
RESTORING LEGITIMACY: THE GRAND JURY AS THE PROSECUTOR'S ADMINISTRATIVE AGENCY

Within weeks of each other in 2014, a grand jury in Ferguson, Missouri, and another in Staten Island, New York, both declined to indict police officers in the deaths of unarmed black men: Ferguson's eighteen-year-old Michael Brown and New York's forty-three-year-old Eric Garner.¹ Nationwide protests involving thousands erupted in the wake of the grand juries' decisions.² The protests fostered widespread criticism of the institution of the grand jury, prompting calls for its abolition as part of broader criminal justice reform. But federal and state grand juries have long been the subject of immense criticism from scholars, defense attorneys, and activists.³ The recent controversies merely drew public attention to flaws in the grand jury system that had been there all along. In 1972, Professor James Shannon wrote:

[T]he grand jury has lost its historical identity as a shield protecting innocent citizens from unwarranted charges by officers of the law, and has become a shield protecting officers of the law from possible criminal charges by the citizenry. The grand jury has thus become in effect an administrative agency, executing in secrecy and with unlimited discretionary power, the policies, also determined in secret, of law enforcement officers who continue to maintain the fiction that the grand jury is a free and autonomous body impartially ferreting out objective truth. This proposition is simply no longer believable.⁴

These words, written over four decades ago, nevertheless mirror the scathing contemporary criticism of the grand jury and its role in today's criminal justice system. But a particular line in Shannon's cri-

¹ See J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2014), <http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html> [<https://perma.cc/TT76-5EFE>].

² See *Ferguson Grand Jury Decision Sparks Protests Nationwide*, CBS NEWS (Nov. 24, 2014, 11:54 PM), <http://www.cbsnews.com/news/ferguson-grand-jury-decision-sparks-protests-nationwide> [<https://perma.cc/LY4U-BHUY>]; S.P. Sullivan, *Grand Jury Decision in Staten Island Reverberates Across N.J.*, NJ.COM (Dec. 6, 2014, 10:08 AM), http://www.nj.com/news/index.ssf/2014/12/grand_jury_decision_in_staten_island_reverberates_across_nj.html [<https://perma.cc/VM5N-6T5S>].

³ See, e.g., Richard P. Alexander & Sheldon Portman, *Grand Jury Indictment Versus Prosecution by Information — An Equal Prosecution-Due Process Issue*, 25 HASTINGS L.J. 997, 1000–01 (1974); Peter Arenella, *Reforming the State Grand Jury System: A Model Grand Jury Act*, 13 RUTGERS L.J. 1, 6–8 (1981); Patricia Mar, *The California Grand Jury: Vestige of Aristocracy*, 1 PAC. L.J. 36, 47 (1970); Kevin K. Washburn, *Restoring the Grand Jury*, 76 FORDHAM L. REV. 2333, 2352–53 (2008). But see Thomas P. Sullivan & Robert D. Nachman, *If It Ain't Broke, Don't Fix It: Why the Grand Jury's Accusatory Function Should Not Be Changed*, 75 J. CRIM. L. & CRIMINOLOGY 1047, 1049 (1984) (arguing that the grand jury system already “adequately fulfills an appropriate accusatory function”).

⁴ James P. Shannon, *The Grand Jury: True Tribunal of the People or Administrative Agency of the Prosecutor?*, 2 N.M. L. REV. 141, 166–67 (1972).

tique deserves further exploration: “The grand jury has thus become in effect an administrative agency.” The recent high-profile grand jury decisions have damaged the grand jury’s legitimacy in the eyes of the public and have provided an opportunity to explore the ways in which the grand jury resembles an administrative agency. Because the grand jury is the “administrative arm” of the prosecutor, responsible for converting charges into indictments, it is appropriate to consider lessons from the quest for legitimacy in the administrative-agency context.

Part I of this Note will delve into the structure of the grand jury as it currently stands, including the grand jury’s core characteristics of secrecy and dependence on the prosecutor. Part II will define the term “legitimacy,” using recent high-profile grand jury cases to elaborate on criticisms of the grand jury system. Part III will highlight the similar legitimacy concerns raised by grand juries and administrative agencies — such as lack of transparency, arbitrariness, and failure to incorporate the community’s voice — as well as address distinctions between the two. Lastly, Part IV will discuss solutions to the legitimacy issue in the agency context — enhanced political accountability and measures to avoid the appearance of arbitrariness — and the applicability of such solutions to grand juries.

I. THE GRAND JURY AS AN INSTITUTION

The use of grand juries is ubiquitous: federal grand juries are enshrined in the Fifth Amendment,⁵ and while not required under most state constitutions, all states use the grand jury to either indict or investigate.⁶ In light of the grand jury’s ubiquity, this Part will discuss the grand jury’s primary functions, which are to return indictments when the prosecutor’s case meets the probable cause standard and to represent the community’s voice in the criminal justice system. This Part will then discuss the significant influences of prosecutorial control and grand jury secrecy, which impair the grand jury’s ability to adequately serve its roles.

A. *The Dual Function of the Grand Jury*

Although states vary significantly in details such as the number of grand jurors who hear each case and which criminal charges require a grand jury indictment, the typical grand jury process is for the prosecutor to present evidence, including witness testimony, after which the grand jury deliberates and votes on “whether there is probable cause

⁵ U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .”).

⁶ Susan W. Brenner, *The Voice of the Community: A Case for Grand Jury Independence*, 3 VA. J. SOC. POL’Y & L. 67, 97–98 (1995).

that the accused committed the crime and should stand trial.”⁷ When a prosecutor has met the probable cause standard,⁸ the grand jury is expected to vote to indict the accused. Alternatively, the grand jury is expected to prevent charges from being brought by returning a “no bill” when a prosecutor’s case has not met the probable cause standard.⁹ Because the grand jury is intended to use its powers of subpoena, immunity, and contempt to act as a screen,¹⁰ it has been “hailed . . . as an indispensable buffer of protection from malicious and unfounded prosecution by the State.”¹¹ In tandem with this screening function, the premise of the grand jury is that it incorporates “the laypeople’s perspective — the voice of the community — into the charging process.”¹²

B. Prosecutorial Discretion and Control

1. *Prosecutorial Discretion in the Justice System.* — Crucial to understanding the context within which grand jurors serve this dual function is the fact that prosecutors wield considerable power in the system at large. Prosecutors make charging decisions, offer plea deals, and recommend sentences.¹³ As “the most powerful officials in the criminal justice system,” prosecutors make discretionary decisions with a tremendous impact on outcomes for criminal defendants.¹⁴ Courts have also deemed many aspects of prosecutorial decisionmaking unreviewable; for example, the charging decision “has long been regarded as the special province of the Executive Branch.”¹⁵ Additionally, the

⁷ OFFICE OF THE EXEC. SEC’Y, SUPREME COURT OF VA., HANDBOOK FOR VIRGINIA GRAND JURORS 1 (May 2013), http://www.courts.state.va.us/courts/circuit/handbook_grand_jurors.pdf [<https://perma.cc/4EER-AWZK>].

⁸ Under federal law, probable cause to indict “requires only the ‘kind of “fair probability” on which “reasonable and prudent [people,] not legal technicians, act.”” *Kaley v. United States*, 134 S. Ct. 1090, 1103 (2014) (alteration in original) (quoting *Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013)). Some states, however, “use a stricter formulation of probable cause.” William Ortman, *Probable Cause Revisited*, 68 STAN. L. REV. 511, 559 (2016); see Arenella, *supra* note 3, at 27 n.76 (discussing the “more rigorous probability-of-conviction standard of probable cause” to indict).

⁹ See Arenella, *supra* note 3, at 7–8 (describing the grand jury’s traditional investigatory and accusatory functions).

¹⁰ See *id.* at 7.

¹¹ George Edward Dazzo, Note, *Opening the Door to the Grand Jury: Abandoning Secrecy for Secrecy’s Sake*, 3 D.C. L. REV. 139, 139 (1995).

¹² Brenner, *supra* note 6, at 121. “Like voting, grand jury service gives [citizens] the opportunity to participate — in a very direct and personal way — in our democracy.” N.Y. STATE UNIFIED COURT SYS., GRAND JUROR’S HANDBOOK, http://www.nyjuror.gov/pdfs/hb_grand.pdf [<https://perma.cc/38YK-6VQ9>].

¹³ See Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 871, 872 n.11 (2009); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1980 (1992); William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1978 (2008).

¹⁴ ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 5 (2007).

¹⁵ *Heckler v. Chaney*, 470 U.S. 821, 832 (1985).

increasing number of criminal laws and the sentences attached to them further enhance prosecutorial leverage,¹⁶ and courts have sanctioned the use of such leverage during the plea bargaining process.¹⁷

Importantly, the high likelihood that a defendant who faces this prosecutorial leverage will plead guilty rather than go to trial leaves grand juries as the main avenue for community involvement in the criminal justice system.¹⁸ Up to ninety-five percent of defendants never see the procedural protections of trial.¹⁹ As will be discussed in the next section, the grand jury is no longer effectively shielding the accused from unjustified prosecution, while at the same time, compensatory protections have not developed elsewhere in the system to fulfill the grand jury's traditional functions. Although the grand jury was intended to serve as the "voice of the community," using its probable cause determination to cast light on the adjudicative process by screening unjustified charges, the criminal justice system now relies instead on the shadow cast by the ostensible procedural protections of trials that rarely materialize.²⁰

2. *Prosecutorial Control over Grand Juries.* — The prosecutorial control that dominates the system also applies to grand juries. The most important factor in the grand jury's probable cause determination is the evidence presented during the proceedings, and the prosecutor is the sole source of the evidence upon which the grand jury must decide whether to indict. Thus, "[i]t can fairly be said that the prosecutor holds all the cards before the grand jury."²¹ Furthermore, the grand jury is structurally dependent on the prosecutor. The grand jury lacks a physical building or staff and is not a singular body, but rather "a series of panels of citizens summoned for part-time service as grand jurors, who meet at the convenience of the prosecutor and the court."²² The complete prosecutorial control over the grand jury — particularly over the flow of information and grand jury procedure — solidifies the grand jury's dependence on the prosecutor.

¹⁶ See Doris Marie Provine, *Too Many Black Men: The Sentencing Judge's Dilemma*, 23 LAW & SOC. INQUIRY 823, 833 (1998).

¹⁷ See, e.g., *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) ("[B]y tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty.").

¹⁸ See Arenella, *supra* note 3, at 12–13.

¹⁹ LINDSEY DEVERS, BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, PLEA AND CHARGE BARGAINING 1 (2011), <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf> [<https://perma.cc/7EB3-5M6L>].

²⁰ See Peter Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 463, 468 (1980).

²¹ *Commonwealth v. Walczak*, 979 N.E.2d 732, 752 (Mass. 2012) (Lenk, J., concurring).

²² Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1, 29 (2004).

The idea of grand jury independence may have once inspired public confidence;²³ the grand jury has often been described as both a sword investigating criminal conduct and a shield between the individual and the unrestrained power of the government.²⁴ But to repurpose this metaphor, there is a growing perception that grand juries are the prosecutor's sword — to be used in furtherance of governmental goals — while acting as the prosecutor's shield from the prying eyes of the public. This perception is significantly buttressed by both prosecutorial control over grand jury proceedings and the secrecy that covers almost all aspects of those proceedings.

C. *The Pervasiveness of Grand Jury Secrecy*

Secrecy is a core characteristic of grand juries,²⁵ covering both the nature of the grand jury processes and the details of ongoing investigations. As a traditional aspect of grand juries, secrecy has been justified by the rationales of avoiding giving the accused a chance to flee, protecting the reputation of the accused prior to an indictment, preventing witness tampering or harassment, and fostering uninhibited juror deliberation and investigation.²⁶ State laws typically strictly limit who can be in the room during grand jury proceedings and impose penalties for violating grand jury secrecy rules.²⁷

However, grand jury secrecy has been criticized for “frustrat[ing] popular comprehension of [the grand jury’s] already enigmatic character.”²⁸ Because all aspects of grand juries are hidden from the public, including “the very fact of their existence at particular times, the system eliminates a valuable source of oversight Secrecy thus permits entrenchment of the status quo[—]prosecutorial control.”²⁹ In this way, the public’s lack of knowledge about individual grand juries, and about grand jury processes in general, further enhances prosecutorial control over grand juries.

²³ See Melvin P. Antell, *The Modern Grand Jury: Benighted Supergovernment*, 51 A.B.A. J. 153, 153 (1965).

²⁴ E.g., Arenella, *supra* note 20, at 484–85, 484 n.105.

²⁵ See Kuckes, *supra* note 22, at 2 (describing grand juries as “mysterious” and “clouded in ambiguity”).

²⁶ See *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 405 (1959) (Brennan, J., dissenting). For an overview of arguments in favor of grand jury secrecy, see generally Samuel Dash, *The Indicting Grand Jury: A Critical Stage?*, 10 AM. CRIM. L. REV. 807, 818–24 (1972).

²⁷ See, e.g., N.Y. STATE UNIFIED COURT SYS., *supra* note 12, at 8.

²⁸ Roger A. Fairfax, Jr., Essay, *Should the American Grand Jury Survive Ferguson?*, 58 HOW. L.J. 825, 827 (2015).

²⁹ Brenner, *supra* note 6, at 96.

D. *Indicting a Ham Sandwich*

Especially in light of the prosecutorial control over grand juries and the secrecy surrounding grand jury proceedings, statistics cast doubt on how well the grand jury is serving its screening function.³⁰ Despite the lack of comprehensive state data, statistics from the Bureau of Justice Statistics on federal prosecutions indicate that a grand jury declining to return an indictment is a rare event. Grand juries declined to indict in 11 out of 162,351 federal cases in 2010.³¹ In the words of Justice Douglas: “It is, indeed, common knowledge that the grand jury, having been conceived as a bulwark between the citizen and the Government, is now a tool of the Executive.”³² In this vein, the principal criticisms of grand juries refer to their inability to protect individuals from unwarranted prosecution due to their failure to adequately screen cases.³³ This lack of faith in the grand jury’s screening function is illustrated by the common saying that grand juries would indict a “ham sandwich.”³⁴ The next Part will elaborate on how the grand jury has failed to fulfill its mission and on the resulting harms to its legitimacy.

II. HARMS TO THE GRAND JURY’S LEGITIMACY

After defining legitimacy, this Part will describe the context surrounding the grand juries convened over actions related to the deaths of Tamir Rice and Michael Brown, as these cases illustrate substantial harms to the grand jury’s legitimacy. This Part will then discuss and rebut the justifications for the current system of prosecutorial control and secrecy. Given the pitfalls shown by the above cases, discarding the grand jury may seem to be an acceptable reform measure. But as described in Part I, the grand jury has important functions, and the community’s voice will be lost if prosecutors avoid its use.

³⁰ See Ben Casselman, *It’s Incredibly Rare for a Grand Jury to Do What Ferguson’s Just Did*, FIVETHIRTYEIGHT (Nov. 24, 2014, 9:30 PM), <http://fivethirtyeight.com/datalab/ferguson-michael-brown-indictment-darren-wilson> [https://perma.cc/93PM-4FD4]. But see Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 274–75 (1995) (cautioning against drawing hasty conclusions from the statistics).

³¹ See, e.g., MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, FEDERAL JUSTICE STATISTICS 2010 — STATISTICAL TABLES 11–12 (2013). However, it is important to note the possibility that the indictment rates could also partially reflect that prosecutors are bringing strong cases to the grand juries. See Leipold, *supra* note 30, at 276.

³² *United States v. Mara*, 410 U.S. 19, 23 (1973) (Douglas, J., dissenting).

³³ Kuckes, *supra* note 22, at 18–19; see also Leipold, *supra* note 30, at 294.

³⁴ E.g., *In re Grand Jury Subpoena of Stewart*, 545 N.Y.S.2d 974, 977 n.1 (Sup. Ct.), *modified*, 548 N.Y.S.2d 679 (App. Div. 1989).

A. Defining Legitimacy

One understanding of legitimacy refers to whether there is in fact a legal basis for an action, whether by statute, constitution, or judicial decision.³⁵ This Note will use the shorthand phrase of “legitimacy in outcome” to reference this understanding of legitimacy. As grand juries have been charged with issuing or declining indictments, the system’s legitimacy would be based on the accuracy of its screening function — whether decisions to indict are based on probable cause, and whether cases that do not meet the probable cause standard are screened out. Under this understanding of legitimacy, voting to indict in cases that do not have probable cause and screening out cases that have probable cause would also demonstrate arbitrariness through treating similar situations dissimilarly.³⁶

But the concept of legitimacy can also be extended further to the more intangible idea of whether the community *perceives* an action as acceptable, morally right, and worthy of support³⁷ — which this Note will refer to as “perceived legitimacy.” Applied to grand juries, this form of legitimacy stems from the community’s acceptance of grand jury decisions and proceedings as just.

The importance of both forms of legitimacy to a well-functioning system has been highlighted by recent high-profile cases concerning officer-involved shootings. These cases demonstrated different prosecutorial ways of handling the process, yet all either raised questions about the arbitrariness of grand jury decisionmaking or otherwise harmed the community’s confidence in the institution of the grand jury.

B. Undermining the Grand Jury’s Legitimacy

The grand jury hearing to determine whether there was probable cause to indict those involved in the death of Tamir Rice presents an example of harms to perceived legitimacy stemming from public confusion and procedural injustice. Tamir Rice was a twelve-year-old black boy who was shot and killed in Cleveland by a police officer who said that he saw Rice drawing a gun from his waistband.³⁸ The gun turned out to be a toy gun. When the prosecutor announced that

³⁵ See Timothy H. Jones, *Administrative Law, Regulation, and Legitimacy*, 16 J.L. & SOC’Y 410, 410 (1989).

³⁶ Cf. Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 464 (2003) (noting the risks of arbitrary decisionmaking by administrative agencies).

³⁷ See Jones, *supra* note 35, at 410.

³⁸ Teddy Cahill et al., *Calls for Calm After Grand Jury Declines to Indict Officers in Death of Tamir Rice*, WASH. POST (Dec. 29, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/12/28/tamir-rice-grand-jury-announcement-expected-monday> [<https://perma.cc/XE49-BTPX>].

the grand jury did not indict the officer, the public was confused about the procedure used during the grand jury proceedings, including the meaning of the prosecutor's statement that the grand jury had "declined to indict" and whether or not the grand jury had actually voted on bringing charges.³⁹ The spokesman for the prosecutor's office stated initially in an interview that the grand jury had not held a vote; days later, he attempted to clarify that he had been referring specifically to a vote on criminal charges and that the grand jury *had* voted on whether the shooting was justified.⁴⁰ The resulting public confusion about the proceedings diminished community members' sense of the process's legitimacy, particularly amid such a controversial case.⁴¹

The public's confusion about the grand jury process used in the Tamir Rice case also highlights how the secrecy of grand jury procedures exacerbates the public's lack of knowledge about grand juries. This confusion created a vacuum of public information that allowed accusations of manipulation and sabotage to flourish. When the prosecutor announced that the grand jury had declined to indict the officers involved, protests erupted because some believed the prosecution had "deliberately sabotaged" the grand jury process.⁴² For example, the Rice family released a statement that "Cuyahoga County Prosecutor Timothy McGinty was abusing and manipulating the grand jury process to orchestrate a vote against indictment."⁴³ This confusion about process allowed for the perception to grow that the prosecutor was hiding behind the grand jury to limit the negative fallout and political damage. Such a situation could have been prevented by increased transparency about the process used in the state generally and for that grand jury specifically.

In contrast with the transparency criticisms described above, distinct — but equally important — criticisms were leveled at St. Louis County Prosecutor Bob McCulloch after he announced the grand jury's decision not to indict Officer Darren Wilson for the death of

³⁹ Eric Sandy, Vince Grzegorek & Sam Allard, *The Grand Jury in the Tamir Rice Case Did Not Take a Vote on Charges*, CLEVESCENE (Jan. 20, 2016, 3:04 PM), <http://www.clevescene.com/scene-and-heard/archives/2016/01/20/the-grand-jury-in-the-tamir-rice-case-did-not-take-a-vote-on-charges> [https://perma.cc/993J-H6JL].

⁴⁰ See Mark Berman, *Grand Jurors in the Tamir Rice Case Voted that the Shooting Was Justified, Did Not Vote on Specific Criminal Charges*, WASH. POST (Jan. 20, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/01/20/grand-jurors-in-the-tamir-rice-case-voted-that-shooting-was-justified-did-not-vote-on-specific-criminal-charges> [https://perma.cc/2SM5-USC5].

⁴¹ See Cahill et al., *supra* note 38.

⁴² *Id.*

⁴³ Dan Turkel, *Tamir Rice's Family Accuses Prosecutor of "Manipulating" Grand Jury to Get Cops Out of Indictment for 12-Year-Old's Death*, BUS. INSIDER (Dec. 28, 2015, 7:10 PM), <http://www.businessinsider.com/ohio-prosecutor-tamir-rice-said-to-be-trying-to-lose-2015-12> [https://perma.cc/KN8N-M2DB].

Michael Brown.⁴⁴ The grand jury proceedings that McCulloch presided over were described as “extraordinary” because he presented virtually all of the available evidence, including witnesses who contradicted *and* supported the officer’s testimony, several autopsy reports, bloodstains, and shell casings.⁴⁵ Because prosecutors are not required to present evidence that does not support an indictment,⁴⁶ this prosecutorial maneuver of inundating the jurors with conflicting evidence was described as “shrewd” by commentators since it allowed for the deflection of responsibility for the failure to indict the officer while seemingly steering the grand jury away from finding that there was probable cause to charge.⁴⁷ Despite using more balanced proceedings that would appear to be “the opposite of the . . . ham-sandwich approach,”⁴⁸ the prosecutor’s ability to alter the amount and type of evidence presented fueled perceptions of arbitrariness in the grand jury’s decisionmaking and underscored the depth of prosecutorial discretion.

C. *Rebutting the Justifications for the Current Structure*

In the Cleveland and Ferguson cases discussed above, the public confusion about procedure and the prosecutor’s deviation from the typical grand jury process specifically affected the grand jury’s legitimacy through arbitrariness, lack of transparency, and perceptions that the grand jury was being used as a shield from political blame. But despite the criticisms, the current grand jury system has benefits, particularly with regard to the streamlined, efficient nature of the pretrial process — which avoids transforming the grand jury into a mini-trial⁴⁹ — as well as concerns about witness safety and the presence and reputation of the accused.⁵⁰ While the reforms suggested in subsequent sections of this Note may help to ensure transparency and decrease arbitrariness, such reforms would require additional costs in the

⁴⁴ Associated Press, *St. Louis County Prosecutor Bob McCulloch Faces New Criticism over Ferguson Case*, SILIVE.COM (Nov. 26, 2014, 8:17 AM), http://www.silive.com/news/index.ssf/2014/11/prosecutor_faces_new_criticism.html [<https://perma.cc/9CUQ-CLFQ>].

⁴⁵ David Zucchini, *Prosecutor’s Grand Jury Strategy in Ferguson Case Adds to Controversy*, L.A. TIMES (Nov. 25, 2014, 8:49 PM), <http://www.latimes.com/nation/la-na-ferguson-da-analysis-20141126-story.html> [<https://perma.cc/48AP-KGZN>]; *see also* Joel Cohen & Bennett L. Gershman, *Reflecting on the Ferguson Grand Jury*, HUFFINGTON POST (Dec. 2, 2014, 3:19 PM), http://www.huffingtonpost.com/joel-cohen/reflecting-on-the-ferguso_b_6249714.html [<https://perma.cc/WQ8C-PE7H>].

⁴⁶ *See* United States v. Williams, 504 U.S. 36, 52 (1992).

⁴⁷ Zucchini, *supra* note 45.

⁴⁸ Jeffrey Toobin, *How Not to Use a Grand Jury*, NEW YORKER (Nov. 25, 2014), <http://www.newyorker.com/news/news-desk/use-grand-jury> [<https://perma.cc/8357-B763>].

⁴⁹ *See* United States v. Calandra, 414 U.S. 338, 349–50 (1974).

⁵⁰ *See supra* note 26 and accompanying text.

form of more procedure, although the reforms would stop short of requiring a preliminary hearing.⁵¹

But perhaps grand jury secrecy does not deserve its exalted status as one of the grand jury's core characteristics. As stated by Justice Brennan: "Grand jury secrecy is maintained to serve particular ends. But when secrecy will not serve those ends or when the advantages gained by secrecy are outweighed by a countervailing interest in disclosure, secrecy may and should be lifted . . ." ⁵² The secrecy surrounding grand jury proceedings allows for prosecutorial abuse by preventing effective citizen oversight, and the significant need for greater transparency around grand jury procedures is illustrated by the widespread confusion about process after the prosecutor announced that the grand jury had declined to indict the officers involved in the shooting of Tamir Rice. Additionally, some of the considerations in favor of secrecy are less relevant in cases in which the defendant is an officer of the state: protecting the reputation of the accused would be less pertinent in a high-profile case in which the name of the officer had already been widely publicized; not giving the accused a chance to flee would be less critical since accused officers would appear to be low flight risks; and guarding against witness intimidation would be less pressing because the state would seem to be less likely to engage in such harassment.

Reform is also necessary because despite the reduced number of trials, grand juries still allow for community participation in the justice system,⁵³ and meaningful community participation is inherently not cheap. Considering the pretrial burdens faced by defendants after an indictment, in terms of both reputation and the costs of raising a defense, the criminal justice system needs to be even more stringent in ensuring that the probable cause standard is being met. Thus, the concerns for fostering community participation and protecting the rights of the accused should override efficiency.

D. Risks of Sidestepping the Grand Jury

Given the criticisms of the current grand jury system, one potentially efficient and accountable solution would be for the prosecutor to remove the charging decision from the grand jury's hands, as occurred in the Jamar Clark case in Minneapolis, Minnesota. Clark died when a police officer shot him in the head. Some witnesses said that Clark was handcuffed when he was shot, while the officers said that he was

⁵¹ In contrast with a grand jury hearing, a preliminary hearing is open, and the accused, through counsel, may cross-examine witnesses and offer testimony. See Dash, *supra* note 26, at 810.

⁵² *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 403 (1959) (Brennan, J., dissenting).

⁵³ See *supra* notes 18–20 and accompanying text.

reaching for a gun.⁵⁴ Citing the grand jury's accountability and transparency limitations, the prosecutor announced that a grand jury would not be convened⁵⁵ and instead conducted his own investigation, ultimately concluding that the evidence was insufficient to pursue charges.⁵⁶ The announcement touched off weeks of protests.⁵⁷

Having prosecutors make their own probable cause determinations may seem to be an improvement from the standpoint of political accountability because it moots any potential perception that prosecutors are manipulating grand juries or avoiding transparency. However, such a solution raises its own difficulties, particularly in the most controversial cases, by excluding community input. The institution of the grand jury seeks to "enhance a perception of justice."⁵⁸ But bypassing the grand jury eliminates the community's voice at this important stage of the judicial process.

III. THE GRAND JURY AS AN ADMINISTRATIVE AGENCY

Building on the preceding Parts' discussions of the grand jury's role in the criminal justice system and the criticisms of its performance, this Part will compare grand juries to administrative agencies and discuss the similar dangers to legitimacy — specifically, transparency deficits, arbitrariness, and majoritarian concerns — raised by both.

A. Overview of Administrative Agencies

According to the D.C. Circuit, the Administrative Procedure Act⁵⁹ (APA) "apparently confers agency status on any administrative unit with substantial independent authority in the exercise of specific functions."⁶⁰ Administrative agencies combine legislative and adjudicatory functions in that Congress enacts broad regulatory provisions and del-

⁵⁴ *What We Know About the Death of Jamar Clark*, STAR TRIB. (Mar. 30, 2016, 6:05 PM), <http://www.startribune.com/what-we-know-about-the-death-of-jamar-clark/353199331> [<https://perma.cc/K26R-BNSM>].

⁵⁵ Michael O. Freeman, *Hennepin County Attorney Mike Freeman's Statement About Decision Not to Use a Grand Jury in Jamar Clark Case*, OFF. HENNEPIN COUNTY ATT'Y (Mar. 16, 2016), <http://www.hennepinattorney.org/~media/Attorney/NEWS/2016/jamarclark-%20onogrand-jury-statementmarch16.pdf> [<https://perma.cc/EKK5-4F28>].

⁵⁶ Paul Walsh & David Chanen, *NAACP Calls for Special Prosecutor to Re-investigate Jamar Clark Shooting*, STAR TRIB. (Apr. 4, 2016, 11:42 PM), <http://www.startribune.com/woman-with-jamar-clark-to-say-he-didn-t-assault-her-she-wasn-t-his-girlfriend/374493131> [<https://perma.cc/9PPM-4QKT>].

⁵⁷ Dana Ford et al., *Jamar Clark Death: Protesters Rally After No Charges Filed Against Police*, CNN (Mar. 30, 2016, 10:05 PM), <http://www.cnn.com/2016/03/30/us/minneapolis-jamar-clark-police-shooting-no-charges> [<https://perma.cc/GJX9-8PD9>].

⁵⁸ Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1, 55 (2002) (emphasis omitted).

⁵⁹ Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

⁶⁰ *Soucie v. David*, 448 F.2d 1067, 1073 (D.C. Cir. 1971).

egates to agencies the task of defining the precise “range of proscribed conduct.”⁶¹ Agency legitimacy concerns arise from the lack of a clear connection between agency decisionmaking and the democratic process.⁶² Grand juries function as the prosecutor’s administrative agency in that grand juries make adjudicative decisions despite being at least a step removed from an elected official. As a result, it may be constructive to look to lessons from administrative law that bear upon perceptions of legitimacy.

Agency regulation is guided by administrative law, which includes principles intended to ensure that agencies carry out fair decisionmaking procedures free from arbitrariness or bias.⁶³ The initial development of agencies in the late nineteenth century raised concerns about how agency authority could be reconciled with democratic government, and a potential solution was found in judicial review, which ensured that agency action had been statutorily authorized by a democratically elected legislature.⁶⁴ The legitimacy concern intensified during the New Deal era, when increasing governmental complexity necessitated the delegation of significant amounts of discretion to administrative and regulatory agencies; in response, some argued that regulatory management under experts legitimated agency authority.⁶⁵ The late 1960s ushered in an interest-representation model focused on ensuring that agency discretion was responsive to the concerns of affected interests. In addition, under hard look review, courts required agencies to respond to submissions by participating interest groups and justify policy decisions based on the rulemaking record.⁶⁶ Since then, deference to agencies has generally increased⁶⁷ and then decreased.⁶⁸

⁶¹ William T. Mayton, *The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking*, 1980 DUKE L.J. 103, 104.

⁶² See Marshall J. Breger, *The Quest for Legitimacy in American Administrative Law*, 40 ISR. L. REV. 72, 73 (2007).

⁶³ See Richard B. Stewart, Essay, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 438–39 (2003).

⁶⁴ See Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1751 (2007).

⁶⁵ See Stewart, *supra* note 63, at 440–41.

⁶⁶ *Id.* at 442. Additionally, agencies were required to perform cost-benefit analyses of proposed major regulations, which were subject to review by the Office of Management and Budget, not by the courts. Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 3 (1995).

⁶⁷ See generally Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833 (2001).

⁶⁸ See generally John F. Coverdale, *Chevron’s Reduced Domain: Judicial Review of Treasury Regulations and Revenue Rulings After Mead*, 55 ADMIN. L. REV. 39 (2003).

B. Lack of Transparency and Accountability

As indicated by the brief description above, administrative law has long placed an emphasis on judicial supervision. Importantly, in addition to public participation through rulemaking, judicial review has required greater transparency in administrative law.⁶⁹ Transparency concerns surrounding agencies have been widely discussed,⁷⁰ as “equal access, transparency, and judicial review are considered cornerstones of accountable government.”⁷¹ To promote transparency, agency discretion has also been accompanied by legislative controls.⁷² Congress has, for example, required open records, allowed for “rigorous processes for advisory groups,” and mandated the inclusion of all interested participants.⁷³

This relative transparency contrasts with the grand jury system, so often described as shrouded in secrecy and fully within the prosecutor’s domain. The structures of both agencies and grand juries raise concerns about transparency, but with regard to agencies, reforms evolved to allow for greater public access to administrative decisions.⁷⁴ In contrast, prosecutorial discretion remains essentially unchecked. But viewing grand juries through this alternative lens would allow for more openness to oversight, which would in turn require greater transparency.

Transparency in agency decisionmaking thus facilitates oversight by legislative controls, judicial review, or quasi-political supervision; in the grand jury context, increased transparency can also promote oversight. However, for grand juries, this oversight may take the form of political accountability as the courts have rejected judicial review as an avenue of oversight.⁷⁵ A counterargument to the efficacy of such political accountability is that increased transparency may be insufficient to alter prosecutorial behavior or change voter calculus, given tough-on-crime pressures and other political forces.⁷⁶ However, the re-

⁶⁹ See, e.g., *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

⁷⁰ See, e.g., Jacob E. Gersen & Anne Joseph O’Connell, *Hiding in Plain Sight? Timing and Transparency in the Administrative State*, 76 U. CHI. L. REV. 1157 (2009).

⁷¹ Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1324 (2010).

⁷² See Shannon, *supra* note 4, at 167.

⁷³ Wagner, *supra* note 71, at 1323; see also Stewart, *supra* note 63, at 452 (observing that benchmarks and accurate reporting of regulatory actions would allow for enhanced “political visibility and accountability of the method of regulation”).

⁷⁴ “From the outset, drafters of the APA considered public scrutiny of the government’s decision-making process to be an important part of legitimacy and democratic accountability . . .” William R. Sherman, *The Deliberation Paradox and Administrative Law*, 2015 BYU L. REV. 413, 416.

⁷⁵ See, e.g., *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 (1958).

⁷⁶ See Malia N. Brink, *A Pendulum Swung Too Far: Why the Supreme Court Must Place Limits on Prosecutorial Immunity*, 4 CHARLESTON L. REV. 1, 8–9 (2009).

cent election losses by incumbent prosecutors serve as a counterpoint,⁷⁷ demonstrating that public attention to the prosecutor's use of grand juries *can* influence prosecutorial elections.

Additionally, trust and confidence in the criminal justice system are low,⁷⁸ potentially indicating that the community already disapproves of the actions of prosecutors given that they are the most powerful actors in the system. But perhaps grand jury proceedings have remained stable for so long because the lack of transparency surrounding their procedures does not provide voters with sufficient information with which to hold elected prosecutors accountable. Increased transparency would allow for voters to make better-informed decisions.

Moreover, even if the majority of a community *were* supportive of the current grand jury system, there could still be dire consequences if only a subset of community members did not perceive the system as legitimate. The appearance of procedural injustice to even part of a community can negatively impact the community's social cohesion and respect for the rule of law.⁷⁹

C. Arbitrariness

While transparency may be used to promote accountability, arbitrariness is also important in considering the legitimacy of grand juries. Cases in which grand juries have declined to indict, including the Michael Brown shooting in Ferguson, Missouri; the Eric Garner chokehold death in Staten Island, New York; the Tamir Rice shooting in Cleveland, Ohio; and the death of Sandra Bland in Waller County, Texas, demonstrate the injury to the legitimizing function of the grand jury when nonindictments are perceived as arbitrary and devoid of meaningful community involvement.⁸⁰

Professor Lisa Bressman highlights the prevention of administrative arbitrariness as key to "a theoretical justification of administrative legitimacy and a practical evaluation of administrative law doc-

⁷⁷ See *infra* p. 1221.

⁷⁸ See, e.g., *Confidence in Institutions*, GALLUP (June 2016), <http://www.gallup.com/poll/1597/confidence-institutions.aspx> [<https://perma.cc/Z2RK-9Y92>].

⁷⁹ See, e.g., Claire P. Donohue, Essay, *Article 32 Hearings: A Road Map for Grand Jury Reform*, 59 HOW. L.J. 469, 480–82 (2016) (discussing "[p]rocedural justice theory and the associated research," *id.* at 480, and reflecting on the benefits of grand jury reform through the lens of procedural justice). See generally TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 19–68 (1990).

⁸⁰ See Lauren-Brooke Eisen, *What Is on the Horizon for Grand Jury Reform?*, HUFFINGTON POST (Mar. 25, 2015), http://www.huffingtonpost.com/laurenbrooke-eisen/what-is-on-the-horizon-fo_b_6535090.html [<https://perma.cc/3ZF2-HR69>]; cf. Sarah Maslin Nir, *Officer Peter Liang Convicted in Fatal Shooting of Akai Gurley in Brooklyn*, N.Y. TIMES (Feb. 11, 2016), <http://www.nytimes.com/2016/02/12/nyregion/officer-peter-liang-convicted-in-fatal-shooting-of-akai-gurley-in-brooklyn.html> [<https://perma.cc/R3EU-E33M>] (reporting the manslaughter conviction of the NYPD officer in the shooting death of Akai Gurley).

trines.”⁸¹ Bressman argues that accountability and arbitrariness are interrelated insofar as increasing accountability will discourage arbitrariness.⁸² “[A]rbitrary administrative decisionmaking is not rational, predictable, or fair,” and it leads to “conclusions that do not follow logically from the evidence, rules that give no notice of their application, or distinctions that violate basic principles of equal treatment.”⁸³

This perspective has clear applications to the grand jury, where a prosecutor’s wide-ranging discretion allows for changes to procedure on the whim of the prosecutor. The prosecutor’s management of the grand jury that did not indict Officer Wilson in the death of Michael Brown is a prime example of arbitrariness based on differing procedures. In that case, the prosecutor allowed the accused officers to testify before the grand jurors, which departed dramatically from the typical grand jury process in which the accused is unaware of even the existence of the grand jury. If it were the norm for defendants to be allowed to tell their side of the story to grand jurors and for prosecutors to present all evidence to the jury — instead of only inculpatory evidence — then the grand jury screening function would look very different. Thus, while the grand jury is usually accused of being a “rubber stamp” for the prosecutor,⁸⁴ the opposite seems to be true for officer-involved cases. This disparity highlights a fundamental issue — grand jury procedures that differ based on who has been accused demonstrate arbitrariness and undermine perceptions of legitimacy.

Additionally, the similarities between grand juries and administrative agencies extend to perceptions of their use as tools to shift blame for decisionmaking. “Congress . . . can attempt to engage in blame-shifting: rather than enacting an unpopular policy itself, Congress delegates the matter to an agency, shifting responsibility and blame to the agency and thereby reducing the political costs of the policy.”⁸⁵ Similarly, the prosecutor’s discretion both to choose whether to seek an indictment *and* to control the manner in which an indictment is sought can be used or perceived as a tool to avoid political responsibility.

⁸¹ Bressman, *supra* note 36, at 464 (“From the birth of the administrative state, . . . we have sought to reconcile the administrative state with a constitutional structure that reserves important policy decisions for elected officials and not for appointed bureaucrats.” *Id.* at 462.).

⁸² *See id.* at 494–95.

⁸³ *Id.* at 496.

⁸⁴ Washburn, *supra* note 3, at 2352 & n.99.

⁸⁵ Nicholas Almendares, *Blame-Shifting, Judicial Review, and Public Welfare*, 27 J.L. & POL. 239, 241 (2012) (“In effect, blame-shifting turns the agency into Congress’[s] political cat’s-paw. Blame-shifting, then, is an attempt by Congress to reduce the political costs for unpopular policies it wishes to see enacted by making use of delegation. In like fashion, Congress is thought to be able to displace blame for a regulatory program that fails to deliver on its promises.” (footnote omitted)).

D. Majoritarian Concerns

Responsiveness to community input is also applicable in assessing the legitimacy of grand juries and administrative agencies. A key issue in administrative law has been how to reconcile the discretion afforded agencies with their insulation from democratic control; the majoritarian paradigm in the field is grounded in “the notion that only the people or their representatives [can] render legitimate governmental policy decisions.”⁸⁶ It would seem that this majoritarian concern with administrative agencies should not apply to grand juries, as they are premised on the involvement of the community. However, the grand jury is not simply a series of citizen panels; the prosecutor is an integral — if not the predominant — element of the modern grand jury. Prosecutors lead grand jury investigations, determine which witnesses and documents to subpoena, “and issue ‘grand jury’ subpoenas without asking for permission to seek evidence in the grand jury’s name.”⁸⁷ The majoritarian concern is pressing because grand jurors are dominated by the prosecutor and are thus unable to serve fully as the people’s voice.⁸⁸

But perhaps accountability can be found through the elected official heading the prosecutor’s office. This hypothesis lines up with the presidential administration model, which recognizes two primary ways to promote accountability in administration: the first is through enhancing transparency, which “enabl[es] the public to comprehend more accurately the sources and nature of bureaucratic power”;⁸⁹ the second is through presidential leadership, “establish[ing] an electoral link between the public and the bureaucracy, increasing the latter’s responsiveness to the former.”⁹⁰ Applying the presidential administration model to prosecutors’ offices and grand juries, greater transparency and reduced secrecy around grand jury procedures would be necessary to increase prosecutorial accountability. Otherwise, it would be less likely that the specter of being voted out in the next election cycle would drive any change.⁹¹

Current prosecutorial elections, however, generally do not seem to reflect this public responsiveness. While American prosecutors are elected — in contrast to other countries’ systems⁹² — incumbent prosecutors win reelection the vast majority of the time, which may be par-

⁸⁶ Bressman, *supra* note 36, at 478.

⁸⁷ Kuckes, *supra* note 22, at 26.

⁸⁸ See Shannon, *supra* note 4, at 146; see also Washburn, *supra* note 3, at 2353.

⁸⁹ Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–32 (2001).

⁹⁰ *Id.* at 2332.

⁹¹ Cf. Bressman, *supra* note 36, at 491.

⁹² See Michael J. Ellis, Note, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528, 1530 (2012).

tially due to the deficient quality of information available to voters.⁹³ Despite this trend, earlier this year two incumbent prosecutors, Timothy McGinty and Anita Alvarez, were voted out of office — results that have been attributed to activism from the Black Lives Matter movement.⁹⁴ McGinty, the prosecutor who oversaw the grand jury in the Tamir Rice case described in Part II, lost to a primary challenger, and Cook County State’s Attorney Alvarez lost her primary election due in part to criticism for having waited over a year to bring charges against the Chicago officer who fatally shot seventeen-year-old Laquan McDonald in 2014.⁹⁵ While these rare electoral outcomes demonstrate the impact of popular accountability, transparency reform is needed to ensure that all prosecutor elections similarly reflect the will of a well-informed majority and serve to promote legitimacy.

IV. SOLUTIONS TO LEGITIMACY PROBLEMS IN THE ADMINISTRATIVE LAW CONTEXT APPLIED TO GRAND JURY REFORMS

This Part will discuss administrative law responses to legitimacy concerns and potential analogous reforms for grand juries. To counteract the risks of lack of transparency, arbitrariness, and the majoritarian concerns described in Part III, grand jury reform should look to efforts to empower grand jurors relative to prosecutors, which would be analogous to promoting independence and avoiding capture in the agency context. This Part will first address responses to agency dependence on the Executive before applying lessons learned to grand juries and prosecutors.

A. *Insulating Agencies from Capture and Control*

In the exercise of their judgment, independent agencies must be insulated to some degree from executive control.⁹⁶ Under the established view of independent agencies, their insulation from control is based on statutory restrictions on the President’s power to remove agency members; thus, independent agencies are typically headed by experts who can only be removed by the President for good cause.⁹⁷ Also, Profes-

⁹³ See Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 582–83 (2009).

⁹⁴ Andrea Noble, *Prosecutor Ousters Show Potential Election Clout of Black Lives Matter*, WASH. TIMES (Mar. 16, 2016), <http://www.washingtontimes.com/news/2016/mar/16/black-lives-matter-voters-oust-prosecutors-in-poli> [https://perma.cc/2Z2H-RS27].

⁹⁵ See *id.*

⁹⁶ See *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 629 (1935) (discussing Congress’s power to create bodies to carry out its quasi-legislative and quasi-judicial duties with independence from executive authority); *Soucie v. David*, 448 F.2d 1067, 1073 (D.C. Cir. 1971) (concluding that the APA defines an agency as “any administrative unit with substantial independent authority”).

⁹⁷ See, e.g., Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 610 (2010).

sor Rachel Barkow points to the use of information as a “powerful weapon[]” that agencies can utilize to build public support for their missions and maintain accountability, especially given that “the public may [otherwise] have no idea that there is even an issue worth fighting for because it lacks the resources to monitor agencies and government operations.”⁹⁸ The key, Barkow argues, is “to imbed information generation and dissemination into an agency’s structure,”⁹⁹ such as through a research arm of the agency that produces reports and studies for the public or a public advocate who monitors agency actions and challenges actions on the public’s behalf.¹⁰⁰ For example, many states have public utility consumer advocates who represent consumers in the ratemaking processes concerning state utilities, providing oversight and affecting substantive agency policy in favor of consumers as a counterbalance to industry interests.¹⁰¹

*B. Insulating Grand Juries by Empowering
Actors Other than the Prosecutor*

Just as administrative agencies guard against capture and control, grand juries should have structural designs that resist pressure and protect the public — in this case, the accused — from unjustified indictment. The traditional focus on the tenure and removal of agency heads is not applicable because grand juries feature temporary panels of citizens rather than career experts. Instead, independence in the grand jury context should come from reforms analogous to the use of information dissemination tools and public advocates in the administrative sphere.

1. *Empowering Grand Jurors via an Advocate.* — Because the grand jury’s lack of independence feeds into its lack of legitimacy, buttressing the grand jury’s independence by reducing prosecutorial control would make its verdicts more legitimate. For example, to reduce the pressure a grand jury may feel from the state, it is illegal in Virginia for a prosecutor to appear before the grand jury.¹⁰² But to take this reform a step further, grand jurors might be better able to exercise their independent decisionmaking and their powers of investigation if they had an independent representative or advocate. The grand jury representative could be required, as independent counsel, to inform the grand jury of

⁹⁸ Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 59 (2010).

⁹⁹ *Id.* at 60.

¹⁰⁰ *Id.* at 60, 63–64.

¹⁰¹ *Id.* at 63–64.

¹⁰² The attorney for the state may only enter the grand jury’s room to act as a witness or to advise about the grand jury’s duties if members of the grand jury request. See OFFICE OF THE EXEC. SEC’Y, SUPREME COURT OF VA., *supra* note 7, at 9.

lesser charges, which would allow the jury to become more engaged in the process of formulating charges.¹⁰³ Such a representative could also play an important role in the dissemination of information about grand jury design, as will be discussed later in this section.

Hawaii is the only state to have a grand jury counsel position,¹⁰⁴ but this counsel fulfills a more restricted role than the position described in the preceding paragraph. Under chapter 612, section 57 of the Hawaii Revised Statutes, the grand jury counsel may be present during proceedings and give advice to the jurors on matters of law.¹⁰⁵ While a similar provision would potentially aid grand juries in balancing prosecutorial power, Hawaii's version of the grand jury counsel may not be sufficient since under the statute, the counsel "shall not participate in the questioning of the witnesses or the prosecution."¹⁰⁶ A more robust vision of a grand jury advocate would further empower the grand jury relative to the prosecutor — an approach that could be complemented by strategies that empower defendants and witnesses.

2. *Empowering Defendants as a Source of Evidence.* — Another potential avenue for reform would be to allow a defense presentation during grand jury proceedings.¹⁰⁷ If the potential harms, such as the risk of the defendant fleeing or danger to prosecution witnesses, would be too great, then the prosecution could be required to present exculpatory evidence. Such an evidentiary requirement is not constitutionally required at the federal level after *United States v. Williams*,¹⁰⁸ but may be possible at the state level. This reform would hamper efficiency by requiring lengthier grand jury proceedings to accommodate the presentation of exculpatory evidence. But a one-sided presentation may not be able to reliably meet the probable cause standard.¹⁰⁹ Without the opportunity for defendant testimony, the grand jury depends on the prosecutor for all the evidence it sees. If the grand jury's probable cause determination could vary significantly based on whether the prosecutor chooses to introduce conflicting or exculpatory evi-

¹⁰³ See Adriaan Lanni, *The Future of Community Justice*, 40 HARV. C.R.-C.L. L. REV. 359, 398 (2005).

¹⁰⁴ Brenner, *supra* note 6, at 94.

¹⁰⁵ HAW. REV. STAT. § 612-57 (2015).

¹⁰⁶ *Id.*

¹⁰⁷ See R. Michael Cassidy, *Toward a More Independent Grand Jury: Recasting and Enforcing the Prosecutor's Duty to Disclose Exculpatory Evidence*, 13 GEO. J. LEGAL ETHICS 361, 384 (2000); see also Walter W. Steele, Jr., *Right to Counsel at the Grand Jury Stage of Criminal Proceedings*, 36 MO. L. REV. 193, 194 (1971).

¹⁰⁸ 504 U.S. 36 (1992); see also *id.* at 55.

¹⁰⁹ See Arenella, *supra* note 3, at 7 ("Most agree that an inexperienced and untrained body of citizens cannot possibly screen out unwarranted prosecutions in an ex parte proceeding at which they hear only the government's side of the case and depend on the prosecutor for all legal advice and direction.").

dence, then there may be good reason to see the grand jury's indicting function as arbitrary.

3. *Information Dissemination Through Grand Jury Design.* — As referenced earlier, embedding information generation and dissemination into an agency's structure is important for offsetting tough-on-crime pressures and other forces prosecutors face.¹¹⁰ Similarly, incorporating information dissemination into grand jury design would have important consequences for insulating the grand jury and improving the quality of information available to the voting public. Although scholars have advocated for judicial supervision of prosecutorial decisions,¹¹¹ this avenue of reform can be complemented by increased accountability of prosecutors through elections. Both would require a more transparent system, which is currently hindered by the easy manipulability of the grand jury process and the lack of public information about it.¹¹²

To enhance legitimacy through judicial supervision, granting defendants the presumption of access to grand jury minutes would increase the likelihood that the grand jury is adequately serving its screening function in individual cases by allowing defendants an opportunity to become aware of and challenge any deficit in grand jury procedures. Additionally, to enhance legitimacy through electoral supervision, more data and information on grand jury procedure and decisionmaking should be available to the public. One important transparency reform measure would be to release records after the grand jury has voted on whether to indict an accused person. These records would add to the information voters have about their elected district and state attorneys. The New York Civil Liberties Union (NYCLU) made a transparency argument in a suit the organization filed to make public the records of the grand jury that declined to indict the NYPD officer in the death of Eric Garner; the lower court denied the motion, and the NYCLU requested that the New York Court of Appeals review the decision.¹¹³ To counteract concerns about disclosure, there could be a distinction made between substance and procedure: substance — such as the details of the evidence and witnesses that form the basis of the prosecution's case — could be withheld, while procedure — how the prosecutor's office structured the process — could be disclosed.

¹¹⁰ See *supra* pp. 1221–22.

¹¹¹ See, e.g., KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE* 207–14 (1969).

¹¹² See DAVIS, *supra* note 14, at 5 (“Even elected prosecutors, who presumably answer to the electorate, escape accountability, in part because their most important responsibilities — particularly the charging and plea bargaining decisions — are shielded from public view.”).

¹¹³ Press Release, N.Y. Civil Liberties Union, NYCLU Motion: Garner Grand Jury Records Must Be Public (Aug. 18, 2015), <http://www.nyclu.org/news/nyclu-motion-garner-grand-jury-records-must-be-public> [<https://perma.cc/W73W-TU8Q>].

C. Officer-Specific Reforms

In the wake of high-profile cases that have fueled protests and outrage, some have called for reforms specifically targeting cases in which officers are investigated for the killing of civilians. For example, under the proposed Grand Jury Reform Act of 2015,¹¹⁴ a special prosecutor would be required to investigate when a police officer kills a civilian in the line of duty and would present the results of the investigation to a judge in an open probable cause hearing.¹¹⁵ California presents another example of such a targeted reform measure, as it became the first state to ban the use of grand juries in cases involving police shootings, instead leaving the prosecutor to determine whether to charge a police officer with using deadly force.¹¹⁶

Reform measures, such as the bills described above, that institute different processes for cases in which an officer kills a civilian, are motivated by a desire for increased legitimacy through either greater transparency in an open probable cause hearing or increased accountability from the prosecutor directly making the indictment decision. However, such reforms raise two potential concerns: (1) reform through piecemeal solutions depending on who has been accused will not affect the majority of cases, and (2) taking the decision out of the grand jury's hands in a subset of cases bypasses an opportunity for public participation in the justice system. Ideally, reform would increase legitimacy by promoting transparency and accountability while *also* amplifying the voice of the community.

D. A Broader Vision of the Grand Jury

This Part has focused on hewing charging policies to community opinion, whether through transparency measures allowing voters to make informed electoral decisions or independence measures providing grand jurors with an advocate who will allow them more agency in the proceedings. It is also important, however, to expand our vision of the grand jury to ensure more meaningful pretrial community engagement.

Administrative law has focused on including avenues for public input into agency decisionmaking through notice and comment,¹¹⁷ the

¹¹⁴ H.R. 429, 114th Cong. (2015).

¹¹⁵ *See id.* § 3.

¹¹⁶ Allie Gross, *California Becomes First State to Ban Grand Juries in Police Shooting Cases*, MOTHER JONES (Aug. 13, 2015, 5:00 AM), <http://www.motherjones.com/politics/2015/08/california-becomes-first-state-ban-grand-juries-police-shooting-cases> [https://perma.cc/U2XD-BN9K].

¹¹⁷ *See, e.g.*, *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 241 (1973); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 417 (1971); *Seacoast Anti-Pollution League of N.H. v. Nuclear Regulatory Comm'n*, 690 F.2d 1025 (D.C. Cir. 1982).

procedural requirements of which “serve important purposes of agency accountability and reasoned decisionmaking.”¹¹⁸ While it would be impractical to have a notice-and-comment system for each grand jury indictment, analogous structures can ensure meaningful community input. For example, Professor Adriaan Lanni suggests using grand juries “not merely as indictment machines, but as focus groups to set policing and prosecution priorities for the neighborhood.”¹¹⁹ In addition to deciding individual cases, grand juries operating under such an expanded vision would convene to make more general recommendations on charging and bargaining policies. Lanni argues that these community-based charging guidelines would also allow the community to provide the prosecutor with guidance on which cases seem most “worthy of prosecution.”¹²⁰

Such a reform has the advantage of being a more direct link to the community’s voice than an election and could promote organized information dissemination. The grand jury representative discussed earlier could also lead these grand jury focus groups, which could request information on grand jury policies and statistics from prosecutors’ offices. In addition to providing for more rigorous investigation and thus more legitimate outcomes, an advocate’s involvement with a grand jury empowered along these lines would also improve the system’s perceived legitimacy by bolstering the community’s role in, and insight into, this more rigorous and independent process.

CONCLUSION

Grand juries have traditionally existed on the periphery of the public’s imagination.¹²¹ But police-involved shootings and deaths have shined a spotlight on the inner workings of state grand juries.¹²² Grand juries are subject to the same threats to legitimacy — such as arbitrariness and a lack of transparency — that have long been recognized in the context of the administrative agency. Grand juries should learn from administrative law’s responses to these threats to breathe “the spirit of a community into the enforcement of law.”¹²³

¹¹⁸ *Am. Med. Ass’n v. Reno*, 57 F.3d 1129, 1132 (D.C. Cir. 1995); *cf.* *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001) (“[T]he overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication.”).

¹¹⁹ Lanni, *supra* note 103, at 399.

¹²⁰ *Id.*

¹²¹ See Roger Roots, *If It’s Not a Runaway, It’s Not a Real Grand Jury*, 33 CREIGHTON L. REV. 821, 821 (2000).

¹²² See Fairfax, *supra* note 28, at 826–27.

¹²³ *United States v. Smyth*, 104 F. Supp. 283, 291 (N.D. Cal. 1952).