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THE VOICE OF THE COMMUNITY: (N1)
A CASE FOR GRAND JURY INDEPENDENCE

by
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Introduction

67 Grand juries are the offspring of free government; they are a protection against llfounded accusations .... (N3)

Our constitutional framers thought it a sound idea to create structures allowing lay citizens to check government excesses. The jury system, one of the more obvious and enduring of such structures, was included in our governmental framework because of the widespread belief that the community's voice would ensure a more just judicial system. Requiring community consent before charging a person with a serious crime was considered so important that the grand jury structure was immortalized in the Bill of Rights.

Despite its auspicious origins, the federal grand jury has become little more than a rubber stamp, indiscriminately authorizing prosecutorial decisions. At best, grand juries are passive entities whose existence burdens judicial efficiency and needlessly drains federal funds. At worst, grand juries' continued presence invidiously maintains the illusion of a community voice. This lulls corrective action and permits increased prosecutorial abuse.

The current status of state grand juries is more complex. Some states have maintained and even increased grand jury independence. Others have devolved into more passive institutions than their federal **68** counterparts. The dominant trend in both systems, however, demonstrates an historical transformation from juries that were once active and aggressive to weak and passive bodies that are utterly dependent upon prosecutors for guidance.

This Article explores this transformation from the viewpoint that grand jury independence is important and that measures should be taken to restore this voice of the community to the judicial process. Part I briefly explores the historical evolution from the primarily proactive grand juries of the colonial period to their current status as an overwhelmingly passive institution. Parts II and III evaluate the current status of federal and state grand juries. These Parts identify structural and functional elements in both systems which tend to promote proactive, active, or passive grand juries. Such elements may serve as models for systems seeking to reestablish grand juries as a thriving community voice in judicial affairs. Part IV focuses specifically on federal grand juries, which have most dramatically departed from their intended purpose. This Part suggests means for revitalization. Grand juries are an indelible part of our national judicial system, save the unlikely event of a constitutional amendment that eradicates them. Since we are, for practical purposes, stuck with the institution, we should

pursue simple measures to enable grand juries to achieve their potential role as an important voice of the community.

I. A Brief Historical Overview

The American grand jury is a British import, created by King Henry II in the twelfth century as a means of investigating and bringing charges for criminal activity. (N4) While contemporary American grand jurors generally rely on a prosecutor to present evidence to them, early English grand jurors acted on the basis of their own personal **69** knowledge about occurrences in their community. (N5) If what they knew led them to believe that someone had committed a crime, the jury brought charges against that person. (N6) During the early years of the English grand jury's existence, a grand jury brought charges either through an "indictment" or a "presentment." (N7) Later, a distinction developed between the two: a presentment became a statement of charges that a grand jury had returned on its own initiative and from its own knowledge, while an indictment represented charges returned at a prosecutor's behest. (N8)

Though the grand jury began as an instrument of the Crown, it was soon regarded as a useful buffer between the state and the individual, infusing an effective community voice into the early judicial process. By the time the Magna Carta was adopted, the opportunity to have a grand jury decide whether criminal charges should be brought was considered important enough to be included as a guaranteed right in the Magna Carta. (N9) By the eighteenth century, English citizens regarded the grand jury as a shield that protected individuals from government oppression. (N10) English grand juries also served the practical purpose of issuing "reports". (N11) At first, reports were reserved for identifying conduct that was blameworthy, but not sufficiently heinous to warrant the imposition of criminal liability. (N12) But as the grand jury evolved, reports **70** increasingly focused on regulatory matters, such as the state of a community's roads and prisons and the conduct
of its public officials. (N13)

British emigrants brought the grand jury to the American colonies, (N14) where it flourished in both its guises--as a device for determining if criminal charges should be brought and as a means of monitoring community affairs. (N15) The colonial American grand jury apparently took its role as a shield against oppression to heart. In several famous instances, American grand juries refused to return charges sought by British authorities. (N16) And throughout the colonial period, grand juries aggressively monitored the condition of local roads, bridges, and public buildings, as well as scrutinized the conduct of public officials. (N17)

The American grand jury survived the Revolution unscathed, but was not originally included as an element of the federal system of government established by the Constitution. (N18) The Bill of Rights remedied this omission with its Fifth Amendment guarantee of the right to be indicted by a grand jury for "capital, or otherwise infamous **71** crime[s]." (N19) Unlike virtually all other provisions of the Bill of Rights, however, this guarantee has not been incorporated into the states and is only binding on the federal government. (N20) States are, of course, free to adopt their own guarantee of the right to indictment for serious offenses, and many have done so. In fact, many state grand jury systems now provide greater protection to criminal defendants and independence to grand jurors than does the federal system.

The functioning of American grand juries changed little from the end of the eighteenth century until well into the nineteenth century. At both the state and federal levels, grand jurors continued to assess the propriety of criminal charges. (N21) Grand juries also persisted in monitoring civic affairs, including the conduct of public officials. In one case, a federal grand jury brought charges against a Congressman for making statements critical of the government. (N22) Others used presentments to lobby for legislation, including the Bill of Rights. (N23)

Although jurors continued to exercise their own initiatives in bringing charges, (N24) the process came increasingly under the control of prosecutors. (N25) Apparently alarmed by the aggressiveness of American grand juries, voters in a number of states enabled their legislatures to **72** abolish the institution in the late nineteenth century. (N26) Other states abrogated constitutional provisions which granted a right to indictment and replaced them with measures allowing prosecutors to bring charges independently, without the participation of a grand jury. (N27) This drive to eliminate the institution, or reduce its importance, was prompted by a belief that grand juries were unnecessary due to the emergence of "professional criminal prosecutor[s]." (N28) According to this view, citizen participation was no longer needed in the charging process because full-time prosecutors could conduct an independent, disinterested review of the need to bring charges. (N29) The Fifth Amendment's requirement that charges for serious offenses be brought in an indictment returned by a grand jury has blocked all analogous efforts to abolish federal grand juries. (N30) Nevertheless, the federal grand jury lost much of its independence as prosecutors began to assume greater control over the processes of investigating and charging federal offenses. (N31)

Prosecutorial dominance over federal grand juries is the product of several factors. First, federal grand jurors rely heavily on prosecutors to educate them about applicable law and to assist them in applying that law to the evidence. (N32) While state grand jurors tend to evaluate such conceptually simple offenses as rape, theft, and murder, federal **73** grand jurors must grapple with the often arcane intricacies of federal criminal law, which encompass a variety of legally and factually complex offenses. One example of this is the federal anti-racketeering statute, RICO. (N33) Prosecutors may provide federal grand jurors with their only source of legal advice, so the jurors their dependence is often directly related to an issue's complexity.

Secondly, prosecutors learned to further enhance grand jury dependence by developing a rapport with them. This rapport causes jurors to identify with prosecutors, thus increasing their willingness to follow a prosecutor's lead in deciding the course of an investigation and in bringing charges based on the evidence elicited by an investigation. (N34) Finally, federal grand juries' subservience to prosecutors was exacerbated when the federal system eliminated the use of presentments, which allowed a grand jury to bring charges on its own initiative. (N35) Now, federal grand jurors cannot return charges in the form of an indictment without a prosecutor's consent. (N36) Elimination of the presentment demonstrates the historical trend towards elimination of proactive features in the grand jury system.

Because of the importance prosecutors assumed in the criminal justice system, the federal grand jury, though it survived as a shadow institution, lost much of its authority and influence. In addition to losing the ability to bring charges on its own initiative, the federal grand jury lost its common law power to investigate regulatory matters and to issue reports. The Federal Rules of Criminal Procedure abrogated the grand jury's ability to return presentments, but

juries lost the ability to investigate and issue reports because of their ignorance and neglect--arguably another symptom of the erosion of their strength and independence.

74 Destruction of the report power was a gradual process. As the grand jury fell into disfavor in the nineteenth century, it gradually ceased investigating and issuing reports. (N37) By the twentieth century, it no longer did so at all, presumably because grand jurors were unaware that they enjoyed the report power. (N38)

Since federal grand jurors are almost always non-lawyers, (N39) they learn of their powers and duties from two primary sources: instructions provided by the impaneling judge and any additional information provided by prosecutors who serve as their legal advisors. (N40) Because neither judges nor prosecutors have any incentive to inform grand jurors about their powers to investigate and issue reports, jurors predictably remain ignorant of these abilities and limit themselves to conducting investigations and returning charges in accordance with a prosecutor's wishes. This failure to disclose was responsible for the disappearance of federal grand jury reports, (N41) since no federal statute has ever abolished this power. (N42)

Subsequently, until 1970, a federal grand jury's only function was to decide whether evidence presented to it by a prosecutor warranted the return of criminal charges. (N43) In 1970, federal grand juries partially regained their reporting function in the Organized Crime Control Act of 1970. (N44) The Act created a "special" grand jury. Special grand juries are authorized to investigate organized crime, to return charges if they find probable cause to believe crimes have been committed, and/or to **75** issue reports on the results of their investigations. (N45) The Organized Crime Control Act did not, however, confer the full common law reporting ability on special grand juries. Congress was concerned about grand jury abuse of this power (N46) and accordingly included several limitations on special grand jury reports in the Act. (N47) Reports must concern criminal activity, (N48) must arise out of information elicited by an investigation authorized by the Act, (N49) and must be filed with the district court which supervises the special grand jury. (N50) Courts decide whether these reports will be made public. (N51)

Like special grand juries, regular grand juries in the federal system also have lost their ability to inquire into civil matters and to issue reports on their findings. As direct descendants of common law grand juries, regular federal grand juries theoretically retain their common law ability to issue reports on civil matters. Congress never has attempted to deprive grand juries of this power and it thus remains technically a part of juror obligations, but the last reported use of the civil reporting power occurred in 1895. (N52) The refusal of courts and **76** prosecutors to explain the civil report power has effectively eliminated it over time. (N53)

This historical overview reveals the demise of the grand jury from a proactive community voice to an entity which has forfeited its own powers. The primary historical themes of increasing prosecutorial control and concomitant grand jury ignorance and dependence foreshadow current structural and functional impediments to independence.

II. Grand Jury Structure and Its Relationship to Independence

Most choices in construction of federal and state grand jury systems either foster or impede institutional independence. Even seemingly benign structural decisions, such as term of service arrangements, can profoundly effect a grand jury's ability to attain its potential to

infuse the criminal justice system with community perspective. This Part evaluates structural differences among federal and state grand jury systems and distinguishes choices which tend to encourage independence with those which induce passivity.

A. Institutional Status

Until recently, all federal and state grand juries have been understood to be a part of the court. (N54) The Supreme Court cast doubt on this understanding, at least for federal grand juries, in United States v. Williams. (N55) The Williams Court held that the grand jury is a distinct entity, an institution not "assigned ... to any of the branches described in the first three Articles" of the United States Constitution. (N56) The **77** Court's observations in Williams have left the institutional status of the federal grand jury uncertain. (N57)

As for state grand juries, a few state statutes characterize the grand jury as part of the court which impanels it, (N58) and a number of pre-Williams decisions also describe state grand juries as an agency or arm of the court. (N59) The grand jury's institutional status is important because if it is a part of the court, a court legitimately can exercise its supervisory power to exert greater control over grand jury proceedings. (N60) If grand juries are not part of the court, then courts have little, if any, ability to exercise control other than that specifically authorized by statute. (N61) Thus, the treatment of grand juries as an independent rather than subsidiary entity is conducive to increased independence in the federal system.

78 B. Composition and Selection

Common law grand juries were composed of between twelve and twenty-three jurors, (N62) and federal law has deviated only slightly from this practice. Under the Federal Rules of Criminal Procedure and the statute governing special grand juries, a federal grand jury--whether regular or special--must consist of between sixteen and twenty-three persons. (N63) State grand juries vary widely in size, ranging from five (N64) to twenty-three (N65) jurors. The pool of persons who may serve as grand jurors has expanded, reflecting an evolving notion of the relevant community with a legitimate interest in the judicial system. At common law, only men could serve on grand juries. (N66) State and federal systems have eliminated this limitation, along with racial and ethic restrictions. (N67) These relaxed qualifications are consistent with the notion of grand juries providing the voice of the community.

Federal and state policies regarding attorneys' service on grand juries implicate grand jury independence. Although federal jury selection statutes do not exempt attorneys from grand jury service, a number of federal judicial districts have adopted local rules which enable attorneys to be excused easily. (N68) In districts that have not adopted such rules, attorneys are still unlikely to be chosen to serve on a grand jury for two reasons. Federal grand juries sit for long terms, and an impaneling court is likely to grant an attorney's request that she be excused because the demands of her practice make it impossible for her to serve. (N69) Also, a court impaneling a grand jury may avoid selecting attorneys as jurors out of a concern that they may resist prosecutors' **79** instructions and thereby disrupt the functioning of the grand jury. These concerns also have affected state practices regarding attorney service on grand juries. State impaneling judges virtually always excuse attorneys from service. (N70)

Theoretically, rules restricting attorney service on grand juries cut both ways in terms of achieving independence. On the one hand, these restrictions arguably increase

independence by ensuring that grand jurors' community voice will not be colored by the perspective of a lawyer in their midst. On the other hand, permitting lawyers to serve might quell prosecutorial authority by providing grand jurors with a different source of legal information. Even if the latter is true, however, attorney inclusion in grand juries would be sporadic and unlikely to increase independence on an institutional level.

Grand juror selection systems on both the federal and state levels mirror the trend also evident in broadened grand juror qualification rules toward ensuring that juries include a "fair cross section of the community in the district or division" where the court sits. (N71) In the federal system, the selection of grand jurors is governed by the Jury Selection and Service Act of 1968. (N72) Under the Act, a district court begins the process of juror selection by developing a written plan that explains how it will select jurors randomly (N73) and identifies persons **80** who will be excused from service. (N74) The court then creates a list of names of those who are qualified and nonexempt from jury service. (N75) From this list, it randomly selects a pool of potential jurors and calls them for service. After excusing any for whom service would present a hardship or be otherwise inappropriate, the court identifies and impanels the jury. (N76) This guarantee that jurors are randomly selected from a fair cross section of the community is important because selection of grand jurors, like that of petit jurors, implicates constitutional principles, including the guarantees of equal protection, due process, and the Sixth Amendment right to a fair trial. (N77) Random selection ensures that the grand jury's voice will be pure and representative of all members of the community.

State jury selection procedures also are intended to ensure that jurors are randomly selected from a fair cross section of the state's populace. (N78) Like the federal jury selection act, state statutes identify neutral sources of names to be used in juror selection, (N79) specify how **81** names are to be randomly selected from these sources to create a venire, and describe how jurors are to be chosen and impaneled. (N80)

C. Operational Elements

1. Meeting Frequency

The frequency with which grand juries are convened carries implications for grand jury independence and an enhanced community voice. Federal grand juries hold regular sessions, but the convening of these sessions can vary widely from district to district. (N81) In large urban districts, several grand juries may be in session every day, while in smaller, rural districts a grand jury may only convene once a week or even once a month. (N82) The idiosyncrasy of federal grand juries' schedules is a function of the role they play in the federal justice system. Since federal grand juries are essentially passive facilitators of inquiries directed by prosecutors, their meeting schedules tend to be responsive to prosecutors' needs. Consequently, if prosecutors in a given district have less need for a grand jury's assistance, the grand juries in that district will meet less often. The same is no doubt true of many state grand juries, but exact policies on meeting frequency have been difficult to determine because of the informality surrounding the state **82** grand jury process. A few sources indicate, however, that state grand juries are called into session on an "as needed" basis. (N83) The fact that grand juries meet at the direction of prosecutors further entrenches both the appearance and reality that grand juries serve largely as prosecutorial adjuncts. The state situation provides the first example of the informality surrounding grand jury processes, a theme which will recur throughout this Article. Like the issue of whether attorneys should

serve as grand jurors, informality arguably cuts both ways in the debate over grand jury independence. On the one hand, it suggests a local comfort with the institution, perhaps reinforcing the idea that it represents a lay perspective in typically rigid government. The more likely interpretation of informality, which typically accompanies greater prosecutorial discretion, is that it indicates a lack of respect for the institution and a belief in its dispensability.

2. Quorum

Informality also has resulted in the absence of a specified quorum for federal grand juries. Rule 6 of the Federal Rules of Criminal Procedure, which governs grand jury matters, does not specify a quorum, but states only that a grand jury "shall consist of not less than 16 nor more than 23 members." (N84) The courts have extracted from this provision the rule that if fewer than sixteen jurors appear for a session, a federal grand jury cannot meet. (N85)

Many states have statutorily prescribed the quorum that is needed for a grand jury to convene. (N86) But like the federal system, many states **83** have also failed to establish a quorum for grand jury proceedings. This failure is also the product of the informality that still characterizes grand jury practice. In many instances, state grand jury procedures are a matter of local custom, which may vary slightly from court to court. The size of a quorum in each local area is a product of historic, routinized assumptions. Neither the legislature nor the courts have found it necessary to specify the grand jury's quorum because "everyone knows" that X number of jurors are needed in order for a grand jury to convene. In this context, "everyone" becomes those who are responsible for convening grand juries--typically prosecutors. The practice has never aroused judicial or legislative attention, so informality in this and other procedures continues to further entrench prosecutorial control and increase grand jury dependence.

3. Evidence

Grand juries' treatment of evidence provides another example of an element which can either promote or deter independence. There are three ways in which federal and state grand juries diverge in their treatment of evidence. Federal and state courts differ in applying the rules of evidence, in applying the exclusionary rule under the Fourth Amendment, and in requiring the presentation of exculpatory evidence. Although the first two of these differences are arguably neutral as to juror independence, the latter practice can influence a grand jury's ability to serve as an effective voice of the community.

Except for the law governing privileges, federal grand juries operate unconstrained by the Federal Rules of Evidence. (N87) The states diverge over whether evidentiary constraints should apply in grand jury proceedings. A few apply certain rules of evidence, most often prohibiting prosecutors from presenting inadmissible hearsay in grand jury proceedings. (N88) Most states, however, impose few, if any, evidentiary **84** restraints on grand jury proceedings, (N89) following federal practice. (N90) Second, federal grand juries can hear evidence that was obtained in violation of the Fourth Amendment's prohibition on unreasonable searches and seizures. (N91) Most states also allow their grand juries to consider evidence that was illegally obtained, (N92) but a few apply their own versions of the exclusionary rule to grand jury proceedings. (N93) The few states which have chosen to apply

constitutional protections **85** and rules of evidence to grand jury proceedings have ironically opted to provide greater protection to criminal defendants than their federal counterpart.

The final point of divergence between presentation of evidence in state and federal grand juries carries the greatest implications for grand jury independence. Federal prosecutors are not obligated to present to grand juries exculpatory evidence, or evidence which tends to negate the accused's guilt. (N94) Some states follow federal practice and do not require introduction of exculpatory evidence; (N95) others do require it. (N96) In addition to providing greater safeguards to criminal defendants, **86** the presentation of exculpatory evidence enhances juror independence by forcing prosecutors to present a different version of the case than the one they are advocating, shifting discretion from the government to the jury.

4. Secrecy

Secrecy has always been a defining characteristic of grand jury proceedings. Secrecy remains a basic element in the federal system (N97) and is maintained in all fifty states and the District of Columbia. (N98) Unless prior court approval is given, evidence that has been presented **87** to a grand jury may be revealed only to federal prosecutors, personnel who assist prosecutors, and other federal grand juries. (N99) A court must approve disclosure of federal grand jury information to state law enforcement authorities or for usage in connection with a "judicial proceeding." (N100) Most states have comparable requirements for the release of information about grand jury proceedings. (N101) This secrecy surrounding grand jury proceedings provides yet another opportunity for prosecutorial abuse and control. By insulating proceedings from oversight, secrecy rules shield grand jurors from alternative sources of information and grant prosecutors free reign to influence and cajole.

5. Recording

The practice of recording grand jury proceedings has the potential to enhance grand jury independence. In 1979, the Federal Rules of Criminal Procedure were amended to require that grand jury proceedings be recorded, either stenographically or electronically. (N102) The present version of Rule 6 allows either a court reporter or the operator of an electronic recording device to be present while recording a proceeding. (N103) **88** Most states have implemented similar rules, either mandating or permitting recordation. (N104)

One reason the federal system mandated recordation was to prevent prosecutorial abuse of the grand jury process. (N105) A major premise of the 1979 amendment was that prosecutors would be deterred from engaging in improper conduct before a grand jury if they knew their misbehavior was being memorialized. (N106) A similar desire to quell prosecutorial abuses explains most states' adoption of recording requirements.

6. Personnel in Attendance

Federal practice permits interpreters to attend sessions "when needed." (N107) Most states also allow interpreters to attend sessions (N108) and a number of states approve the attendance of persons needed to assist individuals who are hearing impaired or otherwise disabled. (N109) In addition **89** to such unobjectionable personnel, many states allow a law enforcement officer to be present during sessions, usually to ensure security while a witness

is testifying. (N110) Federal practice does not permit **90** attendance of law enforcement personnel. (N111) Some states also provide grand juries with investigators, who perform the duties of federal agents in the federal system. (N112) Unlike federal agents, these state investigators may attend grand jury sessions in limited circumstances. (N113)

These willingness of these states to allow the presence of officers and investigators may be attributed to the pervasively casual attitude toward grand jury proceedings. Inclusion of officers and investigators may reflect the perception of the grand jury as an instrument of the prosecutor, because the presence of investigators will not be regarded as objectionable if the grand jury is perceived as an ad hoc adjunct of the prosecutor's office.

Regardless of its explanation, the decision to permit officers and investigators to attend grand jury sessions is particularly damaging to grand jury independence. The presence of law enforcement is completely inconsistent with the grand jury's role as an impartial assessor of the factual and moral propriety of bringing charges. The presence of such personnel promotes a grand jury's tendency to identify with prosecutors and, by extension, "law enforcement," and thereby exacerbates the trend of grand jury dependence.

7. Terms of Service

Federal regular grand juries are convened for specific terms which are not linked to the functioning of the court or other governmental agencies. (N114) This independent existence enhances a grand jury's ability **91** to serve as a voice of the community and to distinguish itself from the prosecutor's office. Regular and special grand juries are convened for a basic term of eighteen months, with an option for extension. (N115)

Most states also use terms to measure the existence of a grand jury, although terms range widely from North Dakota's ten day term (N116) to the two-year terms permitted in Oklahoma, Nevada, Utah, and the District of Columbia. (N117) Some states still follow the common law practice of convening a grand jury to serve for the term of the court that impaneled it. (N118)

Instead of using a numerically defined term for the grand jury, some states specify the maximum amount of time a single grand juror must serve. (N119) This procedure seems most conducive to grand jury independence. **92** Because jurors' terms of service overlap, new jurors can perpetually learn from others who have already been serving. This permits members of grand juries to serve in leadership roles and to provide an alternative source of guidance from prosecutors.

8. Prosecutors' role

As an officer of the State, it is the prosecutor's duty to be an advocate; he must exert his best efforts to prosecute successfully those who have violated the criminal law.... [A]s an officer of the court, he is required to act as the grand jury's legal advisor, to aid but not interfere in its determination of the probability of guilt. (N120)

The above quotation describes an implausible endeavor. Permitting prosecutors to serve both as advocates and as "neutral" grand jury advisors presents the ultimate conflict of interest--one with huge ramifications for grand jury independence. Despite this obvious inherent conflict, federal and state prosecutors continue to act both as grand juries' legal advisors and

as advocates who present evidence and submit indictments for consideration. (N121) Except for Connecticut, which has abolished the "civilian" grand jury (N122)--thus entirely eliminating the community's voice in that phase of the judicial process--all states and the District of Columbia allow one or more prosecutors to attend grand jury sessions. (N123) Neither federal law nor that of most state **93** jurisdictions permit a prosecutor to be present while grand jurors are voting or deliberating, (N124) however unfortunately, prosecutors have often influenced the grand jurors unduly prior to the deliberation process. States that use the grand jury to return indictments also make **94** prosecutors responsible for drafting indictments and submitting them to a grand jury for its consideration. (N125) In most states, furthermore, prosecutors act as a grand jury's legal advisor, although they may share this task with the court. (N126)

Hawaii is unique in limiting prosecutorial influence by providing grand juries with their own independent counsel. (N127) This requirement was introduced by a constitutional provision adopted in 1978 (N128) and is implemented by several statutes. (N129) Giving grand juries their own attorney was intended to increase their independence by eliminating the **95** influence a prosecutor can wield as the grand jury's legal advisor. (N130) Grand jury counsel are appointed by the Chief Justice of the Hawaii Supreme Court to serve a one year term. (N131) Their terms may be extended as needed to allow them to finish a particular task, but they cannot be reappointed to serve a second consecutive term. (N132) Their assignment is to "be at the call of the grand jury during its proceedings" in order to provide "appropriate advice on matters of law." (N133) Counsel serves along with a prosecutor who is responsible for calling matters to a grand jury's attention, providing it with evidence, and submitting proposed indictments for its review. (N134) Hawaii's unique system is a solid model for federal grand juries and states wishing to re-establish the legitimacy and independence of grand juries.

C. Analysis of Grand Jury Structure

The preceding discussion of structural elements in state and federal grand juries identifies several pervasive features that either evidence or erode grand jury independence. The grand jury's anonymity has **96** increased so that the general public is no longer aware of grand juries' role and importance. (N135) Because of the secrecy surrounding grand juries, the American public is generally uninformed about the nature and function of the institution and therefore is little concerned with its potential for prosecutorial dominance and other abuse.

A related aspect of the American grand jury is the extent to which its structure is dictated by informal practices--mostly local customs that have survived or evolved from the common law. One simply does not encounter this degree of informality in other aspects of the American criminal justice system, such as the trial court. It is inconceivable that a trial court would impanel a jury without selecting a specific number of required participants, for instance. Secrecy further nurtures this tolerance for informality. By disguising from the public all aspects of grand juries, even the very fact of their existence at particular times, the system eliminates a valuable source of oversight which would expose the irony that grand juries operate in the absence of formal constraints. Secrecy thus permits entrenchment of the status quo-prosecutorial control.

The grand jury's institutional anonymity and structural idiosyncrasies have historically been justified on the grounds that both are necessitated by its distinct functions. Part III considers this argument by exploring the grand jury's primary functions. It also compares and contrasts grand juries' current status with the historical ideal of the grand jury as a voice of the community.

III. Grand Jury Functions and the Capacity to Provide a Voice of the Community

Grand juries are like church congregations: You never quite know how to size them up because you can never **97** know what mix of talents, interests, and abilities have come together. (N136)

Before delving into an analysis of grand juries' two primary functions--returning indictments and investigating criminal and/or noncriminal activity--it is necessary to address two preliminary issues: the current status of state grand juries and their distinct roles in investigating and charging crimes.

A. Current Status

State statutes and constitutions have taken a variety of approaches toward grand juries' role in their criminal justice systems. These approaches can be divided into several categories. The first consists of states that explicitly permit their legislatures to abolish or modify the grand jury. (N137) The second category consists of one state, Pennsylvania, which has given its courts the ability to abolish the use of the indicting grand jury. Interestingly, every Pennsylvania court so empowered has exercised its authority. (N138) The third category consists of states that either explicitly forbid grand jury abolition or follow federal law by requiring the use of an indictment to charge at least certain offenses. (N139) As a federal enclave, the District of Columbia is bound by the Fifth Amendment, and consequently must employ the grand jury to return indictments for capital or otherwise infamous crimes.

The grand jury is, therefore, a constitutionally-protected institution in fewer than half the states and in the District of Columbia. As subsequent Sections explain, however, even though most states do not require **98** a constitutional amendment to abolish the grand jury, every state continues to use it either to indict or to investigate, and an overwhelming majority of states use it for both purposes.

B. Roles

As previously explained, a grand jury can serve as a proactive, active, or passive participant in the investigating and indicting processes. The archetype of a proactive grand jury is the colonial and early post-Revolutionary grand jury. These aggressive grand juries initiated their own inquiries and brought their own charges, rather than acting at the direction of a prosecutor. The proactive, investigatory nature of these grand juries is evident from the autonomy they exercised in supervising public affairs and in their extensive use of presentments. (N140)

Active grand juries are less aggressive than their proactive counterparts, but still inject their own initiatives into the investigating and/or indicting processes. The following incident in Ohio illustrates the behavior of an active indicting grand jury. Prosecutors asked a state grand jury

to charge a mother with voluntary manslaughter in the death of her small child. Media coverage of the case had provoked enough outrage among the jurors that they insisted on elevating the charge to murder, even though the facts may not have supported that charge. (N141)

An example of an active investigatory grand jury is a special federal grand jury established to investigate organized crime. While it shares this investigative function with its colonial antecedents, the control federal prosecutors exercise over an investigation makes it impossible for a special grand jury to become proactive. It cannot return a presentment because the federal system abolished presentments; (N142) it cannot return an indictment unless the prosecutor agrees; (N143) and it **99** cannot report its findings without the approval of the court that impaneled it. (N144) Despite these limitations, a special grand jury is not a passive entity. (N145) Special grand jurors may not be able to control an investigation, but they can influence it by questioning witnesses, by expressing their opinions of the evidence that has been presented, and by requesting additional evidence. (N146) The members of a special federal grand jury are, however, much less likely to play an active role in the charging process than the above description suggests. The complexity of federal substantive criminal law makes it difficult, if not impossible, for federal grand jurors to propose charges or, indeed, to do much more than vote to accept or reject a statement of charges submitted by a prosecutor.

The third role a grand jury can assume is the passive collaborator of a prosecutor. A passive indicting grand jury is one that does nothing more than "rubber stamp" the charges presented to it. A recent law review article reported, for instance, that one federal prosecutor took only forty-five minutes to secure fifteen indictments from a federal grand jury. (N147) This instance may be notable for the sheer number of indictments returned, but it is not unusual as an example of grand juries' routine, simple acceptance of the indictments submitted by a **100** prosecutor. (N148) Compliant indicting grand juries are the focus of most criticism directed at the modern grand jury and provide the basis for this Article's call for increased independence. (N149) Passivity can also occur in investigative grand juries, but it is likely to be less pronounced, depending on the nature and length of the investigation(s) in which they engage. Jurors who are involved in an ongoing investigation that is intrinsically interesting and/or affects their lives are likely to become—or attempt to become--active participants in the process. For grand jurors, "active participation" means questioning witnesses and attempting to exert some influence over the nature and quantity of evidence that is presented to the grand jury.

Grand jury activism is directly proportional to its independence. Independence, in turn, leads to a more influential, accurate, and legitimate community voice in the judicial process. Although at this point achievement of proactive federal grand juries is unlikely, it is nevertheless worthwhile to work towards greater activity, for many state grand juries retain the strong potential to serve in a proactive manner. All such endeavors will serve to legitimate grand juries and to strengthen their independence.

C. The Indicting Function

Like their common law counterparts, (N150) modern state and federal grand juries determine whether probable cause exists to believe that particular persons have engaged in criminal activity. (N151) The usual **101** practice is for a prosecutor to submit a statement of proposed

charges contained in an indictment to a grand jury. If the jury finds that the charges are supported by probable cause, it can vote to return the indictment, thereby initiating criminal proceedings against those named therein. (N152)

Most states and the District of Columbia use grand juries to indict. Twenty-three states and the District of Columbia require an indictment to charge at least certain offenses. Like the federal system, these states generally require that an indictment be used to charge capital crimes and/or serious felonies, reserving other charging instruments, such as informations (N153) and complaints, for misdemeanors and minor felonies. (N154) Of the many states that make use of indictments optional, most **102** permit charges for any offense to be brought either by indictment or information. (N155) As in the federal system, states that use an information instead of an indictment must provide an independent determination of probable cause made by a magistrate at a preliminary hearing. (N156)

Two states, Connecticut and Pennsylvania, have abolished the indicting grand jury but retained the grand jury as an investigative agency. In both states, the indicting grand jury was abolished by a constitutional amendment approved by the electorate. (N157) The Connecticut amendment substituted the requirement of a probable cause hearing for that of a grand jury indictment. (N158) The state legislature **103** then established procedures for conducting the hearing. (N159) Connecticut took this step because of "perceived inequities" in the indicting process--namely, its secrecy and resulting inaccessibility, and the facts that prospective defendants and witnesses could not present evidence on their own behalf, could not otherwise participate in the process, and were hampered by the restrictions on usage of proceeding transcripts. (N160) To eliminate these defects, Connecticut replaced the grand jury with the use of an information plus "an open and adversarial probable cause hearing." (N161)

Instead of categorically replacing indictments with informations or leaving this decision to the legislature, the Pennsylvania amendment gave each county court the option of using informations, rather than indictments. (N162) All of the county courts subsequently chose that option. (N163) Why Pennsylvania chose to commit the indicting grand jury's fate to the local judiciary instead of to the legislature is unclear, but the decision may be a result of several decisions in which the Pennsylvania Supreme Court held that the legislature could not abolish the grand jury. (N164)

In states that continue to use indicting grand juries, there exists a potential indicator of the extent to which prosecutors control the charging process. In the federal system, an indictment is not valid unless it is signed by a prosecutor and the prosecutor enjoys sole discretion **104** over the decision to sign. (N165) While this effectively prevents a modern federal grand jury from "running away" by initiating an investigation and/or bringing charges on its own, (N166) it also limits the grand jury's potential to provide a community perspective. Prosecutors' formal control over the charging process is further enhanced by the federal system's abolition of the use of presentments; (N167) consequently, federal grand juries cannot return charges on their own initiatives, using jurors' personal knowledge of criminal activity. (N168)

These formal aspects of the charging process make it clear that federal grand juries can at most play an active role in this endeavor. Certain informal aspects of the process make it even more likely that juries will be consigned to a passive role. For example, the substantive

complexity of federal criminal law makes it difficult, if not impossible, for grand jurors to play an active role in deciding what charges should be brought in a given instance. The difficulties that arise from the substantive law involved are often exacerbated by the complexity of the factual transactions at issue in a proposed indictment.

Perhaps the most significant informal factor that encourages passivity in federal indicting grand juries is the relationship that develops between prosecutors and grand jurors. (N169) The secrecy surrounding grand jury proceedings makes it impossible to provide a detailed empirical description of this relationship, but it is clear from the available anecdotal evidence that most prosecutors are careful to develop a rapport with grand jurors. (N170) The nature and extent of this rapport depends, at least in part, on the amount of time a prosecutor spends with **105** jurors. If a prosecutor only appears before a grand jury on one occasion, she obviously cannot develop a strong relationship with the jurors. But even in this situation prosecutors will nevertheless endeavor to develop a sense of camaraderie with jurors--a sense that "we are all regular people who want to do the right thing."

Prosecutors who regularly appear before a grand jury have the opportunity to establish a stronger rapport with the jurors. Prosecutors who have a long-term working relationship with a grand jury often establish a relationship in which the jurors come to identify with their cause and with them personally. This type of relationship is illustrated by an incident a prosecutor described to the author: a group of federal grand jurors retired to consider a proposed indictment; upon returning from their deliberations, they informed the prosecutor, "we gave you those charges you wanted." (N171) The statement suggests a desire on the part of grand jurors to please their legal advisor, as well as a lack of understanding of the precise nature of the charges.

The rapport a federal prosecutor cultivates with a grand jury is an effective informal control on the jurors' behavior. (N172) As jurors come to identify with the prosecutor and her cause, they are far less likely to challenge the propriety of the proposed charges she submits to them. (N173) When the effects of this identification are combined with the complexity of the legal and factual issues federal grand jurors typically confront, it becomes highly unlikely that they will play an active **106** role--let alone a proactive role—in the charging process. Formal aspects of the charging process sufficiently prevent federal grand jurors from "running away" and bringing charges on their own. (N174) Additional, informal restraints on juror independence impede the voice of the community.

Like the federal system, some states have abolished the use of presentments as a charging instrument. (N175) In these states, therefore, a grand jury is effectively denied the opportunity to play a proactive role in the charging process. Other states still use presentments, (N176) although some limit the grand jury's role in returning a presentment to recommending that certain activity be investigated, without permitting the instigation of charges. (N177)

In states which use presentments as a charging instrument, grand juries have retained the formal ability to play a proactive role in the **107** charging process. (N178) And at least two of the informal factors that discourage independence among federal grand jurors--the complexity of the law involved and the factual complexity of the criminal activity at issue--are generally not relevant to the experience of state grand jurors. (N179) For the most part, state grand jurors are concerned with crimes such as homicide, sexual abuse, theft, and drug

offenses, the legal and factual aspects of which are usually simple and straightforward. This relative simplicity makes it possible for jurors to initiate charges on the basis of their personal knowledge of specific criminal activity.

Whether a grand jury will serve in a proactive manner depends on several factors, including the legal instructions jurors receive and the extent to which prosecutors actively discourage jurors from acting on their own. Although the court that impanels a grand jury may be bound by law to inform jurors of their ability to formulate their own charges, prosecutors are unlikely to encourage this activity due to a concern that juror-initiated charges may be ill-founded and unlikely to produce a conviction. Since state grand jurors, like federal grand jurors, depend on prosecutors for legal advice, a prosecutor can use his expertise to subtly discourage a grand jury from pursuing its own charges. And since state prosecutors, like federal prosecutors, usually establish a rapport with jurors, they can use their informal control over a grand jury to the same end.

With regard to indictments, the states are divided on the formal indicia of prosecutorial control discussed above. A number do not require a prosecutor's signature on valid indictments. (N180) Others direct **108** but do not require the signature, (N181) and some impose such a requirement (N182) in an effort to give prosecutors more control over the charging process. (N183) Unfortunately, though forty-eight states still use indicting grand juries, secrecy rules make it difficult to elicit any direct evidence of the role grand jurors play in these states. Like federal grand jurors, jurors in states that require a prosecutor's signature on an indictment can at most play an active role in the indicting process. The legal and factual complexity that inhibits the autonomy of federal grand jurors is generally not a factor in the activities of state grand jurors. But the subtle dominance a prosecutor exercises over a grand jury and the fact that jurors are probably unaware of their ability to act without the prosecutor's approval make it likely that the same result will hold even in states which do not require a prosecutor's signature on an indictment. It is reasonable to infer, therefore, that indicting state grand juries--like their federal counterparts--are passive or, at best, active entities.

109 Admittedly, the possibility of a proactive indicting grand jury is preserved in some states by statutes that permit or require jurors to report any personal knowledge of criminal activity for grand jury inquiry. There is, however, no reason to equate a juror's ability to call criminal activity to a grand jury's attention with the latter's assumption of a proactive role in bringing charges for that activity. It is more reasonable to assume that once a juror reports possible illegal conduct, the grand jury will defer to a prosecutor, as its legal advisor, and she will decide whether and how to proceed. This assumption is particularly compelling in states where prosecutors must sign all indictments.

D. The Investigative Function

A grand jury can also be a proactive, active, or passive participant in the processes of investigating criminal and non-criminal activity and bringing charges for the former. On the federal level, special grand juries are statutorily authorized to "undertake inquiries into criminal matters upon their own initiative, without referral from the district court or the prosecuting attorney." (N184) As noted previously, this provision bestows a power regular federal grand juries theoretically still possess by virtue of the common law. (N185) However, federal grand juries, whether regular or special, do not in practice initiate their own investigations. This is presumably attributable to the same factors that discourage

autonomous action by federal indicting grand juries. That is, the complexity of federal criminal law and case fact patterns combine to discourage grand jurors from launching their own investigations. The effect of these two factors is no doubt compounded by the fact that, given the complexity of the activity federal criminal law encompasses, it is highly unlikely that any grand juror will have sufficient personal knowledge of such activity to call for an investigation into it. The inhibiting effect of these three factors is even further increased by the informal control a federal prosecutor exercises over a panel of grand jurors.

110 Grand juries in every state and in the District of Columbia enjoy at least some ability to investigate criminal activity. This is true even in Connecticut and Pennsylvania, both of which have abolished the indicting grand jury. Connecticut replaced its "civilian" grand jury with an investigatory jury composed of one or three judicial officers. (N186) Pennsylvania's investigatory grand jury is a citizen grand jury like those that conduct investigations in other states. (N187)

Although the investigative capacity of state grand juries varies among states, investigating grand juries can be grouped into three categories. In some states, grand juries may investigate only the criminal activity identified and submitted to them by a prosecutor or by a court. (N188) In other states, grand juries can investigate any activity that violated the criminal laws of their state and occurred within their venue, which is usually the county in which they sit. (N189) The third category **111** consists of state analogues to the special federal grand jury. These states have created a distinct category of grand juries which investigate specific varieties of criminal activity and/or activity beyond the reach of conventional grand juries because it is conducted over a broad geographical area and is therefore outside usual venues. (N190) **112** Known variously as "special grand juries," "statewide grand juries," "state grand juries," and "multicounty grand juries," (N191) the grand juries in this category are usually convened in addition to the regular grand juries that are impaneled to investigate more routine types of criminal activity. (N192)

Grand juries which fall into the first category are likely to play a passive role in the investigatory process for the same reasons many indicting grand juries play a passive role in the charging process. That is, although these grand juries do investigate criminal activity, the scope of their investigation is very limited. Rather than launching their own inquiries, they merely determine whether probable cause exists to support charges for criminal activity brought to their attention by a prosecutor or a judge. In many instances, especially when a prosecutor brings a matter to their attention, these grand juries will be asked to do little more than is required of an indicting grand jury. Some cases may require a more probing inquiry, but the highly structured context in **113** which these grand juries function makes it very unlikely that they will become active participants in the investigative process. (N193)

The potential to assume an active role exists for those grand juries in the second category--those authorized to investigate any criminal activity that may have occurred in their venue. The extent to which this potential will be realized in any specific instance depends upon several factors, including the length of time the jurors serve and the nature of their relationship with prosecutors. If prosecutors are accustomed to controlling the activities of grand juries in a particular locality, it will be difficult for any grand jury to take the reins in its own hands. (N194)

There is, however, one factor which suggests that increased activity is a real possibility, at least in some of the second category states. A number of states statutorily require and/or permit grand jurors to report any knowledge of criminal activity they have personally acquired to the grand jury for further investigation. (N195) Many of these states also fall into the category of states permitting grand juries to engage in investigative activity. This combination of circumstances suggests that the institutional culture of these states might tolerate a greater degree of initiative on the part of grand juries than that allowed **114** in other states, especially those which fall into the category discussed in the preceding paragraph. (N196)

The special grand juries which comprise the third category are created for the express purpose of investigating. (N197) It may, therefore, seem that they would be likely to play an active or even proactive role in those investigations. Several factors, however, make it almost certain that these grand juries will not serve as proactive investigatory entities. (N198) First, they are usually impaneled to investigate criminal endeavors which operate on a broader geographical and substantive scale than the isolated, localized conduct that is the focus of regular state grand juries. (N199) The broader geographical focus can reduce grand jurors' confidence in their ability to exercise any influence over the course of an investigation because of their relative unfamiliarity with the places and persons involved in it. The broader substantive focus can exacerbate this tendency toward insecurity because these grand juries are often charged with determining if complex crimes such as **115** racketeering and securities fraud have been committed. (N200) Like their federal counterparts, these special grand jurors may find that they must rely heavily on the expertise of prosecutors in making this determination. (N201) Finally, the composition of the grand jury itself can foster some insecurity; it is not uncommon for states to require that special grand juries include jurors from several counties or judicial districts, depending on the nature of the special grand jury itself. (N202)

These problems notwithstanding, state special grand juries will almost certainly be more active than their regular counterparts. As noted previously, they are impaneled for the express purpose of investigating possible criminal activity. The nature of this endeavor requires that special grand juries be called into session more often and over a longer period than grand juries convened simply for the purpose of considering indictments. (N203) The continuity--and possible intensity--of this experience should counterbalance the above-described tendencies toward juror insecurity and thus allow special grand juries to take an **116** active role in their investigations, much like the special federal grand juries on which they were modeled.

As discussed previously, early American grand juries actively investigated and monitored non-criminal matters. They devoted a substantial portion of their time to monitoring the condition of public facilities and reviewing the conduct of various public officials. Modern federal grand juries no longer enjoy the authority to inquire into non-criminal matters and issue reports on their findings. (N204) The practice fell into decline on the federal level in the nineteenth century and was abolished by the adoption of the Federal Rules of Criminal Procedure in 1946. (N205) State grand juries still enjoy the ability to inquire into and report on non-criminal matters. (N206) The most common of such matters is the condition of the local jail and other confinement facilities. Half of the states either require or permit grand juries to investigate penal institutions (N207) or related matters. (N208) Grand juries in some states investigate **117** local officials other than those in charge of incarcerative institutions. (N209)

They may scrutinize the conduct of elections and bring criminal **118** charges when they discover improprieties. (N210) Some states assign grand juries a variety of specific tasks, (N211) while others simply direct them to "investigate and make recommendations concerning the public welfare or safety." (N212)

The diversity of these inquiries makes it impossible to conduct any meaningful analysis of the extent to which the jurors charged with conducting them take advantage of the opportunity provided to pursue a rigorous investigation. Anecdotal evidence suggests that grand juries take their responsibilities seriously, (N213) though their scrutiny may be **119** less than searching when the inquiry involved is a repetitive one, such as inspecting the local jails. (N214) Some skeptics are willing to concede the dedication of grand juries but question the efficacy of their inquiries, especially when a grand jury is asked to evaluate a complex institution. In California, for example, grand jurors review the operations of local government, and critics of the grand jury's civil investigative role contend that this type of inquiry is an undertaking for which the laypeople who serve on California's grand juries are not qualified. (N215) Those who defend this function maintain that the grand jurors' lack of professional expertise is precisely the quality that makes their inquiries valuable by bringing the common sense perspectives shared by the populace of a given community to bear on certain government activities. (N216)

Another criticism sometimes raised about the effectiveness of grand juries investigating non-criminal matters is the suggestion that even if grand jurors are dedicated to their task and perform a worthwhile function by using lay perspectives to evaluate the actions of public officials, they have no way to ensure that their findings will receive serious consideration or that their recommendations will be implemented. (N217) **120** Although grand juries that investigate criminal matters can return formal charges and thereby initiate an official proceeding, those that investigate non-criminal matters are limited to presenting their findings and conclusions in a report which they usually submit to the court that impaneled them. (N218) If such a report is made public, (N219) it may generate enough indignation in the community to produce changes in the conditions at issue. (N220) If a report is not made public, (N221) or if it is made public but generates little community interest, the fate of its findings and recommendations is likely to settle in the hands of local public officials, including those whose activities it scrutinizes. (N222) **121** In these instances grand jury reports are likely to have little practical significance.

IV. Recommendations and Conclusion

The principal value of a grand jury ... consists in the independence of the jurors. (N223)

Although the federal system is constitutionally obliged to employ the indicting grand jury, the states are not. It is remarkable, therefore, that forty-eight states have retained the indicting grand jury despite concerted efforts to eliminate it in the nineteenth century. This persistence suggests that the institution contributes, or can contribute, something important to the criminal justice system.

This contribution is injection of the laypeople's perspective--the voice of the community--into the charging process. In the American criminal justice system, the importance of this perspective lies not so much in its role as a shield against government oppression, but in its

enhancement of the perceived legitimacy of criminal charges that are returned. Grand jury review is a way for prosecutors to obtain community support for charges, especially charges that might otherwise be regarded as questionable, i.e., products of political motivation, racial bias, prosecutorial vindictiveness, and/or prosecutorial excess. Grand juries also provide a means for prosecutors to garner political support by demonstrating their capacity to work with the people's representatives to secure appropriate charges against those who have allegedly engaged in conduct which the community regards as particularly outrageous. Conversely, grand jury review enables prosecutors to avoid bringing charges in situations in which someone's conduct may satisfy the formal requisites for imposing liability but the community's moral sense would regard such charges as "unjust."

It is therefore ironic that the grand jury enjoys greater institutional security in the federal system but federal grand juries actually perform **122** this role as "voice of the community" to a far lesser extent than do their state counterparts. The diminished importance of the grand jury in the federal system is attributable to several factors discussed in this Article, the most important of which are the complexity of matters they consider and the influence of prosecutors.

The factual and legal complexity of federal criminal cases makes it difficult, if not impossible, for a federal grand jury to act as the "voice of the community" and meaningfully assess the propriety of bringing either the specific charges that have been submitted to it or any other appropriate charges. Consequently, jurors are forced to depend on the advice they receive from the prosecutors, who are hardly disinterested in the outcome of the grand jury's deliberations. There is a direct correlation between the jurors' ability to exercise independent judgment and their dependence on prosecutors. The more grand jurors identify with prosecutors and follow their advice, the more jurors functionally surrender their independence and become a "rubber stamp" for prosecutors. The federal system is therefore caught in an institutional "Catch 22": the Fifth Amendment requires that grand juries be used to bring charges for serious federal crimes, but the federal indicting grand jury is no longer capable of making a meaningful contribution by screening the propriety of federal charges. The contemporary federal grand jury has lost its ability to act as the voice of the community and, in a perverse turn of events, has become the tool of prosecutors.

To a public as mystified by the complexities of federal criminal law as grand jurors are, grand juries legitimize the charges that are brought against certain persons. Of course, since federal grand juries almost always "sign off" on the charges presented to them by a prosecutor, this legitimacy is illusory. Public ignorance of this perfunctory process can work to the detriment of those charged by grand juries in a second way. Notwithstanding the presumption of innocence, trial jurors may be influenced by a grand jury's decision to return charges, especially since trial jurors may also be mystified by the factual and legal intricacies of the case. The trial jurors may make the common-sense assumption that "there must be something to the charges," because the grand jury would not have brought them otherwise. To a degree, this is an unavoidable assumption, one problematic even when charges are the result of a grand jury's use of its own independent judgment. But the current system injects an element of injustice into **123** the proceedings because the jurors are giving credence to a process void of the substantive content attributed to it.

What should be done to remedy federal indicting grand juries transformation from a voice of the community to a voice of the prosecutor? One solution would be to adopt a constitutional amendment abrogating the right to indictment in federal cases. Though abolishing federal indicting grand juries would eliminate the misperception of legitimacy which currently results from their actions, it would also destroy any chance of injecting the lay perspective into the charging process. The states' persistence in using indicting grand juries indicates states' belief that this perspective makes a valuable contribution to that process. If that perspective is to be preserved, a less drastic solution is in order.

One possibility for restoring a measure of objectivity to the process is to require that prosecutors include exculpatory evidence in their presentations to an indicting federal grand jury, thus affording jurors a more balanced version of the facts at issue. Alternatively, courts could ensure a balanced presentation by allowing those facing the possibility of indictment to participate in the process. Potential defendants could, for example, be permitted to appear before grand jurors to rebut evidence showing that they engaged in certain criminal activity.

This approach is intuitively appealing insofar as it would guarantee a far more balanced presentation, but there are strong reasons for not adopting it. For one thing, imposing formal requirements that a grand jury hear exculpatory evidence would effectively transform the grand jury review process into a trial on liability, thus unnecessarily duplicating the tasks assigned to trial jurors and increasing the expenses incurred by both the prosecution and defense in all criminal cases. In addition to its inefficiency, imposing such a requirement would markedly diminish grand juries' effectiveness by injecting evidentiary issues, such as whether particular evidence was sufficiently exculpatory, into grand jury deliberations. Artful defense attorneys could use such claims improperly to delay and perhaps even defeat a prosecutor's justifiable efforts to persuade jurors to indict. Adopting this approach would further undermine a federal grand jury's ability to conduct an independent review of the charges submitted to it. As the Supreme Court has long recognized, the grand jury cannot perform its screening **124** function effectively if it is impeded with evidentiary and other procedural restraints. (N224)

There is a better alternative: As noted earlier, the major threat to a federal indicting grand jury's ability to exercise its own judgment comes from the control prosecutors exert over jurors. The best way to restore grand jurors' independence is, therefore, to diminish prosecutors' influence. Abolishing a federal prosecutor's role as the grand jury's legal advisor would go a long way toward accomplishing this goal, though it would also deprive grand jurors of necessary legal advice unless an alternative source is established. The ideal solution is to follow Hawaii's lead and provide federal grand juries with their own counsel. Statutes could create the office of "grand jury counsel" and specify the qualifications required of those who would fill this position. The district court impaneling a grand jury could appoint counsel at the time the jurors are sworn.

To reinforce the grand jury's role as the voice of the community, the grand jury's counsel should be an attorney who practices in that district. To avoid biases resulting from an extended tenure in the position of grand jury counsel, each counsel should be appointed to serve as long as that grand jury serves, and no longer. Temporally uniting the counsel and grand jurors would in most instances produce a relationship between the two that will at least superficially resemble the juror-prosecutor relationship that emerges under present practice. Such a relationship is not objectionable because unlike a prosecutor, who must serve as both

advocate and advisor, (N225) the grand jury counsel would serve purely as an impartial legal advisor. (N226)

As such, a grand jury's counsel would act as a buffer between jurors and prosecutors, as well as between jurors and the persons against **125** whom a prosecutor seeks charges. Its counsel could advise the jurors as to the advisability of hearing exculpatory evidence in a particular instance. Unlike a prosecutor, grand jury counsel is far more likely to recommend that jurors hear such evidence when it seems appropriate to do so. This would let the jurors hear a more balanced presentation in appropriate instances without saddling the grand jury with formal requirements mandating the introduction of exculpatory evidence. Since the decision to hear such evidence would be committed to the discretion of the jurors, acting with the advice of their counsel, defense counsel could not manipulate this option to its own ends.

In addition to giving jurors objective legal advice and advising them on the need to hear exculpatory evidence, the grand jury counsel could foster jurors' capacity for independent review in yet another way. As previously explained, the Supreme Court has refused to apply the exclusionary rule to grand jury proceedings. (N227) While this result is constitutionally unimpeachable, permitting grand juries to hear illegally obtained evidence fosters the appearance that grand jury proceedings are biased in favor of the prosecution. Although grand juries would still hear such evidence, their counsel could reduce the appearance of bias by explaining to jurors that particular evidence was obtained in violation of the Fourth Amendment and could not, therefore, be introduced against the prospective defendants at trial. (N228) The jurors could then weigh this information in deciding whether such charges are warranted. Jurors' knowledge that the evidence is tainted increases the independence of their judgments about it and thus enhances the legitimacy of the review process.

Creating the position of grand jury counsel would enhance the perceived legitimacy of the process by discouraging claims of grand jury abuse. Currently, defendants often accuse prosecutors of abusing the grand jury process in the course of obtaining indictments against them. (N229) Abuse claims are varied but usually involve allegations that a **126** prosecutor exploited a grand jury to gain some litigation advantage. Defendants often, for example, claim that prosecutors used a grand jury for improper purposes, such as to gather evidence for use at trial, or that they used the grand jury to harass and intimidate witnesses. (N230) Establishing the position of grand jury counsel would make it far more difficult for defendants to make and establish such claims because the review process would be removed from the hands of prosecuting attorneys. For these reasons, providing federal grand juries with independent counsel would restore a significant measure of objectivity to the screening process and enhance the jurors' ability to make their own determinations as to the "justness" of particular charges. It would, in other words, go a long way toward restoring the federal indicting grand jury's ability to act as the voice of the community.

Introducing the position of grand jury counsel into the state indicting process would no doubt enhance the objectivity of that process, but far less need for this measure exists among the states than in the federal system. The relative factual and legal simplicity of state charges makes them more accessible to state jurors without the assistance of independent counsel. (N231) And state grand jurors tend to serve shorter and more sporadic terms, decreasing the likelihood that jurors will develop the type of long-term relationship that typically emerges between federal indicting grand juries and the prosecutors with whom they work.

Furthermore, state grand jurors are less likely to be intimidated **127** by collateral aspects of the process. For example, federal agents (FBI and otherwise), who testify before grand juries are more likely to command awe and fear among jurors than state officers, with whom they interact on a daily basis and whose jobs are mundane. Jurors may more easily treat state officers' testimony with skepticism.

State grand jurors are, in other words, generally better able to conduct a critical review of charges proposed by a prosecutor. While providing them with their own counsel would improve their ability to exercise an independent review of the law and the facts presented to them, such a measure does not assume the critical importance it does in the federal system, in which indicting grand juries have virtually lost their ability to bring the laypeople's perspective to the indicting process.

There are also profound differences between the federal and state systems' respective utilization of the investigating grand jury. As previously explained, the federal system is not constitutionally obligated to employ grand juries as an investigative agency and has responded by almost eliminating the grand jury's investigative role. The only federal grand jury that is statutorily authorized to investigate is the special federal grand jury which, unlike its state counterparts, can only investigate criminal activity. (N232) In fact, federal grand juries apparently never exercised the civil investigative abilities of their state counterparts. One wonders why the federal grand jury, a lineal descendant of the English common law grand jury, never exercised the full civil investigative ability of its ancestor.

The answer lies in the character of the federal system and its relationship to the "voice of the community notion. Grand juries are by nature parochial. They are concerned with local activity and were designed to import a local, lay perspective on the legal significance of that activity. This parochial nature is no impediment to a federal grand jury's ability to perform its indicting function. Like their common law ancestor, federal grand juries are asked to return charges for criminal activity that occurred--in whole or in large part--in their immediate locality. (N233) The activity in question, however complex, is complete in **128** itself, which means a federal grand jury can analyze it and take appropriate action without having to consider larger issues.

This would not be true if a federal grand jury were to investigate non-criminal activity, such as the conduct of federal government operations. Since the federal system is a national system, a grand jury investigating a government activity such as the operation of the federal prison system would have to review the operation of all the prisons in the federal system. This would be an extraordinarily difficult task for laypeople to perform because of the voluminous amount of technical information involved and the time and effort needed in traveling around the country to visit various federal prisons.

Aside from the geographical magnitude and empirical complexity of this task, it is difficult to reconcile such an investigation with the parochial nature of the grand jury. Would a grand jury impaneled to investigate an activity such as the operation of the federal prison system be composed of citizens from all parts of the United States? Since the activity under investigation is national in scope, must the voice of the community be the voice of the national community? If not, the grand jury would not bring a representative lay perspective to bear on the activity at issue. If so, it would become an inefficient and ineffective entity. Jurors would be summoned from various parts of the country, required to devote a great deal of time to touring

facilities around the country, and asked to evaluate an operation with which they have no technical familiarity. (N234)

The federal system could create regional grand juries and assign each the task of evaluating certain government operations within its region. Some states establish regional grand juries, usually to investigate large-scale criminal activity. Regional grand juries present a viable option because of the relatively limited geographical area they encompass, and because they focus on criminal activity far less complex than federal government operations. A regional federal civil investigative grand jury would face the same basic difficulties that would impede a national grand jury like it, however. The geographical scope of the region would make selecting a representative jury panel a **129** complicated task. Jurors would be required to travel extensively and would still be confronted with evaluating activities that can require a high degree of technical expertise to comprehend, let alone evaluate.

Another theoretical option would be to create specialized federal civil investigative grand juries. If such a grand jury were, for example, impaneled to investigate the Internal Revenue Service, it would be composed of tax attorneys and accountants. But although this option eliminates the lack of technical expertise that makes lay civil investigative grand juries highly problematic, it also eliminates the lay perspective that is the raison d'etre for grand jury review.

The geographical scope and operational complexity of federal government activities are simply not amenable to scrutiny by a grand jury; they defy its parochial nature. It is therefore far more sensible to assign the review task to specialized agencies staffed by individuals who have technical expertise in the activities they are assigned to review. And when extraordinary situations such as the events at the Branch Davidian compound in Waco, Texas, or the government's conduct at Randall Weaver's home in Ruby Ridge, Idaho arise, Congress can conduct its own investigation of those events.

Civil investigatory grand juries prosper among the states for several reasons, most of which arise out of obvious differences between the state and federal systems. In most states, civil investigatory grand juries are almost always concerned with investigating activity which occurs locally and/or institutions which are maintained at the county level. Therefore, the problems of juror selection and travel that would plague a federal civil investigative grand jury do not arise. And though it is theoretically possible that a lack of technical expertise could hamper the functioning of these grand juries, in practice they are asked to review matters within the understanding of ordinary citizens. Consequently, jurors are able to conduct an intelligent, if not professional, review of those activities and institutions and are often able to offer suggestions for improvement. Whether or not governments adopt these proposals, the fact of lay review of the institution's operations will to some extent heighten its responsiveness to the local citizenry and will clearly heighten the legitimacy of its operations in the public's eyes.

130 A. Prognosis

Without intervention, the federal indicting grand jury will become an ever more powerful tool of the prosecutors who dominate it. The history of the federal grand jury is the history of the voice of the prosecutor subtly but surely overwhelming the voice of the community. As the

federal grand jury becomes the prosecutor's pawn, it moves further away from its intended function of injecting the community's notions of morality and justice into the charging process.

Similar tendencies exist at the state level, but because federal grand juries are subject to constraints not applicable to state grand juries, the latter retain more of their traditional function. In addition, a prosecutor's domination of a state indicting grand jury has less severe consequences than such domination has at the federal level because state trial jurors are more likely to conduct their own critical review of the charges against a particular defendant.

Therefore, while establishing the position of grand jury counsel is an imperative for the federal system, it is merely an option states should consider. Both systems, however, should concentrate on restoring the grand jury to its role as the voice of the community by educating the public about grand juries and by adopting features of state systems likely to encourage independence. Currently, most adult Americans, even those who pride themselves on being generally well-informed about their government and its activities, know little about grand juries. (N235) They may be aware that grand juries exist, but will almost certainly be unfamiliar with their roles, functions, and historical purpose. Because of the secrecy surrounding the grand jury, the media provides little, if any, information about the activities of specific grand juries, and the entertainment industry has almost ignored the grand jury. A few popular novels touch on it, (N236) but it has been almost entirely neglected by the film and television industries. If grand jurors do not learn about grand juries from other sources, they will remain dependent on judges and prosecutors. Since neither is inclined to advise a grand jury of the full extent of its independence, the decline of the **131** voice of the community will continue unless grand juries are provided an objective source of information.

FOOTNOTES

N1. The phrase has been used to describe the function of grand juries. See Barker v. Fox, 238 S.E.2d 235, 236 (W.Va. 1977) ("[T]he grand jury serves as the voice of the community in calling forth suspected criminals to answer for their alleged misdeeds.").

N2. Professor of Law, University of Dayton.

N3. United States v. Smith, 27 F. Cas. 1186, 1188 (C.C.D.N.Y. 1806) (No.16341A).

N4. Susan W. Brenner & Gregory G. Lockhart, Handbook of Federal Grand Jury Practice § 2.1 (forthcoming 1996) (on file with the Virginia Journal of Social Policy & the Law); 1 William Holdsworth, A History of English Law 321-23 (7th ed. 1956); Theodore F.T. Plucknett, A Concise History of the Common Law 111-13 (5th ed. 1956); Susan M. Schiappa, Note, Preserving the Autonomy and Function of the Grand Jury: United States v. Williams, 43 Cath. U. L. Rev.311, 324-25 (1993); see also Andrew D. Leipold, Why Grand Juries Do Not (And Cannot) Protect the Accused, 80 Cornell L. Rev. 260, 280-81 (1995) (noting that the king devised the grand jury as a way to eliminate the practice of using private complaints to bring criminal charges).

N5. Brenner & Lockhart, supra note 4, § 2.1; Leipold, supra note 4, at 281 ("Because the sheriff could not keep track of all the mischief committed by the locals, each juror was expected to bring to the proceedings the names of those suspected of crimes.").

N6. Brenner & Lockhart, supra note 4, § 2.1; Schiappa, supra note 4, at 325-26.

N7. Brenner & Lockhart, supra note 4, § 2.1; Schiappa, supra note 4, at 327.

N8. William Blackstone, Commentaries on the Law of England 301-02.

N9. Ron S. Chun, The Right to Grand Jury Indictment, 26 Am. Crim. L. Rev.1457, 1459-60 (1989); see also Akhil R. Amar, The Bill of Rights and the Fourteenth Amendment, 101 Yale L. J. 1193, 1248 (1992).

N10. See, e.g., In re Russo, 53 F.R.D. 564, 568 (C.D. Cal. 1971); Leipold, supra note 4, at 284 (stating that during these years, the "grand jury's screening role became increasingly prominent").

N11. Barry J. Stern, Revealing Misconduct by Public Officials Through Grand Jury Reports, 136 U. Pa. L. Rev. 73, 84 (1987).

N12. See id. (stating that juries in the late seventeenth and early eighteenth centuries used reports to "comment on matters of community concern"); Ronald F. Wright, Why Not Administrative Grand Juries?, 44 Admin. L. Rev.465, 468 (1992).

N13. Stern, supra note 11, at 84.

N14. Wright, supra note 12, at 468.

N15. State v. Smith, 285 S.E.2d 500, 503 (W. Va. 1981) ("At the time of the American Revolution, the grand jury was perceived by most Americans as a highly esteemed institution ....").

N16. See James Alexander, A Brief Narrative of the Case and Trial of John Peter Zenger 17 (1972); Marvin E. Frankel & Gary P. Naftalis, The Grand Jury: An Institution on Trial 11 (1977); Renee B. Lettow, Note, Reviving Federal Grand Jury Presentments, 103 Yale L. J. 1333, 1337 (1994); Schiappa, supra note 4, at 328-29. Some infer from the highly publicized instances of grand juror independence discussed in these sources that colonial grand juries often acted as a shield between the British government and its American subjects. See, e.g., Wright, supra note 12, at 469. Others suggest that this was not true until the later colonial period, when there was a great deal of tension between the colonists and the British government. See, e.g., Leipold, supra note 4, at 283-85.

N17. Wright, supra note 12, at 470-71; Schiappa, supra note 4, at 328 ("[T]he colonial grand jury represented the people in its community, suggested new laws, exposed governmental abuses, identified municipal problems such as roads and bridges in need of repair, and performed administrative duties.").

N18. Richard D. Younger, The People's Panel: The Grand Jury in the United States, 1634-1941, at 44-45 (1963); Schiappa, supra note 4, at 329.

N19. U.S. Const. amend. V. See generally Schiappa, supra note 4, at 329- 30 (explaining the process through which the amendment was proposed and ultimately ratified). For the definition of an "infamous" crime, see Brenner & Lockhart, supra note 4, § 2.2.

N20. Hurtado v. California, 110 U.S. 516, 538 (1884) (rejecting the argument that state grand jury indictment is required under the Due Process Clause); Brenner & Lockhart, supra note 4, § 2.2.

N21. See, e.g., United States v. Elliott, 25 F. Cas. 1003, 1003-04 (Crim. Ct. D.C. 1845) (No. 15,045); United States v. Mundell, 27 F. Cas. 23, 23-24 (C.C.D. Va. 1795) (No. 15,834); Richards v. Foulks, 3 Ohio 66 (1827).

N22. Younger, supra note 18, at 50.

N23. See, e.g., Presentment of the Grand Jury of the Circuit Court for the District of Virginia (May 23, 1794), reprinted in 2 The Documentary History of the Supreme Court of the United States, 1789-1800, at 472 (Maeva Marcus ed., 1988); Presentments of the Grand Jury of the Circuit Court for the District of Georgia (Oct. 18, 1791; Apr. 27, 1792; Nov. 13, 1792), reprinted in 2 The Documentary History of the Supreme Court of the United States, 1789-1800, at 224, 272, 332-33; Lettow, supra note 16, at 1337-39.

N24. See, e.g., United States v. Flanakin, 25 F. Cas. 1105, 1105 (Super. Ct. Ark. Terr. 1825) (No. 15119a).

N25. Lettow, supra note 16, at 1340-41.

N26. Younger, supra note 18, at 60-71; Richard D. Younger, The Grand Jury Under Attack, 46 J. Crim. L. & Criminology 26, 33-37 (1955) [hereinafter Younger, The Grand Jury]. Although England preceded the United States in discussions to restrict the grand jury, it waited until the twentieth century to abolish the grand jury entirely. James R. Acker, The Grand Jury and Capital Punishment: Rethinking the Role of an Ancient Institution Under the Modern Jurisprudence of Death, 21 Pac. L. J. 31, 51 n.102 (1989); Schiappa, supra note 4, at 313 n.9.

N27. Younger, The Grand Jury, supra note 26, at 44-45.

N28. Wright, supra note 12, at 483.

N29. Id. at 483-84 nn. 94-98.

N30. There have been efforts to override this requirement. Leipold, supra note 4, at 272 (noting that during the 1970s, Congress considered "at least four proposals to amend the Fifth Amendment to abolish the grand jury requirement").

N31. Wright, supra note 12, at 481-84 (noting a general decline in grand juries' ability to initiate investigations of criminal conduct during nineteenth and early twentieth centuries); Fred A. Bernstein, Note, Behind the Gray Door: Williams, Secrecy, and the Federal Grand Jury, 69 N.Y.U.L. Rev. 563, 576-80 (1994); Schiappa, supra note 4, at 332-35.

N32. Brenner & Lockhart, supra note 4, §§ 7.1-7.2.

N33. See, e.g., Id. § 2.3.

N34. Id. §§ 2.3, 7.3 (arguing that it is when this rapport breaks down that a grand jury is likely to attempt to "run away," i.e., initiate its own inquiries and/or charges).

N35. Fed. R. Crim. P. 7(a) advisory committee's note 4 (explaining that "[p]resentments ... are obsolete, at least as concerns the Federal Courts"); Brenner & Lockhart, supra note 4, § 2.2.

N36. United States v. Cox, 342 F.2d 167, 171-72 (5th Cir. 1965), cert. denied, 381 U.S. 935 (1965); Brenner & Lockhart, supra note 4, § 2.3.

N37. See Brenner & Lockhart, supra note 4, § 3.3.

N38. Id.

N39. Id. § 7.1.

N40. Id. §§ 6.3, 7.1.

N41. Id. § 3.3. It is obviously difficult, if not impossible, to locate direct support for this proposition. Inferential confirmation comes, however, from the fact that the standard charge which impaneling judges give to new grand juries still does not advise them of their power to issue reports. Id. § 6.3. And no reference to reports appears in The Handbook for Federal Grand Jurors, which jurors receive during orientation to further acquaint them with their duties and responsibilities. Id. § 3.3.

N42. See id. § 3.3.

N43. Id. § 2.4.

N44. 18 U.S.C. §§ 3332-33 (1970).

N45. Id.; Brenner & Lockhart, supra note 4, § 2.4.

N46. Reports on criminal activity raise certain concerns, the most notable of which involves the propriety of allowing a grand jury to issue a report on criminal conduct instead of bringing charges against a defendant. See Brenner & Lockhart, supra note 4, § 3.3. Allowing a grand jury do this is problematic. Grand juries presumably bring charges when they find probable cause to believe that a crime has been committed. Id. § 3.2. From this, it follows that a grand jury may choose to issue a report only when it has not been convinced that probable cause exists to return charges against certain individuals. Such a report is objectionable for at least two reasons: it accuses those it names of criminal activity on the basis of evidence that was insufficient to warrant the return of an indictment; and because no charges have been brought against them, they have no means by which to refute the allegations which appear in the report or to clear their names.

N47. Id. §s 3.3.

N48. H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 39 (1970), reprinted in 1970 U.S.C.C.A.N. 4007.

N49. 18 U.S.C.§ 3333(b).

N50. 18 U.S.C. § 3333(a); Brenner & Lockhart, supra note 4, § 3.3.

N51. Id.

N52. See In re Charge to Grand Jury, 66 F. 963 (N.D.N.Y. 1895), where, at the instigation of the federal judge who impaneled it, a grand jury issued a report calling attention to the inadequate facilities and supplies provided to federal district courts; see also Brenner & Lockhart, supra note 4, § 3.3. But see In re Grand Jury Sitting in Cedar Rapids, Iowa, 734 F.Supp. 875 (N.D. Iowa 1990) (grand jury gave court report concerning alleged, possibly criminal, improprieties committed by state public officials).

N53. Ronald Wright offers an alternative explanation of this phenomenon. Wright, supra note 12. He attributes elimination of the need for federal grand juries' civil duties to the rise of administrative agencies, which now perform the oversight function that was once consigned to grand juries. Id. at 491-93.

N54. See, e.g., Levine v. United States, 362 U.S. 610, 617 (1960) ("The grand jury is an arm of the court ...."); Brenner & Lockhart, supra note 4,§ 2.3.

N55. 504 U.S. 36 (1992).

N56. Id. at 47.

N57. See Brenner & Lockhart, supra note 4, § 2.3.

N58. See, e.g., N.Y. Crim. Proc. Law § 190.05 (McKinney 1993) ("A grand jury is a body consisting of not less than sixteen nor more than twenty-three persons, impaneled by a superior court and constituting a part of such court ...."); N.C. Gen. Stat. § 15A-621 (1994); Wash. Rev. Code § 10.27.020(6) (1990).

N59. See, e.g., O'Leary v. Superior Court, 816 P.2d 163, 166-67 (Alaska 1991); People v. Superior Court, 531 P.2d 761, 766 (Cal. 1975); State ex rel. Martin v. Michell, 188 So.2d 684, 686-87 (Fla. Dist. Ct. App.), aff'd per curiam, 192 So.2d 281 (Fla. 1966); In re Moe, 617 P.2d 1222, 1224 (Haw. 1980); People v. Polk, 174 N.E.2d 393, 395 (Ill. 1961); Greenwell v. Commonwealth, 317 S.W.2d 859, 861 (Ky. 1958); Grand Jurors of Worcester County for Year 1951 v. Comm'r of Corps. & Taxation, 106 N.E.2d 539, 541 (Mass. 1952).

N60. See, e.g., In re Moe, 617 P.2d at 1224: The circuit court has supervisory powers over grand jury proceedings to insure the integrity of the grand jury process and the proper administration of justice. A grand jury is a constituent part of the court or branch of a court having general criminal jurisdiction. A grand jury acts in connection with and under general

instruction from the court to which it is attached and it is under the general supervision and control of such court. (citations omitted).

N61. Brenner & Lockhart, supra note 4, §2.3.

N62. State v. Gowan, 214 N.W.2d 228, 231 (Minn. 1973); People v. Infante, 511 N.Y.S.2d 293, 294 (N.Y. App. Div. 1987); State v. Conger, 878 P.2d 1089, 1097 (Or. 1994).

N63. 18 U.S.C. § 3321 (1994) ("Every grand jury impaneled before any district court shall consist of not less than sixteen nor more than twenty- three persons."); Fed. R. Crim. P. 6(a)(1) ("The grand jury shall consist of not less than 16 nor more than 23 members.").

N64. Va. Code Ann. § 19.2-195 (Michie 1990).

N65. E.g., R.I. Gen. Laws §§ 12-11.1, 12-11.1-1 (1994); Pa. R. Crim. P. 253(a); Vt. R. Crim. P.6(a).

N66. See, e.g., Strauder v. West Virginia, 100 U.S. 303, 308 (1879).

N67. Brenner & Lockhart, supra note 4, ch. 5.A.

N68. Id.§ 5.1.

N69. See id.

N70. Because of the secrecy surrounding grand jury proceedings, it is difficult to find direct support for this proposition. The Supreme Court has, however, implicitly acknowledged its validity on at least one occasion. See Shadwick v. City of Tampa, 407 U.S. 345, 351-52 (1972) ("Our legal system has long entrusted nonlawyers to evaluate ... complex and significant factual data .... Grand juries daily determine probable cause prior to rendering indictments ...."); see also Leipold, supra note 4, at 294 ("In submitting a case to the grand jury we are asking nonlawyers with no experience in weighing evidence to decide whether a legal test is satisfied, and to do so after the only lawyer in the room, the prosecutor, has concluded that it has.").

N71. 28 U.S.C.§1861 (1988); see also Brenner & Lockhart, supra note 4, §§ 5.1-5.2. The selection procedure is also intended to ensure that all U.S. citizens have the opportunity to be considered for jury service and that no one is excluded because of "race, color, religion, sex, national origin, or economic status." 28 U.S.C. §§ 1861-1862 (1988).

N72. 28 U.S.C. §§ 1861-69 (1988). For more on federal jury selection, see Brenner & Lockhart, supra note 4, §§ 5.1-5.2.

N73. 28 U.S.C.§1863(a) (1988). Each district's plan must designate a jury commission or court clerk to be in charge of jury selection, state whether voter registration lists or lists of actual voters are to be used as a source of prospective jurors, and indicate how jurors are to be chosen from these lists and assigned to jury panels. 28 U.S.C.§1863(b)(1)-(4), (7)-(8). For examples of district plans implementing these requirements, see U.S. Dist. Ct. Rules E.D.

Cal., Juror Selection Plan; U.S. Dist. Ct. Rules, S.D. Ill., Jury Selection Plan; see also Brenner & Lockhart, supra note 4,§5.2.

N74. The exemptions are specified under 28 U.S.C. §§ 1863(b)(5)(A), 1863(b) (6). District plans then supplement these bases for excusal. See, e.g., U.S. Dist. Ct. Rules, W.D. Va., Jury Selection Plan; see also Brenner & Lockhart, supra note 4, §§ 5.1-5.2.

N75. 28 U.S.C.§1866(a).

N76. 28 U.S.C. §§ 1866(a), (c).

N77. See Reece v. Georgia, 350 U.S. 85, 87 (1955) ("[V]alid grand-jury selection is a constitutionally protected right."). For more on this topic, see also Brenner & Lockhart, supra note 4, §§ 5.1-5.2, 5.10.

N78. See, e.g., Ala. Code §12-16-55 (1986) ("It is the policy of this state that all persons selected for jury service be selected at random from a fair cross section of the population of the area served by the court, and that all qualified citizens have the opportunity ... to be considered for jury service ...."); Kan. Stat. Ann.§43-155 (1993).

N79. E.g., Ala. Code §12-16-57(a) (1986) (requiring jury commission in each county to compile and maintain an "alphabetical master list" of prospective jurors residing in the county; the list may include all registered voters, those holding drivers' licenses and registering motor vehicles, and the list may incorporate other lists, such as lists of utility customers and persons listing property for ad valorem taxation); Kan. Stat. Ann.§43-162 (1993) (requiring jury commissioners to prepare jury lists from county's voter registration records, lists of licensed drivers, census records, and "lists of holders of state-issued nondrivers' identification cards who reside in the county"); Minn. R. Gen. Prac. 806(b) (requiring names to come from voter registration and drivers' license lists for the county in which grand jury is impaneled).

N80. E.g., Ala. Code §12-16-58(c) (1986) (describing the following process: "names on the master list shall be divided by the number of names to be placed in the master jury box and the whole number next greater than the quotient shall be the key number, except that the key number shall never be less than two;" a random method is then used to determine a starting number from the numbers one to the key number; the names to be put into the master jury box are chosen from the master list by taking the first name on the list corresponding to the starting number and then taking successively the names appearing on the list at intervals equal to the key number; if necessary, the process begins again at the start of the list and continues until the required number of names has been selected); Ala. Code §12-16-58(a) (names so chosen are written on a card and placed in the master jury box). For similar procedures utilized elsewhere, see, e.g., Ariz. Rev. Stat. Ann. §§ 21-312, 21-323, 21-423 (1990 & Supp. 1995); Kan. Stat. Ann. §§ 43-163 to 43-164 (1993); Miss. Code Ann.§13-7-15 (Supp. 1995); Mo. Ann. Stat. §§ 540.011, 540.021 (Vernon Supp. 1995); Nev. Rev. Stat. Ann. §§ 6.110(1)-(2), 6.120(1)-(2) (Michie 1986). For somewhat different approaches, see, e.g., Cal. Penal Code §§ 899-902 (West 1985 & Supp. 1995) (requiring that names be written on slips of paper and drawn from the "grand jury box"); La. Code Crim. Proc. Ann. arts. 411, 413 (West 1991) ("names drawn from 'general venire box"'). For the corresponding federal practice, see Brenner & Lockhart, supra note 4,§5.2.

N81. Brenner & Lockhart, supra note 4,§6.6.

N82. Id.

N83. See, e.g., In re Standard Jury Instructions--Criminal Report No. 90-2, 575 So.2d 1276, 1283 (Fla. 1991) (model grand jury instruction informing jurors that the "grand jury will not be in constant session but will be called in from time to time as necessary") (per curiam); La. Code Crim. Proc. Ann. art. 435 (West 1991) (grand jury "shall meet as directed by the court" and may also meet on its own initiative). But see Tex. Code Crim. Proc. Ann. art. 20.08 (West 1977) (grand jury shall meet at times agreed on by a majority of the jurors, subject to the consent of the court if the adjournment is more than three days).

N84. Fed. R. Crim. P. 6(a)(1). See, e.g., United States v. Marrapese, 610 F.Supp. 991, 1006 (D.C.R.I. 1985); see also Brenner & Lockhart, supra note 4,§6.6.9(a).

N85. Brenner & Lockhart, supra note 4,§6.6.9(a).
N86. E.g., Ariz. Rev. Stat. Ann.§21-322(B) (Supp. 1994); Ga. Code Ann.§§ 15-12-61(a), 15-12-100(b) (1994); Ill. Ann. Stat. ch. 705, para. 305/16 (Smith-Hurd 1992); Kan. Stat. Ann.§22-3001(3) (1988); Haw. R. Penal P. 6(f).

N87. Brenner & Lockhart, supra note 4, ch. 10.B

N88. See, e.g., Cal. Penal Code §939.6 (West 1985); Idaho Code §19- 1105 (1987 & Supp. 1995); La. Code Crim. Proc. Ann. art. 442 (West 1991) ("A grand jury should receive only legal evidence ...."); Nev. Rev. Stat. Ann.§172.135 (Michie 1992); N.M. Stat. Ann.§31-6-11(A) (Michie 1984) (admitting "oral testimony of witnesses made under oath"); N.Y. Crim. Proc. Law §190.30(1) (McKinney 1993) ("Except as otherwise provided ... the ... rules of evidence ... are ... applicable to grand jury proceedings."); S.D. Codified Laws Ann.§23A-5-15 (1988) ("The rules of evidence shall apply to proceedings before the grand jury.").

N89. See, e.g., Ala. R. Crim. P. 12.8(f)(1) ("For purposes of this section, legal evidence may consist of hearsay evidence in whole or in part."); Ohio R. Evid. 101(c)(2) ("These rules ... do not apply in ... [p]roceedings before grand juries."); People v. Wilson, 647 N.E.2d 910, 921 (Ill. 1994) ("[P)rivilege and relevance ... are not relevant at the grand jury stage ... since the rules of evidence do not apply."), cert. denied, 64 U.S.L.W. 3245 (1995); People v. Hoffman, 518 N.W.2d 817, 828 (Mich. Ct. App. 1994) ("[A] grand jury ... is not constrained by the rules of evidence and may consider all sources of evidence ...."), appeal denied, 535 N.W.2d 790 (Mich. 1995); see also Pitts v. Superior Court, 862 P.2d 894, 895 (Ariz. Ct. App. 1993) ("[T]he rules of evidence do not apply in grand jury proceedings."), vacated, 876 P.2d 1143 (Ariz. 1994) (en banc); People v. Gable, 647 P.2d 246, 252 (Colo. Ct. App. 1982); Anderson v. State, 365 S.E.2d 421, 426 (Ga. 1988); State v. O'Daniel, 616 P.2d 1383, 1388 n.3 (Haw. 1980) (allowing hearsay to be admitted, but suggesting that "[u)se of hearsay should be kept to a minimum"); Commonwealth v. Pina, 549 N.E.2d 106, 112 (Mass.) (permitting use of hearsay before grand jury), cert. denied, 498 U.S. 832 (1990); State v. Price, 260 A.2d 877, 879 (N.J. Super. Ct. Law Div. 1970); Hennigan v. State, 746 P.2d 360, 369 (Wyo. 1987). At least one state exempts grand jury proceedings from the rules of evidence, but puts certain

limits on the use of hearsay. See Utah Code Ann.§77-10a- 13(5)(a) (1995) (allowing grand juries to receive hearsay if it would be admissible at preliminary hearings).

N90. Both the Wilson and Hoffman courts cited United States Supreme Court decisions for the proposition that evidentiary constraints do not apply to grand jury proceedings, suggesting that federal practice does influence the states, at least in this area. 647 N.E.2d at 921; 518 N.W.2d at 828.

N91. United States v. Calandra, 414 U.S. 338 (1974); Brenner & Lockhart, supra note 4,§10.8.

N92. See, e.g., People v. DeLaire, 610 N.E.2d 1277, 1283 (Ill. App. Ct.) ("The exclusionary rule does not bar a grand jury from considering evidence illegally obtained...."), appeal denied, 616 N.E.2d 340 (Ill. 1993). Accord In re Special Investigation No. 227, 466 A.2d 48, 49-50 (Md. Ct. Spec. App.), cert. denied, 297 Md. 417 (1983); Commonwealth v. Santaniello, 341 N.E.2d 259, 260-61 (Mass. 1976); In re Mahler, 426 A.2d 1021, 1031 (N.J. Super. Ct. App. Div.), certification denied, 434 A.2d 93 (N.J. 1981); In re Grand Jury Proceedings, 452 N.Y.S.2d 643, 644 (N.Y. App. Div. 1982); State v. Dixon, 880 S.W.2d 696, 700 (Tenn. Crim. App. 1992); Alejandro v. State, 725 S.W.2d 510, 513 (Tex.
Ct. App. 1987)

N93. See, e.g., Ark. Code Ann. 16-85-511 (Michie 1987) ("The grand jury can receive none but legal evidence."). Accord La. Code Crim. Proc. Ann. art. 442 (West 1991); Mont. Code Ann.§46-11-314 (1995); Nev. Rev. Stat. Ann.§172.135(2) (Michie 1992); see also N.M. Stat. Ann.§31-6-10 (Michie 1984) ("Before the grand jury may vote an indictment charging an offense ... it must be satisfied from the lawful evidence before it that an offense ... has been committed ...."). State constitutions can be used to supplement the protections provided by the federal constitution. See In re May 1991 Will County Grand Jury, 604 N.E.2d 929, 934 (Ill. 1992) ("[A] State's constitutional protection may be greater than that of the comparable United States constitutional provision.").

N94. United States v. Williams, 504 U.S. 36 (1992); Brenner & Lockhart, supra note 4,§10.10.

N95. See, e.g., People v. Beu, 644 N.E.2d 27, 30 (Ill. App. Ct. 1994) ("[P]rosecutor has no duty to present exculpatory evidence to the grand jury."). Some states mandate that grand juries are not bound to hear evidence for the defendant, but should order evidence produced if they believe it would be exculpatory. See, e.g., Ark. Code Ann.§16-85-511 (Michie 1987); Cal. Penal Code §939.7 (West 1985); Idaho Code §19-1106 (1987); La. Code Crim. Proc. Ann. art. 442 (West 1991); Nev. Rev. Stat. Ann.§172.145(1) (Michie 1992); N.D. Cent. Code §29-10.1-27 (1991); Or. Rev. Stat.§132.320(4) (1990); S.D. Codified Laws Ann.§23A-5-15 (1988); cf. Ky. R. Crim. P. 5.08 (if defendant advises prosecutor "in writing of his desire to present evidence before the grand jury," prosecutor shall "inform the grand jury" of the request; they "may hear evidence for the defendant but are not required to do so").

N96. A Utah statute provides that if any person submits exculpatory evidence to the prosecutor and requests that the evidence be presented to the grand jury, or requests to appear before the grand jury, the prosecution must forward the request the grand jury. Utah Code Ann.§77-10a-13(5)(b) (1995). The same statute also requires the prosecutor to disclose to the grand jury any "substantial and competent" exculpatory evidence of which she is

personally aware. Id.§77-10a-13(5)(c). Some state courts have held that prosecutors must introduce at least some types of exculpatory evidence. See, e.g., Frink v. State, 597 P.2d 154, 164- 66 (Alaska 1979); Commonwealth v. Trowbridge, 647 N.E.2d 413, 417 (Mass. 1995) (holding that prosecutors must not disclose all exculpatory evidence, but that they must disclose evidence that would undermine the credibility of evidence supporting indictment); Gordon v. Ponticello, 879 P.2d 741, 742-43 (Nev. 1994) (relying on state statute requiring disclosure); State v. Hogan, 657 A.2d 462, 466-67 (N.J. Super. Ct. App. Div. 1995) (reasoning that the duty to disclose arose out of the prosecutor's duty to act in good faith); State v. Gaughran, 615 A.2d 1293, 1296-97 (N.J. Super. Ct. Law Div. 1992); State v. Lara, 797 P.2d 296, 305 (N.M. Ct. App.) (requiring prosecutors to present "evidence that directly negates defendant's guilt"), cert. denied, 795 P.2d 1022 (N.M. 1990).

N97. The traditional justifications for secrecy are that it: (i) Encourages witnesses to come forward and provide evidence to the grand jury; (ii) prevents witnesses and grand jurors from being bribed or intimidated; (iii) makes it more difficult for guilty parties to flee prosecution; and (iv) protects innocent persons who are investigated but exonerated. Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218-19 (1979). See also Brenner & Lockhart, supra note 4, §§ 8.1, 8.4

N98. E.g., Ala. Code §§ 12-16-214 to 12-16-216, 12-16-219 to 12- 16-221 (1986); Ariz. Rev. Stat. Ann.§13-2812 (1989); Ark. Code Ann.§16-85-514 (Michie 1987); Cal. Penal Code §924.2 (West 1985); Colo. Rev. Stat. Ann.§13-72-105 (1987); Conn. Gen. Stat. Ann.§54-45a (West 1994); Fla. Stat. Ann.§905.24 (West Supp. 1995); Ga. Code Ann.§§ 15-12-67 (Supp. 1995), 15-12-83 (1994); Idaho Code §19-1112 (Supp. 1995); Ill. Stat. ch. 725, para. 5/112-6 (Smith-Hurd 1992); Ind. Code Ann.§35-34-2-4 (Burns 1994); Kan. Stat. Ann.§22-3012 (1988); La. Code Crim. Proc. Ann. art. 434 (West 1995); Md. Cts. & Jud. Proc. Code Ann.§2-503(b)(2) (1995); Mass. Gen. Laws Ann. ch. 277,§5 (West 1994); Mich. Comp. Laws Ann.§767.19f (West 1982); Miss. Code Ann.§13-7-29 (Supp. 1995); Mo. Ann. Stat.§540.080 (Vernon Supp. 1995); Mont. Code Ann.§46-11-317 (1994); Neb. Rev. Stat.§29-1404 (1989); Nev. Rev. Stat. Ann.§172.245 (Michie 1992); N.H. Rev. Stat. Ann.§600:3 (Supp. 1994); N.M. Stat. Ann.§31-6- 6(A)-(B) (Michie 1984); N.Y. Crim. Proc. Law §190.25(4) (a) (McKinney 1993); N.C. Gen. Stat.§15A-623(e) (1988); N.D. Cent. Code §29-10.1-30 (1991); Ohio Rev. Code Ann.§2939.07 (Anderson 1993); Okla. Stat. Ann. tit. 21,§583 (West 1983); Or. Rev. Stat.§132.060 (1990); R.I. Gen. Laws §12-11.1-5.1 (1994); S.C. Code Ann.§14-7-1720 (Law. Co-op. Supp. 1994); S.D. Codified Laws Ann.§23A-5-7 (1988); Tex. Code Crim. Proc. Ann. art. 19.34 (West 1977); Utah Code Ann.§77-10a-9 (1995); Va. Code Ann.§19.2-192 (Michie 1995); Wash. Rev. Code Ann.§10.27.090 (West 1990); Wis. Stat. Ann.§756.11 (West 1981); Alaska R. Crim. P. 6(1); Del. Super. Ct. Crim. R. 6(e)(2); D.C. Super. Ct. R. Crim. P. 6(e)(2); Haw. R. Penal P. 6(e); Iowa R. Crim. P. 3(4)(d); Ky. R. Crim. P. 5.24; Me. R. Crim. P. 6(e); Minn. R. Crim. P. 18.08; N.J. R. Crim. P. 3:6-7; Pa. R. Crim. P. 257(b); Tenn. R. Crim. P. 6(k); Vt. R. Crim. P. 6(d); W. Va. R. Crim. P. 6(e)(2); Wyo. R. Crim. P. 6(a)(7)(B).

N99. See Fed R. Crim. P. 6(e)(2)-(3) Advisory committee note; Brenner & Lockhart, supra note 4,§9.1.1.

N100. See Brenner & Lockhart, supra note 4,§9.1.2.

N101. See, e.g., Ala. Code §§ 12-16-220 to 12-16-221 (1986); Ark. Code Ann.§16-85-514 (Michie 1987); Cal. Penal Code §924.6 (West 1985); Fla. Stat. Ann. § 905.27 (West Supp. 1995); Ga. Code Ann. § 15-12-67, 15-12-71 (Supp. 1995); Idaho Code § 19-1123 (1987); Ill. Stat. Ann. ch. 725, para. 5/112-6(c) (Smith-Hurd 1992); Kan. Stat. Ann. § 22-3012 (1988); Miss. Code Ann. § 13-7-29 (Supp. 1995); Mont. Code Ann. § 46-11-317 (1994); Nev. Rev. Stat. Ann. § 172.245 (Michie 1992); N.D. Cent. Code § 29- 10.1-30 (1991); Okla. Stat. Ann. tit. 22 § 355 (West 1992); 42 Pa. Cons. Stat. Ann. § 4549(b) (1981); S.D. Codified Laws Ann. § 23A-5-16 (1988); Tenn. Code Ann. § 40-12-210 (1990); Utah Code Ann. § 77-10a- 13(7)(c) (1995); Wash. Rev. Code Ann. § 10.27.090 (West 1990); Alaska R. Crim. P. 6(1); Del. Super. Ct. Crim. R. 6(e)(3); D.C. Super. Ct. R. Crim. P. 6(e)(3); Haw. R. Penal P. 6(e)(1); Ky. R. Crim. P. 5.24; Me. R. Crim. P. 6(e); Ohio R. Crim. P. 6(E); R.I. Super. Ct. R. Crim. P. 6(e); Vt. R. Crim. P. 6(f); W. Va. R. Crim. P. 6(e)(3); Wyo. R. Crim. P. 6(a)(14).

N102. Fed. R. Crim. P. 6(e)(1) ("All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device."); see also Brenner & Lockhart, supra note 4, § 6.6.1(d).

N103. Fed. R. Crim. P. 6(d); see also Brenner & Lockhart, supra note 4, § 6.6.1(d).

N104. For an example of a state in which recording is optional, see Ark. Code Ann. § 16-85-501(b) (Michie 1987). For a state which mandates recording, see Ala. Code § 36-15-11.1(e) (1991).

N105. Brenner & Lockhart, supra note 4, § 6.6.1(d).

N106. See id.

N107. Fed. R. Crim. P. 6(d). See also Brenner & Lockhart, supra note 4, § 6.6.1(c). The federal rule allows either a court reporter or the operator of an electronic recording device to be present during a grand jury's sessions.

N108. E.g., Cal. Penal Code § 937 (West 1985); Fla. Stat. Ann. §§ 905.15, 905.17 (West 1985 and Supp. 1995); Idaho Code § 19-1111 (1987); Ind. Code Ann. § 35-34-2-4(f) (Burns 1994); Kan. Stat. Ann. § 22-3010 (1988); La. Code Crim. Proc. Ann. art. 433(A)(1)(e) (West 1991 & Supp. 1995); Miss. Code Ann. § 13-7-29(1) (Supp. 1995); Mo. Ann. Stat. § 540.150 (Vernon Supp. 1995); Mont. Code Ann. § 46-11-308 (1994); Nev. Rev. Stat. Ann. § 172.235(1)(d) (Michie 1992); N.M. Stat. Ann. § 31-6-7 (Michie 1984); N.Y. Crim. Proc. Law § 190.25(3)(d) (McKinney 1993); N.C. Gen. Stat. § 15A-623(d)(1) (1988); N.D. Cent. Code § 29-10.1-28 (1991); Or. Rev. Stat. § 132.090(2) (1990); S.C. Code Ann. § 14-7-1720(A) (Law. Co-op. Supp. 1994); S.D. Codified Laws Ann. § 23A-5-11 (1988); Tenn. Code Ann. § 40-12-207 (1990); Utah Code Ann. § 77-10a-13(2) (1995); Wash. Rev. Code Ann. § 10.27.080 (West 1990); Ala. R. Crim. P. 12.6; Ariz. R. Crim. P. 12.5; Del. Super. Ct. Crim. R. 6(d); D.C. Super. Ct. R. Crim. P. 6(d); Haw. R. Penal P. 6(d); Ky. R. Crim. P. 5.18; Ohio R. Crim. P. 6(D); Pa. R. Crim. P. 264(b); R.I. Super. Ct. R. Crim. P. 6(d); Vt. R. Crim. P. 6(e); Va. S. Ct. R. 3A:5(a); Wyo. R. Crim. P. 6(a)(9)(B)

N109. E.g., Ala. Code § 12-21-131(c) (Supp. 1994); Ariz. Rev. Stat. Ann. § 12-242(A) (1956); Colo. Rev. Stat. § 13-90-204(1)(b) (1987); Fla. Stat. Ann. § 90.6063(2) (West Supp. 1995); Iowa Code Ann. § 622B.2 (West Supp. 1995); Kan. Stat. Ann. § 75-4355a (Supp. 1994); La.

Rev. Stat. Ann. § 46:2364 (West Supp. 1995); Mich. Comp. Laws Ann. § 393.503(1) (West 1988); Miss. Code Ann. § 13-1-303 (Supp. 1995); Mo. Ann. Stat. § 476.753.1(1) (Vernon Supp. 1995); Mont. Code Ann. § 49-4-503(1) (1995); N.J. Stat. Ann. § 34:1-69.10(a) (West 1988); Okla. Stat. Ann. tit. 63, § 2409 (West Supp. 1995); S.D. Codified Laws Ann. § 19-3-10(1) (1995); Tenn. Code Ann. § 24-1-103(b)(1) (Supp. 1995); Utah Code Ann. §s 78-24a-2(1) (Supp. 1995); Wash. Rev. Code Ann. §s 2.42.120(1) (West 1988); W. Va. Code §s 57-5-7(a) (Supp. 1995); Wyo. Stat. § 5-1-109(a) (1977); see also People v. Rodriguez, 546 N.Y.S.2d 769, 773 (N.Y Sup. Ct. 1989) (construing two state statutes as requiring an interpreter for "two profoundly hearing and speech impaired witnesses" before the grand jury). Even those states that do authorize the presence of an interpreter for witnesses suffering from disabilities may not allow an interpreter to assist a disabled juror. E.g., Cooligan v. Celli, 492 N.Y.S.2d 287, 288 (N.Y. App. Div. 1985) (refusing to interpret statute allowing interpreters to allow sign language interpreter to assist hearing impaired person in serving on a grand jury; though interpreter could attend sessions, her presence was not authorized during deliberations). New York has amended its statute to eliminate this problem. See N.Y. Crim. Proc. Law § 190.25(3-a) (McKinney Supp. 1995) (providing that an interpreter for a hearing-impaired grand juror may attend deliberations and voting); see also Cal. Penal Code § 939.11 (West Supp. 1995) ("Any member of the grand jury who has a hearing, sight, or speech disability may request an interpreter when his or her services are necessary to assist the juror to carry out his or her duties."); accord Fla. Stat. Ann. § 90.6063(2) (West Supp. 1995); Kan. Stat. Ann. § 75-4355a (Supp. 1994); Mo. Ann. Stat. § 476.753(1)(1) (Vernon Supp. 1995); W. Va. Code § 57-5- 7(a) (Supp. 1995).

N110. E.g., Cal. Penal Code § 939 (West Supp. 1995) (officer having custody of a prisoner witness can be present while prisoner testifies); Nev. Rev. Stat. § 172.245(2) (Michie 1992) ("peace officers" may attend grand jury proceedings); N.M. Stat. Ann. § 31-6-4(C) (Michie 1984) (security officers who are neither potential witnesses nor interested parties may attend the taking of testimony with special leave of court); N.Y. Crim. Proc. Law § 0.25(3)(e) (McKinney 1993) (public servant guarding a witness in custody may accompany the witness while he appears if the public servant has taken an oath); N.C. Gen. Stat. § 15A-623(d)(2) (1988) (officer holding a witness in custody may be present while witness testifies if the officer takes a secrecy oath); Tex. Code Crim. Proc. Ann. arts. 19.36, 19.38 (West 1977) (court may appoint bailiffs to attend proceedings other than deliberations and voting if the bailiffs take a secrecy oath); N.M. Dist. Ct. R. Crim. P. 5-114 (court can assign security officers to be present while grand jury is hearing testimony if reasonably necessary to preserve the decorum of the proceedings or the safety of the participants therein); Pa. R. Crim. P. 264(b) and cmt. (on request of prosecutor or grand jury, court can order that security officers attend grand jury sessions to escort witnesses and/or protect grand jurors); see generally Ex parte Rogers, 640 S.W.2d 921, 924 (Tex. Crim. App. 1982) (officers may be present when grand jury is not deliberating, but "better practice" is for them not to attend). Several states provide for the appointment of an "officer" who "attends" the grand jury and who "retires" with them, but it is not clear whether these individuals may be present when a grand jury is in session. E.g., Mich. Comp. Laws Ann. § 767.11 (West 1982); Neb. Rev. Stat. § 29-1407 (1989); Ohio Rev. Code Ann. § 2939.08 (Anderson 1993).

N111. Fed. R. Crim. P. 6(d); see also Brenner & Lockhart, supra note 4, § 6.6.1(b).

N112. E.g., Colo. R. Crim. P. 6.5(a) ("Upon the written motion of the grand jury, the court shall appoint an investigator or investigators to assist the grand jury in its investigative functions.");

see also Cal. Penal Code §§ 936, 936.5(a) (West 1985); Ill. Ann. Stat. ch. 725, para. 5/112-5(b) (Smith-Hurd 1992); Kan. Stat. Ann. § 22-3006(3) (1988); Mont. Code Ann. § 46-11-315(3) (1995).

N113. E.g., Colo. R. Crim. P. 6.5(b) ("Upon written motion of the grand jury, approved by the prosecutor, the court, for good cause, may allow a grand jury investigator to be present during testimony to advise the prosecutor."); see also Cal. Penal Code §§ 936, 936.5(a) (West 1985) (investigator may present evidence to grand jury); Pa. R. Crim. P. 264(b) cmt.; see generally Ill. Ann. Stat. ch. 725, para. 5/112-5(b) (Smith-Hurd 1992) (investigator's duties determined by court).

N114. See Brenner & Lockhart, supra note 4, § 2.4.

N115. 18 U.S.C. § 3331(a) (1985); Fed. R. Crim. P. 6(g); see also Brenner & Lockhart, supra note 4, § 2.4.

N116. N.D. Cent. Code § 29-10.1-04 (1991).

N117. Nev. Rev. Stat. Ann. §§ 172.275(1), 172.047 (Michie 1992); Okla. Stat. Ann. tit. 22, §§ 330, 352(A) (West 1992); Utah Code Ann. § 77-10a- 18(1) (1995); D.C. Sup. Ct. R. Crim. P. 6(g).

N118. E.g., Ala. R. Crim. P. 12.2(b).

N119. E.g., Cal. Penal Code §§ 901, 908.2 (West 1985); Colo. Rev. Stat. §§ 13-73-103, 13-74-103 (1087). This practice also can be used to allow different jurors to serve on the same grand jury and each single juror to serve on two or more grand juries. This system becomes merely another means of defining the term of a grand jury as a whole if all jurors are impaneled at the same time. If the jurors are not discharged before their specified period of service elapses, which can occur when a grand jury finishes the tasks assigned to it, they must all be discharged when that date arrives. In either event, the discharge of the jurors effectively terminates the existence of that grand jury. Instead of defining the life of a grand jury by a single constituency, as well as when a grand jury is impaneled for a specific term, some states have created systems where different jurors serve on the same grand jury. See, e.g., Cal. Penal Code § 901(b) (West Supp. 1995) (providing that the court may name up to four jurors to serve consecutive grand jury terms); S.C. Code Ann. §§ 14-7-1510, 14-7-1530 (Law. Co-op. 1976); Cal. Prof. Rules, § 17(c). When a grand jury sits for an extended period of time, having at least some of the jurors enter and exit service is a way of preserving the continuity of the grand jury's investigation while diminishing the burden on those who must serve. Finally, the practice of specifying a period of service for individual jurors rather than a term for a grand jury allows jurors to serve on more than one grand jury. Assume, for instance, that a state requires jurors to serve for one year and that grand juries are convened as needed. It is quite possible, especially in less populous areas of the country, that grand juries will be convened, sit for a month or two, and be discharged, and that this scenario will repeat itself two, or three, or even four times within a year. If the number of jurors summoned to serve that year exceeds the number required to form one grand jury panel, the jurors will find themselves serving on different grand juries that are composed of or include different jurors.

See, e.g., Steinbeck v. Iowa Dist. Court, 224 N.W.2d 469, 471 (Iowa 1974) (jurors sat on different grand juries simultaneously because the grand juries were impaneled at different times). If the number of jurors summoned to serve that year does not exceed the number required to form one jury panel, the jurors will serve on different grand juries but that are composed of the same jurors with whom they previously served.

N120. Coleman v. State, 553 P.2d 40, 47 (Alaska 1976).

N121. See, e.g., Brenner & Lockhart, supra note 4, ch. 7.

N122. In 1987, Connecticut abolished the indicting grand jury but retained an investigatory grand jury consisting of a judge, a referee, or a panel of three judges. See Conn. Gen. Stat. Ann. § 54-47b(3) (West 1994) (defining "investigatory grand jury").

N123. See, e.g., Ala. Code § 12-16-209 (1986); Ark. Code Ann. § 16-85- 512 (Michie 1987); Cal. Penal Code § 935 (West 1985); Colo. Rev. Stat. § 20-1-106 (1986); Fla. Stat. Ann. § 905.36 (West 1995); Ga. Code Ann. § 15-18-6 (Supp. 1995); Idaho Code § 19-1111 (1987); Ill. Ann. Stat. ch. 725, para. 5/112-6(a) (Smith-Hurd 1992); Ind. Code Ann. § 35-34-2- 4(c) (Burns 1994); Kan. Stat. Ann. § 22-3007(1) (1988); La. Code Crim. Proc. Ann. art. 64 (West 1991); Mich. Comp. Laws Ann. § 767.20 (West 1982); Minn. Stat. Ann. § 628.63 (West 1983); Miss. Code Ann. § 13-7-11 (Supp. 1995); Mo. Ann. Stat. § 540.140 (Vernon Supp. 1995); Mont. Code Ann. § 46-11-308 (1995); Neb. Rev. Stat. § 29-1408 (1989); Nev. Rev. Stat. Ann. § 172.235(1) (Michie Supp. 1992); N.H. Rev. Stat. Ann. § 600-A:5 (1986); N.M. Stat. Ann. § 31-6-4(C) (Michie 1984); N.Y. Crim. Proc. Law § 190.25(3)(a) (McKinney Supp. 1995); N.C. Gen. Stat. § 15A-623(h) (1988); N.D. Cent. Code § 29-10.1-29 (1991); Okla. Stat. Ann. tit. 19, § 215.13 (West Supp. 1995); Or. Rev. Stat. § 132.090 (1990); S.C. Code Ann. § 14- 7-1720(A) (Law. Co-op. Supp. 1994); S.D. Codified Laws Ann. § 23A-5-11 (1988); Tenn. Code Ann. § 8-7-501 (1993); Tex. Code Crim. Proc. Ann. art. 20.03 (West 1977); Utah Code Ann. § 77-10a-13(2)(a) (1995); Va. Code Ann. § 19.2-210 (Michie 1995); Wash. Rev. Code Ann. § 10.27.070 (West 1990); Wis. Stat. Ann. § 756.15 (West 1981); Wyo. Stat. § 7-5- 203(a) (1995); Alaska R. Crim. P. 6(k); Ariz. R. Crim. P. 12.5; Del. Super. Ct. R. Crim. P. 6(d); D.C. Super. Ct. R. Crim. P. 6(d); Haw. R. Penal P. 6(d); Iowa R. Crim. P. 3(4)(d); Ky. R. Crim. P. 5.14(1); Me. R. Crim. P. 6(d); Mass. R. Crim. P. 5(c); N.J. R. Crim. P. § 3:6-6(a); Ohio R. Crim. P. 6(D); Pa. R. Crim. P. 264(a); R.I. Super. Ct. R. Crim. P. 6(d); Vt. R. Crim. P. 6(e); W. Va. R. Crim. P. 6(d); see also Lykins v. State, 415 A.2d 1113, 1120 (Md. Ct. App. 1980).

N124. See, e.g., Ala. Code § 12-16-209; Ark. Code Ann. § 16-85-512; Cal. Penal Code § 939.1 (West 1985); Fla. Stat. Ann. § 905.17(3) (West Supp. 1995); Idaho Code § 19-1111; Ill. Ann. Stat. ch. 725, para. 5/112- 6(a); Ind. Code Ann. § 35-34-2-4(h) (Burns 1994); Kan. Stat. Ann. § 22- 3010 (1988); La. Code Crim. Proc. art. 64 Ann. (West 1991); Minn. Stat. Ann. § 628.63; Mo. Ann. Stat. § 540.140; Mont. Code Ann. § 46-11-308; Neb. Rev. Stat. § 29-1408 (1989); Nev. Rev. Stat. Ann. § 172.235(2) (Michie Supp. 1992); N.M. Stat. Ann. § 31-6-4(B) (Michie 1984); N.Y. Crim. Proc. Law § 190.25(3); N.C. Gen. Stat. § 15A-623(d); N.D. Cent. Code § 29-10.1- 28 (1991); Okla. Stat. Ann. tit. 22, § 340 (West 1992); Or. Rev. Stat. § 132.090(3) (1990); S.C. Code Ann. § 14-7-1720(A); S.D. Codified Laws Ann. § 23A-5-11; Tenn. Code Ann. § 8-7-501; Utah Code Ann. § 77-10a- 13(2)(b); Va. Code Ann. § 19.2-210; Wash. Rev. Code Ann. § 10.27.080; Wyo. Stat. § 7-5-203(b) (1995); Alaska R. Crim. P. 6(k); Ariz. R. Crim. P. 12.5; Del. Super. Ct. R. Crim. P. 6(d); D.C. Super. Ct. R. Crim. P. 6(d); Haw. R. Penal P. 6(d); Iowa R. Crim. P. 3(4)(d); Ky. R. Crim. P. 5.18; Me. R. Crim. P. 6(d); Ohio R.

Crim. P. 6(D); Pa. R. Crim. P. 264(d); R.I. Super. Ct. R. Crim. P. 6(d); Vt. R. Crim. P. 6(e); W. Va. R. Crim. P. 6(d); Lykins v. State, 415 A.2d 1113, 1120 (Md. Ct. App. 1980); State v. Krause, 50 N.W.2d 439, 444 (Wis. 1951); Mach v. State, 135 S.E.2d 467, 470 (Ga. Ct. App. 1964) (quoting an annotation for the general rule regarding a prosecutor's presence at grand jury proceedings). But see Mass. R. Crim. P. 5(g) ("The prosecuting attorney shall not be present during deliberation and voting except at the request of the grand jury."); Miss. Code Ann. § 25-31- 13 (1991) ("The district attorney shall attend the deliberations of the grand jury whenever he may be required by the grand jury, and shall give the necessary information as to the law governing each case ...."). Cf. N.J. R. Crim. P. § 3:6-6(a) (prosecutor may be present during deliberations unless asked to leave by the grand jury).

N125. See, e.g., Ala. Code § 36-15-13 (1991); Alaska Stat. § 12.40.070 (1990); Ariz. Rev. Stat. Ann. § 21-408(A) (1990); Fla. Stat. Ann. § 27.03 (West 1995); Ga. Code Ann. § 15-18-6(4) (Supp. 1995); Haw. Rev. Stat. § 806-7 (1994); Ill. Ann. Stat. ch. 725, para. 5/112-4(d) (Smith-Hurd 1992); Iowa Code Ann. § 331.756(8) (West 1994); Miss. Code Ann. § 13-7- 11 (Supp. 1995); N.M. Stat. Ann. § 31-6-7 (Michie 1984); Or. Rev. Stat. § 132.340 (1990); S.C. Code Ann. § 14-7-1650(A) (Law. Co-op. Supp. 1994); Tex. Code Crim. Proc. Ann. art. 0.20 (West 1977); Va. Code Ann. § 19.2- 191(1) (Michie 1995); Wash. Rev. Code Ann. § 10.27.070(11) (West 1990); Ky. R. Crim. P. 5.14(1).

N126. Some states expressly authorize prosecutors to serve in this capacity. E.g., La. Const. art. V § 26(B); Ala. Code § 12-16-209 (1986); Ariz. Rev. Stat. Ann. § 11-532(A)(3) (Supp. 1994); Colo. Rev. Stat. § 20-1-106 (1986); Fla. Stat. Ann. § 27.03 (West 1995); Ind. Code Ann. § 35-34-2- 4(k) (Burns 1994); Kan. Stat. Ann. § 19-713 (1988); Mich. Comp. Laws Ann. § 767.20 (West 1982); Miss. Code Ann. § 13-7-11 (Supp. 1995); Mo. Ann. Stat. § 56.180 (Vernon 1989); Mont. Code Ann. § 46-11-315(2) (1995); Neb. Rev. Stat. § 23-1208 (1991); N.D. Cent. Code § 29-10.1-29 (1991); Ohio Rev. Code Ann. § 2939.10 (Anderson 1993); Okla. Stat. Ann. tit. 19, § 215.13 (West Supp. 1995); Or. Rev. Stat. § 132.340 (1990); S.C. Code Ann. § 14-7-1650(A) (Law. Co-op. Supp. 1994); S.D. Codified Laws Ann. § 7-16-11 (1988); Tenn. Code Ann. § 8-7-501 (1993); Ky. R. Crim. P. 5.14(1); see also Coleman v. State, 553 P.2d 40, 47 (Alaska 1976); People v. Meyers, 617 P.2d 808, 812 (Colo. 1980) (en banc); State v. Falcone, 195 N.W.2d 572, 577 (Minn. 1972); People v. Calero, 618 N.Y.S.2d 996, 999 (N.Y. Sup. Ct. 1994); Lykins, 415 A.2d at 1120. Other states authorize the prosecutor to give advice to grand jurors at their request. E.g., Ark. Code Ann. 16-85-515 (Michie 1987) ("The grand jury may, at all reasonable times, ask the advice of the court or the prosecuting attorney."); Cal. Penal Code § 934 (West 1985); Idaho Code § 19-1111 (1987); Minn. Stat. Ann. § 628.63 (West 1983); S.D. Codified Laws Ann. § 23A-5-10 (1988); Tex. Code Crim. Proc. Ann. art. 20.06 (West 1977); see also People v. Martinez, 624 N.Y.S.2d 783, 785 (N.Y. Sup. Ct. 1995).

N127. Haw. Const. art. I, § 11 ("Whenever a grand jury is impaneled, there shall be an independent counsel appointed ... to advise the members of the grand jury regarding matters brought before it.").

N128. Id.; see also State v. Kahlbaun, 638 P.2d 309, 315-16 (Haw. 1981).

N129. See Haw. Rev. Stat. §§ 612-51 to 612-60 (1995).

N130. See Kahlbaun, 638 P.2d at 315-16: [T]he grand jury system has come under severe criticism. Rather than being a shield to unfounded charges as intended, critics charge that the grand jury has become a rubber stamp of the prosecuting attorney.... [T]hus, a substantial movement developed to abolish the grand jury.... Instead of ... abolishing the grand jury system in Hawaii, the 1978 Constitutional Convention sought to cure some of the ills by proposing the ... independent grand jury counsel.... [T]his measure would ensure the independence of the grand jury from the domination of the prosecutor.

N131. Haw. Rev. Stat. §§ 612-51, 612-53(a) (1988).

N132. Haw. Rev. Stat. § 612-53(b)-(c) (1988).

N133. Haw. Rev. Stat. § 612-57 (1988).

N134. Id.: The grand jury counsel may be present during grand jury proceedings ... but shall not participate in the questioning of the witnesses or the prosecution. The grand jury counsel's function shall be only to receive inquiries on matters of law sought by the grand jury, conduct legal research, and provide appropriate answers of law. See also Haw. R. Penal Proc. 6(d). A grand jury's counsel does not participate in deliberations or voting, but can be called in to give legal advice on questions that arise during the deliberations. Haw. Rev. Stat. § 612-58(b) (1988).

N135. See Louis N. Smith, Final Report of the Hennepin County Attorney's Task Force on Racial Composition of the Grand Jury, 16 Hamline L. Rev. 879, 900 (1993) (concluding that the "general public knows very little about the grand jury").

N136. Jim Wooten, An Important Safeguard: Let's Not Limit a Grand Jury's Right to Be Nosy, Atlanta J. and Const., Mar. 2, 1994, at A10.

N137. E.g., Colo. Const. art. II, § 23; Ill. Const. art. 1, § 7. For constitutions which, by failure to require indictments, implicitly permit abolition of grand juries, see, e.g., Ariz. Const. art. II, § 30; Ark. Const. amend. 21, § 1.

N138. Pa. R. Crim. P. 3 cmt. ("[A]ll courts of common pleas have abolished the indicting grand jury and now provide for the initiation of criminal proceedings therein by information filed in the manner provided by law.").

N139. Although the second group of states has not explicitly addressed this issue, requiring the use of an indictment inferentially establishes that the legislature cannot abolish the grand jury or modify it in such a way as to deprive it of this function. See, e.g., Ala. Const. art. 1, § 8; amend. 37; Alaska Const. art. 1, § 8.

N140. As Part I explained, a presentment is a statement of charges that a grand jury returns on its own initiative and that is based on its own knowledge of criminal activity, while an indictment is a statement of charges a grand jury returns at a prosecutor's behest. See supra text accompanying note 7.

N141. Tanya Bricking, Woman Indicted in Murder, Cincinnati Enquirer, Sept. 2., 1995, at B2.

N142. See supra text accompanying note 35.

N143. See supra text accompanying note 36.

N144. Brenner & Lockhart, supra note 4, § 3.3.

N145. There are, of course, differences among special federal grand juries; some will certainly be more aggressive than others. Several factors, however, combine to ensure that the members of a special federal grand jury will take an active, interested role in its inquiries. The most important of these is the nature of their task--investigating organized crime in the community in which they live. Jurors are unlikely to be dispassionate about the injury such activity can inflict. Another notable factor is the extensive nature of the investigations a special federal grand jury is likely to undertake. A related factor is the length of time for which it sits. The amount of time jurors spend on an investigation and with each other is likely to diminish any inhibitions they may have had at the outset and increase their willingness to become active participants in the investigative process.

N146. See, e.g., Lettow, supra note 16, at 1353 (describing Rocky Flats grand jurors' efforts to take control of the investigation assigned to them).

N147. Bernstein, supra note 31, at 573. The indictments were all returned against "mules" who were caught carrying drugs into the United States. Id. At 573 n.55. To obtain each indictment, the prosecutor simply had a federal agent testify that he examined a prospective defendant after he arrived in this country and found drugs in his possession. Id. The article does not indicate whether the grand jury in question was a regular or special grand jury, but it is reasonable to assume it was the former because regular grand juries are the indicting bodies in the federal system. See Brenner & Lockhart, supra note 4, § 2.4.

N148. See Commonwealth v. Webster, 337 A.2d 914, 920 (Pa. 1975) (Pomeroy, J., dissenting) (noting that grand juries in Philadelphia County, Pennsylvania, returned 98% of the indictments submitted by prosecutors in 1968), cert. denied, 423 U.S. 898 (1975); B.D. Colen, Reining In Runaway Prosecutors, Newsday, June 6, 1989, at 13 ("[G]rand juries are, by and large, rubber stamps for prosecutors.... [M]ost grand juries simply hear the case presented to them and vote as ordered.").

N149. See, e.g., Leipold, supra note 4, at 290-304.

N150. See, e.g., Beavers v. Henkel, 194 U.S. 73, 84 (1904) ("The grand jury is a body known to the common law, to which is committed the duty of inquiring whether there be probable cause to believe the defendant guilty of the offense charged ...."); see also Brenner & Lockhart, supra note 4, §§ 2.1, 3.3.

N151. United States v. Shoup, 608 F.2d 950, 960 (3d Cir. 1979) ("The function of the grand jury then is to determine whether there is probable cause that the defendant has committed acts that constitute an offense ...."); In re May 1991 Will County Grand Jury, 604 N.E.2d 929, 935 (Ill. 1992); State v. Stewart, 486 N.W.2d 444, 446 (Minn. Ct. App. 1992), aff'd, 514 N.W.2d 559 (Minn. 1994) (en banc); In re Grand Jury of Douglas County, 509 N.W.2d 212, 213 (Neb. 1993) ("It is the duty of the grand jury to inquire into offenses against the criminal laws ... and to determine based on the evidence presented whether or not there is probable cause for

finding indictments."); State v. Smith, 634 A.2d 576, 579-80 (N.J. Super. Ct. App. Div. 1993), certification denied, 644 A.2d 612 (N.J. 1994); Cook v. Smith, 834 P.2d 418, 420 (N.M. 1992).

N152. Wilkerson v. Whitley, 28 F.3d 498, 503 (5th Cir. 1994), cert. denied, 115 S.Ct. 740 (1995); Cummiskey v. Superior Court, 839 P.2d 1059, 1071 (Cal.1992) (in bank); State v. D'Anna, 506 S.W.2d 200, 203 (Tenn. Crim. App. 1973). The alternative to bringing charges by presentment is discussed in Part I.

N153. An information is a charging instrument that is issued by a prosecutor rather than a grand jury. 1 Charles A. Wright, Federal Practice and Procedure: Federal Rules of Criminal Procedure § 121 (2d ed. 1982). Informations have been used in federal practice since 1790. Id.; see also Act of April 30, 1790, ch. 9, § 32, 1 Stat. 119 (1845). Under Rule 7 of the Federal Rules of Criminal Procedure, an information can be used to charge: (i) offenses for which an indictment would otherwise be required if the defendant waives her right to indictment; and (ii) offenses for which an indictment is not required. Fed. R. Crim. P. 7(a).

N154. See, e.g., Fla. Const. art. I, § 15(a) ("No person shall be tried for capital crime without presentment or indictment by a grand jury, or for other felony without such presentment or indictment or an information under oath filed by the prosecuting officer ...."); La. Const. art. I, § 15 ("Prosecution of a felony shall be initiated by indictment or information, but no person shall be held to answer for a capital crime or a crime punishable by life imprisonment except on indictment by a grand jury."); Me. Const. art. I, § 7 ("No person shall be held to answer for a capital or infamous crime, unless on a presentment or indictment of a grand jury, except in cases of impeachment, or in such cases of offenses, as are usually cognizable by a justice of the peace, ..."); Miss. Const. art. III, § 27; Mo. Const. art. I, § 17; N.J. Const. art. I, para. 8 ("No person shall be held to answer for a criminal offense, unless on the presentment or indictment of a grand jury, except in cases of impeachment, or in cases now prosecuted without indictment, ..."); N.Y. Const. art. I, § 6 ("No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, [certain military offenses], and in cases of petit larceny ...), unless on indictment of a grand jury, ..."); N.D. Const. art. I, § 10; Ohio Const. art. I, § 10; R.I. Const. art. I, § 7 ("[N]o person shall be held to answer for any offense which is punishable by death or by imprisonment for life unless on presentment or indictment by a grand jury, ..."); S.C. Const. art. I, § 11; Tex. Const. Ann. art. I, § 10; W. Va. Const. art. III, § 4; N.H. Rev. Stat. Ann. § 601:1 (1994); Va. Code. Ann. § 19.2-217 (Michie Supp. 1995); Ky. R. Crim. P. 6.02; Mass. R. Crim. P. 3(b)(1); Minn. R. Crim. P. 17.01. But see Tenn. Const. art. I, § 14 ("[N]o person shall be put to answer any criminal charge but by presentment, indictment or impeachment."). In Tennessee, an information may be used only if the defendant agrees. Tenn. R. Crim. P. 7, Advisory Commission Cmt.

N155. Colo. Const. art. II, § 8; Colo. Rev. Stat. Ann. § 16-5-101 (West 1986); Ga. Code Ann. §§ 15-7-46, 17-7-70 to 17-7-70.1 (1990); Ind. Code Ann. § 35-34-1-1(a) (Burns 1994); Iowa Ct. R. 4(2); Neb. Rev. Stat. § 29-1601 (1989); Nev. Const. art. I § 8, Nev. Rev. Stat. Ann. § 173.025 (Michie 1992); S.D. Const. art. VI, § 10; Vt. R. Crim. P. 7(b); Wash. Const. art. I, § 25; Wis. Stat. Ann. § 967.05 (West Supp. 1994); Wyo. R. Crim. P. 3(a).

N156. Gerstein v. Pugh, 420 U.S. 103, 117-20 (1975). In the federal system, offenses are charged by information when they are not encompassed by the Fifth Amendment's indictment

requirement or when the defendant waives his right to indictment. Fed. R. Crim. P. 5(c); Fed. R. Crim. P. 7(b); see also Wright, supra note 153, § 85. Many states have constitutionalized or legislated this requirement. See, e.g., Ariz. Const. art. II, § 30 ("[N]o person shall be prosecuted for felony by information without having had a preliminary examination before a magistrate or having waived such preliminary examination."); accord Cal. Const. art. I, § 14; Ill. Const. art. I, § 7; Mont. Const. art. II, § 20(1); N.M. Const. art. II, § 14; Okla. Const. art. II, § 17; Or. Const. art. VII, § 5(5); Utah Const. art. I, § 13; Ill. Ann. Stat. ch. 725, para. 5/111-2(a) (Smith-Hurd 1992); Kan. Stat. Ann. §§ 22-2902, 22- 3201 (1988);
Mich. Ct. R. 6.112.

N157. State v. Mitchell, 512 A.2d 140, 144 (Conn. 1986); Commonwealth v. Webster, 337 A.2d 914, 915 (Pa.), cert. denied, 423 U.S. 898 (1975). In Connecticut, the amendment and implementing legislation went into effect in 1983. State v. Sanabria, 474 A.2d 760, 765 (Conn. 1984). The Pennsylvania amendment and implementing legislation went into effect in 1974. Webster, 337 A.2d at 915-16.

N158. Sanabria, 474 A.2d at 765-66.

N159. Id. at 765-67. The legislature also repealed a statutory provision which had implemented the prior right to indictment by a grand jury. Id. at 765-66.

N160. Mitchell, 512 A.2d at 143-44.

N161. Id.

N162. Webster, 337 A.2d at 915. A preliminary hearing must precede the filing of charges by information. 42 Pa. Cons. Stat. Ann. § 8931(d)(1982).

N163. Pa. R. Crim. P. 3 cmt. ("[A]ll courts of common pleas have abolished the indicting grand jury and now provide for the initiation of criminal proceedings by information."). Before the courts had reached unanimity on this issue, the county option procedure was challenged as violating equal protection. Webster, 337 A.2d at 914. The Pennsylvania Supreme Court rejected the challenge on the grounds that the grand jury indictment process did not provide any procedural protections that were not also guaranteed by the new system of initiating charges. Id. at 917-19. Contra In re Lowrie, 9 P. 489, 499-500 (Colo. 1886).

N164. E.g., In re Investigation by Dauphin County Grand Jury, September, 1938, 2 A.2d 804, 809 (Pa. 1938) (holding that "the legislature cannot abolish the grand jury").

N165. United States v. Cox, 342 F.2d 167, 172 (5th Cir.), cert. denied, 381 U.S. 935 (1965); Brenner & Lockhart, supra note 4, § 2.3.

N166. See Brenner & Lockhart, supra note 4, § 2.3. Common law grand juries were, of course, free to do this.

N167. See Brenner & Lockhart, supra note 4, § 3.3.

N168. Id.

N169. See In re Russo, 53 F.R.D. 564, 569 (C.D. Cal. 1971) (noting that the government prosecutor exercises "substantial influence over the grand jury").

N170. 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. 1047, 1062 (1984) (arguing that "[i]f prosecutors are at all sensitive, they will establish rapport with the grand jury"); Fed. R. Crim. P. 6(e)(1) advisory committee note on 1979 amendment.

N171. Conversation with Gregory G. Lockhart, Assistant U.S. Attorney for S.D. Ohio, in Dayton, Ohio (May 17, 1994).

N172. See George E. Dix, It's Time to Replace Texas' Grand Jury Sham, Tex. Lawyer, Jan. 14, 1991, at 22 (describing "prosecutors' practical ability ... to dominate grand jury proceedings and effectively to dictate what occurs during grand jury consideration as well as what result the grand jury reaches"); John Riley, Big Bug Bugs Prosecutors on Role of Juries, Nat'l. L. J., Nov. 16, 1987, at 6 (noting that Chief Judge Sol Wachtler of the New York Court of Appeals said that a good prosecutor could get a grand jury to "indict a ham sandwich").

N173. See Who Controls Grand Juries, Ark. Democrat-Gazette, Aug. 11, 1995, at 9B: Grand juries are made up of laymen who are thrown into a strange atmosphere and placed under the control of a person whom they know to be learned in the law. Immediately, a bond springs up and the prosecutor becomes a father figure who guides the way that evidence is submitted....Almost invariably the grand jurors will ask the prosecutor what decision they should make.

N174. For an instance in which a federal grand jury unsuccessfully attempted to bring charges on its own, see In re Grand Jury Proceedings, Special Grand Jury 89-2, 813 F.Supp. 1451, 1462 (D. Col. 1992) (reasoning that "[t]he grand jury has always been a check on prosecutorial power, not a substitute for the prosecutor"); In re Grand Jury Proceedings, Special Grand Jury 89-2, no. 92-Y-180, 1993 WL 245557 (D. Colo. Jan. 26, 1993); see also Brenner & Lockhart, supra note 4, § 2.3.

N175. See, e.g., In re Grand Jury of Wabasha County, Charged by the Court January 19, 1976, 244 N.W.2d 253, 254 (Minn. 1976) ("[T]he aim was to avoid informal and haphazard charges and findings by grand juries and to focus the jury's attention on whether an indictment should be found ....").

N176. E.g., Ga. Code Ann. § 15-12-74 (1994) (allowing presentments to be issued upon the information of one juror for violations observed before and after being sworn); Tenn. Code Ann. § 40-3-102 (1990) ("All violations of the criminal laws may be prosecuted by indictment or presentment of a grand jury, and a presentment may be made upon the information of any one (1) of the grand jury."); Va. Code Ann. § 19.2-202 (Michie 1990) (allowing grand juries to make presentments based upon the information of two or more grand jurors); W. Va. Code. § 52-2-8 (1994) (same).

N177. See, e.g., N.C. Gen. Stat. § 15A-641(c) (1988): A presentment is a written accusation by a grand jury, made on its own motion ... charging a person ... with ... one or more criminal offenses. A presentment does not institute criminal proceedings against any person, but the

district attorney is obligated to investigate the factual background of every presentment ... and to submit bills of indictment to the grand jury dealing with the subject matter of any presentments when it is appropriate to do so. But see Ga. Code Ann. § 17-7-51 (1990) ("All special presentments by the grand jury charging defendants with violations of the penal laws shall be treated as indictments.").

N178. See infra Part III.D.

N179. State analogues of the special grand jury, discussed infra Part III.D., encounter the same, informal constraints as their federal counterparts. These grand juries almost always are charged with investigating complex criminal activity and are, therefore, concerned with legal and factual issues that are more analogous to those encountered at the federal level. To the extent that the legal and factual complexity of the matters at issue discourage independence among grand jurors, special state grand juries will assume roles analogous to those of federal grand jurors. That is, they will be unable to play a proactive role in the charging process and usually will be relegated to a passive role for the reasons set forth in Part II's discussion of indicting federal grand jurors.

N180. E.g., Head v. State, 44 So.2d 441, 444 (Ala. Ct. App. 1950); Brown v. State, 339 S.E.2d 332, 340 (Ga. Ct. App. 1985); Ellison v. State, 62 S.E.2d 407, 408 (Ga. Ct. App. 1950); People v. Rupp, 348 N.Y.S.2d 649, 653 (Sup. Ct. 1973); State v. Sellers, 161 S.E.2d 15, 22 (N.C. 1968); State v. Doughtie, 77 S.E.2d 642, 644 (N.C. 1953); see also Ill. Ann. Stat. ch. 725, para. 5/111-3(b) (Smith-Hurd 1992) (grand jury foreman signs indictment; prosecutor signs information); Va. Sup. Ct. R. 3A:6(d) (same). One court found that the statutory requirement of a prosecutor's signature on an indictment is not required when a private citizen, rather than the prosecutor, seeks the indictment. State ex rel R. L. v. Bedell, 452 S.E.2d 893, 897 (W. Va. 1994). Another court found the whole idea of a prosecutor signing indictments distasteful. White v. Commonwealth, 37 S.E.2d 14, 17 (Va. 1946) (remarking that "we do not think it a good practice and it should be avoided").

N181. E.g., Ohio R. Crim. P. 7 cmt. (eliminating signature requirement because of case law holding that "the failure of the prosecuting attorney or an assistant to sign does not invalidate the indictment"); State v. Bunyan, 555 N.E.2d 980, 983 (Ohio Ct. App. 1988) (ruling that a state statute requiring signatures is directory rather than mandatory); State v. Ewing, 459 N.E.2d 1297, 1298 (Ohio Ct. App. 1983) (same).

N182. E.g., Sullivan v. Leatherman, 48 So.2d 836, 839 (Fla. 1950) (en banc) ("[The prosecutor's] signature is essential to give it legal status and in reality it does not become an indictment till he signs it."); State v. Huffman, 87 S.E.2d 541, 551 (W. Va. 1955). Some states impose this requirement by statute. E.g., Mo. Ann. Stat. § 545.040 (Vernon 1987); R.I. Gen. Laws § 12-12-1.2 (1956); S.D. Codified Laws Ann. § 23A-6-1 (Supp. 1995) (allowing certain exceptions); Utah Code Ann. § 77-10a-14 (1995) ("To be valid, the indictment shall be signed by the foreman and the attorney for the state or special prosecutor ...."); Haw. R. Penal P. 7(d); Md. R. Crim. P. 4- 202(b) (indictment "shall be signed by the State's Attorney ... or by any other person authorized by law to do so"); W. Va. R. Crim. P. 7(c)(1).

N183. See, e.g., Vt. R. Crim. P. 7 reporter's notes (requirement imposed "to give the state's attorney or other prosecutor ultimate control over prosecution") (citing United States v. Cox, 342 F.2d 167 (5th Cir.), cert. denied, 381 U.S. 935 (1965)).

N184. H.R. Rep. No. 1549, 91st Cong., 2d Sess., pt. 6, at 77 (1970), reprinted in 1970 U.S.C.C.A.N. 4007, 4053.

N185. Id. (statute "is a restatement of existing federal law as reflected in Hale v. Henkel, 26 S.Ct. 370, 201 U.S. 43, 50 L.Ed. 652 (1906)"); see also Brenner & Lockhart, supra note 4, § 2.4.

N186. See Conn. Gen. Stat. Ann. § 54-47(b)(3) (West 1994) ("An Investigatory grand jury' means a judge, constitutional state referee or any three judges of the superior court ... appointed by the chief court administrator to conduct an investigation into the commission of a crime or crimes.").

N187. 42 Pa. Cons. Stat. Ann. § 4545(a) (1981) (requiring 23 jurors and seven alternates).

N188. E.g., Ariz. Rev. Stat. Ann. § 21-407(A) (1990) ("The grand jurors shall inquire into every offense which may be tried within the county which is presented to them by the county attorney or other prosecuting officer at the request of the county attorney ...."); Fla. Stat. Ann. § 905.16 (West 1985) (grand jury may investigate offenses submitted to the prosecutor which have not been the subject of official indictments); La. Code Crim. Proc. Ann. art. 437 (West 1991) (grand jury investigates non-capital offenses "when requested to do so by the district attorney or ordered to do so by the court"); Mo. Ann. Stat. § 540.031 (Vernon 1995) (grand jury investigates "all possible violations of the criminal laws as the court may direct"); Mont. Code Ann. § 46-11-310 (1995) (grand jury "shall inquire into those matters as directed by the court summoning the jury and shall inquire into other matters as presented by the prosecutor"); N.C. Gen. Stat. § 15A-628(a)(4) (1994) (grand jury may investigate offenses submitted to the prosecutor that have not been the subject of official indictments).

N189. See, e.g., Ala. R. Crim. P. 12.3(c)(1) (grand jury must "[i]nquire into all indictable offenses committed or triable within the county"); accord Alaska Stat. § 12.40.030 (1990); Ark. Code Ann. 16-85-503(b) (Michie 1987); Cal. Penal Code § 917 (West 1985); Idaho Code § 19-1101 (1987); Ind. Code Ann. § 35-34-2-3(e) (Burns 1994); Minn. Stat. Ann. § 628.02 (West 1983); Neb. Rev. Stat. § 29-1407 (1989); Nev. Rev. Stat. Ann. § 172.105 (Michie 1992); N.D. Cent. Code § 29-10.1-01 (1991); Ohio Rev. Code Ann. § 2939.08 (Anderson 1993); Okla. Stat. Ann. tit. 22, § 331 (West 1992); Or. Rev. Stat. § 132.310 (1990); S.D. Codified Laws Ann. § 23A-5- 9 (1988); Tex. Code Crim. Proc. Ann. art. 20.09 (West 1977); Va. Code Ann. § 19.2-200 (Michie 1990); Wash. Rev. Code Ann. § 10.27.100 (West 1990); W. Va. Code § 52-2-7 (1994); Iowa R. Crim. P. 3(4)(j); Ky. R. Crim. P. 5.02; Tenn. R. Crim. P. 6(d); see also Ala. Code § 9-11- 21(a) (1987) (grand jury must investigate "[a]ny hunting accident involving a gun or bow and arrow when such accident results in death ... caused by one person against another"); Fla. Stat. Ann. § 104.43 (West 1985) (must investigate possible election offenses upon a request by a candidate or qualified voter); Ga. Code Ann. § 16-11-10 (1992) (investigates "communists or ... other subversive organizations"); Minn. Stat. Ann. § 628.61(3) (West 1983) (investigates misconduct in office of county officers). But see La. Code Crim. Proc. Ann. art. 437 (West 1991) (grand jury must investigate "all capital offenses triable within the parish" and can only investigate non-capital offenses if prosecutor asks or

court orders it to do so). Pennsylvania's investigatory grand jury is charged with inquiring "into offenses against the criminal laws of the Commonwealth alleged to have been committed within the county or counties in which it is summoned," but it cannot bring charges for that activity. 42 Pa. Cons. Stat. Ann. § 4548(a) (1981)

N190. See, e.g., Ariz. Rev. Stat. Ann. § 21-422(B) (1990) (state grand juries investigate: tax fraud, securities fraud, and other types of fraud; drug, theft, gambling and/or prostitution activity that is conducted in multiple counties; and perjury or other obstructive behavior involving a state grand jury); Ill. Ann. Stat. ch. 725, para. 215/2 (Smith-Hurd Supp. 1995) (statewide grand juries investigate narcotics racketeering, money laundering, violations of the Cannabis and Controlled Substances Tax Act; unlawful sale and transfer of firearms; and streetgang related felonies); Miss. Code Ann. § 13-7-7(1) (Supp. 1995) (state grand juries investigate controlled substance offenses "if the crimes occur within more than one circuit court district"); N.J. Stat. Ann. § 2A:73A-3 (West 1994) (state grand juries investigate crimes committed anywhere in the state); 42 Pa. Cons. Stat. Ann. § 4542 (1981) (multicounty grand juries investigate "organized crime or public corruption" if the activity spans several counties); R.I. Gen. Laws § 12- 11.1-1 (1994) (statewide grand juries investigate crimes committed anywhere in the state); S.C. Code Ann. § 14-7-1630(A) (Law. Coop. Supp. 1994) (state grand juries investigate multi-county activity involving drug trafficking, money laundering, obscenity, public corruption, and election offenses); see also Colo. Rev. Stat. §§ 13-73-101 to 13-73-102 (1987); N.H. Rev. Stat. Ann. § 600-A:1 (Supp. 1994); Okla. Stat. Ann. tit. 22, § 353 (West 1992); Va. Code Ann. § 19.2-215.1 (Michie 1995); Wyo. Stat. § 7-5- 308(a) (1977). Connecticut's investigatory judicial grand jury functions in a similar capacity. See Conn. Gen. Stat. Ann. § 54-47(b)(2)-(3) (West 1994) (investigates corruption in state or local government; fraud by "vendor of goods or services in the medical assistance program under Title XIX of the Social Security Act Amendments of 1965"; violations of state election laws; and any other felony punishable by imprisonment in excess of five years for which state's attorney demonstrates a need for investigatory assistance of a grand jury). For examples of the type of investigation conducted by these grand juries, see, e.g., People v. McCormick, 859 P.2d 846, 849 (Colo. 1993) ("complex criminal schemes that extended beyond the borders of a single county"); People v. Bobo, 897 P.2d 909, 910 (Colo. Ct. App. May 18, 1995) (violations of Colorado Organized Crime Control Act); Commonwealth v. Atwood, 601 A.2d 277, 280 (Pa. Super. Ct. 1991) (multi-county fundraising activities of an evangelist), appeal denied, 607 A.2d 249 (Pa. 1992); State v. Barroso, No. 2357, 1995 WL 361699, at *1-*2 (S.C. Ct. App. June 12, 1995) ("massive drug trafficking conspiracy"). Some states impanel special grand juries which investigate other types of activity. See, e.g., Ga. Code Ann. § 15-12-100(a) (1994) (county judges can impanel special grand jury to investigate "any alleged violation of the laws of this state"); Nev. Rev. Stat. Ann. § 6.135(1) (Michie 1986) (county judge can impanel a special grand jury which investigates "state affairs" and the conduct of "state officers and employees"); Ky. R. Admin. P. § 22(1) (chief circuit judge may convene "special grand jury to deal with a situation requiring lengthy investigation which cannot be adequately handled during the term of the regular grand jury").

N191. See, e.g., Ariz. Rev. Stat. Ann. § 21-422(B) (1990) (state grand juries); Colo. Rev. Stat. §§ 13-73-101 to 13-73-102 (1987) (multicounty and statewide grand juries); Ga. Code Ann. § 15-12-100(a) (1994) (special grand juries); Ill. Ann. Stat. ch. 725, para. 215/2 (Smith-Hurd Supp. 1995) (statewide grand juries); Miss. Code Ann. § 13-7-7(1) (Supp. 1995) (state grand juries); Nev. Rev. Stat. Ann. § 6.135(1) (Michie 1986) (special grand juries); 42 Pa. Cons. Stat. Ann. § 4542 (1981) (multicounty grand juries); R.I. Gen. Laws § 12-11.1-1

(1994) (statewide grand juries); S.C. Code Ann. § 14-7-1630(A) (Law. Co-op. Supp. 1994) (state grand juries); Ky. R. Admin. P. § 22(1) (special grand juries).

N192. See, e.g., Ariz. Rev. Stat. Ann. § 21-421 (1990); Ill. Ann. Stat. ch. 725, para. 215/3 (Smith-Hurd Supp. 1995); Miss. Code Ann. § 13-7-7 (Supp. 1995); R.I. Gen. Laws § 12-11.1-5 (1994); S.C. Code Ann. § 14-7- 1610 (Law. Co-op. 1995); Ky. R. Admin. P. § 22(1). But see Ark. Code Ann. § 16-85-517(a) (Michie 1987) (special grand jury convened as substitute for regular grand jury); Colo. Rev. Stat. § 13-72-109 (Supp. 1994) (if judicial district grand jury is convened, it is not necessary to impanel a county grand jury).

N193. These jurors may assume a more active role, however, when asked to investigate what appears to be a problematic, unusual, or controversial allegation of criminal activity. See, e.g., RIAA Praises 'Body' Ruling, Daily Variety, Nov. 4, 1992, at 11 (discussing a grand jury's refusal to indict a record store owner for selling an allegedly obscene recording to a minor); Patrick Reardon, Grand Jury Won't Indict Mother in Baby's Drug Death, Chi. Trib., May 27, 1989, at C1 (reporting grand jury's refusal to indict a mother for involuntary manslaughter resulting from the mother's drug use while pregnant); Jury Rejects Doctor's Indictment, UPI, Aug. 17, 1984 (reporting a grand jury's refusal to indict a doctor accused of giving his terminally ill mother a lethal injection). In such cases, the prosecutors may subtly encourage grand jurors to take an active, and skeptical, role in order to avoid bringing unfounded charges. See generally Colleen Mancino, Teacher Cleared of Sex Assault, Bergen Record, Aug. 17, 1995, at A1 (reporting that the prosecutor allowed the accused to take the stand).

N194. This may not be true when criminal activity is called to the grand jury's attention by someone other than a prosecutor. See Toni Lepeska & Lawrence Buser, Two Officers Indicted in Pepper Gassing of Lawyer, Com. Appeal, Aug. 12, 1995, at A1 (reporting that an assault victim himself brought a presentment against two police officers to the grand jury).

N195. E.g., Ala. Code § 12-16-206 (1986); Cal. Penal Code § 918 (West 1985); Ind. Code Ann. § 35-34-2-3(g) (Burns 1994); La. Code Crim. Proc. Ann. art. 438 (West 1991); Or. Rev. Stat. § 132.350(1) (1990); Wash. Rev. Code § 10.27.100 (1990); Ky. R. Crim. P. 5.02.

N196. As the preceding Section pointed out, it is impossible to equate a statutory obligation to report criminal conduct with proactive grand juries. The combination of factors discussed in the text above, however, reasonably supports an inference that grand juries in these states at least have the potential to become active participants in the investigatory process. This is especially true in a state like Tennessee, which allows a grand jury to return charges on its own initiative in a presentment.

N197. This purpose is underscored in Virginia, which allows special grand juries to investigate, but not to indict. Vihko v. Commonwealth, 393 S.E.2d 413, 415 (Va. Ct. App. 1990) (evidence gathered by special grand jury is typically presented to regular grand jury, which may indict). In most states, as in the federal system, special grand juries can indict as well as investigate. See, e.g., Bell v. Roddy, 646 So. 2d 967, 971 (La. Ct. App. 1994); State v. Gallagher, 644 A.2d 103, 104 (N.J. Super. Ct. App. Div. 1994); Smith v. Retirement Bd. of Employees' Retirement Sys., 656 A.2d 186, 188 (R.I. 1995); State v. Barroso, No. 2357, 1995 WL 361699 at *15 (S.C. Ct. App. June 12, 1995).

N198. In addition to the generic factors discussed in the text, the activities of special grand juries are also subject to the courts' control in some states. See, e.g., District Court of Second Judicial Dist. v. McKenna, 881 P.2d 1387, 1391 (N.M. 1994) (noting that the court has statutory authority to limit the scope of special grand jury's investigation), cert. denied, 115 S.Ct. 1361 (1995). But see Commonwealth v. McCauley, 588 A.2d 941, 945 (Pa. Super. Ct. 1991) (special grand jury may investigate criminal activity unrelated to the purpose for which it was impaneled), appeal denied, 604 A.2d 248 (Pa. 1992).

N199. E.g., Ariz. Rev. Stat. Ann. § 21-422(B) (1990); Ill. Ann. Stat. ch. 725, para. 215/2 (Smith-Hurd Supp. 1995); Miss. Code Ann. § 13-7- 7(1) (Supp. 1995); 42 Pa. Cons. Stat. Ann. § 4542 (1981); S.C. Code Ann. § 14-7-1630(A) (Law. Co-op. Supp. 1994).

N200. E.g., Ariz. Rev. Stat. Ann. § 21-422(B)(1) (1990); Fla. Stat. Ann. § 905.34 (West Supp. 1995); N.D. Cent. Code § 29-10.2-05(1) (1991); Tenn. Code Ann. § 40-12-201(a)(5) (1990).

N201. The need, or the perceived need, to rely on their expertise may be enhanced by the unusual sophistication and experience of the prosecutors assigned to special grand juries. See Ariz. Rev. Stat. Ann. § 21-424 (1990) (attorney general or his designee presents evidence to state grand juries); Colo. Rev. Stat. Ann. § 13-73-106 (West 1987) (same); Fla. Stat. Ann. § 16.56(3) (West 1988) (statewide prosecutor may serve as the legal advisor to statewide grand juries); Miss. Code Ann. § 13-7-11 (1995) (attorney general or designee is legal advisor to state grand juries); N.H. Rev. Stat. Ann. § 600-A:5 (1986) (attorney general shall present evidence); N.J. Stat. Ann. § 2A:73A-7 (West 1994) (same); N.D. Cent. Code § 29-10.2-04(2) (same); Wyo. Stat. § 7-5-306 (1995) (same).

N202. E.g., Colo. Rev. Stat. Ann. § 13-73-103 (Bradford 1987) ("[N]ot more than one-fourth of the members of the state grand jury shall be residents of any one county"); Fla. Stat. Ann. § 905.37(2) (West Supp. 1995) ("In selecting and impaneling the statewide grand jury ... the presiding judge shall select no fewer than one statewide grand juror from each congressional district in the state."); N.J. Stat. Ann. § 2A:73A-4 (West 1994) (providing that "not more than 1/4 of the members of the State grand jury shall be residents of any one county"); N.D. Cent. Code § 29-10.2-03 (1991) ("[N]ot more than one-half of the members [of a state grand jury) may be residents of one county."). But see Ariz. Rev. Stat. Ann. § 21-423(A) (1990) ("[D]epending on the nature of the matters to be investigated," the Arizona Supreme Court may permit a state grand jury to be composed of jurors from "either one county or several counties").

N203. See, e.g., Russell E. Eshleman, Jr., State Grand Jury Plays a Critical--But Anonymous--Role, Philadelphia Inquirer, Nov. 11, 1993, at B2 (reporting that Pennsylvania state grand juries may be impaneled for up to two years and are in session for one week each month).

N204. See Brenner & Lockhart, supra note 4, § 3.3.

N205. Id.

N206. The ability to investigate non-criminal matters is limited to regular grand juries; special grand juries generally only investigate criminal activity. See, e.g., Cal. Ct. R. - Standards of Judicial Admin. § 17(a) ("'Regular grand jury' means a body of citizens ... selected by the court to investigate matters of civil concern in the county."). But see Ariz. Rev. Stat. Ann. § 21-422(B) (1990) (allowing statewide grand jury to investigate civil matters such as taxes, sales of land, and bankruptcies).

N207. For those that require such an inspection, see, e.g., Ala. Code § 12- 16-191 (1986) (requiring the grand jury to "make a personal inspection of the condition of the county jail in regard to its sufficiency for the safekeeping of prisoners, their accommodation and health and to inquire into the manner in which the same has been kept"); accord Ark. Code Ann. §§ 12-41-508, 16- 85-503(a)(2) (Michie 1987); Cal. Penal Code § 919(b) (West 1985); Ga. Code Ann. § 15-12-71(b)(1) (Supp. 1985); Ill. Ann. Stat. ch. 730, para. 125/22 (Smith-Hurd 1993); La. Rev. Stat. Ann. § 15:121 (West 1992); Md. Code Ann. Crim. Law § 703 1/2 (1992); Minn. Stat. Ann.§ 628.61(2) (West 1983); Miss. Code Ann.§ 13-5-55 (Supp. 1995); Mo. Ann. Stat.§ 221.300 (Vernon 1983); Nev. Rev. Stat. Ann.§ 172.175(1)(b) (Michie 1992); N.C. Gen. Stat.§ 15A-628(a)(5) (1994); Ohio Rev. Code Ann.§ 2939.21 (Anderson 1993); Okla. Stat. Ann. tit. 57,§ 59 (West 1991); Or. Rev. Stat.§ 132.440(1) (1990); Iowa R. Crim. P. 3(4) (j); N.M. Uniform Jury Instructions - Crim. 14-8001; see also N.D. Cent. Code § 29-10.1- 22(1) (1991) (must inquire into "condition and management of the public prisons in the county" when ordered to do so by the court). Many states expressly permit inquiry and/or guarantee access for prison inspections. E.g., Alaska Stat.§ 12.40.060 ("[G]rand jury is entitled to access, at all reasonable times, to the public jails and prisons ...."); accord Ariz. Rev. Stat. Ann.§ 21-407(A) (1990); Idaho Code § 19-1110 (1987); Neb. Rev. Stat.§ 29-1417 (1989); S.D. Codified Laws Ann.§ 23A- 5-9 (1988); Wyo. Stat.§ 7-5-202(b)(ii) (1977); Tenn. R. Crim. P. 6(e)(3) (allowing inquiry).

N208. E.g., Ga. Code Ann.§ 42-4-8 (1994) (charging grand jury with duty of inspecting sheriff's records and if it finds they have not been properly kept, reporting this to the court, which can hold sheriff in contempt). For an example of such a report, see Scott Marshall, Panel: New Jail Policies Needed; Deputies Refused to Accept Prisoner, Atlanta Const., Aug. 2, 1995, at J1. Inspection of records is a traditional grand jury function. See Jim Reis, Pieces Of The Past: Newport Jail Built in 1900 to End an Old "Insult to Common Decency," Kentucky Post, Nov. 11, 1991, at K4 (describing several grand juries' roles in advocating the construction of new local jail in the 1890s). In Louisiana, grand juries also inspect hospitals and asylums and report to the court on treatment of inmates. La. Rev. Stat. Ann.§ 15:121 (West 1992).

N209. E.g., Mo. Const. art. I,§ 16 (inquire into the willful and corrupt misconduct of public officers); Ala. Code § 36-11-3 (1991) (investigate officers' "alleged misconduct or incompetency of any public officer in the county which may be brought to its notice"); Ark. Code Ann. 16-85- 503(a)(3) (Michie 1987) (inquire into the willful and corrupt misconduct of public officers); Cal. Penal Code § 919(c) (West 1985) (same); Minn. Stat. Ann.§ 628.61(3) (1983) (same); Nev. Rev. Stat. Ann.§ 172.175(1)(c) (Michie 1992) (same); N.Y. Crim. Proc. Law § 190.05 (McKinney 1993) (investigate "misconduct, nonfeasance and neglect in public office"); N.D. Cent. Code § 29.-10.1-22(2) (1991) (investigate misconduct when directed by district court); Okla. Stat. Ann. tit. 22,§ 338(3) (West 1992) (same as Ark.); Iowa R. Crim. P. 3(4)(j)(3) (investigate "unlawful misconduct" of county officers and employees); Tenn. R. Crim. P. 6(e)(6) (investigate "abuse of office" by state or local officers); see also Ala. Code §

12-16-192 (1986) (examine "county treasury and the bonds of all county officers"); Ala. Code § 12-16-194 (1986) (examine "fee book of the probate judge and ascertain if illegal fees have been received"); Ala. Code § 12-16-195 (1986) (examine "books and papers of the county superintendent of education"); Ark. Code Ann.§ 16-85-503(e) (1987) (examine "accounts of the collecting officers of the county, dockets of justices of the peace, and any matters relating to the general school fund"); Cal. Penal Code §§ 888, 925 (West Supp. 1995) (inquire into needs of specified county agencies, including the need to create or abolish offices, provide equipment and/or change their operating methods; and review "operations, accounts, and records of the officers, departments, or functions of the county"); Ga. Code Ann.§ 15-12-71(b)(1) (Supp. 1995) (at least every three years, inspect "offices and operations of the clerk of superior court, the judge of the probate court, and the county treasurer or county depository"); Ga. Code Ann.§ 15-12- 71(b)(2) (Supp. 1995) (appoint a committee of grand jurors to inspect county offices and buildings); Ga. Code Ann.§ 48-5-161(d) (1991) (review each tax collector's "execution docket and cashbook"); Miss. Code Ann.§ 13-5-59 (Supp. 1995) (examine tax collector's books and reports); Miss. Code Ann.§ 19-17-17 (1995) (receive county auditor's report on accounts and records of county officers); Mo. Ann. Stat.§ 540.031 (Vernon Supp. 1995) (inspect public buildings); N.C. Gen. Stat.§ 15A-628(a)(5) (1994) (inspect county offices and agencies); Tenn. Code Ann.§ 18-2-212 (1994) (review "correctness and sufficiency" of bonds of county court clerks); Tenn. R. Crim. P. 6(e)(3) (inquire into "condition and management" of prisons, public buildings, and institutions); Tenn. R. Crim. P. 6(e)(4)-6(e)(5) (same as Ala. Code § 12-16-192). But see In re Elkhart Grand Jury, June 20, 1980, 433 N.E.2d 835, 838 (Ind. Ct. App. 1982) (holding that Indiana grand juries are not authorized to issue reports criticizing the conduct of public officials that does not amount to an indictable offense). N210. See, e.g., Ga. Code Ann.§ 21-2-500 (Supp. 1995) (inspect "used, unused, and void ballots," stubs of ballots, and all election records); accord Ky. Rev. Stat. Ann.§ 117.365 (Michie/Bobbs-Merrill 1993); see also Ark. Code Ann.§ 7-5-807 (Michie 1993) (investigate upon citizen complaint); Fla. Stat. Ann.§ 104.43 (Harrison 1985) (investigate upon request by qualified voter or candidate); Kan. Stat. Ann.§ 22-3001 (1988) (investigate on petition filed by voters); Ky. Rev. Stat. Ann.§ 119-307 (Michie/Bobbs- Merrill 1993) (investigate unexcused absences of election officials).

N211. See, e.g., Ala. Code § 31-8-29 (1989) (investigate county pension list to determine if anyone is receiving pension who is not entitled to it); Cal. Penal Code § 920 (West 1985) (inquire into transfers of land which "might or should escheat to the State of California"); Cal. Penal Code § 933.6 (West Supp. 1995) (investigate non-profit corporations created by or operated on behalf of a public entity); Ga. Code Ann.§ 15-1-12 (1994) (fix compensation for services of probate court judges and superior court clerks); Ga. Code Ann.§ 15-12-7 (Supp. 1995) (fix yearly compensation of court bailiffs and expense allowance for county jurors); Ga. Code Ann.§ 36-3-2 (Harrison 1981) (vote on proposed change in county boundaries); Mo. Ann. Stat.§ 150.110 (Vernon 1976) (review merchants' failures to obtain required licenses); 53 Pa. Cons. Stat. Ann.§ 13621 (1994) (vote on proposals to erect memorials honoring military veterans); Tenn. Code Ann.§ 68-8-113 (1992) (investigate failures to comply with rules requiring rabies vaccinations of dogs and cats).

N212. Alaska Stat.§ 12.40.030 (1990) (directing the grand jury to "inquire into all crimes committed or triable within the jurisdiction of the court and present them to the court"); see also Nev. Rev. Stat.§ 172.175(2) (1992) ("A grand jury that is not impaneled for another specific limited purpose may inquire into any and all matters affecting the morals, health and

general welfare of the inhabitants of the county ...."); In re Report of Washoe County Grand Jury, 590 P.2d 622, 624 (Nev. 1979).

N213. See, e.g., Anne Krueger, Grand Jury Recommends More Workers, Computers for Child Sex-Abuse Cases, San Diego Union-Tribune, June 9, 1995, at B2 (reporting that a California grand jury "recommended several administrative changes" in county's handling of child sex-abuse cases; its predecessor issued a scathing report accusing county prosecutor of having a "lax management style"); Michael G. Wagner, Grand Jury Withdraws Request for Independent Counsel, L.A. Times, June 9, 1995, at B4 (noting that a grand jury investigating county bankruptcy initially sought its own counsel to assist with the investigation); Michelle Williams, Little-Used Statute Basis of Grand Jury Move Against Collins, Ariz. Republic, June 6, 1986, at A8 (describing how a grand jury used a little-known "misconduct in office" statute against county prosecutor for the first time in the state's history).

N214. See, e.g., Kathey Alexander & Mary L. Kelly, 1994 Legislative Session Bill Would Give Jurors Freedom from Routine Inspections, Atlanta J. and Const., Feb. 17, 1994, at A7 (according to representative of Georgia county commissioners' association, "going to the jail and inspecting county facilities" has become a "perfunctory task" for Georgia grand juries). But see Chris Adams, Grand Jury Backs Jail Bond Issue in St. Bernard, New Orleans Times-Picayune, Oct. 5, 1989, at B4 (chronicling grand jury inspection of jail and its unprecedented publicly stated support for constructing a new facility); Len Penix, Clermont Jail Hangs "No Smoking" Signs, Cincinnati Post, Mar. 11, 1991, at 1A (describing grand jury criticism of local jail's new no smoking policy).

N215. Robert W. Stewart, Experts Question Role; State Grand Jury Failing Civil "Watchdog" Function, L.A. Times, Aug. 5, 1986, at 1 (reporting that critics claim that grand juries' recommendations are often "trivial, poorly researched, overly broad or self-evident").

N216. Jim Wooten, An Important Safeguard: Let's Not Limit a Grand Jury's Right to Be Nosy, Atlanta J. and Const., Mar. 2, 1994, at A10 (observing that grand juries are "feared by politicians and bureaucrats because the powerful can never be quite certain who they're dealing with or how far they'll go," and therefore have an important role in "keeping government honest").

N217. See, e.g., Alexander & Kelly, supra note 214, at A7 (quoting a prosecutor lamenting that nine successive grand juries issued reports that were "scathing[ly]" critical of the condition of the courthouse and recommended changes, but nothing was done); Penix, supra note 214, at 1A (noting that despite grand jury's criticism of no smoking policy in local jail, the sheriff made the final decision to institute it).

N218. See, e.g., Ala. Code § 12-16-224 (1986); Cal. Penal Code § 933 (West 1985); Ga. Code Ann.§ 15-12-71(b)(3) (Supp. 1995); La. Rev. Stat. Ann.§ 15:121; Nev. Rev. Stat. Ann.§ 172.267 (Michie 1992); Okla. Stat. Ann. tit. 22,§ 346 (West 1992); Alaska R. Crim. P. 6.1; Tenn. R. Crim. P. 6(e)(7). A grand jury's willingness to issue a highly critical report may be influenced by the fact that, at least in some states, comments in a grand jury report are not privileged, and so can become the basis of an action for defamation. See McClatchy Newspapers v. Superior Court, 751 P.2d 1329, 1337 (Cal. 1988) (en banc).

N219. In at least one state, grand juries may conduct public sessions on matters "affect[ing] the general public welfare" with the approval of the court. Cal. Penal Code § 939.1 (West 1985).

N220. See, e.g., Krueger, supra note 213, at B2 (noting that a California grand jury issued a scathing report on the performance of the county prosecutor, which apparently caused him to lose his bid for re-election).

N221. In some states, courts can seal a grand jury report if, for example, it does not satisfy statutory requirements or if its release could jeopardize a pending criminal matter. See, e.g., N.Y. Crim. Proc. Law § 190.85(4)- (5) (McKinney 1993); Utah Code Ann.§ 77-10a-17(6)-(7) (1995). Absent specific statutory authorization, a grand jury may not release a report that criticizes the behavior of identified individuals. See, e.g., Kelley v. Tanksley, 123 S.E.2d 462, 463-64 (Ga. Ct. App. 1961); In re Grand Jury of Wabasha County, 244 N.W.2d 253, 255 (Minn. 1976); In re Grand Jury of Douglas County, 509 N.W.2d 212, 214 (Neb. 1993); see also Simington v. Shimp, 398 N.E.2d 812, 817 (Ohio Ct. App. 1978) (holding grand jury reports on civil matters proper only on issues specifically authorized by statute).

N222. See, e.g., Cal. Penal Code §§ 927 to 928 (West 1985) (grand jury reports on salaries of county-elected officials and needs of county officers are sent to county board of supervisors); Nev. Rev. Stat. Ann.§ 172.271 (Michie 1992) (report submitted to court; if the court finds the report acceptable, it files it and sends a copy to "each person or governmental entity" mentioned therein); Ohio Rev. Code Ann.§ 2939.21 (Anderson 1993) (report on jails submitted to court and sent to state department of corrections). But see Ala. Code § 36-11-3 (1991) (report recommending public officer be removed from office is to be transmitted to state attorney general).

N223. United States v. Watkins, 28 F. Cas. 419, 451 (C.C.D.C. 1829) (No. 16,649).

N224. See, e.g., United States v. R. Enterprises, Inc., 498 U.S. 292, 297- 298 (1991); United States v. Johnson, 319 U.S. 503, 510 (1943).

N225. See Brenner & Lockhart, supra note 4, §§ 7.1-7.2.

N226. To guarantee impartiality it might be advisable to exclude both prosecutors and defense attorneys from the position of grand jury counsel. Counsel could be chosen from the ranks of civil practitioners and given a basic orientation on the substantive and procedural issues likely to arise during her term with the grand jury. When more difficult legal issues arise, the grand jury's counsel could seek guidance from the court, from the Department of Justice, or from an independent body established for this purpose.

N227. United States v. Calandra, 414 U.S. 338 (1974).

N228. Counsel could also similarly instruct jurors that certain evidence was hearsay that would be inadmissible at trial.

N229. See United States v. Williams, 504 U.S. 36, 60 n.7 (1992) (citing numerous cases involving prosecutorial misconduct, such as misstating the law and operating under a conflict

of interest). For examples of such charges in the news, see Elizabeth Becker, Carcich Lawyers Accuse Prosecutor of Abusing the Grand Jury System, Wash. Post, Feb. 25, 1978, at A1; Linda Deutsch, DA Abusing Grand Jury, Simpson Lawyers Assert, Bergen Record, Aug. 26, 1994, at A14; Richard A. Serrano, McVeigh's Lawyers Seek Dismissal of Bomb Case Charges, L.A. Times, Oct. 14, 1995, at A17 (reporting that bomb suspect's attorney accused the government of shielding the grand jury from "potentially crucial evidence").

N230. See Brenner & Lockhart, supra note 4,§ 20.4.

N231. To understand why this is true, one has only to consider the kind of charges the two types of grand juries are asked to bring. Except for the special state grand juries, state grand juries are concerned with offenses such as homicide, arson, theft, sexual offenses, and the like. The law and the facts at issue in these crimes are straightforward and easily comprehended by a layperson. Indeed, laypersons often have some familiarity with these offenses, either as a result of personal experience or vicariously, through the media. Federal grand juries, on the other hand, are asked to consider complex crimes like racketeering, money laundering, bank fraud, mail fraud, and environmental offenses. Since few, if any, laypersons will have had personal or even vicarious experiences with these offenses, they are unable to bring their common sense to bear on the facts and on the law as presented to them by a prosecutor. Consequently, they are far more dependent on the prosecutor than their state counterparts.

N232. See supra Part III.D.

N233. See Brenner & Lockhart, supra note 4, §§ 7.1-7.2.

N234. As Part III.D. notes, California grand juries are charged with investigating various government activities, and critics claim that jurors have been given a task that is simply beyond their expertise.

N235. See Charles W. Coward, Jr., It's Time to Take Grand Juries out of the Middle Ages, N.Y. Times, Sept. 20, 1981, at § 11, p. 32

N236. See, e.g., Barry Reed, The Indictment (1995).