their authority to subpoena witnesses, which is intrinsic to its indicting function. By contrast, investigative³ grand juries are specifically convened for the purpose of uncovering widespread and systematic criminal activity, or crimes in high places, with which the ordinary processes of law enforcement are unable to cope and would not otherwise come to light. In their crime-fighting capacity, investigative grand juries resemble their

¹Other authorities indicate that the 12 jurors were “knights.” Most sources put the number at 12, although it was later expanded to 24.

² Information on the precise number of states requiring grand jury review, and for which felonies, is not available in the literature. The figures presented in the article are based on my analysis of statistics cited by authorities on the subject in a number of sources, which are remarkably consistent with one another.

³ Investigative grand juries also inspect and monitor the operation of local jails, health facilities, and perform a variety of other functions which are not crime-related.

historic counterpart accusatory or presenting grand juries, which ferreted out crime through their own devices. The focus of investigative grand juries—governmental corruption, organized crime, and white-collar crime—is of course quite different from the public watchdog role of early accusatory grand juries that were concerned with ordinary “street crimes” committed by individuals. But the need to utilize investigative grand juries to detect nonconventional crime was evidenced by some early grand juries which began to take a stand against governmental corruption by issuing presentments⁴ against royal officials whom they believed were derelict in their duties. On occasion, today’s indicting grand jury may also be charged with responsibilities ordinarily assumed by dedicated investigative grand juries. The discussion of the grand jury which follows is based on the regular indicting grand jury whose primary function is to screen cases for trial.⁵

Selecting Grand Jurors

Modern grand juries are indicting bodies consisting of between 16 and 23 lay citizens who meet in private to decide whether defendants should be required to stand trial on the charges presented to them by the prosecutor. The first step in the grand jury selection process involves the method used for identifying potential grand jurors in the county or venue where the grand jury hears cases. There are two different methods for doing this: (a) the “key-man” or discretionary system, and (b) random selection. In key-man jurisdictions, a few judges or other designated officials—the key-men—personally hand pick grand juror candidates or ask community leaders and organizations for recommendations. The key-man model, which was used in most states prior to 1968, allegedly results in blue ribbon grand juries containing “higher social class” persons and the “better elements” of society on them. In Houston, where regular grand juries were picked from a short list drawn up by several judges as late as 1990, the result was “overqualified,” non-representative grand juries that were stacked with professionals or were lawyer-laden (Belkins, 1989). Some key-man programs may incorporate an element of random selection at some point before a grand jury is impaneled. In Georgia, key-men selected the tentative grand jurors whose names were then placed on a list from which the final selection of 16-23 jurors was randomly chosen. In Nebraska, 40 names are selected at random from the list of registered voters, after which a three-person board then hand picks the 16 to serve on a grand jury. Although key-man systems are subjective and more susceptible to abuse than random selection, they are constitutionally permissible (Beale et.al., 2001).

Today, all but a handful of jurisdictions use a random selection system; potential grand jurors are randomly selected from “master lists” (venire) of registered voters, tax returns, city telephone directories, driver license records, utility customers, etc. Random selection from such broadly-based and unskewed sources ensures that grand juries will be drawn from a “*fair cross section* of the community.” The fair cross-section principle means that the composition of grand juries will be representative of the population in their

⁴ The term “presentment” is now obsolete in most jurisdictions; an “indictment” currently describes any grand jury accusation regardless of whether the charge was originally prepared by the prosecutor or was generated by an investigative grand jury.

⁵ This article is not concerned with grand juries which are specifically summoned and charged by the court to conduct an investigation into criminal or non-criminal matters, often called “Special Investigating Grand Juries.” Nor does it cover indicting grand juries which may occasionally be used for the same purpose. See Segal, Spivack & Costilo (1961).

localities, and no distinct (*cognizable*) group of persons will be “systematically excluded” from consideration or intentionally discriminated against. (“Systematic exclusion” and “purposeful discrimination” are determined by a statistical analysis of the extent to which the group in question is underrepresented on the grand jury array compared to their concentration in the general population, and the reasons for such underrepresentation.) It is extremely difficult to mount a successful constitutional challenge to juries impaneled under random selection, unless the master lists themselves run seriously afoul of the fair cross-section benchmark. This would occur if the master list only contained the names of homeowners, credit-card holders, married couples, two-car or no-children families--individuals likely to be better-educated, more affluent, more white, and therefore not a cross-section of the community. By contrast, the key-man system is much more vulnerable to squashed indictments and reversed convictions because it is more amenable to arbitrary or discriminatory selection.

The next step, under either system, involves summoning a larger number of prospective grand jurors (the jury pool) than the 16-23 who will eventually be chosen for grand jury service, in order to weed out those who are legally ineligible or cannot serve for other reasons. The standard qualifications for serving on grand juries include being functionally literate in the English language, a U.S citizen, at least 18 years of age, residing at least one year in the district where the grand jury will sit, and not having any felony convictions, current pending criminal charges, or other limitations that would preclude effective service (Allen, 1992; Frankel & Naftalis, 1977; *Handbook for Georgia Grand Jurors*, 2003). A number of jurisdictions also require that prospective jurors possess sound judgment and be of good character and morals==a hallmark of the key-man system. Certain occupational groups are automatically exempted from jury duty (e.g., police officers and physicians) because their uninterrupted service to the community is deemed more important than their serving on grand juries. Individuals summoned to or picked for jury service may be excused at the outset if serving would constitute an “undue hardship” or they would be unable to execute their duties impartially. In addition to the 16-23 members comprising a grand jury, several “alternate” jurors are also selected in the event it becomes necessary to replace any of the regular jury members in order to have a quorum, without which no business may be transacted. Grand juries are convened by the court, at scheduled intervals or “at such times as the public interest requires,” for terms of 2-6 months to as long as 18 months in the federal system, hence the reason for occupational exemptions and hardship excusals (Goldstein, 1998). Over the course of their term, jurors usually sit to hear cases just one or two days each week, depending on the size of the criminal caseloads in their counties and the number of grand juries sitting at the same time in the same jurisdiction (Belkins, 1989). Even in large counties in Atlanta, grand juries rarely sit for more than three days a week (R. Keller, personal communication, June 26, 2006).

Although petit juries are drawn from same sources and in same manner as grand juries, there is reason to believe that grand juries are more impartial in their deliberations and more representative of the community than trial juries. Since grand juries consists of 16-23 citizens, they are, by headcount alone, more representative of the community than 12-person petit juries⁶. All non-exempted summoned individuals who satisfy the minimal statutory qualifications have an equal chance of being seated, unlike in criminal trials where juror eligibility is just the first and perfunctory step toward choosing petit jurors.⁶ And because

⁶ Occupational exemptions are the same for both juries

there is no *voir dire* in empanelling grand juries there are no peremptory challenges, which are utilized by opposing counsel to select petit jurors who are apt to see things their way, i.e., to stack the deck with *partial* jurors. Being accepted as a grand juror is an uneventful process in which "one and all" are welcome and may serve without further scrutiny, compared to the composition of trial juries where many are interviewed but few get the job. The only consideration which may affect the comparative virtues of grand juries over trial juries is that courts may be more lenient in excusing grand juror candidates because of hardships associated with their much longer term of service. Even so, the *rate* of hardship dismissals in both types of juries would only impact representativeness if the relevant characteristics of hardship "rejects" were distinctly different from the non-hardship seated jurors (or venire itself) or were uniquely related to how they vote.

How Modern Grand Juries Operate

Grand jurors, prosecuting attorneys, and administrative personnel who officially participate in the proceedings are required to keep secret all matters occurring before the grand jury, unlike witnesses who are generally free to discuss their grand jury testimony with whomever they choose (*Federal Rules of Criminal Procedure*, 2005, 6 (e)). Even in the few of states which put a "gag order" on witness testimony, in *Butterworth v. Smith* (1990) the Supreme Court ruled that witnesses cannot be prevented from disclosing their testimony after the grand jury's term has ended. Secrecy requirements are intended to encourage witnesses to be completely truthful when testifying about their knowledge of crime commission, to prevent witness and/or juror tampering, to avoid leaking information to reporters, and to protect the identities and reputations of innocent accused who are not indicted. How much good muzzling grand jury personnel actually does in realizing the last objective is questionable; however, because in most cases the defendants have already been arrested and their identities made known through the grapevine, media, or public records, it is no secret that their cases are going to be presented before the grand jury. As part of the swearing-in process before impaneled jurors hear cases, the court instructs the panel not to indict any person "through hatred, malice, or ill will" and not to be deterred from returning an indictment "through fear, favor, or affection or for any reward or hope or promise thereof" (Benchbook for U.S. District Judges, 2000, Chapter 7.04). After administering the oath of secrecy and instructions concerning the grand jurors' general duties and authority, the court has no further direct contact with the seated jurors because the grand jury "is an institution separate from the courts, over whose functioning the courts do not preside" (*United States v. Williams* 1992, p. 47). Defendants—the "*targets*" of grand jury review—ordinarily are not entitled to testify or observe the proceedings of the grand jury. The only lawyer present during grand jury sessions is the prosecuting attorney who, acting as both an advocate for the government and grand jury's "legal adviser," makes an *ex parte* presentation of the case against defendants. The only time the prosecutor takes leave of the grand jury is when they deliberate on whether to indict the subjects or targets.

The prosecutor decides on the charges to be submitted to the grand jury, the witnesses to be called, and how much testimonial and physical evidence to introduce. Most presentations begin with an opening statement in which the prosecutor lays out the crimes charged and supporting documentation, which the grand jurors will learn more about from the oral testimony of scheduled witnesses and/or production of physical evidence. State grand juries commonly hear from a single witness (the investigating

police officer) per case, in a session lasting a matter of minutes from start to finish, which is why Harris County (Texas) grand juries are able to dispose of 60-90 cases a day in two days of sessions each week (Belkins, 1989). Typical federal presentations, which involve more complex criminal laws and charges, may take a few hours to wrap-up, provided that all the necessary witnesses are available (Subin, Berke, & Tirschwell, 2006). Prosecuting attorneys explain the grand jury's authority to request additional witnesses, to question witnesses directly or have their questions posed by the prosecutor, to base indictments on evidence that would normally not be admissible at trial, and to subpoena witnesses and compel testimony from recalcitrant witnesses. They also review the applicable statute which was violated by the defendant's conduct, the legal elements constituting the charges contained in the indictment, the level of proof (probable cause) needed to return an indictment, the relevance of the witnesses' testimony in establishing probable cause, and the jurors' right to request clarification from their mentor on specific legal points which may be germane to their deliberations. When, in rare circumstances, prosecutors are unable to confidently answer a juror's question, the proceedings will be suspended until the prosecutor has obtained a judicial opinion on the matter.

If the majority of a 23 member grand jury finds that the evidence presented would cause a reasonable person to believe that the accused is probably guilty of the offense charged, they issue an indictment or a "true bill." Twelve votes are still required to indict even if just 16 (a quorum) of the 23 grand jurors participated in the deliberations; states with smaller grand juries may require a two-thirds or three-quarters vote to indict. An indictment is a written accusation, prepared by the prosecutor and signed by the grand jury foreperson, which contains the formal charges, including each separate criminal charge in a multi-count indictment, on which the accused will subsequently be arraigned and stand trial. Grand jurors may choose to indict on a greater or lesser offense than the indictment charge requested by the prosecutor, or on a single count instead of all the charges contained in the Bill of Indictment. If the grand jury concludes that the evidence against the defendant falls short of probable cause, it refuses to indict: returns a "*no* (true) *bill*" and the defendant's case is dismissed.

Prosecutors can resubmit rejected cases to a new grand jury on the same charges, or go back to the original one later, with additional evidence in hand because the Fifth Amendment protection against double jeopardy does not apply to the grand jury stage. "In theory, you could submit a case repeatedly to a grand jury as long as it's within the statute of limitations. So, in a murder case, you could theoretically be subjected to trial for the rest of your life" (Taylor, 1993, p. 3). Indictment charges may be refiled "in the interests of justice," because as new evidence becomes available, the controversial issues involved demand a full airing at trial, or in response to political pressure from groups outraged over the grand jury's refusal to indict. In 1992, the first Austin grand jury refused to indict a knife-wielding home invader for rape because the young woman, fearful of contracting a sexually-transmitted disease, pleaded with the defendant to use a condom which she gave him, which some jurors took as evidence of "implied consent." After more than a 100 angry residents demonstrated in front of the Travis County Courthouse over the jury's decision, the prosecutor refiled charges before a second Austin grand jury which indicted Joel Valdez on aggravated sexual assault and burglary (Sanchez, 1992; Davis, 1992; Taylor, 1992; Texas Man Charged With Rape, 1992). After a Manhattan grand jury refused to indict Bernhard Goetz (the "subway vigilante") on any of the more serious charges for shooting four black youths on a subway train in January 1985, the district attorney

obtained an indictment from a second grand jury on attempted murder, assault and reckless endangerment, purportedly on the basis of "significant new evidence" developed in the interval and because of the explosive racial overtones in the case (Shipp, 1987).

Obtaining Indictments

In making their decisions, grand jurors must be able to obtain full and unguarded testimony from witnesses who can shed light on the defendant's culpability. Otherwise, criminal activity could be hidden behind a "wall of silence" based on the desire of private citizens not to get involved, fear of retaliation, and not wanting to be a "snitch." The grand jury's unhampered access to witnesses and ability to compel them to testify rests on the long-standing principle that the "obligation of every person to appear and give testimony ... [is] indispensable to the administration of justice" (Whitebread & Slobogin, p. 598). This "right to every man's evidence" (*United States v. Dionisio*, 1973, p. 331) means that witnesses who refuse to testify on Fifth Amendment self-incrimination grounds can be required to do so if granted immunity from prosecution because their testimony is needed to catch the bigger fish, who are the actual targets of the hearings. Once immunity has been granted, witnesses must answer the posed questions or risk being held in contempt of court and incarcerated for a period not exceeding the duration of the term of the grand jury before which they refused to testify⁷, or until they purge themselves of contempt by complying with the court's civil contempt order, i.e., the contempt sanction is coterminous with *that* grand jury's term (*Shillitani v. United States*, 1966). Immunized obstinate witnesses, however, can be resubpoened before a successive grand jury, and if they persist in "keeping mum" they can be held in contempt again and confined until the second grand jury's term ends, *ad infinitum* in theory, unless a cap is placed on the maximum total period of confinement.

There are few legal restrictions placed on the types of evidence which the grand jury may consider from cooperating witnesses (*United States v. R. Enterprises, Inc.*, 1991). Witness hearsay evidence is admissible almost everywhere. In many cases, the sole evidence placed before the grand jury consists of the testimony of police officers or federal agents who summarize what they have learned about the defendant from others. In *Costello v. United States* (1956), the Supreme Court held that indictments may be based entirely on such hearsay evidence. Evidence obtained in violation of the Fourth and Fifth Amendments is similarly admissible, such as the fruits of illegal searches or un-Mirandized confessions. In *United States v. Calandra* (1974), the Court emphasized that the exclusionary rule is inapplicable at the grand jury stage because their operation "generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials" (p. 343). The Supreme Court also refused to extend the exclusionary rule to the grand jury stage because of the difficulty of knowing, without a suppression hearing, whether the evidence was in fact unconstitutionally obtained. Last but certainly not least, the prosecutor is not required to disclose exculpatory evidence to the grand jurors because, as the

⁷A few state statutes implicitly deviate from the Shillitani principle that the intransigent witness' confinement must end when the grand jury has been discharged. Arizona provides that "If a person refuses to testify after being granted immunity and after being ordered to testify as aforesaid, he may be adjudged in contempt and committed to the county jail. If the grand jury before which he was ordered to testify has been dissolved, he may then purge himself by testifying before the court." Ariz Rev Stat Ann, section 13-4064.

Court reiterated in *United States v. Williams* (1992, p. 55), "neither justice nor the concept of a fair trial" hinges on telling grand jurors about evidence that is favorable to suspects and defendant.

There are formidable obstacles to quashing indictments before trial or having jury convictions flowing from flawed grand jury proceedings overturned. Even if, in hindsight, the grand jury's finding of probable cause was "wrong," the indictment cannot be nullified on insufficiency of evidence grounds. The prospect of dismissing indictments is severely weakened by the stringent barriers to dismissal endorsed and reiterated by the Supreme Court since it first addressed the issue a century ago (*Bank of Nova Scotia v. United States*, 1988; *United States v. Mechanik*, 1986; *Vasquez v. Hillery*, 1986; *Rose v. Mitchell*, 1979; *Campbell v. Louisiana*, 1998). Tracking the language of Rule 52 (a) of the Federal Rule of Criminal Procedure, the Court held that "error, defects, irregularities, or variances" occurring before a grand jury are subject to harmless error analysis. Dismissal is only appropriate for errors not affecting fundamental rights if it is established that the violation substantially influenced the grand jury's decision to indict or if there is grave doubt that the decision to indict was free from the substantial influence of such violations (*Bank of Nova Scotia v. United States*, 1988; *United States v. Mechanik*, 1986). Since the errors commonly alleged are technical or relatively narrow violations of statutory prescriptions or prohibitions, it is highly unlikely that defendants will be able to make a prima facie showing of prejudicial error: that but-for the claimed variances from grand jury rules, they would not have been indicted or would have been indicted on a lesser charge or fewer counts. If minor infringements of federal and state grand jury statutes do not result in indictment dismissal before trial, any post-conviction remedy is foreclosed because "the conviction of the defendants by the petit jury render[s] harmless any conceivable error in the charging decision that might have flowed from the violation," i.e., the subsequent guilty verdict on the indictment charges purges the tainted portion of the indictment. The opportunity for successful post-conviction challenge changes, however, when grand jury defects or irregularities rise to the level of a constitutional violation, such as a deprivation of Equal Protection by virtue of racial discrimination in the selection of grand juries. Because racial bias here "undermines the structural integrity of the criminal tribunal itself" and is "so pernicious and other remedies so impractical," once a reviewing court finds discrimination the error is not amenable to a harmless error inquiry. There is an irrebuttable presumption of prejudice and reversible error, which requires automatic reversal of the conviction (despite a flawless trial) and dismissal of the indictment, which are "the only means of deterring grand jury discrimination in the future" (*United States v. Mechanik*, 1986, p. 70). In *Vasquez*, a black defendant was indicted for murder by an all-white grand jury in Kings County (Ca.), where the trial judge personally handpicked all grand jurors during the preceding seven years, none of which included African-American jurors. If the grand juries had been chosen by chance or by a random selection method, the probability that no black would have been selected in the seven-year period was 2 in 1,000. Unmoved by the prosecution argument that the exclusion of blacks constituted harmless error, the Supreme Court held that fundamental fairness and the Equal Protection Clause is violated when a defendant "is indicted by a grand jury from which members of a racial group purposefully have been excluded" (*Vasquez v. Hillery*, 1986, p. 262).

Absent systematic exclusion of cognizable groups, egregious prosecutorial misconduct or isolated cases involving constitutional breaches of the codes governing grand jury administration, indictments returned by a legally constituted and unbiased grand jury are virtually immune from being dismissed before

or after trial. In the “subway vigilante” case, the intermediate court of appeals tossed out the indictments against Goetz on the grounds that the prosecutor used an improper standard⁸ in explaining the law of self-defense to the jurors (*People v. Goetz*, 1986). U.S. District Judge Ronald R. Lagueux set aside the indictment against a Providence (R.I.) police officer accused of beating two people because the prosecutor “gave the grand jury a charge that went beyond the law. He told the grand jury who was lying and who wasn’t lying. The really egregious thing was that he was telling the grand jury how to judge credibility” (Gibeaut, 2001, p. 37).

Grand Jury Reform

The principal criticism of the grand jury is that “prosecutorial control” over all facets of its operations has undermined the grand jury’s ability to function as an independent and effective screening body, resulting in their passively acquiescing to the prosecuting attorney’s wishes by “rubber-stamping” indictments. Contributing to the rubber-stamp claim is the “rapport” factor. Grand jurors who see the same prosecuting attorney day in and day out are said to be inclined to take their indictment cues from legal advisers whom they come to identify with and develop an allegiance toward. The changes in grand jury procedure discussed below are attempts to reduce prosecutorial control by giving witnesses more rights and providing greater protection to defendants who are the targets of grand jury review.

Most states do not afford grand jury witnesses the unencumbered assistance of counsel. Without counsel to advise them, many witnesses “with something to hide” may not be aware of their right to remain silent or to trade their self-incriminating testimony for immunity from prosecution, thereby exposing themselves to possible indictment for crimes related or unrelated to the instant case. (The prosecutor does not have to give subpoenaed witnesses Miranda-type warnings because the questioning of grand jury witnesses is not tantamount to police “custodial interrogation” of suspects.) To prevent the government from taking advantage of a witness’s ignorance of the right to remain silent, at least 18 states and federal law now grant witnesses the assistance of counsel under certain narrow circumstances (Resnick, 1992). Either before or while testifying, witnesses may consult with counsel who is waiting *outside* the grand jury room, the more common practice. Witnesses who want counsel’s advice on whether to answer particular questions, or to refuse and face contempt of court, then leave the chamber and the hearings are put on hold until they return. States which allow counsel to accompany witnesses *into* the grand jury room (the less common practice) do not permit them to address the grand jury, to enter objections or to question their clients, i.e., the lawyers cannot directly participate in the proceedings. Prosecuting attorneys claim that the availability of witness lawyers, under either scenario, disrupts the proceedings and interferes with the expeditious handling of indictment presentations.

A core criticism of grand jury protocol is that prosecuting attorneys ordinarily have no duty to apprise the grand jury of exculpatory evidence, no matter how exonerative such evidence may be. Requiring

⁸ New York intermediate courts dismissed the second grand jury’s indictments against Goetz because, in their view, in explaining the law of self defense to jurors the prosecutor had incorrectly used an “objective” standard (the hypothetical reasonable man) rather than a subjective test of whether Goetz’ use of deadly force was “reasonable to him.” The state’s highest court subsequently reinstated all of the dismissed counts, ruling that the objective standard—that of “a reasonable man in the defendant’s situation”—was the correct one and properly construed the clear intent of the Legislature.

disclosure of exculpatory evidence would allegedly make jurors less dependent on the prosecutor's one-side account of the facts supporting the indictment, aid them in screening out unfounded cases, and be a step toward representing the interests of the absent accused. Even if the exculpatory evidence was not strong enough to preclude an indictment, it might serve to mitigate the proposed charge to a lesser offense. Mandatory disclosure is also said to be dictated by the *shield* function (clearing the innocent) of modern grand juries. About one-quarter of the states require prosecutors to inform grand juries of "substantial" or "clearly" exculpatory evidence, a very high standard for defendants to satisfy; and because the terms "substantial" and "clearly" are not defined by statute or case law, the prosecutor effectively retains wide discretion over whether any exculpatory evidence will be revealed to the jurors.

Defendants are rarely entitled to testify before grand juries--they have no automatic right to tell jurors their version of the story. This position reflects the grand jury's historical development as an inquisitorial rather than an adversarial institution and the different functions of the grand jury and trial jury. Whether defendants wishing to testify will be permitted to do so is entirely up to the prosecuting attorney. Why the accused would want to testify, and the prosecutor would accede to or deny their request, depends on "what's in it" for both parties. By testifying, defendants open the door to the prosecution's using statements made to the grand jury to impeach and diminish the defendant's trial testimony. A defendant's testimony will rarely if ever be persuasive enough to negate probable cause; and there is always the chance that uncounseled defendants may inadvertently say something that will actually strengthen state's case-in-chief. On the other hand, in any give case a suspect's candor can make the difference between an indictment or no true-bill. And grand jurors may be inclined to give "any and all" exculpatory evidence presented by defendants speaking on their own behalf greater weight or special consideration. In New York, which is among a handful of states granting defendants an unqualified right to testify, 14% of the Brooklyn felony suspects who elected to do so in 2004 had their charges no-billed (Glaberson, 2004). Prosecutors, of course, make similar judgments on a case-by-case basis in deciding whether allowing defendants to testify will work to their advantage on balance.

Hawaii's innovative approach to curtailing the prosecutor's power entails transferring the "legal adviser" function to a court-appointed impartial, independent counsel who has no personal or professional stake in how the grand jury votes (Brenner, 1995). Under this reform, the grand jury has its "own lawyer" who explains the elements of the criminal charges, reviews the standard of probable cause, and answers any legal questions jurors have. Part of their jury charge might include a patterned instruction to return indictments only if strictly warranted by the evidence, and that they are the sole arbiters of probable cause and should not be influenced in their decision to indict (or not) by any other considerations. The grand jury counsel could, in the "interests of justice," decide to disclose exculpatory evidence in particular instances, or inform jurors that certain presented evidence was obtained in violation of the Fourth Amendment and would be suppressed at trial. By giving jurors a new, quasi-judicial source of information ("information is power"), Hawaii's reforms seek to strike a new balance of power between the prosecuting attorney and panel members, making it less likely that grand jurors will rubber-stamp indictments out of a feeling of "undivided loyalty" (*rapport*) toward the prosecutor.

Deliberating Rubber-Stamping Charges

The accusation that grand juries simply do the bidding of prosecutors by rubber stamping indictments, and thus do not exercise independent judgment in their deliberations, is strikingly tautological: evidence of "prosecutorial dominance" is found in exceptionally high indictment rates, and high indictment rates are taken as evidence that grand juries rubber stamp requests for indictments. As part of the swearing-in process, the impaneling judge normally impresses upon jurors that "you would violate your oath if you merely 'rubber-stamped' indictments brought before you by the government representatives"--emphasizes the jurors' independence from the prosecutor, and urges them to rely on their own good sense and not defer ("passively acquiesce") to prosecuting attorneys with whom they will necessarily be closely working (Benchbook for U.S. District Judges, 2000). Yet these cautionary instructions to avoid being influenced in their deliberations by the "wish list" of their legal advisers are completely ignored by the rubber-stamp enthusiasts, or apparently seen as a "pep talk" which is lost on grand jurors as soon as they begin hearing cases.

The premise underlying the reform agenda is that high indictment rates are a sinister artifact of and due to the absence of witness and defendant rights: the admissibility of illegally obtained evidence, reliance on hearsay evidence, the suppression of exculpatory evidence, the prosecutor's filtered account of the facts, etc. But since it is largely the current *legalistic* features of grand jury operation which make probable cause determinations so facile, how can grand juries be condemned for "rubber-stamping" indictments rather than concluding that they are simply "following the law?" By changing the rules of engagement, so the reform agenda argument goes, grand juries will cease to function as cogs in the prosecutor's wheel and express their new-found sense of "independence" by returning fewer indictments. However, what empirical evidence is there to indicate that indictment rates--*the* measure of rubber-stamping and independence--will be significantly reduced, given the pliable contours of probable cause, that only a bare majority of votes is needed to indict, and the minimal quantum of proof needed for the government to meet its burden.?

What is conspicuously absent in the grand jury polemic is any discussion of how the reformers' claims can be objectively evaluated. Sparse anecdotal accounts from former grand jurors who elect to publicly bemoan their experience with the process and criticize prosecuting attorneys hardly qualify as trustworthy testimony from disgruntled parties who can not be cross-examined. What is one to make of grand jurors who complain, "There was almost no discussion of the cases [during deliberations]. In every case grand jury Number 3 voted to indict every defendant, mostly on exactly the charges the prosecutor asked for" (Allen, 1992, p. 32). The responsibility for "automatically voting for indictments" rests with the jurors, not with their legal advisers who are out of the room while jurors deliberate without any set time limit for reaching a decision. The comment by a former grand juror in the District of Columbia may be more revealing about the reasons for the brevity of grand jury deliberations. On the first day of Rose's grand jury service she expressed her hope that "they'll let us out early today" so that she could attend a parole hearing for her boyfriend who had just been re-arrested (Allen, 1992, p. 9). If a 34-year old computer programmer "saw her fellow grand jurors sit inattentively as the government presented its cases," is this the fault of prosecuting attorneys who didn't mesmerize their audience by being more entertaining and charismatic in their delivery (Gibeaut, 2001, p. 35)? If prosecutors are perceived to "rush through" presentations, may it not be because there is usually little more that should or needs to be said or heard in order to establish probable cause, i.e., in run-of-the-mill cases there is little *to* deliberate? And if grand jurors resent being

made to "make felons" out of defendants who violate laws the jurors don't agree with because prosecutors should have informed them of their "right" to jury nullification, should prosecutors ignore judicial impaneling instructions telling jurors they "cannot judge the wisdom of the criminal law"? And should they flaunt opinions that "grand juries lose any guarantee of fairness if they have unfettered discretion to decide whether clear evidence of probable cause should be disregarded in each individual case?" (Cohen, 2005; *United States v. Marcucci*, 2002, p. 12047). Would the rubber-stamp critics like to see more grand jury decisions like the one in the condom rape case because their action characterizes "active" and "aggressive" grand juries--the kind urged by prosecutorial control conspiracy theorists--which do not march to the tune of prosecutorial Pied Pipers?

The relevance of prosecutorial dominance in accounting for high indictment rates is highly debatable. That grand juries do not reject more indictment recommendations may be due to considerations other than rubber-stamping, rapport, and procedural flaws. Prosecuting attorneys may screen out weak or borderline cases beforehand so that they never reach the grand jury, the low probable cause standard is easily satisfied, and the incriminating facts are indisputable in the typical presentation. This alternative interpretation for grand juries' seeing eye-to-eye with prosecuting attorneys is supported by the high percentage (circa 80%-85%) of indictments which result in convictions (Goldstein, 1998). It is extremely unlikely, for example, that not having to disclose clearly-exculpatory evidence to the grand jury--an indicator of "prosecutorial control"--can account for the impressive indictment "batting average." Because if such highly exculpatory evidence existed, why would 80%-85% of indicted defendants plead or be found guilty? The high conviction rate also strongly suggests that the brevity of grand jury deliberations is not due to prosecutorial pressures to rubber-stamp indictments without jurors thoroughly reviewing the evidence before voting. Although the great bulk of these convictions is through guilty pleas, by pleading guilty defendants implicitly concede that had they been tried they would have been found guilty beyond a reasonable doubt. Since later developments establish that those indicted by grand juries were "*certainly*" guilty of the crimes for which they were indicted or substituted plea-bargained offenses, grand juries may not find it necessary to spend much time mulling over the evidence before deciding that the targets of their deliberations are "*probably* guilty" of the submitted charges.

Hard survey data based on scientific research design exploring the validity of the reform proposals are hard to come by because of the secret nature of grand jury proceedings. But it is entirely feasible to conduct before-and-after experiments without entering the grand jury room, by comparing pre and post-indictment rates in areas where reforms have been implemented, or by comparing indictment rates for the same time period in adjacent venues, which have and have not adopted reform procedures. The specific effect of individual reform measures--such as mandatory disclosure of exculpatory evidence--on indictment rates could be investigated by having prosecuting attorney staff complete prepared data collection forms on each case presented over the course of the grand jury's term. Until such time as the case for grand jury reform is based on more than speculation, unsubstantiated accusation, and impassioned rhetoric, the reformers have not established a probable cause case that the grand jury has strayed from its historic mission to shield the innocent accused "against hasty, malicious and oppressive prosecution" (*Wood v. Georgia*, 1962, p. 390).

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