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## **Rodney King and the Decriminalization of Police Brutality in America: Direct and Judicial Access to the Grand Jury as Remedies for Victims of Police Brutality When the Prosecutor Declines to Prosecute**

Peter L. Davis

*Touro Law Center*, [pdavis@tourolaw.edu](mailto:pdavis@tourolaw.edu)

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### **Recommended Citation**

53 Md. L. Rev. 271 (1994).

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# Articles

## RODNEY KING AND THE DECRIMINALIZATION OF POLICE BRUTALITY IN AMERICA: DIRECT AND JUDICIAL ACCESS TO THE GRAND JURY AS REMEDIES FOR VICTIMS OF POLICE BRUTALITY WHEN THE PROSECUTOR DECLINES TO PROSECUTE

PETER L. DAVIS\*

*This Article begins with the premise that, despite political rhetoric and occasional prosecutions to the contrary, police brutality has been effectively decriminalized in this country. The Article adopts the Rodney King case as the paradigm for examining this phenomenon. Scrutinizing the culture and semantics of police brutality, the author concludes that a double standard of criminality exists in the United States, under which different rules apply to police than to everyone else. This double standard is socially dysfunctional. Particularly among minorities, it leads to a sense of cynicism about our legal system that can result in civil disorder when properly fueled. More importantly, this double standard is morally wrong.*

*Because existing measures, including civil suits and civilian review boards, have failed to deter police misconduct, the author*

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\* Associate Professor of Law, Touro College, Jacob D. Fuchsberg Law Center. A.B., 1969, Harvard College; J.D., 1972, New York University. The author wishes to thank Marianne Artusio, Richard Brown, Eric Cassell, Frank DeSousa, Mort Eisenberg, Marsha Freeman, Martin Feinberg, Dee Glick, Catherine Healy, Max Hugo, Dan Jordan, Richard Klein, Beth Mobley, Nadine Mobley, Jeffrey Morris, Vincent Siccaldi, Abbe Smith, Barbara Swartz, Thomas Ventura, Jeffrey Yablon, and Peter Zablotsky. This Article is dedicated to Andra and Conner; to Gerard Papa, Richard Simonsen, and the thousands of victims of police brutality; to Weldon Brewer, Art Cohen, and the legions of whistleblowers.

We prefer to avert our eyes from those who persist in reminding us of the wrongs they have suffered—the mother whose child disappeared three years ago on a New York street and who, instead of mourning in silence, continues to appear on television and appeal for information about her missing son; the young Sicilian woman who, instead of marrying her rapist as ancient local custom dictates, scandalizes the town by bringing criminal charges; the concentration-camp survivors who, instead of putting the past behind them, persist in pointing their fingers at ex-Nazis living comfortable lives on quiet streets. Such people are disturbers of the peace; we wish they would take their memories away to a church, a cemetery, a psychotherapist's office . . .

SUSAN JACOBY, WILD JUSTICE 1-2 (1983). This Article is dedicated to these disturbers of the peace—and to their lawyers—who, the author hopes, will find it useful.

*suggests that only the realistic threat of criminal prosecution will actually deter police violence. Unfortunately, the close working relationship between the police and prosecutors continues to make it extremely unlikely that many prosecutors will ever mount a credible challenge to systemic police brutality. Although, at first glance, traditional judicial deference to prosecutorial discretion may appear to preclude other avenues for undertaking criminal prosecution of officers who engage in police brutality, the author suggests there is another approach—citizen access to the grand jury—that could help correct the current imbalance. This Article examines the avenues available under current law by which victimized citizens may bring their cases before the grand jury, either directly or through the impaneling judge, even when such action is opposed by the public prosecutor.<sup>1</sup> The author concludes that the only reason that citizens have pursued this option so infrequently is that neither the bar nor the general public is aware of it. Thus, the goal of the Article is to analyze the pertinent law and provide practicing attorneys—and their clients—with information on procedures for gaining access to the grand jury in their jurisdictions.<sup>2</sup>*

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1. The legal strategies suggested in this Article are applicable to *any* violation of state law. It is these particularly sensitive cases—those involving police criminality or other forms of governmental misconduct—which the author wishes to emphasize. Significantly, in the midst of the movement for victims' rights, the right of victims most ignored is the right to commence a criminal prosecution. For instance, the ABA GUIDELINES FOR FAIR TREATMENT OF CRIME VICTIMS AND WITNESSES IN THE CRIMINAL JUSTICE SYSTEM (1983) appears to *assume* prosecution, and the key issue of what to do when the district attorney refuses to prosecute is completely ignored.

2. Normally, the limited biographical information about the author of a law review article supplied in note \*, *supra*, would suffice; but in this case, greater disclosure seems indicated. The author was a criminal trial attorney for the Legal Aid Society of New York from 1972 to 1980. In 1987, he was appointed Special Counsel to the Public Safety Committee of the Suffolk County, New York, Legislature, for the purpose of investigating law enforcement—both the Police Department and the District Attorney's office—in Suffolk County. In the past two decades, the last decade as a law teacher, the author has also been co-counsel in the trial of a federal civil rights action arising from an incident of police brutality and has dealt repeatedly with the Civilian Complaint Review Board of the New York Police Department. Also during this time, he has advised many victims of police brutality and personally witnessed incidents of such brutality himself. In addition, he has written previously on the topic of possible remedies for victims of police brutality. See Peter L. Davis, *The Crime Victim's "Right" to a Criminal Prosecution: A Proposed Model Statute for the Governance of Private Criminal Prosecutions*, 38 DEPAUL L. REV. 329 (1989).

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# I. RODNEY KING AND THE DECRIMINALIZATION OF POLICE BRUTALITY

They give me a stick they give a mee [sic] a gun they pay me  
50Gs to have some fun . . . .

—unidentified Los Angeles police officer<sup>3</sup>

There are no accurate, national statistics on the number of police assaults on civilians.<sup>4</sup> However, a Gannett News Service study of one hundred police brutality lawsuits nationwide found “that taxpayers are punished more than the officers responsible for the violence. The 100 cases, involving police departments that lost lawsuits and had to pay victims at least \$100,000, cost the nation’s taxpayers nearly \$92 million. But of 105 officers involved, only five were fired—and 19 were promoted.”<sup>5</sup> The Christopher Commission concluded that “[p]olice violence is not a local problem”;<sup>6</sup> and shortly after the King episode the heads of police departments from ten major cities around the country “called for a national commission on crime and violence

3. REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 52 (1991) [hereinafter CHRISTOPHER COMMISSION REPORT] (verbatim transmission from a Los Angeles Police Department mobile digital terminal).

4. Erwin Chemerinsky, *Protecting Individual Rights: Policing the Police*, TRIAL, Dec. 1991, at 32. As for actual statistics, John Dunne, then head of the Justice Department’s civil rights division, admitted that the Department had done a recent study of police brutality nationwide based on “regrettably unreliable statistics.” David Johnston, *Aide Termed Easy on Police and Unbudging on Rioters*, N.Y. TIMES, May 8, 1992, at A18. Dunne conceded that the statistics were incomplete because they included complaints made to federal authorities only. *Id.* Curiously, Dunne “disclosed that the Administration opposes legislation requiring the Justice Department to collect statistical data on the misconduct of officers from local police departments, saying he feared such a measure would have a ‘chilling effect’ on the department’s efforts to improve the local police agencies.” *Id.*

5. Rochelle Sharpe, *Policing Brutality: How Cops Beat the Rap*, GANNETT NEWS SERVICE, at 1 (photo. reprint) (1992) [hereinafter GANNETT REPORT]. Gannett claims that its report is “believed to be the first nationwide study of police discipline and brutality. . . .” *Id.* at 2. Gannett began by obtaining a list of civil police brutality suits, limiting that list to cases since 1985 in which the police were required to pay \$100,000 or more. One hundred cases from twenty-two states, amounting to almost \$92 million in awards, were included in the database. *Id.*

The database yielded some interesting results: for instance, of two police officers—a corporal and a sergeant—who cost a North Carolina town \$220,000 in such a lawsuit, the sergeant was subsequently promoted to captain and the corporal became chief of police in another North Carolina town. *Id.*

After the Albuquerque Police Department lost \$332,500 in a civil suit involving Officer Jeff House, the department still made him “Officer of the Month.” The jury concluded House had shot and killed Johnny Lopez, a burglary suspect, although the district attorney and the department’s internal affairs division cleared him of all wrongdoing. *Id.* at 3.

6. CHRISTOPHER COMMISSION REPORT, *supra* note 3, at i.

to track instances of police brutality, stating that the problem of excessive force is real and is linked to drugs, strife, and urban decay.”<sup>7</sup> And Hubert Williams, formerly Chief of Police of Newark, New Jersey, now President of the Police Foundation, said: “Police use of excessive force is a significant problem in this country, particularly in our inner cities.”<sup>8</sup>

This Article begins with the premise that police brutality—particularly, but not exclusively, against minorities<sup>9</sup>—is *de facto* decriminalized in the United States<sup>10</sup> and has been so for many years. The Article argues that decriminalization has occurred for many reasons, including the influential role of the police in an organized society, the desensitization of the public and the judicial system to the realities of police criminal behavior, the symbiotic relationship of prosecutors and the police, the growth of the legal doctrine of prosecutorial discretion and the corresponding decline of private prosecutions, and the waning independence of the grand jury. One need not look far to find cases illustrating these concepts. Without question, the most well-known police brutality case in recent years was the videotaped beating of Rodney King.<sup>11</sup> The Christopher Commission found that while Rodney King was lying on the ground, Sergeant Koon of the Los Angeles Police Department (LAPD) twice fired a Taser electric stun gun at him.<sup>12</sup> As George Holliday’s videotape shows in horrifying detail, three uniformed LAPD officers then clubbed King fifty-six times with their batons and kicked him six times in the head and

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7. *Id.* at 25.

8. *Id.* at i.

9. Cf. Russ W. Baker, *Thugs in Blue: New York's Finest Serve and Protect Themselves*, THE VILLAGE VOICE, Sept. 29, 1992, at 29 (“Police brutality: It’s not just for minorities anymore.”). In fact, in two of the more significant cases of police brutality with which the author has been personally involved, the victims were white. Thus, although race assuredly plays a major role in police violence, to view police brutality simply as a function of racism is to misunderstand—and oversimplify—the problem.

10. De facto decriminalization occurs when an act, though still deemed criminal by the legislature or common law, no longer results in sanction because the criminal justice system simply refuses to punish violations of the law—at least under certain circumstances. De facto decriminalization does not require the abandonment of all prosecution under the law. If only a very small percentage of the known violators is prosecuted (or convicted), however, at some point the sanction associated with the crime becomes so remote that the crime is effectively or functionally decriminalized. Hence, if one million acts of police brutality occur each year, but only a dozen brutal cops are convicted, de facto decriminalization of police brutality has occurred.

11. “[T]he videotape of Rodney King being beaten by officers of the Los Angeles Police Department last year made police brutality real for white suburbanites—and, indeed, for all Americans who might have doubted the phenomenon’s existence.” *Comment: Tales of the Tapes*, THE NEW YORKER, Oct. 12, 1992, at 4.

12. CHRISTOPHER COMMISSION REPORT, *supra* note 3, at 6.

body.<sup>13</sup> One reason why the King case makes such a compelling example is that many Americans expected the police officers involved in the beating of Rodney King to be swiftly charged, convicted, and punished. One African-American author used the following words to describe the period immediately after the assault upon King: "I, like millions of others, watched the tape over and over, feeling more enraged each time. 'They'll go to jail,' is what my friends and I kept saying. 'It's an open-and-shut-case. It's in living color.'"<sup>14</sup> Instead, the officers were acquitted in state court.<sup>15</sup> Following the subsequent riots in Los Angeles, President Bush ordered the Justice Department to undertake its own criminal investigation. The Justice Department immediately convened a federal grand jury, which then reindicted the four police officers on charges of criminal civil rights violations. In April 1993, nearly two years after the original beating and one year after the officers' acquittal on the state criminal charges, a federal jury convicted Sergeant Koon and Officer Powell of civil rights violations and acquitted the remaining two officers.<sup>16</sup>

The King case received so much publicity because a private citizen, George Holliday, captured on videotape the brutal beating of Rodney King early in the morning of March 3, 1991, by California law enforcement officers. This tape was televised and retelevised with mind-numbing frequency across the nation. Because of this publicity, when the state criminal trial of the four police officers who participated in the beating resulted in the virtual acquittal of the officers, the verdict triggered rioting in Los Angeles, scenes of which also were televised repeatedly throughout the country. Viewed together, these events present a fascinating cause-and-effect illustration of the social dysfunction that results from the breakdown of public confidence in the criminal justice system.<sup>17</sup>

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13. *Id.* at 3, 7.

14. Terry McMillan, *This Is America*, N.Y. TIMES, May 1, 1992, at A35.

15. Three of the four officers were acquitted on all charges; the fourth officer was acquitted on all charges but one. On the final count, an assault charge, the jury was unable to reach a verdict. Robert Reinhold, *U.S. Jury Indicts 4 Police Officers in King Beating*, N.Y. TIMES, Aug. 6, 1992, at A1, B8. The trial judge later dismissed this remaining charge. *State Charge Dismissed Against Powell*, DALLAS MORNING NEWS, Apr. 29, 1993, at 6a.

16. *Verdict in LA: King Case Chronology*, HOUSTON CHRON., Apr. 18, 1993, at A19.

17. The King case represents the exceptional situation in which the public could view and form its own judgment on the evidence that was presented at trial. "Unlike most trials, a lot of people have not only seen the event itself but have seen it again and again and again . . . ." Seth Mydans, *Officers' Assault Trial Nears Opening*, N.Y. TIMES, Mar. 2, 1992, at B8 (quoting Toni M. Massaro of the University of Arizona College of Law). Rarely has the public had a better chance to view an event with the camera's eye and then to compare it to the outcome of the corresponding trial. Several in-depth factual

Following the Los Angeles riots, the independent Christopher Commission was appointed to study the King matter. The Commission investigated both the causes and the extent of police brutality in the LAPD and found that there was a culture of police brutality in the Department that extended well beyond the acts of the four indicted police officers.<sup>18</sup> Several facts, including the nonintervention and passive complicity of the other police officers on the scene, convincingly refuted theories that the four officers were just "bad apples."<sup>19</sup> In fact, the demographics of the LAPD officers on the scene during the incident indicated that this was not a homogeneous or nonrepresentative group of officers.<sup>20</sup> Neither the age, experience, gender, or race of the police officers involved seemed to be a key factor;<sup>21</sup> if color *was* an issue, it was the color blue that mattered most. Instead, the facts of the King case suggested that the beating was not an isolated event within the LAPD and that the officers were not seriously concerned about being brought up on disciplinary or criminal charges.<sup>22</sup> Even after the King beating, several LAPD officers who were questioned shared the view that administering such a beating was not inappropriate.<sup>23</sup>

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investigations also were available to the public, the best-known of which was the CHRISTOPHER COMMISSION REPORT, *supra* note 3. See also *infra* notes 18, 24-29 and accompanying text.

18. See CHRISTOPHER COMMISSION REPORT, *supra* note 3, at 31, 97 (discussing how the style of law enforcement practiced in the LAPD, combined with inadequate supervision of abusive officers, contributed to police brutality).

19. Only one of the twenty-three LAPD officers present at the beating of Rodney King made any attempt to intervene. *Id.* at 7, 11. Ironically, four of the LAPD officers who stood by and watched were field training officers, to whom was entrusted the training of impressionable probationary officers during their first year of police work after graduation from the Police Academy. *Id.* at 11, 12.

20.

The ages of these 23 LAPD officers ranged from 23 to 48. Their experience varied from 10 days to 29 years since graduation from the Police Academy. In the group were one African-American male, one African-American female, four Latino males, two white females, and 15 white males.

*Id.* at 11.

21. For an excellent discussion on the causal role of racism in the King case, see Deborah W. Post, *Race, Riots and the Rule of Law*, 70 DEN. U. L. REV. 237 (1993). "A fear of black men still dwells in the collective unconscious of America. The verdict in the Rodney King case legitimized that fear." *Id.* at 248. Still, it is significant that even the black officers were at least passively complicit in the beating. This complicity may indicate that the subculture of police brutality exerts even greater influence than racial affinity.

22. At the hospital where King was first taken, the nurses reported that the police officers "openly joked and bragged about the number of times King had been hit." CHRISTOPHER COMMISSION REPORT, *supra* note 3, at 15.

23. The fact that some kind of attitude problem existed among the officers of the LAPD—whether toward the public in general or toward ethnic minorities in particu-



Further manifestations of this attitude problem appeared when the Christopher Commission analyzed computer tapes of messages transmitted among police officers on duty. In Los Angeles, police cars and headquarters are linked by a sophisticated communications network of on-board computer terminals called Mobile Digital Terminals (MDTs). An officer can type a message to any other officer on the keyboard of the MDT in his patrol car. Incoming messages are displayed on the MDT computer screen.<sup>24</sup> The Commission found "brazen and extensive references to beatings and other excessive use of force in the MDTs."<sup>25</sup> In fact,

That officers would feel free to type such messages . . . into the Department's official computer communications channel, knowing that the communications were subject to monitoring, is, in the Commission's view, evidence of a serious problem with respect to excessive force in the LAPD. The apparent confidence of these officers that nothing would be done about their inflammatory statements suggests

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lar—was demonstrated by the results of a poll taken by the Police Department two months after the King beating: 4.9% of the officers surveyed agreed with the statement that "an officer is justified in administering physical punishment to a suspect who has committed a heinous crime," *id.* at 34, and 4.6% said that it was appropriate to administer physical punishment to "a suspect with a bad or uncooperative attitude." *Id.* Although 84% of the officers surveyed disagreed with these statements, another 11% took no position. *Id.* The Christopher Commission concluded:

That nearly 5% of LAPD officers would acknowledge in a written survey sponsored by the Department that an officer would be entitled to use "street justice" against suspects with a "bad or uncooperative attitude," and that 11% would have "no opinion," are evidence of a serious problem in attitude toward use of force among a significant group of LAPD officers.

*Id.*

24. *Id.* at 48.

25. *Id.* at iii. For a sampling of these conversations, see *id.* at 49-54. One of the more "subtle" conversations uncovered by the Christopher Commission included the following:

"We prond (sic) him straight out of his jaguar . . . ."

"He is crying like a baby."

"Did U educate him."

"Take 1 handcuff off and slap him around."

"He is crying to (sic) hard and there is 4 detectives here." "Well, dont (sic) seatbelt him in and slam on the brakes a couple times on the way to the sta[tionhouse]. . . ."

*Id.* at 49-50.

The MDT transmissions also indicated that a number of officers sought out and enjoyed pursuits of fleeing suspects and shooting incidents. *Id.* at xi. The transmissions disclosed a recurrent theme of racial epithets, often comparing members of different ethnic groups to different animals. *Id.* at xii.

a tolerance within the LAPD of attitudes condoning violence against the public.<sup>26</sup>

The Christopher Commission concluded further that the civilian complaint system, created to detect and punish police officers' use of excessive force, was "skewed against complainants."<sup>27</sup> For example, Rodney King's brother had attempted to make such a complaint against the LAPD, but his efforts were frustrated.<sup>28</sup> Absent extraordinary circumstances, the reviewing panel generally would not "sustain" an uncorroborated civilian complaint if it conflicted with police officers' accounts. Thus, the Commission found that in the King case,

[e]ven if there had been an investigation, [the Commission's] case-by-case review of the handling of over 700 complaints indicate[d] that without the Holliday videotape the complaint might have been adjudged to be "not sustained," because the officers' version conflicted with the account by King and his two passengers, who typically would have been viewed as not "independent."<sup>29</sup>

Los Angeles has no monopoly on ineffective civilian complaint systems.<sup>30</sup> One report observed that nationwide police internal investigations so routinely exonerated the officers scrutinized that "critics joke the investigators have whitewash under their fingernails."<sup>31</sup> For example, in the case of one officer who received forty-

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26. *Id.* at 54-55. Although it is not mentioned by the Commission, these were not situations in which police officers, pumped up with adrenaline, shouted inane and racist epithets in the heat of a chase. The LAPD's MDT system requires that an officer—probably not well-trained as a typist—take the time *to type* what he wants to say. These messages, then—as opposed to shouts over a police radio—are not entirely spontaneous; they are premeditated. The aspect of premeditation and lack of any sense of need for self-censorship is a reflection of the depth of the problem.

27. *Id.* at xix, 153.

28. *Id.* at ii.

29. *Id.* The Christopher Commission noted that only 42 of 2152 civilian complaints of abuse were sustained by the Department. *Id.* at 153.

30. See GANNETT REPORT, *supra* note 5, at 2 (noting that although "in Los Angeles, police discipline is about as rare as a smog-free day," other cities show similar laxity toward police offenders). "A commission in Boston . . . declared the police internal affairs process was 'unfairly skewed against Boston's citizens.' The panel studied 136 brutality complaints filed in 1989-90, finding only eight were upheld by the department." *Id.*

31. *Id.* at 4. Frequently, police review boards do not even take the time and trouble to collect all the evidence. *Id.* at 5.

Indeed, many internal affairs officers don't even bother to interview witnesses. When the Christopher Commission investigated brutality in Los Angeles last year after the Rodney King beating, it found cases where officers made no attempt to identify citizens who witnessed abuse. A similar commission in Boston discovered the department did not contact any witnesses in 79 percent of its abuse cases.

*Id.*

four civilian complaints in less than four years, none of the complaints were sustained by the police department's internal discipline system.<sup>32</sup> Amnesty International, an organization usually associated with exposing police-state atrocities in Third World and totalitarian countries, recently released a report detailing systematic torture of civilians by the Chicago police department.<sup>33</sup>

The advent of the camcorder has made the epidemic of police brutality more visible nationwide. In Fort Worth, an officer was dismissed after he was videotaped gratuitously striking a suspect repeatedly with his baton.<sup>34</sup> A videotaped incident in Kansas City, Missouri, led to a comprehensive plan to sensitize police officers, particularly those with the most citizen complaints against them, so that they would not continue to use excessive force.<sup>35</sup>

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These boards rarely even include the record or finding of civil or criminal trials. Some lawyers for municipalities, who defend the police, admit that even they are troubled by the quality of internal affairs investigations. *Id.*

In New York City, the Civilian Complaint Review Board has a reputation for disciplining police officers that is remarkably unimpressive. For example, in one criminal case tried by the author, two defendants without any prior records were charged with assaulting a lone police officer. Both defendants testified it was the officer who assaulted them, and their testimony was corroborated by two disinterested witnesses. The jury returned with acquittals in less than an hour and demanded of the writer why the police officer had not been disciplined. The author filed a complaint containing all the pertinent information with the CCRB. Months later the CCRB found the charges "unsubstantiated." When pressed as to what it had done to investigate the case, the CCRB finally admitted that it had not even attempted to interview the acquitted defendants or the independent witnesses or even to obtain the trial transcript; investigators merely spoke with the officer involved and read the police reports he filled out about the incident. That was the investigation that cleared this officer.

32. *Id.* at 4 (observing that "[i]t's a system where the citizens virtually cannot win" (quoting Harvey Grossman, legal director of the American Civil Liberties Union in Illinois)).

33. AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: ALLEGATIONS OF POLICE TORTURE IN CHICAGO, ILLINOIS (1990).

34. *Officer Dismissed in Beating*, N.Y. TIMES, Oct. 29, 1991, at A22.

35. Don Terry, *Kansas City Police Go After Own "Bad Boys"*, N.Y. TIMES, Sept. 10, 1991, at A1, D19. It is difficult to be optimistic about the results of this program, however. Officer Jim Pott was one of the first to graduate from the program; afterwards, he told a reporter:

Sometimes I get carried away with the macho image; a lot of us do . . . . I consider myself an aggressive officer; you have to be. I like messing with the real bad guys. Not too long ago, the unwritten rule was if somebody ran on you and you caught 'em, you'd smack 'em one. To be honest, . . . in the past we got away with quite a bit. But everything is post-L.A. now.

*Id.* Pott was talking with a reporter while on patrol, explaining that, in retrospect, he was glad he had been part of the program: "The dispatcher's voice broke in: 'Man with a gun in his shorts.' Flicking his cigarette out the window, Officer Pott made a U-turn. And then, heading his cruiser toward the stranger with the gun, he smiled and said, 'I love this job.'" *Id.* at D19.

One reason why the police can engage in such outrageous brutality without being held accountable is that the enormous power wielded by police groups and unions is frequently directed toward subverting attempts to reform the system.<sup>36</sup> On a fundamental level, this power is fueled by the public's fear of crime. One ex-New York City police officer has suggested that most citizens are pleased to think that the violent urban underclass is afraid of the police.<sup>37</sup> In this view, the police behavior in the Rodney King case was not aberrant; it was an "honest" manifestation of what the citizenry wants its police force to do.<sup>38</sup> Widespread fear of crime and criminals translates into public backing of the police and their unions and diminished scrutiny and criticism of their tactics. "[Police] know the public will tolerate more force these days because of the war on crime."<sup>39</sup>

In addition to widespread public support, police unions enjoy remarkable political influence.<sup>40</sup> Politicians compete fiercely for the

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36. See, e.g., Baker, *supra* note 9, at 29-30 (detailing efforts of the New York city police union, the Patrolmen's Benevolent Association, to prevent the formation of an all-civilian review board). Individual police officers can also exert concerted pressure to discourage disciplinary actions against perpetrators of brutality:

Last year, [the Kansas City police chief] handed out the stiffest suspension in department history, 120 days without pay when an officer hit a Baptist minister in the back of the head with the butt of a shotgun during a robbery investigation.

The officer's colleagues held a monthlong work slowdown to protest the action and raised thousands of dollars for the officer by auctioning off the same kind of shotgun he used to strike the minister.

Terry, *supra* note 35, at D19.

37. Ira Socol, *Trained to Do Our Dirty Work for Us*, N.Y. TIMES, May 2, 1992, at 23 (observing that "in Los Angeles and other places, most citizens have been happy in the knowledge that the urban enemy is afraid of the warriors in blue."). Thus, Socol argues, to be surprised by police attitudes and misconduct is to be "ignorant of the American public's relationship with its urban police forces":

Americans insist on "control" of street crime. Politicians at every level echo that call, and no one really protests. Not the media, not civic leaders, not even the American Civil Liberties Union.

. . . .

Only when the collateral damage ends up on TV do we worry. Then our conscience takes over, and we are stunned and shocked. Like Vietnam, we have sent people to do our dirty work, but, please, don't let any of the blood splatter on us.

*Id.*

38. *Id.*

39. GANNETT REPORT, *supra* note 5, at 2.

40. Of the New York City's Patrolmen's Benevolent Association, one reporter wrote: The 20,000-member union is so dominant and so brazen it can hold the city hostage if it sees fit, as it did last year when a PBA rally turned into a drunken riot, with thousands of police officers storming the steps of City Hall and blocking traffic on the Brooklyn Bridge.

endorsements of law enforcement unions and, as a result, often are loathe to criticize the police for brutality.<sup>41</sup> When a powerful police union charges that a politician is "soft on crime," that candidate's chances for election or reelection can be dramatically reduced.<sup>42</sup> Indeed, because of their political support and shrewdly negotiated contracts, some police unions virtually run the police departments.<sup>43</sup> In many jurisdictions, police unions have successfully defeated or delayed the establishment of civilian-operated review boards.<sup>44</sup> At least some commentators feel that one of the best ways to deter police brutality may be to diminish the power of police unions.<sup>45</sup>

Another factor contributing to this double standard is the widespread failure of administrators to institute real sanctions against perpetrators of police brutality. Even when an officer is tried administratively and found guilty of abuse, his punishment ordinarily is much lighter than the penalty that would be given to a civilian who committed the same act. For example, Los Angeles police officers who brutalized handcuffed suspects typically were suspended from work for fewer than ten days.<sup>46</sup> In New York City, "when officers are

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Russ W. Baker, *The Rogue Police Union*, THE VILLAGE VOICE, Dec. 7, 1993, at 25, 26. *The Village Voice* concluded that the PBA "has become an increasingly potent local political force . . . one that operates above the law and without review." *Id.* at 27.

41. Questions of brutality often revolve around judgments of whether the amount of force the police officer used was "excessive" or merely "necessary force." When the police claim that only "necessary force to make the arrest" was used, it is the rare politician who will voluntarily enter the fray and challenge that assessment. *Id.* at 5.

42. *Id.* at 3; see also Baker, *supra* note 9, at 30 ("Virtually no politician or powerful figure will publicly acknowledge what many privately maintain: that police brutality and abuse in New York City are much more than a blip on an otherwise placid screen."). One columnist referred to New York City's police union, the Patrolmen's Benevolent Association, as "the famously politically powerful PBA." Andy Logan, *Who Guards the Guards?*, THE NEW YORKER, Oct. 5, 1992, at 70.

43. GANNETT REPORT, *supra* note 5, at 5. The union contract is so strong in Bridgeport, Connecticut, for example, that an officer who pleaded guilty to police brutality not only remained on the force, but was promoted. See *infra* notes 48-49 and accompanying text. See also Baker, *supra* note 40, at 26 ("[I]nside the New York Police Department, little gets done without tacit PBA approval . . ."). Moreover, a review panel found that the PBA actually obstructed efforts to eradicate corruption. Selwyn Raab, *New York's Police Allow Corruption, Mollen Panel Says*, N.Y. TIMES, Dec. 29, 1993, at A1 (observing that "the P.B.A. often acts as a shelter for officers who commit acts of misconduct.").

44. GANNETT REPORT, *supra* note 5, at 6; see also Baker, *supra* note 9, at 29. Ironically, studies show that true civilian-run review boards are less harsh disciplinarians than police chiefs; the civilians involved seem to develop greater sympathies for the police and to give them every benefit of the doubt. GANNETT REPORT, *supra* note 5, at 6.

45. See GANNETT REPORT, *supra* note 5, at 5; see also Baker, *supra* note 40, at 25 (noting that "[p]oliticians kowtow to [the P.B.A.]").

46. CHRISTOPHER COMMISSION REPORT, *supra* note 3, at 3; see also GANNETT REPORT, *supra* note 5, at 2 (noting that even when a police brutality victim wins a civil suit against

found guilty of using excessive force, the penalty many receive is a one-week suspension—the same punishment given to an officer who accepts two free doughnuts from a restaurant, wears a turtleneck while in uniform, or is discourteous to a supervisor.”<sup>47</sup> The ineffectiveness of such sanctions at reforming brutal officers or removing them from the force is illustrated by the case of Robert Christy, a Bridgeport, Connecticut, police officer. Although Christy was indicted for felonious assault on a civilian and plead guilty to a misdemeanor, he returned to the force and subsequently was promoted to sergeant.<sup>48</sup> After rejoining the department, Christy wrote on a police test, “If it takes a whack with a blackjack to get the job done, so be it.”<sup>49</sup>

### A. *The Nature and Semantics of Police Brutality*

Vital to an understanding of police brutality is a grasp of the underlying culture that makes brutality not only permissible, but inevitable. Police brutality is more than the occasional Rodney King case and more than the periodic unprovoked killing of a minority

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the officer or the department, it is rare for the officer to lose as much as one day of work, much less his job).

47. David Kocieniewski & Leonard Levitt, *Turning a Blind Eye to Misconduct: The NYPD, Once a Model, Undermines Enforcement*, NEWSDAY, Nov. 13, 1991, at 5. Furthermore, once an officer has been charged before the Civilian Complaint Review Board, it is rare that he also is criminally prosecuted. See, e.g., Craig Wolff, *Police Sergeant Is Charged in Assault on Brooklyn Civic Leader*, N.Y. TIMES, Aug. 12, 1992, at B1 (noting that the indictment of a police officer who allegedly beat a community leader and her son was “one of the few times that an officer [charged before the CCRB] has been indicted and arrested.”).

48. GANNETT REPORT, *supra* note 5, at 4.

49. *Id.*

In an incident in New York City, the author observed a police officer commit an unprovoked assault in the lobby of the criminal courthouse and filed a complaint with the CCRB, which found the complaint warranted and “determined that the appropriate action in this case is to have the officer involved instructed by his Commanding Officer. The specifics of [the] complaint will be discussed, and the officer will receive formal instructions regarding his responsibility to conduct himself properly in his contacts with the people we serve.” A civilian could have gone to jail for a year for this incident.

The lack of seriousness with which the CCRB views this kind of incident is apparent from the last paragraph of the executive director’s letter announcing the decision in this case: “The Police Commissioner and the members of the Board regret that your experience with a member of the Police Department was less than satisfactory. I trust that in the future our service will meet with your approval.” This public relations sentiment may be appropriate from the president of an airline when his employee misroutes or temporarily loses your luggage; it is not appropriate when a police officer gratuitously assaults another human being. (Less than three years later the officer involved was indicted for “riding shotgun” during two cocaine sales. *Police Officer Indicted in Queens Drug Inquiry*, N.Y. TIMES, Mar. 10, 1981, at B5.) See generally JEROME H. SKOLNICK & JAMES J. FYFE, *ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE* 217-36 (1993) (discussing the development of civilian review boards and criticizing their effectiveness).

youth by a police officer.<sup>50</sup> These sensational cases are just the proverbial tips of the iceberg. Any criminal lawyer who spends a substantial amount of time in an urban criminal court knows that examples of police officers slapping, pummeling, hitting, and beating criminal defendants are routine, as "common as potholes."<sup>51</sup> Ironically, focusing on the killings and the "media" cases minimizes the problem; emphasizing the high-profile cases leads the public to believe that police brutality occurs "only" once every few months. Furthermore, emphasizing only the killings by police officers leads the public to believe that acts of brutality are committed only by mentally deranged police officers and that ordinary officers would never beat or kill a suspect.<sup>52</sup>

In fact, ordinary police officers do commit police brutality, and they do beat and kill criminal suspects. When a suspect dies, the actual lifetaking may be virtually "incidental" from the point of view of the intention of the police officer. An old maxim of criminal lawyers may describe the reality best: murder is simple assault with unfortunate consequences. As with criminals, when a police officer intends to do harm—to kick, shove, or hit a suspect—that officer is responsible for any injury, including death, that may result. The effects of a beating cannot be limited with surgical precision.

For these reasons, it is not necessary that a cop be unusual, crazy, or particularly racist in order to beat and kill a suspect. All that is needed is a cop who decides to teach a backtalking suspect a lesson in his own way. The emotions that cause such killing are present, to a greater or lesser degree, in virtually every police officer; they are shaped and perpetuated by forces and beliefs within police departments and society itself.<sup>53</sup>

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50. Baker, *supra* note 9, at 30 (discussing the killing of Jose Garcia in the Washington Heights section of New York City).

51. *Id.* at 30.

52. This view ignores the essential nature of police work, however. Because of the inherent danger of the job, police are frequently very tense. GANNETT REPORT, *supra* note 5, at 2. To make matters worse, a police officer's shift often involves long and uneventful periods of patrol, which can be interrupted suddenly by a radio call or a street incident. *Id.* Consequently, even "ordinary" officers can be forced to make a nearly instantaneous leap from boredom to frenzied activity and to perform their duty intelligently on the basis of incomplete information about the suspect and the situation. It is not surprising, therefore, that some incidents of brutality may result from momentary bad judgment or the adrenaline of the situation. See *id.* at 3. "[The police officer's job is] 95 percent boredom and 5 percent mass hysteria," said John Dineen, President of the Fraternal Order of Police in Chicago. *Id.*

53. This view is consistent with the work of Haney and Zimbardo, who set up a simulated prison using Stanford University students. Craig Haney & Philip G. Zimbardo,

Hence, to focus on police officers who wrongfully kill prisoners, to the exclusion of those officers who merely “rough them up,” paradoxically, is to distort and minimize the nature of the police brutality problem. The core problem is not those “simple assaults with unfortunate consequences,” but rather the constant, daily battering by police officers of suspects, mostly African-American and Latino.<sup>54</sup> Any policy aimed at deterring police brutality must be

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*The Socialization into Criminality: On Becoming a Prisoner and a Guard*, in LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY: PSYCHOLOGICAL AND LEGAL ISSUES 199 (June L. Tapp & Felice J. Levine, eds., 1977).

[T]he single important lesson to emerge from recent social-psychological research is the degree in which *situations* and *not personalities* control behavior. After careful scrutiny, the dispositional bias has been largely invalidated. All of us—laymen, psychologists, and judges—seem to have greatly overestimated the extent to which traits or dispositions determine behavior.

*Id.*

Interestingly, in the Stanford study, the guards' behavior grew increasingly violent, notwithstanding

the dramatic *decrease* of prisoner resistance. The exercise of power seemed to become self-perpetuating; acts of aggression appeared to acquire inherently rewarding properties and were no longer even quasi-rational responses to situational threats.

Guards' prison reputations are based on demonstrations of masculinity, uses of force, and past experience handling violent encounters. In the simulated prison, the most respected guards were those most sadistic in their treatment of prisoners and most forceful in responding to real or imagined affront. They became the leaders on each shift, and their aggression was modeled by others until their tough demeanor was adopted by nearly all.

*Id.* at 216. Drawing an analogy between prison guards and police officers, Haney and Zimbardo quote Rubinstein:

Every policeman is faced at some point with the temptation to beat a prisoner. There is always someone who angers him or arouses fear in him that he seeks to eradicate by punishing the person who caused him to quiver. If his supervisors do not object, nothing can stop him.

*Id.* (quoting JONATHAN RUBINSTEIN, CITY POLICE 321 (1973)).

54. See generally Baker, *supra* note 9 (detailing examples of police brutality against numerous ethnic victims, including Latinos, African-Americans, Jews, Poles, Italians, and others). The results of such minor assaults may be as much psychological as they are physical. A newspaper editor described a scene from his youth:

I remember seeing my best friend's uncle slapped by a white motorcycle cop after being stopped for a supposed traffic violation. That incident stuck with me because I had deep respect for the uncle, a polite gentleman, an insurance agent and one of the few black professionals, other than teachers, in Montgomery[, Alabama]. He was an important symbol, a role model to a black boy with ambition.

Quite possibly, my friend's uncle didn't make as much of the slap as I did. But after the incident, my friend and I simply looked at each other, speechless, and we never said a word about it. My friend seemed as embarrassed and frightened as I was.

Paul Delaney, *About Men: My "Crazy" Grandfather*, N.Y. TIMES, June 7, 1992, Magazine, at 18.



calculated not just to deter the killings—which are probably the least predictable acts of brutality and hence the least susceptible to deterrence—but rather the more frequently occurring, routine battering of suspects by the police.

In addition to underestimating the nature and extent of the problem, we as a society even fail to assign the proper nomenclature to the police behavior in question. Using the term “police brutality” serves to decriminalize the act: “brutality” is not a crime; the crimes involved are assault and battery. The use of terms like “police brutality,” “police misconduct,” and “excessive force” demonstrate our conscious or unconscious judgment that assaults by police officers are not really crimes.<sup>55</sup> But assaults are crimes even when committed by police officers, and therefore, the term we should be using to describe such events is “police criminality.”<sup>56</sup> Just as we diminish the worth of the victims of police brutality by decriminalizing it, we also set a double standard for our police. As a result, the very people we have chosen to serve as the guardians of law and order in our society are held to a less stringent standard of behavior than are the rest of us. Aside from its irrationality, this result is morally indefensible.

In light of the pervasiveness and intractability of the problem of police brutality or criminality, perhaps it is not surprising that the various avenues of legal recourse available to victims generally have failed to deter such conduct. The following three subsections address the questions of why threats of civil and criminal penalties do not discourage police criminal behavior and why prosecutors can monopolize the legal process to the extent that their discretion dictates that few brutal police officers will ever face criminal charges.

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55. This view comports with the view that many officers seem to hold regarding their own conduct: that they, as police officers, are entitled to engage in behavior that would be illegal if they were civilians. *See, e.g.,* Logan, *supra* note 42, at 70 (describing a protest by ten thousand off-duty New York City police officers at City Hall, in which “the level of contempt and hatred that some members of the city’s Police Department felt for Mayor David Dinkins had reached such a pitch that they felt they had every right to engage in behavior that, had they not been cops, the Police Department would surely have labelled a riot”). *See also* Joseph P. Armao & Leslie U. Cornfeld, *Why Good Cops Turn Rotten*, N.Y. TIMES, Nov. 1, 1993, at A19 (citing the Mollen commission, a body charged with investigating police corruption in New York, as finding that corruption can take the form of brutality: “Today’s corruption is characterized by brutality, theft, abuse of authority and active police criminality.”).

56. For this insight, the author is indebted to Mr. Gerard Papa, an attorney who himself has been a victim of police assault.

*B. Why Civil Remedies Fail to Deter*

Civil rights actions and other civil suits may well discourage police brutality to some extent, but the present pandemic of police criminality indicates that more is needed to deter such behavior. There are several obvious problems with the civil approach. First, in order to collect damages in a civil suit, the victim must be at least minimally attractive to the jury. A petty criminal, the most common victim of police beatings, rarely will succeed in a civil suit because petty criminals generally make unappealing plaintiffs. Furthermore, civil cases can drag on for years, and few victim-plaintiffs have either the resources or the perseverance to endure lengthy litigation. Therefore, because the plaintiff must be both attractive to a jury and willing and able to endure long court delays, the most successful civil plaintiffs will be from the middle class—a group that rarely experiences police brutality—not from the lower classes, which face brutality almost every day. Moreover, there are simply too few lawyers willing to litigate civil suits and federal civil rights actions arising from incidents of police brutality. Personal injury lawyers find most of these cases insufficiently remunerative, and there are not enough “public interest” lawyers to handle this volume of litigation.

Additionally, civil remedies are remarkably ill-suited to deter police brutality. If the swiftness and certainty of punishment are essential to the credibility of a deterrent, then the general absence of these factors from private civil litigation may be one reason why civil suits fail to deter. Quite simply, the threat of liability resulting from a civil suit is not sufficient to change police behavior.

Furthermore, the particularly egregious acts of police violence that occasionally lead to the death of a minority youth are relatively rare, and civil suits arising from those events fail to deter future brutality because police officers fail to identify substantially with a fellow officer who is sued for killing a suspect—precisely because the acts or the chain of events giving rise to such a suit occur infrequently.<sup>57</sup> Hence, infrequent civil suits arising out of the widely-publicized deaths—rather than out of the frequent, nonfatal “street justice” routinely administered by the police—will not provide the identifiability or relevance likely to deter the daily acts of police brutality.

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57. Police officers, like the public, view such occurrences as exceptional and generally fail to see the connection between the daily pummeling of suspects and the “simple assault” that occasionally has “unfortunate consequences.” See *supra* notes 52-53 and accompanying text.

The primary objection to relying on civil suits to punish and deter police brutality, however, is not that such suits are generally unsuccessful at punishing the malefactor, compensating the victim, or deterring similar conduct. Rather, it is that it is simply immoral not to punish such conduct in the *criminal* justice system, where any civilian who committed the same acts would be punished. It is morally indefensible to hold our law enforcement officers to a lesser standard of conduct than that which applies to the rest of the population.<sup>58</sup> Except where there is a statute that explicitly treats police officers differently from private citizens, an act that is a crime when committed by the average person should be a crime when committed by a police officer. Surely the concept of equal justice demands as much. Any system that punishes police criminality outside of the criminal justice arena therefore fails to satisfy the requirements of basic morality.<sup>59</sup>

In addition to satisfying the requirements of basic morality, the threat of criminal prosecution of police officers for unjustified assaults on civilians would serve as a substantial deterrent to police brutality. If even "petty" assaults could be prosecuted against police officers, just as they are against civilians today, the deterrent effect on other officers would be correspondingly broader.<sup>60</sup> Using the criminal

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58. If the self-evident quality of this statement is not immediately apparent, try substituting "politicians," "officeholders," "judges," "prosecutors," or "public servants" for "law enforcement officers" in the above sentence.

59. It is politically inexpedient to propose a system that would not have this moral failing, however, given the power and organization of the police, their unions, and their civilian and political allies. That is why even well-intentioned suggestions for improvements to the civil suit and police review board disciplinary system explicitly sacrifice the requirements of pure morality in favor of a perceived, greater "realism." For example, shortly after the verdict in the state of California's criminal case against the four officers for beating Rodney King, a well-respected federal judge suggested new legislation that would empower the federal government to bring civil police-misconduct litigation on behalf of brutality victims against the state or city that employed the offending officers. Jon O. Newman, *How to Protect Other Rodney Kings*, N.Y. TIMES, May 1, 1992, at A35. Newman's suggestion, editorially endorsed by the *New York Times*, see *A New Weapon Against Brutality*, N.Y. TIMES, May 8, 1992, at A30, has all the benefits of pragmatism, as well as all the moral detriments of the current system; that is, while it would be an improvement, it allows the double standard between police criminals and nonpolice criminals to continue.

60. The theory that deterrence will occur only if one pays attention to the *minor* violations is consistent with the management style of some of the most successful police administrators in the country:

Like other effective administrators, [former Newark Police Chief Hubert] Williams suspended officers even for verbal abuse. Workers who made racist slurs normally received two days off without pay, he said.

"The issue is how you treat people," Williams said. When officers use language that characterizes people as subhuman, "you've got to be absolutely

justice system to resolve police assault cases would also provide more immediate satisfaction for the victim; even the slowest criminal case ordinarily progresses much more quickly than, for example, a federal civil rights action or a civil suit against a police officer for damages. The relative swiftness of a criminal action would also provide a more immediate and more credible deterrent to police officers. Moreover, even if the complainant is "unattractive" in the sense that a jury may not feel great sympathy for his plight, that discrepancy of social position would be offset somewhat by the fact that the police officer would be required to occupy the same chair as anyone else who is arrested, accused of a crime, and labelled a "defendant." As discussed below, however, there is no realistic threat of such criminal prosecutions within the criminal justice system as it is currently administered.<sup>61</sup>

C. *Why Criminal Charges Fail to Deter—The Symbiotic Relationship Between the Police and the District Attorney*

The Los Angeles District Attorney's office indicted four police officers in the Rodney King incident, but the nineteen other officers at the scene, who neither attempted to stop the assault nor reported it to their superiors,<sup>62</sup> were not indicted. The District Attorney referred matters of liability under federal civil rights law to the United States Attorney; after the State case resulted in acquittals, the United States Attorney indicted only the same four officers.<sup>63</sup>

The failure of both the local district attorney and the federal prosecutor to prosecute any of the other officers is anything but surprising, as a study by Professor Schwartz of the University of Pennsylvania has confirmed.<sup>64</sup> Schwartz analyzed the outcomes of approximately twenty-five police violence complaints filed by civilians with the Philadelphia District Attorney's office. He determined that "the District Attorney's office has not been, and, in the nature of

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clear it will not be tolerated."

Added Richard Artison, Milwaukee County, Wis., sheriff, "You have to zero in on verbal abuse or the next thing you know, you'll have physical misconduct."

GANNETT REPORT, *supra* note 5, at 6.

61. *See infra* Part I.C.-D.

62. *See supra* note 19 and accompanying text.

63. *See supra* note 15 and accompanying text.

64. Louis B. Schwartz, *Complaints Against the Police: Experience of the Community Rights Division of the Philadelphia District Attorney's Office*, 118 U. PA. L. REV. 1023 (1970). This study was carried out with the cooperation of the District Attorney and at the request of the Civil Rights Commission of the Philadelphia Bar Association. *Id.* at 1023.

things, could not be, an effective instrument for controlling police violence."<sup>65</sup>

Schwartz cited a number of factors common to all local district attorneys' offices, from which he concluded that the local prosecutors' offices face "a hopeless conflict-of-interest" in handling police violence complaints: the District Attorney's office must investigate the defendant's allegations of brutality against the police while simultaneously investigating the police charges against the defendant.<sup>66</sup> This places the District Attorney's office in an impossible position. Effective prosecution of criminal defendants demands close cooperation with numerous investigating police officers, and the successful prosecution of police officers also depends on this relationship. Therefore, District Attorneys have no choice but to rely on inherently biased investigations of accused officers conducted by their own departments.<sup>67</sup> Internal investigations almost always exonerate the officers involved.<sup>68</sup>

Schwartz also found that the prosecutor's office rarely will charge a police officer with brutality unless the injury to the civilian is both substantial and well-documented.<sup>69</sup> Because of the overwhelming caseload, the prosecutor frequently will attempt to get both the officer and the civilian to withdraw their complaints against each other.<sup>70</sup> Aware of this tactic, police officers who fear that a suspect will file an excessive force complaint will counter it by charging the citizen with

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65. *Id.* at 1024.

66. *Id.* Schwartz found that civilian complaints are brought most often by those who have already been charged by the police with having committed crimes. *Id.* Sometimes this conflict of interest becomes quite stark; Schwartz cited the fact that during the trial of two police officers for assault and battery, prosecuted by the Philadelphia District Attorney's office, both the First Assistant District Attorney and the Police Commissioner spent time sitting at the defense table! *Id.* at 1025.

67. *Id.* at 1025; *see also* GANNETT REPORT, *supra* note 5, at 3 ("District attorneys are reluctant to indict officers, law enforcement experts say, because they depend on police to handle their criminal investigations.").

68. GANNETT REPORT, *supra* note 5, at 2. "Police turn soft on crime when they investigate their own brutality." *Id.*

After a stint in internal affairs, most officers know they may wind up working side by side again with the police they investigate. If they get into a dangerous spot, they will have to rely on these fellow officers for protection. "Their lives will literally depend on their performance . . . ."

Given such stakes, it should come as no surprise that police would be tempted to cover up abuse.

*Id.* at 5.

69. Schwartz, *supra* note 64, at 1026.

70. *Id.*

a minor crime, thereby gaining a bargaining chip.<sup>71</sup>

This combination of factors creates a symbiotic relationship between the police and the prosecutors that virtually guarantees that no local district attorney—in Philadelphia, Los Angeles, or elsewhere—will pursue police brutality prosecutions vigorously.<sup>72</sup> As a result, police officers know that there is no realistic threat of criminal prosecution by the local district attorney, who must preserve his or her working relationship with the police. This failure to prosecute effectively removes much of the deterrent effect that criminal prosecutions could create. As discussed below, the prosecutor's monopoly over the criminal justice system further ensures that the avenue of criminal prosecution for police brutality will remain closed to the average victim.

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71. Knowing of this caseload problem, the police cynically take advantage of it: Most brutality victims get charged with some minor crime. The hope is the victim will drop the abuse complaint if the officer promises to drop the charges, said Ronald Hampton, executive director of the National Black Police Association.

The practice is so common that it almost has become an unwritten rule. At a trial in Los Angeles last spring, a deputy sheriff said he learned about it at his police academy: "When you hurt them, you arrest them."

GANNETT REPORT, *supra* note 5, at 5. In a recent example, charges of disorderly conduct and misdemeanor assault brought against a gay rights demonstrator were dismissed by an angry judge in Manhattan, who found, after hearing the testimony of witnesses and viewing two independent videotapes of the incident, that the only "violent, tumultuous, and threatening behavior"—the demonstrator's alleged crime—"was on the part of the police." James Barron, *Judge Denounces 'Lawless' Beating by Police at Rally*, N.Y. TIMES, Oct. 1, 1991, at B1. The judge found that the police had attacked the demonstrators "without any apparent provocation" and then lied about the incident to cover it up. Richard Perez-Pena, *Man Beaten by Officers Settles Suit*, N.Y. TIMES, Feb. 17, 1994, at B4. Although all criminal charges against the demonstrators were dismissed, the judge condemned the police, and the City of New York settled the civil case for \$350,000. *Id.* The police officers involved were never disciplined. *Id.*

72. In the case arising from the beating of the gay rights demonstrator, *supra* note 71, the judge found that the assistant prosecutor not only had failed to investigate the brutality charge, but also had testified in a less than believable manner. Barron, *supra* note 71, at B1. The Manhattan District Attorney's office even announced that it was appealing the dismissal of the charges against the demonstrator and that it was "not investigating police brutality in the incident." Emily Sachar, *Charges Dropped Against Gay Activist*, NEWSDAY, Oct. 1, 1991, at 23.

The prosecutor's decisions in this case seem calculated more to win points with the police than to pursue justice. In fact, the appeal was subsequently withdrawn. James Barron, *Prosecutor's Appeal Dropped On Police Beating of Protestor*, N.Y. TIMES, Oct. 17, 1991, at B4. The full text of the trial judge's decision can be found in *People v. Hennelly*, N.Y.L.J., Oct. 7, 1991, at 21.

*D. Prosecutorial Discretion; Prosecutorial Monopoly*

Prosecutors enjoy unparalleled power in our society.<sup>73</sup> Traditionally, this power has manifested itself most clearly in the prosecutor's decision whether to bring charges against an alleged criminal offender.<sup>74</sup> Concurrent with this power, as with many powers, there exists the great potential for abuse.<sup>75</sup> Abuse can result both from

73. See generally KENNETH C. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 190 (1971). Davis quotes former Attorney General, later Justice, Jackson:

The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimidations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed . . . . He may dismiss the case before trial, in which case the defense never has a chance to be heard . . . . If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants . . . . [A] prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone . . . . It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal . . . .

*Id.* See also *Sweeney v. Balkcom*, 358 F.2d 415, 419 (5th Cir. 1966) (characterizing prosecutors as "not unknown to have political whips to crack" and "usually in the driver's seat.").

74. WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* 623-25 (2d ed. 1992). One former federal prosecutor has written: "In our legal system, the prosecutor possesses extraordinary discretion that is sweeping, unreviewable and, for the most part, is exercised in secret." George T. Frampton, Jr., *Some Practical and Ethical Problems of Prosecuting Public Officials*, 36 MD. L. REV. 5 (1976); see DAVIS, *supra* note 73, at 224 ("The enormous and much abused power of prosecutors not to prosecute is almost completely uncontrolled, even though I can find no reason to believe that anyone planned it that way—or that anyone would.").

75. Aside from police brutality cases, other cases in which some prosecutors may abuse their power by failing to pursue indictments vigorously are cases involving governmental corruption and official misconduct. See Frampton, *supra* note 74, at 14 ("[M]ost prosecutors are reluctant to go after high-ranking elected officials unless it appears that very solid evidence of criminality can be adduced. This reluctance is based not so much on fear of the public official's power as on respect for his role in the political system."). Again the "double standard" of public responsibility and accountability is raised: "Our system of separate powers has fostered a strong institutional and historical understanding that the ultimate and most appropriate sanction against the wrongdoing of elected public officials and their direct appointees is through the political process, not the criminal law." *Id.* Frampton describes the way the evidence was considered in the Watergate investigation:

[T]he evidence against potential defendants was not weighed against the standard of probable cause but against a much higher standard: whether the prosecutors were convinced to a reasonable certainty that after hearing the Government's evidence and the probable defense case, a jury would conclude beyond a reasonable doubt that the defendant was guilty. This higher standard

decisions to bring prosecutions and from decisions to forego them.<sup>76</sup>

In the United States, we commonly assume that the prosecutor must have great discretion, that the prosecutor need not explain to anyone his decision to prosecute or not to prosecute,<sup>77</sup> and that it is inappropriate for the judiciary to review the exercise of prosecutorial discretion.<sup>78</sup> As Professor Davis points out, however, it remains unclear *why* we have determined that it is necessary for the prosecutor to possess such unfettered discretion.<sup>79</sup> Davis suggests that deference to prosecutorial discretion is a custom not unlike many other customs,

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is probably close to that actually employed by many other responsible prosecutors, *especially in public corruption cases*.

*Id.* at 20 (emphasis added). Federal prosecutors are loathe to go after corrupt public officials:

The decision to investigate and charge a public official with a crime inevitably takes the prosecutor into unfamiliar and dangerous territory. The public interest in the integrity and continued effective functioning of government comes into play. This is a factor that the prosecutor, who is not directly accountable to the electorate, finds discomfiting to assess. As for the politician or public official, he is likely to suffer irreparable injury if indicted, regardless of the outcome of the trial. And no matter how strong his case, the prosecutor also rarely emerges unscathed. If he obtains a conviction he will likely be accused of political bias, of "fronting" for the political enemies of the defendant, and of usurping the role of the electorate in policing the morality of its public officials. If the jury refuses to convict, all of these accusations may be confirmed in the public mind, and the prosecutor himself may be destroyed. *A responsible prosecutor will seldom be eager to incur these risks to himself and to the public without a case founded on particularly compelling evidence.*

*Id.* at 14-15 (emphasis added).

76. A decision not to prosecute is inherently less public than a decision to prosecute and therefore even more susceptible to improper influences or decision criteria:

Prosecutions are often withheld, sometimes on the basis of political, personal or other ulterior influence, without guiding rules as to what will or will not be prosecuted, without meaningful standards stemming from either legislative bodies or from prosecutors themselves, through decisions secretly made and free from criticism, without supporting findings of fact, unexplained by reasoned opinions, and free from any requirement that the decisions be related to precedents.

DAVIS, *supra* note 73, at 224.

77.

Why these various assumptions are made is not easy to discover; the best short answer seems to be that no one has done any systematic thinking to produce the assumptions, but that the customs about prosecuting, like most other customs, are the product of unplanned evolution. Whatever caused the assumptions to grow as they did, prosecutors usually assert that everybody knows that they are necessary.

*Id.* at 189.

78. *Id.* at 188-89. Many cases have made this deference to prosecutorial discretion explicit. *See, e.g.,* *Inmates of Attica Correctional Facility v. Rockefeller*, 447 F.2d 375 (2d Cir. 1973) (holding that the prosecutor's decision to investigate, arrest, and prosecute various state officials was wholly within the discretion of the U.S. Attorney's Office).

79. DAVIS, *supra* note 73, at 189.



one whose origin is "the product of unplanned evolution."<sup>80</sup> Yet, aside from custom, why *should* a district attorney have absolute power to decide not to prosecute, especially in cases for which there is clearly sufficient evidence for a conviction?<sup>81</sup>

Defenders of prosecutorial discretion argue that if the prosecuting attorney exercises his discretion inappropriately, the electorate can vote him out at the next election. However, most of the prosecutorial decisionmaking process is "kept secret, so that review by the electorate is nonexistent except for the occasional case that happens to be publicized."<sup>82</sup>

One solution to the problem of abuse of prosecutorial discretion, suggested by Professor Davis, is that courts provide the same review for prosecutorial abuses and errors as they now provide for administrative agency actions.<sup>83</sup> The principle that prosecutorial decisions were inappropriate for judicial review evolved at a time when actions of the executive branch generally were thought to be unreviewable. In light of the evolution of our jurisprudence, however, executive

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80. *Id.*

81. Davis notes that even asking this question can be difficult:

[T]he habit of assuming that *of course* the prosecutor's decision must be uncontrolled is so deeply embedded that the usual implied response to questions as to whether the prosecuting power can be confined or structured or checked is that the questioner must be totally without understanding. Inability of those who are responsible for administering the system to answer the most elementary questions as to the reasons behind the system is itself a reason to reexamine.

*Id.* at 191. But other countries do not necessarily share the view that prosecutors should have unfettered discretion. Professor Davis found that, unlike the American system, the prosecutorial system in then-West Germany had stripped the prosecutor of the power to decline to prosecute when the evidence and law were sufficiently clear. *Id.* at 194. "This means that selective enforcement, a major feature of the American system, is almost wholly absent from the German system." *Id.* Even where the law is unclear or the evidence dubious, the German prosecutor does not make the decision; he "almost always presents a doubtful case to the judge, who determines the sufficiency of the evidence and the proper interpretation of the law." *Id.*

But see John H. Langbein & Lloyd L. Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 YALE L.J. 1549, 1564-65 (1978) ("The rule of compulsory prosecution is limited by statute to cases of serious crime . . ."); Albert S. Goldstein & Martin Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*, 87 YALE L.J. 240, 275-76 (1977) (positing that the German system has merely shifted the discretion to the police). Davis concedes that his interpretation of the nondiscretionary prosecutorial system in Germany may not be completely precise, but argues that in the great majority of crimes, the German prosecutor generally has no discretion to exercise. DAVIS, *supra* note 73, at 195.

82. DAVIS, *supra* note 73, at 208-09; see also Davis, *supra* note 2, at 372-73 (arguing that it is unrealistic to rely on either the governor or the general populace to police prosecutorial decisionmaking because of the secretive nature of the process).

83. DAVIS, *supra* note 73, at 211-14.

branch actions now can be reviewed to protect against abuse. Therefore, the arguments in favor of reconsidering the doctrine of unreviewable prosecutorial discretion are extremely persuasive.<sup>84</sup>

Another avenue worthy of exploration is the implementation of ethical guidelines to curb prosecutorial decisionmaking power.<sup>85</sup> The *American Bar Association Standards for Criminal Justice Prosecution Function and Defense Function* includes model criteria to guide prosecutors in their decision whether or not to prosecute.<sup>86</sup> Particularly noteworthy in the commentary to the standards is the statement that “[a] prosecutor ordinarily should prosecute if, after full investigation, it is found that a crime has been committed, the perpetrator can be identified, and there is sufficient admissible evidence available to support a verdict of guilty.”<sup>87</sup> As potentially harmful to the innocent as a decision to prosecute may be, a decision not to prosecute is more final because it is not checked or reviewed by any other agency.<sup>88</sup> Indeed, Davis estimates that nine out of ten abuses of prosecutorial discretion stem from refusals to prosecute—decisions never reviewed by any court.<sup>89</sup>

Lastly, a few other commentators have suggested turning to the grand jury for protection against abuse. The National District Attorney’s Association originally conceded that the grand jury may act

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84. *Id.* at 229; see also Note, *The Use of Mandamus to Control Prosecutorial Discretion*, 13 AM. CRIM. L. REV. 563, 569 (1976) (suggesting the creation of a “prosecutorial procedure act”).

85. There is some precedent for setting such guidelines for prosecutors. *E.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1986) [hereinafter MODEL CODE] (stating that “[t]he responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict”); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 cmt. 1 (1991) [hereinafter MODEL RULES].

Guidelines already exist to govern the prosecutor’s conduct before the grand jury. For example, the American Bar Association Standards for Criminal Justice require a prosecutor to give “due deference” to the grand jury’s “status as an independent legal body.” ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION 3-3.5(a) (3d ed. 1993) [hereinafter ABA STANDARDS]. Although the prosecutor can give legal advice and express opinions, he or she “should not make statements or arguments in an effort to influence grand jury action in a manner which would be impermissible at trial before a petit jury.” *Id.* 3-3.5(b).

86. ABA STANDARDS, *supra* note 85, 3-3.9.

87. *Id.* at 3-3.9 commentary. *But cf.* REPORT ON COURTS § 1.2 (National Advisory Commission on Criminal Justice Standards and Goals 1973) (finding that generally the prosecutor should retain the discretion to determine when to prosecute, but concluding that the decision not to prosecute should be reviewable by the courts for abuse of discretion).

88. DAVIS, *supra* note 73, at 188, 190-91.

89. *Id.* at 191 n.2. “Of one thousand decisions not to prosecute, the usual number totally unknown to judges is probably one thousand.” *Id.* at 209 n.21.

as a check on the prosecutor and initiate criminal charges.<sup>90</sup> And the American Bar Association has acknowledged that, although the charging decision should be vested primarily in the public prosecutor, there are jurisdictions “[w]here the law permits a citizen to complain directly to a judicial officer of the grand jury . . . .”<sup>91</sup>

## II. THE GRAND JURY OPTION

It is the final option mentioned above—turning to the grand jury—upon which the remainder of this Article will focus. Specifically, this Article will explore the concept of the victim’s access to the grand jury—against the wishes of the public prosecutor—in the context of police brutality cases and other instances of governmental

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90. NATIONAL DISTRICT ATTORNEY’S ASSOCIATION, NATIONAL PROSECUTION STANDARDS 8.1 (1977) (“The decision to initiate or pursue criminal charges should be within the discretion of the prosecutor, excepting only the grand jury, and whether the screening takes place before or after formal charging, it should be pursuant to the prosecutor’s established guidelines.”).

This concession is no longer quite as clear as it once was. The second edition of these standards, the only national standards written by prosecutors exclusively, reads, perhaps unsurprisingly, like a Christmas list for district attorneys. The section on “Prosecutor’s Relations with the Grand Jury” parrots the directives of the *ABA Standards* on that issue. NATIONAL DISTRICT ATTORNEY’S ASSOCIATION, NATIONAL PROSECUTION STANDARDS 60.2-3 (2d ed. 1991) [hereinafter NDAA STANDARDS]; cf. ABA STANDARDS, *supra* note 85, 3-3.5(a)-(b). The newer edition contains no direct reference to the initiation of a prosecution by a grand jury. See NDAA STANDARDS, *supra*, 43.1 (“In the exercise of the discretion to prosecute, the prosecutor should determine which charges should be filed and how charges should be presented before a grand jury or court.”). On the other hand, the NDAA does not completely shut the door of the grand jury in the faces of volunteer witnesses or crime victims: under the rubric “Investigative Function,” the second edition states that “[e]ach state should determine the precise scope of grand jury investigatory functions.” NDAA STANDARDS, *supra*, 59.1.

91. ABA STANDARDS, *supra* note 85, 3-3.4(d). The third edition suggests that the complainant should be directed to first bring his complaint to the prosecutor and that the prosecutor’s “action or recommendation thereon” should be made known to the pertinent judge or grand jury. *Id.* The first edition of these standards took a more favorable stance toward this possibility: “[u]nder some systems a citizen may take a complaint directly to a grand jury and such a ‘safety valve’ has much to commend itself.” ABA STANDARDS FOR CRIMINAL JUSTICE RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION 2.1 commentary (1971). Judge Lumbard of the Second Circuit also believed that the prosecutor should not have a monopoly on the discretionary decision whether or not to prosecute:

We should not forget that our District Attorneys are elected officials, that they must stand for election at stated intervals, and this makes them subject to pressures and temptations if they have the power to act alone, and that there may well be some cases where it would not be in the public interest to give them the sole power to determine when charges should be brought.

J. Edward Lumbard, *The Criminal Justice Revolution and the Grand Jury*, 39 N.Y. ST. B.J. 397, 400 (1967).

misconduct, because these cases: (1) often involve a built-in prosecutorial conflict of interest, (2) present every opportunity for the public prosecutor to drag his feet, and (3) pose questions of enormous public importance.<sup>92</sup>

An important threshold question is whether there is any reason to believe that the grand jury would provide any greater prosecutorial assistance to the victim than the public prosecutor would provide, if victims had access to the grand jury. Some critics of the grand jury contend that the body is merely a "tool" of the prosecutor, a "rubber stamp" of approval for his or her actions.<sup>93</sup> One commentator has observed that "[t]here seems to be universal agreement in urban areas that prosecutors effectively control the actions of grand jurors."<sup>94</sup> Even the Supreme Court of California has observed:

The grand jury is independent only in the sense that it is not formally attached to the prosecutor's office; though legally free to vote as they please, grand jurors virtually always assent to the recommendations of the prosecuting attorney, a fact borne out by available statistical and survey data. . . .

The pervasive prosecutorial influence reflected in such statistics has led an impressive array of commentators to endorse the sentiment expressed by United States District Judge William Campbell, a former prosecutor: "Today, the grand jury is the total captive of the prosecutor who, if he is candid, will concede that he can indict anybody, at any time, for almost anything, before any grand jury."<sup>95</sup>

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92. It bears repeating that, although this Article focuses on police brutality and other governmental misconduct, this procedure is equally available to the victim of any crime in the penal code of the jurisdiction in which it was committed.

93. Frampton, *supra* note 74, at 5-6; see also Richard A. Carp, *The Harris County Grand Jury—A Case Study*, 12 HOUS. L. REV. 90 (1974) [hereinafter Carp, *Harris County Grand Jury*] (discussing the results of an empirical survey conducted of grand jurors in Harris County, Texas). Carp found that one grand jury voted on 80% of its cases without any discussion following the prosecutor's presentation. *Id.* at 101. Furthermore, he found evidence of "grand jury shopping" by prosecutors when more than one grand jury was sitting concurrently. *Id.* at 118-19.

94. Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 86 n.84 (1968-69).

95. *Hawkins v. Superior Court*, 586 P.2d 916, 919 (Cal. 1978) (quoting William J. Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174 (1973)); accord RAYMOND MOLEY, *POLITICS AND CRIMINAL PROSECUTIONS* 127-28 (1929) ("[T]he grand jury has now come to be a group of men . . . who function under the dictation of the prosecutor."). One possible reason for prosecutorial dominance over the grand jury is that "the only person who has a clear idea of what is happening in the grand jury room is the public official whom these twenty-three novices are expected to check." Melvin P. Antell, *The Modern Grand Jury: Benighted Supergovernment*, 51 A.B.A. J. 153, 154 (1965).

Although there is substantial evidence showing that the grand jury frequently has been the prosecutor's puppet, such an outcome is not inevitable; in fact, there have been some remarkably independent grand juries.<sup>96</sup> Therefore, perhaps the most significant attribute of the grand jury function today is the twin states of ignorance involved: first, the grand jurors do not understand the extent of their own independent powers, and second, neither crime victims nor their attorneys realize that they can approach the grand jury—even over the prosecutor's objection—either directly or through the impaneling judge.

Because we know of the extent to which today's grand juries are mere surrogates for the prosecutor, it is difficult to think of the institution with great respect. In fact, without a great deal of research, most lawyers are unlikely to know that they may seek indictments, even over the objection of the local prosecutor. More likely, a lawyer will tell a client that there is no remedy in the criminal justice system for the harm the client has suffered; the only remedy is by way of civil suit. Yet the benefits of public access to the grand jury are significant. Civilian participation in criminal prosecution brings an entirely different perspective to law enforcement.<sup>97</sup> When citizens are free to approach the grand jury directly or through the impaneling judge, the grand jury "breathes the spirit of the community" as no prosecutor could ever do."<sup>98</sup> As the following section describes, the grand jury actually has been the voice of the people throughout American history; the present degree of prosecutorial domination is an unfortunate—but not irreversible—development.<sup>99</sup>

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96. See *infra* Part II.A. for historical examples of grand jury initiative and independence.

97. The grand jury "is useful in bringing to bear the conscience of the community at the point where the criminal justice system is sought to be invoked." *State v. Johnson*, 441 N.W.2d 460, 468 (Minn. 1989) (Simonett, J., dissenting in part). After all, as George Bernard Shaw noted, "all professions are a conspiracy against the laity." *Id.* at 469 (Simonett, J., dissenting in part).

98. RICHARD D. YOUNGER, *THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634-1941*, at 230 (1963) (quoting United States District Attorney George Z. Medalie, *Grand Juries Value, THE PANEL*, Mar.-Apr. 1931, at 16).

99. *Id.* at 225 ("The grand jury served as an agency of law and order in the West, and while it may have lacked the efficiency and singleness of purpose of the public prosecutor, it made up for this deficiency by emphasizing democratic participation in law enforcement.").

A. *History of the American Grand Jury: The Role of Citizen Participation*

Today's image of the grand jury as a group of citizens who usually ratify, and only occasionally defy, the wishes of the local prosecutor glosses over entirely the grand jury's remarkable history in this country. The grand jury historically has exercised extraordinary power. The English colonists brought the institution of the grand jury with them, and it became an important fixture in early American life. Grand juries "acted in the nature of local assemblies: making known the wishes of the people, proposing new laws, protesting against abuses in government, performing administrative tasks, and looking after the welfare of their communities."<sup>100</sup>

For example, grand juries in Maryland involved themselves in the surveying of land in border controversies in addition to considering indictments.<sup>101</sup> In Dover, Massachusetts, grand jurors accused the officials of the town of neglecting to keep the stocks in good working order.<sup>102</sup> Pennsylvania grand jurors performed tax assessments, awarded contracts for building bridges within their jurisdiction, and inspected public buildings, bridges, and jails.<sup>103</sup> Grand juries in the Carolinas undertook similar endeavors.<sup>104</sup> New Jersey grand juries also levied taxes and audited expenditures of county money, scrutinized the records of the county treasurer, and inspected county roads.<sup>105</sup> In Virginia, the grand jury became part of the county courts, which themselves "were more than mere courts. They exercised legislative and executive as well as judicial authority. They acted as fiscal agents, levying taxes and directing disbursement of funds. They supervised the construction and maintenance of roads and bridges, cared for public buildings, and appointed local officials."<sup>106</sup> The Virginia grand jury "took on such tasks as setting the price to be paid for private property taken for public use and reporting on the condition of roads, bridges, and public buildings."<sup>107</sup>

Furthermore, in states in which there were no representative legislatures, grand juries tended to fill the vacuum. For example, a

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100. *Id.* at 2.

101. *Id.* at 12 n.13.

102. *Id.* at 7 n.3.

103. *Id.* at 15 n.22.

104. *Id.* at 16.

105. *Id.* at 13.

106. *Id.* at 11.

107. *Id.*

New York grand jury sitting in Albany in 1688 declared that those who sold spirits were required to provide lodging for men and their horses.<sup>108</sup> Another New York jury forbade riding over corn fields.<sup>109</sup> The grand jury became a medium for publicizing the complaints of Georgia colonists as well.<sup>110</sup> As Younger described it:

By the end of the Colonial period the grand jury had become an indispensable part of government in each of the American colonies. Grand juries served as more than panels of public accusers. They acted as local representative assemblies ready to make known the wishes of the people. They proposed new laws, protested against abuses in government, and performed many administrative tasks. They wielded tremendous authority in their power to determine who should and who should not face trial. They enforced or refused to enforce laws as they saw fit and stood guard against indiscriminate prosecution by royal officials.<sup>111</sup>

Grand juries in frontier communities continued to suggest policy and legislation; they labored to improve the general welfare of their towns.<sup>112</sup> Territorial and state laws directed grand juries to inquire into the conditions of the local jails and the appropriateness of the treatment of prisoners in addition to checking up on highway supervisors and investigating local taverns.<sup>113</sup> Even in the absence of such legislative direction, frontier jurors kept an eye on the

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108. *Id.* at 15.

109. *Id.*

110. *Id.* at 17.

111. *Id.* at 26. After the Revolution, there were other social problems to be addressed. Occasionally, [grand juries] reflected the general distrust of lawyers as a class. In 1783, a South Carolina grand jury complained that most people were at a loss to explain the fee system used by attorneys. The jurors recognized that "the employing of lawyers in our courts of justice is a grievance that at present seems necessary," but they urged passage of a law strictly regulating legal fees.

*Id.* at 42.

112. *Id.* at 72.

113. *Id.* at 79.

As in most territories, grand jurors in Idaho were under obligation to inspect the local jail, and Judge Alexander Smith told Silver City jurors of their duty but added, "I have been prospecting these parts for several days and haven't even found any such shebang! You may find one, however, so look around." In October, 1867, the jurors reported that the local jail was totally inadequate, with locks and hinges of inferior quality. In the following year they recommended that the jail and all county buildings be weatherboarded, asked the legislature to amend the revenue laws so as to provide a cash fund for payment of contingents, and called for an investigation of rates charged on toll roads.

*Id.* at 169.

conditions of bridges, roads, and public buildings in their area.<sup>114</sup>

Other territories, like Arizona and New Mexico, expressly directed grand juries to inquire into all “wilful and corrupt misconduct of public officials.’ But even in those jurisdictions where there was no specific statute, grand juries denounced and indicted public officials they found guilty of malfeasance or corruption.”<sup>115</sup> The Wasco County, Oregon, grand jury accused the county clerk and the county judge of accepting improper fees; the grand jury of Kimble County, Texas, attempted to dismiss the local sheriff and judge because of their alleged failure to enforce the laws.<sup>116</sup>

Since residents of territories had little say in their own government, grand juries naturally became the vehicles for the transmission of needs, desires, and protests.<sup>117</sup> For example, grand jurors of Washington District, Mississippi Territory, informed Congress that, unrepresented as they were in that body, they would use the grand jury to voice their grievances.<sup>118</sup> On their own initiative, grand juries suggested laws and public projects which they believed would help their communities; in addition, they petitioned local legislatures and Congress.<sup>119</sup> Grand jurors were not shy about this function:

Jurors of Wayne County, Michigan Territory, dispatched a memorial to President John Quincy Adams and the United States Senate requesting that Solomon Sibly not be reappointed to the territorial supreme court because of his “mental imbecility.” The jurors also protested against James Witherall’s appointment as chief justice, “due to superannuation.”<sup>120</sup>

Grand juries proved particularly effective in uncovering illegal business practices. When corporate officers declined to cooperate, the jury’s broad investigative powers were extremely valuable. The grand jury’s power to subpoena witnesses and records, supported by the court’s contempt powers, made it very successful in investigating

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114. *Id.* at 80.

115. *Id.* at 160.

116. *Id.* at 161. For similar improprieties, the Justice of the Peace for Deer Lodge County, Montana, was denounced and indicted by the grand jury. *Id.* (citing *Territory v. McElroy*, 1 Mont. 86 (1868)).

117. *Id.* at 81.

118. *Id.*

119. *Id.* at 80. Chief Justice M.B. Begbie of British Columbia “stressed the importance of inquests as spokesmen for their particular localities, calling attention ‘with great boldness’ to their needs and grievances, speaking ‘with an authority which no other body possesses.’” *Id.* at 137.

120. *Id.* at 78 (citations omitted).



corporate misdoings.<sup>121</sup> Grand juries investigated bank failures in New York City,<sup>122</sup> Milwaukee,<sup>123</sup> and Chicago;<sup>124</sup> brokerage firms in Baltimore;<sup>125</sup> and insurance companies in New York.<sup>126</sup> Grand juries were active in antitrust investigations, indicting the American Tobacco Company in New York<sup>127</sup> and a pool of fire insurance companies in Kentucky.<sup>128</sup> And grand juries were not loathe to investigate the large meat packers, including Armour and Swift, and other corporate giants like International Harvester and Standard Oil.<sup>129</sup> Some grand juries were prolabor<sup>130</sup> and some vehemently antilabor.<sup>131</sup> When labor strikes and violence occurred, some grand juries denounced both labor and management.<sup>132</sup> Although the Sherman Act gave federal prosecutors the right to initiate criminal proceedings by information rather than indictment, United States attorneys learned that, without the grand jury's subpoena powers to compel the testimony of witnesses and production of corporate records, it was simply not feasible to initiate a Sherman Act proceeding by information.<sup>133</sup>

The grand jury system historically shone its brightest in the investigation of municipal corruption. For example, although the infamous Tweed Ring in New York City was attacked by many well-intentioned reformers, it took a New York City grand jury to actually break the Ring in 1872.<sup>134</sup> The grand jury members conducted their own investigation, independent of the district attorney's office.

[T]hey set out to find evidence against city officials without the assistance of experts from the district attorney's office. The jury summoned all manner of witnesses and interrogated them in secret session. To cover all possible sources of information, the twenty-one jurors split up into committees of two and three. These committees visited banks to check on the accounts of public officials, called at the homes of

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121. *Id.* at 209.

122. *Id.* at 209-10, 212.

123. *Id.* at 210.

124. *Id.* at 211-12.

125. *Id.* at 212.

126. *Id.* at 212-13.

127. *Id.* at 219.

128. *Id.* at 219-20.

129. *Id.* at 220-21.

130. *Id.* at 214, 217.

131. *Id.* at 214, 216, 217.

132. *Id.* at 213.

133. *Id.* at 222-23.

134. *Id.* at 182.

witnesses who were unable to come to the jury, and checked the operations of each of the city departments. Even in their off-duty hours, many of the jurors tracked down information useful in tracing frauds to the guilty parties. Their task was not always an easy one.<sup>135</sup>

The jury withstood all forms of social and political pressure, including bribes and threats of force and, after more than a month of investigation, charged Tweed with submitting forged claims to the county for payment.<sup>136</sup> This charge was to be the first in a series of indictments, including that of the City Comptroller.<sup>137</sup> The court praised the grand jury for its work, stating that its members had completed "one of the most important, extraordinary and eventful sessions that has ever marked the history of an American grand jury."<sup>138</sup>

A New York County grand jury reported in 1888 a tremendous backload of excise cases in the district attorney's office. Grand jurors concluded that this indicated either an inefficient office or a lack of real desire to prosecute.<sup>139</sup>

The effectiveness with which a grand jury was able to investigate well-organized and large scale corruption was dependent to some extent upon the co-operation of the county prosecutor. He alone could advise the jurors on legal matters and attend their secret sessions. However, prosecutors were often reluctant to have juries embark upon broad inquiries. Sometimes they feared reprisals and occasionally they themselves were deeply involved in grafting. If the prosecuting attorney sought to stifle an investigation, its success depended largely upon the initiative and ability of the foreman and his fellow jurors. Although grand inquests possessed ample authority to disregard the county prosecutor and proceed without his advice, it took a courageous and independent minded panel to do so.<sup>140</sup>

In another grand jury investigation that involved illegal gambling in New York City, the Tammany Hall district attorney, A.B. Gardiner,

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135. *Id.* at 185.

136. *Id.*

137. *Id.*

138. *Id.* at 186 (quoting Judge Gunning S. Bedford). Fourteen years later, a New York grand jury investigated the suspicious awarding of street railway franchises. Thirteen aldermen on the City Council sold their votes for bribes. The grand jury indicted each of the dishonest aldermen. A subsequent grand jury indicted the officers of the corporation which gave the bribes. *Id.* at 186-87.

139. *Id.* at 188.

140. *Id.*

seemed less than enthusiastic.<sup>141</sup> Witnesses scheduled to be subpoenaed disappeared, and other witnesses declined to testify in front of Gardiner.<sup>142</sup> Consequently, the jurors began to subpoena their witnesses directly, without going through the District Attorney's office.<sup>143</sup> When one important witness was about to testify, the foreman asked Gardiner to leave the room.<sup>144</sup> Gardiner objected, and the entire grand jury assembled in front of the judge, who eventually upheld the jury's exclusion request.<sup>145</sup> The grand jury then took complete control of the investigation, speaking directly to the judge for legal advice.<sup>146</sup> Gardiner eventually was removed by the governor for failing to prosecute certain matters.<sup>147</sup>

Even New York's famous corruption fighter, Thomas E. Dewey, owed his appointment to the efforts of a combative grand jury that was concerned with District Attorney William Dodge's foot-dragging.<sup>148</sup> The foreman of the jury finally took the lead in the investigation and the jurors began calling their own witnesses, freezing out the District Attorney. Lee Thompson Smith, the grand jury foreman, insisted that the District Attorney appoint a special prosecutor. Grand jurors and their investigators were threatened by criminals, but they pressed their investigation. Finally, locked in disagreement with Dodge, the grand jury petitioned the court to discharge them and petitioned the Governor to impanel an extraordinary grand jury and select a special racketeering prosecutor to work with it. Governor Lehman named Dewey to the post and impaneled a new jury.<sup>149</sup> The special grand jury called over five hundred witnesses in four months, inquiring into racketeering and loansharking in labor unions and trade associations.<sup>150</sup> This grand jury panel and its successor eventually indicted "Lucky" Luciano and his top aides.<sup>151</sup> By the time the investigation was over, the grand juries—and Mr. Dewey—"had broken the back of organized racketeering in New York City."<sup>152</sup>

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141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 188-89.

146. *Id.* at 189.

147. *Id.* at 190.

148. *Id.* at 234-35.

149. *Id.* at 235.

150. *Id.*

151. *Id.*

152. *Id.*

In 1892, a Chicago grand jury indicted several aldermen in an attempt to stop bribery and corruption.<sup>153</sup> Several grand juries successfully battled graft in St. Louis in 1902.<sup>154</sup> In 1905, in Milwaukee, a grand jury indicted eighteen county supervisors; and to ensure a cleaner government, the jury recommended "periodic grand juries."<sup>155</sup> In 1911, a Cincinnati grand jury also rescued the city from a corrupt political machine.<sup>156</sup> Other grand jury investigations of municipal corruption occurred in Cleveland,<sup>157</sup> Minneapolis, Boston, San Francisco, Philadelphia, Buffalo, and Miami.<sup>158</sup>

The Minneapolis and San Francisco cases best exemplify the extensive powers of the grand jury. When the Minneapolis public prosecutor declined to cooperate with the grand jury's investigation of corrupt municipal government, the jurors hired private detectives to uncover the necessary evidence.<sup>159</sup> The grand jury indicted the mayor for attempting to bribe county commissioners.<sup>160</sup> The mayor was eventually forced to fire his brother, the police commissioner, and then resign.<sup>161</sup> In this power vacuum "the grand jury assumed the role of a committee of public safety. The jurors named an acting mayor and stood ready to enforce his clean-up orders."<sup>162</sup>

San Francisco had a series of crusading grand juries that attempted to clean up the town from 1890 to 1907.<sup>163</sup> Finally, they achieved substantial success:

While the grand jurors were trying to trace the sources of the various bribes paid to the supervisors, they also had to deal with the problem of who was to govern San Francisco. Mayor Schmitz stood indicted and all but a few of the supervisors had confessed to accepting bribes. The people had lost all confidence in the city administration and newspapers began to agitate for the removal of guilty persons. The decision was clearly up to the grand jury, for it alone held the confidence of the citizens and could make the supervisors do its bidding. To be completely unham-

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153. *Id.* at 191-92.

154. *Id.* at 193-94.

155. *Id.* at 192-93.

156. *Id.* at 190-91.

157. *Id.* at 234.

158. *Id.* at 236-37.

159. *Id.* at 196.

160. *Id.* at 197.

161. *Id.* at 198.

162. *Id.* at 198-99.

163. *Id.* at 199-207.

pered in their investigation, the jurors decided to allow the old supervisors to remain and continue to manage the city's affairs, but the grand inquest continued as the "power behind the throne," holding the municipal legislators in line through threat of indictment. In this manner, they assumed control of executive and legislative as well as judicial affairs in San Francisco. When the Car Workers' Union called a strike against the United Railway Company and a bitter struggle ensued, a committee of the grand jury warned police officials against excessive brutality and threatened to ask the governor for troops if the chief of police could not keep order.<sup>164</sup>

The Mayor went to trial and was convicted, automatically ending his term as mayor, and "the Board of Supervisors looked to the grand jury to tell them who should be named as his successor." It was, indeed, the grand jury that named the new mayor.<sup>165</sup>

Younger summarized the powers and performance of the grand jury:

Where corruption extended to the office of the district attorney, the grand jury's ability to act effectively depended upon its independence of the prosecutor. When necessary, juries demonstrated that they could take investigations into their own hands, ignoring the district attorney . . . . Under extraordinary circumstances grand juries proved that they could, if necessary, unseat an entire municipal administration and using their power of indictment, take over and run a city in the name of the people. In both Minneapolis and San Francisco, grand juries governed the city for long periods while they rooted out crime and corruption. City bosses, corrupt officials, and racketeering criminals learned to fear the grand inquest, but to citizens seeking to rid their city of corruption, it was often the only hope.<sup>166</sup>

### *B. The Politics of Grand Juries and Judges*

Although grand juries have historically provided a democratic check on government, they are not a panacea for all overreaching or politically motivated prosecutorial decisions. Just as public prosecutors have been criticized for the politics of their choices about when,

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164. *Id.* at 205-06.

165. *Id.* at 207.

166. *Id.* at 208.

whom, and how to prosecute,<sup>167</sup> it also would be unrealistic not to recognize that politics affect grand jury choices as well. In particular, the impaneling judge and the people who compose the grand jury itself affect that body's decisions.

Even before this nation was founded, judges occasionally manipulated grand juries for their own political and propaganda purposes.<sup>168</sup> In the years prior to the American Revolution, judges cajoled grand juries into issuing statements against the British military presence;<sup>169</sup> after the Revolution, judges lectured grand jurors on the issues of the day.<sup>170</sup> In fact, judges in the Western territories often used their grand jury charges as an opportunity to deliver a political speech or to lecture on the morality of the community.<sup>171</sup> When the Civil War began, federal judges used their grand jury charges to dispute the South's right to secede.<sup>172</sup> During the war itself, judges in the North used grand jury charges to urge support for the Northern war effort and to denigrate the South.<sup>173</sup>

Grand jurors also developed their own political agendas. As the eighteenth century progressed, many American colonists saw the opportunity to use the grand jury to limit the power of royal officers and to seek redress of grievances.<sup>174</sup> After independence from England was declared, many grand juries issued reports condemning the mother country and urging all colonists to join the war effort.<sup>175</sup> American grand juries issued indictments for treason against those who enlisted in the British army or gave aid or information to the British.<sup>176</sup> Grand juries also provided a voice of reason, restraining antiseditious prosecutors and mollifying war-time hysteria by refusing

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167. See, e.g., HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 290-91 (1968) (discussing failures to prosecute offenses of questionable criminality as creating the potential for abuse of discretion because the prosecutor can elect to prosecute only his enemies or those from whom he can extort money); Monroe H. Freedman, *The Professional Responsibility of the Prosecuting Attorney*, 55 GEO. L.J. 1030, 1034-35 (1967) (discussing prosecutors' improper motives for pursuing certain cases).

168. YOUNGER, *supra* note 98, at 34.

169. *Id.* at 33-40.

170. *Id.* at 41. Judicial preaching was clearly evident at crucial points in this nation's history, including following passage of the Constitution, *id.* at 44, 47-48, in cases involving Sedition Act indictments, *id.* at 51, and during the presidential race between Adams and Jefferson. *Id.* at 54.

171. *Id.* at 77. For example, in states where there were Mormon colonies, judges rarely lost an opportunity to deplore the sin of polygamy. *Id.* at 159.

172. *Id.* at 106.

173. *Id.* at 108.

174. *Id.* at 19.

175. *Id.* at 36.

176. *Id.* at 38.

to indict on weak evidence.<sup>177</sup> Indeed, grand juries often reacted negatively to heavy-handed, politicized jury charges given by partisan judges.<sup>178</sup>

Grand juries have demonstrated independence in more recent times as well. During the times of labor strife in the nineteenth century, grand jury sympathies ranged from pro-business to pro-labor.<sup>179</sup> As grand juries have faced increasingly difficult social, economic, and political issues, sharp disagreements have existed not only among the jurors, but also between the jury and the prosecutor.<sup>180</sup> Recent grand juries have had to deal with serious social problems in making their decisions to indict or not, and have shown remarkable wisdom. For example, grand juries have decided what level of crime with which to charge a subway motorman whose intoxication allegedly caused the deaths of five people in New York City,<sup>181</sup> whether to indict a Hasidic man who lost control of his car and caused the death of a young African-American boy,<sup>182</sup> and whether physician-assisted suicide constitutes murder.<sup>183</sup> Given the rate of scientific advancement, political moodswings, and changes in societal views, future grand juries will have to wrestle with issues that will polarize public opinion even further. Nevertheless, there is every reason to believe that grand jurors will continue to exercise the level of good judgment and intelligence they have shown throughout the history of the grand jury.

### III. GAINING ACCESS TO THE GRAND JURY

The previous discussion is not meant to serve simply as a historical survey. Rather, it is intended to demonstrate the awesome powers of the grand jury and to encourage victims of police brutality (or other governmental misconduct), and their attorneys, to gain direct or judicial access to the grand jury when the local prosecutor declines to prosecute. The particular path that a victim of police

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177. *Id.* at 39-40, 51.

178. *Id.* at 49.

179. *Id.* at 214-17. "[W]hen the policies of large companies or the activities of racketeering labor leaders led to strikes and violence, grand juries intervened to investigate and denounce the practice of both companies and unions." *Id.* at 213.

180. Robert A. Carp, *The Behavior of Grand Juries: Acquiescence or Justice*, 55 SOC. SCI. Q. 853, 865 (1975) [hereinafter Carp, *Behavior of Grand Juries*].

181. Calvin Sims, *Jurors Indict Motorman for Murder*, N.Y. TIMES, Sept. 4, 1991, at B1.

182. John Kifner, *Grand Jury Doesn't Indict Driver in Death of Boy in Crown Heights*, N.Y. TIMES, Sept. 6, 1991, at A1.

183. William Douglas, *Murder Charge for MD: 'Suicide Machine' Inventor's Arrest Could Be Test Case*, NEWSDAY (City ed.), Feb. 6, 1992, at 6.

brutality will take to achieve this goal will depend greatly upon the jurisdiction in which the offense occurred. As the remaining portion of this Article will show, there exists ample state constitutional, statutory, and common law to support the exercise of such a right of access. The following sections discuss five categories of states: those that permit direct citizen access to the grand jury by case law, those that permit such access by statute, those that recognize a constitutional right of access, those that permit a judge to exercise discretion in permitting access, and states in which the law is less clear. Individual states will be discussed separately within each category.

*A. States Allowing Direct Access to the Grand Jury by Case Law*

There are six states in which state courts have recognized the right of the victim of a crime to approach a member or members of the grand jury directly: Texas, Alabama, Louisiana, Georgia, Maryland, and Minnesota. The states and their relevant case law are described below.

1. *Texas*.—Texas law clearly permits a crime victim or witness to approach the grand jury directly. The leading case, *Hott v. Yarbrough*,<sup>184</sup> arose out of a suit for libel. Hott wrote directly to the foreman of the grand jury, requesting the opportunity to testify before the grand jury about how Yarbrough and others had defrauded him.<sup>185</sup> The court held that the victim of a crime had both a clear right and a duty to report the crime to the grand jury:

It is unquestionably the right, if not in fact the duty, of every one who has knowledge of the commission of a criminal offense, punishment to the party guilty whereof is a matter of general public interest, to call to the attention of the grand jury the facts within his knowledge, to the end that they may have proper investigation and such action as the grand jury may deem advisable. Equally clear is the right of any one who may consider himself aggrieved by the actual or supposed commission of a crime to call the matter to the attention of the grand jury for investigation and action. The

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184. 245 S.W. 676 (Tex. 1922).

185. *Id.* The issue of libel arose because of Hott's letter to the grand jury foreman. *Id.* at 678-79. Yarbrough claimed that Hott's letter was libelous. In defense, Hott claimed that the letter was covered by an absolute privilege. *Id.* at 676. The court agreed with Hott, stating that the grand jury's role as an "arm of the court" demanded that a citizen's report of a potential crime to the grand jury could not be the basis of a civil action. *Id.* at 678.



law does not restrict the method by which this may be done.<sup>186</sup>

The court based its holding on Article 432 of the then-current Texas Code of Criminal Procedure.<sup>187</sup> Article 432 required the grand jury to investigate all potentially indictable offenses of which its members gained knowledge either on their own, through a state's attorney, or through "any other credible person."<sup>188</sup> Although the precise wording of that article has been subsequently amended, its meaning is the same and the phrase "*or any other credible person*" remains the same as well.<sup>189</sup>

More recently, the Court of Appeals for the Fifth Circuit further confirmed that a Texas citizen who has witnessed a crime or who has been a victim of a crime may contact a member of the sitting grand jury directly to ask for an investigation and for the right to testify.<sup>190</sup> Although the law on citizen access to the grand jury is completely clear in Texas, it is extremely doubtful that this right is exercised very frequently. This is probably because virtually no one in Texas seems to know about it.

The best empirical work on Texas grand juries has been done by Robert A. Carp.<sup>191</sup> From November, 1971, through February, 1972, Professor Carp sat on the 177th District Court Grand Jury in Houston, Texas.<sup>192</sup> Carp, a political scientist from the University of Houston, kept careful records of that grand jury.<sup>193</sup> Under Carp's supervision, members of previous Harris County grand juries were interviewed extensively for academic purposes.<sup>194</sup> In addition, Carp sent questionnaires to all members of Harris County grand juries between 1969 and 1972.<sup>195</sup> Carp found empirical evidence that the district attorney dominated the grand jury proceedings; the grand jury

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186. *Id.* at 678-79.

187. *Id.*

188. *Id.* (quoting TEX. CRIM. PROC. CODE ANN. art. 432).

189. TEX. CRIM. PROC. CODE ANN. art. 20.09 (emphasis added). The only major change was the substitution of the words "the grand jury shall inquire" for the words "[i]t is the duty of the grand jury to inquire" at the beginning of the article.

190. *See Smith v. Hightower*, 693 F.2d 359, 368 n.21 (5th Cir. 1982) ("Under Texas law, the grand jury has the authority to conduct their own investigations, to subpoena evidence and witnesses, . . . and to indict on matters as to which the district attorney has presented no evidence and sought no indictment.").

191. Carp, *Harris County Grand Jury*, *supra* note 93.

192. *Id.* at 92.

193. *Id.*

194. *Id.*

195. *Id.*

acquiesced overwhelmingly in the prosecutor's recommendations.<sup>196</sup> Fully eighty percent of the cases submitted to Carp's grand jury were voted upon without any discussion whatsoever.<sup>197</sup> In the end, most grand juries deferred to the expertise and judgment of the district attorney in determining whether or not to indict.<sup>198</sup> In fact, Carp found that, where two or more grand juries were sitting simultaneously, the district attorney would take certain types of cases to the grand jury he expected would respond most cooperatively to the prosecutor's wishes—what might be called "grand jury shopping."<sup>199</sup>

Curiously, Carp's excellent study<sup>200</sup> of the Texas grand jury makes absolutely no mention of the citizen's right to direct access to the grand jury. However, on the first day the grand jury sat Dr. Carp overheard the district attorney tell the foreman that there was a mailbox in the courthouse where any citizen could put any communication to the grand jury.<sup>201</sup> The prosecutor told the foreman to

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196. Carp, *Behavior of Grand Juries*, *supra* note 180, at 854, 860, 868.

197. Carp, *Harris County Grand Jury*, *supra* note 93, at 101.

198. *Id.* at 114.

199. *Id.* at 116-18. An extreme example of this occurred in 1989, when an unusual grand jury was selected in Harris County. There were more than twenty people on the list submitted to Judge Norman Lanford, but only fourteen appeared on the date when the grand jury was to be chosen. Since two were removed for reasons of conflict, the judge was forced to accept the remaining twelve. The problem was that five of the twelve were lawyers, including, as foreman, Randy Schaffer, who was already well-known for representing Randall Dale Adams, who was released from prison after his guilt was assailed in the film "The Thin Blue Line." Lisa Belkin, *Grand Jury Disruption: 5 Lawyers and a Feud*, N.Y. TIMES, Sept. 17, 1989, at 30.

It quickly became clear that the lawyer-laden jury was a breed apart. While the average grand jury in Harris County refuses to issue indictments in 3 percent of the cases it hears, this one refused indictments in 9 percent of the cases. It was enough of a change to shake prosecutors' faith that they pretty much control the process.

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Since then, Harris County prosecutors have stopped bringing cases to this grand jury. Some are still assigned automatically, but prosecutors have been steering the cases over which they have discretion to other juries, especially when the cases result from a long police investigation in which the suspects have not yet been arrested.

Five grand juries sit at one time and the four others have heard an average of 590 cases since mid-August. Mr. Schaffer's grand jury has heard 450 cases. The five groups meet in rooms along the same hallway, and while the other juries meet all day, his group has finished before noon, Mr. Schaffer said.

*Id.*

200. See generally Carp, *Harris County Grand Jury*, *supra* note 93.

201. Telephone Interview with Dr. Robert A. Carp, Associate Dean and Professor of Political Science at the University of Houston (April 2, 1992) [hereinafter Telephone Interview].

check it from time to time.<sup>202</sup> However, Carp does not remember any case coming to the grand jury from this source.<sup>203</sup> In fact, Carp received the clear impression that the district attorney seriously discouraged use of this procedure, regarding it as an “end run” around his office.<sup>204</sup> Most importantly, Carp estimates that ninety-nine percent of all criminal lawyers are unaware of their clients’ rights to approach the grand jury directly; ironically, even the two law professors who sat on the grand jury with Carp had never heard of this right.<sup>205</sup>

2. *Alabama.*—Alabama’s statutory scheme contains some support for the right of a citizen to approach the grand jury directly, and Alabama courts have interpreted this right liberally. The Alabama grand jury is by statute a strong and independent investigative body. For instance, the statute requires that any grand juror who knows or suspects that a crime has been committed in the county to report that crime to his fellow grand jurors, who then have a duty to investigate.<sup>206</sup> Furthermore, the grand jury is obligated “to inquire into all indictable offenses committed or triable within the county.”<sup>207</sup>

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202. *Id.* “Any mail addressed to the grand jury will be given unopened to the foreman . . . .” Carp, *Harris County Grand Jury*, *supra* note 93, at 106 (quoting C. Vance, *The Harris County Grand Jury 7* (undated), the grand jury handbook distributed to grand jurors by the Harris County District Attorney).

203. Carp does recall a witness who appeared without being summoned by the grand jury or the prosecutor although he appeared not to have used the grand jury mailbox. Marvin Zindler was then a deputy sheriff who wanted the grand jury to investigate and issue indictments concerning illegal gambling. The district attorney discouraged the grand jury from hearing Zindler’s testimony, but despite the discouragement, the jury spent approximately ten to fifteen hours listening to Zindler. The grand jury voted indictments for gambling but the prosecutor was reluctant to prosecute; he agreed to prosecute only when the grand jury threatened to be less than totally cooperative with the district attorney on the cases he submitted to them. Telephone Interview, *supra* note 201. Zindler, incidentally, was subsequently fired from his job with the sheriff’s office and became a hugely successful consumer affairs reporter for a Houston television station. Later, it was his crusade that led to the closing of the Chicken Ranch, the brothel writer Larry L. King called *The Best Little Whorehouse in Texas*. J. Michael Kennedy, *You Can’t Miss Marvin*, L.A. TIMES, Mar. 5, 1990, at E1. For an update on Zindler, see Allen R. Myerson, *A Day with Marvin Zindler: The Best Little Sideshow in Texas*, N.Y. TIMES, Mar. 9, 1994, at C1. Zindler’s appearance, style, and behavior are all outrageous. Kennedy, *supra*. Perhaps it takes a special kind of moxie for a citizen to exercise his right to appear before the grand jury.

204. Telephone Interview, *supra* note 201; *see also supra* note 203.

205. Telephone Interview, *supra* note 201.

206. ALA. CODE § 12-16-206 (1986).

207. *Id.* § 12-16-192. Additionally, grand jurors must inspect the county jail personally, and if it is inadequate, must indict the county commissioners responsible. *Id.* § 12-16-191. The grand jury also has a duty to inquire into the fiscal affairs of the county. *Id.* § 12-16-192. Similarly, the grand jury is mandated to inspect the books of the sheriff that contain

The fact that Alabama grand juries possess broad investigative powers serves as the basis for judicial interpretations of the statute as permitting direct access to that body. These investigative powers include subpoena authority: at the request of the grand jury, the prosecutor, the jury foreman, or the clerk of the court must issue subpoenas for witnesses.<sup>208</sup> To supplement its fact-finding ability, the grand jury has “free access, at all proper hours, to the county jail, to the office of the county treasurer and to examination, without charge, of all records and other papers in any of the county offices connected in any way with [its] duties.”<sup>209</sup> Describing the breadth of the grand jury’s power, the Alabama Court of Appeals observed “[w]hen the grand jury is so impaneled and sworn, it becomes the supreme inquisitorial body of the county, and no preliminary act of any court or judge can limit its powers.”<sup>210</sup>

On the basis of this investigative power, Alabama courts have laid the foundation for permitting crime victims and witnesses to approach the grand jury directly. The leading case, *King v. Second National Bank & Trust*,<sup>211</sup> arose as an action for malicious prosecution stemming from a case of theft of lumber.<sup>212</sup> The *King* appellee, Will Coleman, had brought a theft to the attention of the grand jury, explaining that he had been told who had committed the crime and providing the names of witnesses.<sup>213</sup> The criminal defendants in the theft case charged Coleman with malicious prosecution, but the court ruled that his behavior was appropriate. The court observed that “[t]he law favors the prosecution of crimes such as larceny”<sup>214</sup> and that “[p]ublic policy demands that the citizen, without hazard to himself, may freely bring before the grand jury the fact that a crime has been committed, request an investigation, and furnish such information as

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the “accounts with the state for feeding prisoners.” *Id.* § 12-16-193. The grand jury, and the district attorney, are also required to examine the fee book of the probate judge, *id.* § 12-16-194, and the superintendent of education. *Id.* § 12-16-195.

208. *Id.* § 12-16-197.

209. *Id.* § 12-16-196.

210. *State v. Knighton*, 108 So. 85 (Ala. Ct. App. 1926).

211. 173 So. 498 (Ala. 1937).

212. *Id.* at 499.

213. *Id.* Those whom Coleman accused of the theft were indicted by the grand jury but later acquitted. *Id.* Although Coleman’s testimony was chiefly hearsay, indictments may rest on hearsay evidence in Alabama. *State ex rel. Baxley v. Strawbridge*, 296 So. 2d 779, 783 (Ala. Crim. App.), *cert. denied*, 296 So. 2d 784 (Ala. 1974). This fact is significant because it permits even those who were not eyewitnesses to a crime to approach the grand jury and testify.

214. *King*, 173 So. 2d at 499.

he has in aid of the investigation.”<sup>215</sup>

Once the victim or witness gets his case to the grand jury, is there anything, other than the inherent powers of the court, to insure a presentation that is fair to that person? Alabama law states:

Nor shall the circuit courts of this state be precluded from utilizing any contempt powers or sanctions which may apply to acts or events which violate the provisions of this division. Further, the circuit judges of this state may issue whatever other reasonable orders as may be necessary to accomplish the purposes of this division.<sup>216</sup>

Clearly, therefore, the circuit court judges are responsible for the fairness of grand jury presentations and possess the tools to ensure that fairness.

3. *Louisiana.*—The dominant influence that Louisiana district attorneys exert over grand juries has been well documented. This relationship is embedded within both the statutory law and the case law of the state. As one commentator has described it, although the Louisiana grand jury is legally an arm of the court, it “function[s] merely as a prosecutorial rubber stamp.”<sup>217</sup> The grand jury is incapable of excluding the district attorney from its sessions.<sup>218</sup> Moreover, should the grand jury fail to render an indictment, the district attorney may simply present the matter to another grand jury.<sup>219</sup>

Although the grand jury is dominated in many ways by the prosecutor, Louisiana case law makes it clear that a citizen also has a

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215. *Id.* Furthermore, the court declared that it was unnecessary for the reporting individual to be convinced that any of the parties are guilty or even have probable cause of their guilt. *Id.*

Forty-four years later, *King* was cited approvingly in *Alabama Power Co. v. Neighbors*, 402 So. 2d 958, 965-66 (Ala. 1981) (citing *King* for the proposition that bringing a criminal matter to the attention of a grand jury for purposes of initiating an investigation did not constitute malicious prosecution).

216. ALA. CODE § 12-16-226 (1986).

217. Jerry Shropshire, Comment, *The Louisiana Grand Jury: Its Precarious Relationship with the District Attorney*, 6 S.U. L. REV. 151, 153 (1979); see also Mary A. Coffey & Joe B. Norman, Comment, *Selected Problems of the Louisiana Grand Jury*, 52 TUL. L. REV. 707, 735 (1978) (finding that the educational standing and official position of the prosecutor may serve to provide added power in manipulating the grand jury).

218. State *ex rel.* De Armas v. Platt, 192 So. 659, 670 (La. 1939).

219. LA. CODE CRIM. PROC. ANN. art. 386 (“The failure or refusal of a grand jury to indict a defendant does not preclude a subsequent indictment by the same or another grand jury, or the subsequent filing of an information or affidavit against him, for the same offense.”).

right of direct access to the grand jury. In *State v. Sullivan*,<sup>220</sup> for example, the court ruled that members of the public were permitted to appear before a grand jury to provide information or to seek an indictment.<sup>221</sup> The court held:

All that these [citizens] did . . . was to request permission to see the members of the grand jury. The grand jury recessed in order to receive them, and, upon the ladies being received, they requested the grand jurors to investigate the case, and, if the facts justified it, to take action thereon. We see no reason, under these facts, to quash the bill. *Any person has a right to go before the grand jury and prefer a charge against another.*<sup>222</sup>

There is some confusion over how the Louisiana grand jury actually functions. As one commentator observed,

Notwithstanding that the district attorney is the center of our criminal justice system, *theoretically*, the grand jury has the power to *open* an investigation of any criminal matter that comes to its attention. The district attorney may not prevent it from considering charges by declaring that the state will not prosecute. Though it cannot refuse his admission to the proceedings, it need not accept his legal advice, and can refuse to indict when it feels an indictment is not warranted. The grand jury is also entitled to return an indictment without the district attorney's consent or approval; and the district attorney cannot direct the grand jury to indict.<sup>223</sup>

Yet the same observer points out that the grand jury "normally hears only those cases presented to it by the prosecutor, and only the

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220. 105 So. 631 (La. 1925).

221. *Id.* at 633. It was not clear how the victim and her witnesses went about seeking their audience with the grand jury. There was a dispute about whether the grand jury was in session at the time, and whether they sought to bring about an indictment or only an investigation. *Id.* Nevertheless, the court found that "any person" may request and receive a hearing. *Id.*

222. *Id.* (emphasis added) (citation omitted). The court also cited *State v. Stewart*, 14 So. 143 (La. 1893), approvingly. The defendant in *Stewart* "complained . . . that one S.A. Morgan, the leading state witness, went without summons or request before the grand jury, and gave his own version of the case against defendant, and instituted this prosecution." *Id.* at 145. The court held that

[t]he witness had the undoubted right to go before the grand jury voluntarily, and disclose his knowledge of the case. As a good citizen, it was his duty to do so. No one can be excused for withholding knowledge of a crime from the public until he is summoned to give his testimony of its commission.

*Id.*

223. Shropshire, *supra* note 217, at 157 (citations omitted).

prosecution's argument concerning those cases."<sup>224</sup> (On the other hand, the trial judge in the *Sullivan* case opined that most criminal prosecutions begin with citizens "talking matters over with" grand jurors.<sup>225</sup>) Restoring the Louisiana grand jury to its proper role, according to the commentator, one must

relegate the prosecutor to an advisory role. Because most grand jurors do not know the law, they should, upon empanelment, be clearly advised as to what their duties are and encouraged to investigate charges of crime or corruption without the district attorney *telling* them to do so. If the grand jurors would actually take this advice, their initiative and independence would be a needful requisite toward restoring the grand jury to its former position as an impartial investigative body, free of the district attorney's influence.<sup>226</sup>

4. *Georgia*.—Grand juries in Georgia have the fundamental right to decide whom to indict and for what offense, and grand jury members are explicitly authorized to draw from a wide range of sources of information, including prior personal knowledge of crimes.<sup>227</sup> The Georgia Supreme Court also has observed that "the grand jury is not bound by the charge stated in the order of the magistrate binding the defendant over. Nor are they bound by the presentment of the district attorney. They must make a separate determination as to what offenses have been committed."<sup>228</sup>

Georgia grand juries have broad powers. They are required to "inspect and examine . . . the receipts and disposition of all money arising from fines and forfeitures" by the county school superintendent, the county treasurer, the judge of the probate court, the district attorney, and the clerk of the superior court.<sup>229</sup> Georgia grand juries are also required to inspect county jails, making appropriate

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224. *Id.* at 154-55.

225. *State v. Sullivan*, 105 So. 631, 633 (La. 1925).

226. Shropshire, *supra* note 217, at 170.

227. *E.g.*, GA. CODE ANN. § 15-12-74 (Michie 1990). This section provides that: Grand jurors have a duty to examine or make presentments of such offenses as may or shall come to their knowledge or observation after they have been sworn. Additionally, they have the right and power and it is their duty as jurors to make presentments of any violations of the laws which they may know to have been committed at any previous time which are not barred by the statute of limitations.

*Id.*

228. *Johnson v. State*, 251 S.E.2d 563, 565 (Ga. 1979).

229. GA. CODE ANN. § 15-12-75 (Michie 1990).

recommendations for improvements,<sup>230</sup> public buildings, property, and records.<sup>231</sup> Georgia law also gives the grand jury the right to appoint a single citizen or a committee of citizens to inspect the books and records of county officials. The appointee(s), who report back to the grand jury, have the "power to take full control" of these offices and their records and to "compel the attendance of witnesses." These powers are to be enforced by the superior court of the county.<sup>232</sup> In addition, upon a recommendation from a grand jury, the court must publish the jury's presentments.<sup>233</sup>

This flexibility and independence naturally lends itself to a system in which citizens are permitted direct access to the grand jury. In fact, the court noted in *In re Lester*,<sup>234</sup> that "it is the right of any citizen or any individual of lawful age to come forward and prosecute for offenses against the state, or when he does not wish to become the prosecutor, he may give information of the fact to the grand jury or any member of the body . . . ."<sup>235</sup>

Another feature of the Georgia grand jury system constitutes an additional check on the prosecutor provided by the judiciary. The Georgia legislature recently created "special purpose grand juries" that can be convened if the chief judge of the superior court of any county, or any elected official, requests the calling of such a grand jury and the majority of superior court judges of the county approve.<sup>236</sup> Because of the manner in which they are called, such grand juries have a closer relationship with the judiciary than with the prosecutor, unlike regular grand juries.<sup>237</sup> The very fact that special grand juries are more responsible to the judiciary than to the prosecutor provides a healthy alternative to monopolistic prosecutorial discretion and helps to ensure that citizen concerns will receive proper attention.<sup>238</sup>

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230. *Id.* § 15-12-78.

231. *Id.* § 15-12-79.

232. *Id.* § 15-12-76.

233. *Id.* § 15-12-80.

234. 77 Ga. 143 (1886).

235. *Id.* at 148; *see also* *Switzer v. State*, 65 S.E. 1079, 1081 (Ga. Ct. App. 1909) (noting that special presentments can be made directly to the grand jury).

236. GA. CODE ANN. § 15-12-100 (Michie 1990).

237. Special grand juries file progress reports and a final report with the impaneling judge. Moreover, it is the judges of the county who decide when the special purpose grand jury has finished its work and should be disbanded. *See id.* § 15-12-101.

238. Whether the complainant can get a fair presentation before the grand jury from a reluctant prosecutor is always a question. Fortunately, in Georgia, all grand jury proceedings must be recorded, *id.* § 15-12-83, so a transcript is available for judicial review. Furthermore, the special purpose grand juries seem more responsive to judicial control



5. *Maryland*.—The Maryland courts have perhaps analyzed the issue of direct access to the grand jury in greater depth than the other states in this section. In keeping with the common law, Maryland permits the whistleblower, police brutality victim, or other crime victim direct access to the foreperson of the grand jury—at least after that victim or witness has exhausted other remedies such as approaching the prosecutor and the committing magistrate. This right of access derives from the wide-ranging power of the grand jury to initiate investigations on its own and to gather information from all sources, a power that was recognized early in Maryland's history.<sup>239</sup>

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than to prosecutorial influence. But even as to regular grand juries, there are some indications that the judiciary might not take its usual hands-off attitude toward the prosecutor's presentation in the grand jury, based on the old rationale of separation of powers. In *In re Pending Cases*, Augusta Judicial Circuit, 215 S.E.2d 473 (Ga. 1975), in order to determine their court schedule, the judges of the Superior Court of the Augusta Judicial Circuit asked the prosecutor's office for a list of cases pending in the district attorney's office. The district attorney objected. *Id.* at 474. In ordering the information turned over, the court said: "The separation of powers is fundamental to our constitutional form of government. However, it does not follow that a complete separation is desirable or was intended. Most state constitutions blend these powers to a certain extent." *Id.* The court continued:

The three departments of government are not kept wholly separate in the Georgia Constitution. Such is the case here. Our Constitution requires district attorneys "to perform such other services as shall be required of him by law." GA. CONST. art. VI, § 11, para. 2. One of these statutory requirements is that district attorneys are "otherwise to aid the presiding judge in organizing the courts as he may require." GA. CODE ANN. § 24-2908-3. District attorneys are also required to prosecute all indictable offenses. GA. CODE ANN. § 24-2908-4. They may not *nolle prosequi* a case without the consent of the court. GA. CODE ANN. § 27-1801. In certain instances the presiding judge may appoint a special prosecutor or "command the services of a district attorney of any other circuit accessible." GA. CODE ANN. § 24-2913.

*Id.* at 474-75.

239. As early as 1891, the Maryland Court of Appeals observed that, because of its inquisitorial power, the grand jury could initiate prosecutions on the basis of information derived from sources other than the prosecutor. *Blaney v. State*, 74 Md. 153, 156, 21 A. 547, 548 (1891).

However restricted the functions of grand juries may be elsewhere, we hold that in this State they have plenary inquisitorial powers, and may lawfully themselves, and upon their own motion, originate charges against offenders though no preliminary proceedings have been had before a magistrate, and though neither the court nor the State's Attorney has laid the matter before them. The peace, the government and the dignity of the State, the well-being of society and the security of the individual demand, that this ancient and important attribute of a grand jury should not be narrowed or interfered with when legitimately exerted.

*Id.* at 156, 21 A. at 548. *Accord In re Report of Grand Jury*, Appeal of Perring, 152 Md. 616, 621-22, 137 A. 370, 372 (1927); *see also* *Coblentz v. State*, 164 Md. 558, 570, 166 A. 45, 50 (1933) (noting that a grand jury is "permitted to act upon knowledge obtained by its

In *Brack v. Wells*,<sup>240</sup> the Maryland Court of Appeals made a clear statement of Maryland law on this issue. In *Brack*, the appellant had requested that a writ of mandamus be issued directing the state's attorney to present a case of alleged barratry and perjury to the Baltimore City grand jury.<sup>241</sup> The court declined to issue the writ because Brack still had another remedy available to him:<sup>242</sup>

[T]he petitioner is entitled [to] personally present[] his case to the grand jury . . . . The members of the grand jury in their oath prescribed by the common law, in addition to other things, swore that they would diligently inquire and true presentment make of all such matters and things as shall be given them in charge *or shall otherwise come to their knowledge*. The inquisitorial powers of the grand jury are not limited to cases in which there has been a preliminary proceeding before a magistrate nor to cases laid before them by the Court or State's Attorney. Whatever may be the duties and powers of that important body in other jurisdictions, in Maryland those inquisitorial powers are broad, full and of a plenary character . . . . Under these broad inquisitorial powers the grand jury may, of course, investigate a case which the State's Attorney, in his discretion, has decided not to present to that body. Upon the proper functioning of the grand jury the lives, security, and property of the people largely depend.<sup>243</sup>

On a motion for modification, the state's attorney argued that if all citizens have a right to appear and present a case before the grand jury, the grand jury's scarce resources will be expended on hearing meritless claims.<sup>244</sup> The court denied the prosecutor's motion, explaining that its opinion should not be read as a means for avoiding

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members from any source").

240. 184 Md. 86, 40 A.2d 319 (1944).

241. *Id.* at 88-89, 40 A.2d at 320. Brack had presented the facts to a local magistrate, who declined to take any action. He also had repeatedly presented the evidence to the state's attorney, who persisted in his refusal to act upon Brack's complaint. *Id.* at 89, 40 A.2d at 320. Brack's request for a writ of mandamus was denied by the trial court. *Id.*

242. *Id.* at 90-91, 40 A.2d at 321.

243. *Id.* at 91-92, 40 A.2d at 321-22. The court, however, did not identify the procedure by which this presentment should be made. *See id.* Quoting the United States Supreme Court, the court merely wrote:

"But in this country [it] is for the grand jury to investigate any alleged crime, no matter how or by whom suggested to them, and after determining that the evidence is sufficient to justify putting the party suspected on trial, to direct the preparation of the formal charge or indictment."

*Id.* at 95, 40 A.2d at 323 (quoting *Hale v. Henkel*, 201 U.S. 43, 63 (1906)).

244. *Id.* at 92-93, 40 A.2d at 322.

the traditional prosecutorial process. Rather, approaching the foreman of the grand jury should be the last stage of appeal,<sup>245</sup> but "every citizen has a right to offer to present to the grand jury violations of the criminal law."<sup>246</sup> The court pointed out that it was illogical to have a grand jury to whom only the prosecutor has access, for "[i]f the presentation of cases before the grand jury in Baltimore City is controlled entirely by the state's attorney . . . the question naturally arises as to why there should be a grand jury."<sup>247</sup>

6. *Minnesota*.—In *State ex rel. Wild v. Otis*,<sup>248</sup> the Minnesota Supreme Court determined that a private citizen may not circumvent the public prosecutor by initiating and prosecuting a private criminal prosecution.<sup>249</sup> Because the citizen could not be the prosecutor, the court outlined the courses of action that are available to the private citizen when the prosecutor declines to prosecute, including direct appeal to the grand jury.<sup>250</sup> Though no affirmative "right" to

245. *Id.* at 97, 40 A.2d at 324 ("The citizen should exhaust his remedy before the magistrate and state's attorney as was done in the instant case, and if relief can not be had there, he then has the right to ask the foreman of the grand jury for permission to appear before that body.").

246. *Id.*

247. *Id.* at 96-97, 40 A.2d at 324. Eleven years later the Maryland Court of Appeals reaffirmed the principles of *Brack v. Wells* in *Piracci v. State*, 207 Md. 499, 515, 115 A.2d 262, 268 (1955) (recognizing a citizen's right to approach the grand jury when other avenues had been exhausted).

248. 257 N.W.2d 361 (Minn. 1977), *cert. denied*, 434 U.S. 1003 (1978).

249. *Id.* at 363. Plaintiff Wild first tried to convince two county attorneys to approve criminal complaints against defendants; then he attempted to convince the grand jury directly to indict; and finally, he filed criminal complaints in an effort to prosecute as a private citizen—all without success. *Id.* at 363, 364 n.1. See generally Davis, *supra* note 2.

250. *Otis*, 257 N.W.2d at 364-65. The other alternatives included: persuading a court to appoint another attorney to act in place of the existing county attorney, *id.*; see also MINN. STAT. ANN. § 388-12 (West 1968) ("The judge of any district court may by order entered in the minutes at any term of court appoint an attorney of such court to act as, or in the place of, or to assist, the county attorney at such term, either before the court or grand jury."); appealing to the governor to request that the prosecutor bring forth an indictment, *Otis*, 257 N.W.2d at 364-65; see also MINN. STAT. ANN. § 8.01 (West 1977 & Supp. 1994) (providing that "[w]henver the governor shall so request, . . . [the attorney general] shall prosecute any person charged with an indictable offense"); and attempting to force the prosecutor's hand by seeking a writ of mandamus. *Otis*, 257 N.W.2d at 364-65.

If a crime victim persuades the grand jury to hear his case, there are certain safeguards in the system to ensure that the prosecutor, who is entitled to be present at grand jury proceedings except for deliberations and voting, will allow a presentation of a fair case. MINN. STAT. ANN. § 388.051 (West Supp. 1994) (detailing when the county attorney shall appear before the grand jury and in what capacity). One safeguard against prosecutorial misconduct in the grand jury is that there is a record of it. The Minnesota Rules of Criminal Procedure state that all grand jury proceedings shall be recorded verbatim, including any colloquy between the prosecutor and the grand jurors. MINN. R.

appear before the grand jury exists in Minnesota, the local rules of

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CRIM. P. § 18.05. Thus, if the prosecutor makes an improper statement that tends to reduce the odds of securing an indictment, it will be on record and will enable the court to monitor the fairness of the grand jury presentation both to the defendant and to the victim. *Id.* For example, if a judge observes that the prosecutor engaged in behavior unfair to the victim, the judge may vacate the proceedings and order a new presentation. *See id.* § 18.07 (“The failure to find an indictment or the dismissal of the charge shall not prevent the case from again being submitted to a grand jury as often as the court shall direct.”).

Historically, it has been the criminal defendant—not the victim—who has sought to obtain a copy of grand jury minutes in order to show their inadequacy or unfairness. The court may disclose the grand jury minutes to the defendant if the defense makes a showing that there may have been irregularities in the grand jury proceeding. Section 18.05(1) provides, in relevant part:

The [grand jury] record shall not be disclosed except to the court or prosecuting attorney or unless the court, upon motion by the defendant for good cause shown, or upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury, orders disclosure of the record or designated portions thereof to the defendant or defense counsel.

*Id.* § 18.05(1).

The Minnesota judiciary has been extremely attentive to preserving the independence of the grand jury. When prosecutors have overstepped the boundaries, Minnesota courts have hastened to dismiss indictments. *E.g.*, *State v. Grose*, 387 N.W.2d 182 (Minn. Ct. App. 1986) (dismissing an indictment against an attorney for suborning perjury because of prosecutorial misconduct before the grand jury, including giving improper legal advice and giving misleading instructions). One particularly telling example occurred in *State v. Johnson*, 441 N.W.2d 460 (Minn. 1989), in which a four judge panel concluded that the county attorney had subverted the independence of the grand jury by threatening to seek out absent jurors and bring them back to the grand jury by police car, instructing the grand jury to keep in mind his office’s “higher” standard of probable cause, discussing trial strategy, improperly instructing the jurors on probable cause, and asking the jurors not to “overwhelm him with charges.” *Id.* at 464-65. There were other errors as well that ultimately lead the appellate court to disagree with the panel’s holding of harmless error. *Id.* at 464-66.

The errors in this case, although not of the magnitude in *Grose*, justify the same result. Threatening members of the grand jury that they could be picked up by police, handing out instructions from previous grand jurors, and giving inaccurate instructions on probable cause and the effect of a failure to indict are the types of errors that seriously undermine the integrity and independence of the grand jury.

Prosecutors must not take advantage of their role as representatives of the state to influence unduly or unfairly a grand jury’s decision.

....  
*The grand jury is not intended to be a tool of the prosecution or the defense. It is an arm of the judiciary and, as such, it shall be used in a fair, impartial and independent manner or not at all. This decision is necessary to protect not only the defendants, but all of us as well.*

*Id.* (emphasis added). The language in the final paragraph of the above quote—“all of us as well”—indicates both that the court is serious about the grand jury maintaining its independence and that the court is determined to make sure that grand jury presentations are fair to defendants and victims alike.

criminal procedure permit it.<sup>251</sup> Additionally, the court noted, “permitting citizens to take complaints directly to this body serves as a kind of ‘safety valve’ and has much to commend it.”<sup>252</sup>

Although the Minnesota Supreme Court in *Otis* stopped short of finding that a private citizen has a “right” to approach the grand jury directly,<sup>253</sup> Minnesota case law clearly recognizes that the public prosecutor does not have a monopoly on the initiation of criminal prosecutions.<sup>254</sup> In order for the grand jury and the prosecutor to serve as effective checks on one another, the average citizen must have access to the grand jury. Understandably, then, the Minnesota statutory structure consistently has supported the judiciary’s view of a strong, independent grand jury.<sup>255</sup> Specifically, Minnesota statutes provide that “[i]f a member of the grand jury shall know or have reason to believe that a public offense has been committed which is triable in the county, he shall declare the same to his fellow jurors, who shall thereupon investigate the same.”<sup>256</sup> Moreover, the grand jury is obligated to inquire into the condition of unindicted prisoners, into the status and administration of prisons within the county, and “[i]nto the wilful and corrupt misconduct in office of all public officers in the county.”<sup>257</sup> The misconduct of all “public officers”—including police officers—is the responsibility of the grand jury to ferret out. This task is made easier, no doubt, by the fact that the grand jury is also permitted access to the prisons and to “all public records in the county.”<sup>258</sup> With these broad powers, the grand jury represents an even more important check on prosecutorial misconduct and a source of redress for citizens who are victims or witnesses to governmental misconduct, including police brutality.

#### *B. States Authorizing Direct Access to the Grand Jury by Statute*

There are four states which have enacted legislation allowing crime victims and witnesses direct access to the grand jury: California, Tennessee, Colorado, and Nebraska.

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251. *Otis*, 257 N.W.2d at 364.

252. *Id.*

253. *Id.*

254. *See supra* note 250 and cases cited therein.

255. *Otis*, 257 N.W.2d at 364; *see also* *Standke v. B.E. Darby & Sons, Inc.*, 193 N.W.2d 139, 143 (Minn. 1971) (holding that the grand jury “has investigatory powers, including the power to investigate on its own initiative situations where it has reason to believe a public offense has been committed”), *cert. denied*, 406 U.S. 902 (1972).

256. MINN. STAT. ANN. § 628.60 (West 1993).

257. *Id.* § 628.61.

258. *Id.* § 628.62.

1. *California*.—California's elaborate statutory scheme creates an extremely powerful grand jury. Not only does the grand jury have the power to "inquire into all public offenses committed or triable within the county and present them to the court by indictment,"<sup>259</sup> but it also has its own preapproved budget for investigative activities<sup>260</sup> and can select its own method of proceeding.<sup>261</sup> Under appropriate circumstances, the grand jury may even hold public sessions.<sup>262</sup> Furthermore, California grand juries may investigate county, city, district, and housing affairs,<sup>263</sup> as well as all real estate transactions.<sup>264</sup> They have free access to prisons and may, without charge, inspect any public record in the county.<sup>265</sup>

Grand juries may investigate and report on the salaries of elected county officials<sup>266</sup> and the needs of county officers.<sup>267</sup> They may review the case of any unindicted prisoner who is languishing in the county jail,<sup>268</sup> and they may oversee the conditions and management of the county prisons.<sup>269</sup> Perhaps most importantly, "[t]he grand jury shall inquire into the willful or corrupt misconduct in office of public officers of every description within the county."<sup>270</sup> To carry out these inquiries, the grand jury may retain the services of various experts,<sup>271</sup> including auditors and appraisers.<sup>272</sup>

Although these powers are expansive, the California grand jury has yet another powerful weapon at its disposal: the accusation.<sup>273</sup> The grand jury may make an accusation in writing against any public

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259. CAL. PENAL CODE § 917 (West 1985); *see also* *Samish v. Superior Court*, 83 P.2d 305, 306-07 (Cal. Ct. App. 1938) (holding that when grand jurors have reliable information indicating that an indictable offense has been committed, it is their duty to investigate the charges fairly and fearlessly and if the evidence warrants, to issue an indictment).

260. CAL. PENAL CODE § 914.5 (West 1985).

261. *Id.* § 916.

262. *Id.* § 939.1.

263. *Id.* § 914.1.

264. *Id.* § 920 (including the direction of escheat proceedings).

265. *Id.* § 921.

266. *Id.* § 927.

267. *Id.* § 928.

268. *Id.* § 919(a).

269. *Id.* § 919(b).

270. *Id.* § 919(c). Interestingly, a person is incompetent to sit on a grand jury in California if he or she is an elected public official. *Id.* § 893(b)(4).

271. *Id.* § 926(a).

272. *Id.* § 926(b).

273. CAL. GOV'T CODE § 3060 (West 1980).

officer for willful or corrupt misconduct in office.<sup>274</sup> If the official pleads “not guilty” to the accusation, then a jury trial similar to a criminal trial is conducted.<sup>275</sup> Further, conviction at the trial or a guilty plea will result in the officer’s removal from office.<sup>276</sup>

A recent charge to the grand jury of Los Angeles County, given by Supervising Judge Klausner for the Criminal Division of the Los Angeles Superior Court, illustrates the qualities and the potential power of a California grand jury.<sup>277</sup> Pertinent to the issue of whether citizens may approach the grand jury directly, the judge’s charge emphasized that the grand jury is an independent body,<sup>278</sup> and that as “the direct successor of the common law grand jury,” the body serves both as “a safety valve” and as an opportunity for citizens to monitor governmental agents “which appear to be destructive of

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274. *Id.* At least 12 of the grand jurors must concur before that body can issue the accusation.

275. *Id.* §§ 3069-70.

276. *Id.* § 3072.

277. Gary Klausner, Charge to the Grand Jury (July 1, 1991) [hereinafter Klausner, Jury Charge] (on file with the author). The charge is composed of a cover page, a three-page table of contents, a one-page oath to be taken by the jurors (required by CAL. PENAL CODE § 911 (West 1985)), a five-page charge to the grand jury, a thirty-four page description of the history, role, and procedures of the grand jury, followed by seventeen pages of pertinent California statutes.

The procedure section, which goes into exhaustive detail, explains how California grand juries are divided into committees.

It is suggested that you form committees for the preliminary consideration of matters in the various fields of activity in which you will function. Regarding committees for the expeditious handling of the business of the grand jury, the following list, drawn from previous grand juries, illustrates the concerns of recent grand juries:

- a. Administrative
- b. Audit
- c. Criminal Complaints
- d. Jails
- e. Juvenile and/or Elderly Concerns
- f. Education
- g. Social Services
- h. Health and Hospital
- i. Environmental Concerns
- j. Editorial

You may change, modify, or add to the committees suggested above, and you may authorize the appointment of any additional or special committees that may seem necessary for you to carry out the work of the grand jury. The audit, criminal complaints, and jails committees are considered essential by most grand juries because of your mandates to audit the county, examine criminal complaints, and inspect the jails.

Klausner, Jury Charge, *supra*, at 3-4.

278. *Id.* at 1.

our social order.”<sup>279</sup>

Furthermore, Judge Klausner’s charge discussed the proper relationship between the district attorney and the grand jury.<sup>280</sup> Among his other duties, the district attorney must help the jurors evaluate citizen complaints received by mail, and must suggest other avenues of redress, if appropriate. Regarding these citizen complaints, the judge wrote, “Some [of these claims] may result in disclosure of offenses that would not otherwise have been brought to light. When you obtain information indicating an offense or misconduct within your jurisdiction, it is [the grand jury’s] duty to take appropriate action.”<sup>281</sup>

Nevertheless, although the law clearly permits it, California grand juries rarely have instigated investigations or indictments on the basis of direct citizen complaints.<sup>282</sup> In fact, almost all of the cases examined by California grand juries have been brought by district attorneys.<sup>283</sup>

2. *Tennessee*.—Tennessee case law makes it clear that the grand jury is an arm of neither the court nor the prosecutor’s office; rather, it exists as a separate agency of government that may act independently of either.<sup>284</sup> Tennessee law expressly protects the grand jury from prosecutorial dominance: the prosecutor may attend grand jury proceedings only at the request of that body.<sup>285</sup> In addition, the judge is required to inform the grand jury expressly of this fact.<sup>286</sup>

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279. *Id.* at IV.

280. *Id.* at 5-7.

281. *Id.* at 13-14. Interestingly, the charge emphasized that a very small percentage of these private claims would be deserving of their attention. *Id.* at 13.

282. Karl Kinaga & Robert F. Jordan, *Some Limitations and Controls of the California Grand Jury System*, 2 SANTA CLARA L. REV. 78 (1962).

283. Norbert Ehrenfreund et al., *Report of the Grand Jury Committee, San Diego County Bar Association*, 9 SAN DIEGO L. REV. 145, 156 (1972).

284. “It is incontestable, therefore, that the inquisitorial function and power of the Grand Jury derive directly from our State Constitution itself and are grounded therein.” *State v. Hudson*, 487 S.W.2d 672, 675 (Tenn. Crim. App. 1972). *E.g.*, *Stanley v. State*, 104 S.W.2d 819, 822 (Tenn. 1937) (“The grand jury is not an agency of the district attorney or of the court. Under our system, it is an agency of the government and may act independently of the court and district attorney.”); *Parton v. State*, 455 S.W.2d 645, 647 (Tenn. Crim. App. 1970) (citing *Stanley* with approval); *State v. Marks*, 464 S.W.2d 326, 328 (Tenn. Crim. App. 1970) (citing *Parton* and *Stanley*).

285. TENN. CODE ANN. § 8-7-501 (1981) (“Whenever required by the grand jury, the district attorney general or his designated assistant may attend before that body for the purpose of assisting in its inquiries, which assistance may include the examination of witnesses and the giving of legal advice as to any matters cognizable by that body . . .”).

286. *Id.* § 8-7-503.



As in other states, Tennessee empowers its grand juries to inquire into the conditions of prisons and other public buildings,<sup>287</sup> the county treasury,<sup>288</sup> the sufficiency of local bonds,<sup>289</sup> and any misconduct by state or local officers.<sup>290</sup> The Tennessee statute also allows both crime victims and witnesses direct access to the grand jury.<sup>291</sup> The legislature enacted this provision specifically to provide the general public greater access to, and more information about, the grand jury.<sup>292</sup>

The Tennessee grand jury process begins when the court clerk publishes notices in local newspapers stating that it is the responsibility of the grand jurors to inquire into any indictable offense committed in the county.<sup>293</sup> Anyone with knowledge of an offense may apply for permission to appear before the grand jury;<sup>294</sup> testimony is given under oath, and rendering false statements to the grand jury constitutes perjury.<sup>295</sup> An application to testify must be submitted to the foreman accompanied by a sworn affidavit of the facts or a summary of the proof alleged.<sup>296</sup> The affidavits provide a logical method by which the grand jury can sort out the petty and false complaints from the genuine reports of crime and victimization. The applicant may select two grand jurors who, with the foreman, will constitute a panel that will rule on whether the application merits

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287. TENN. R. CRIM. P. 6(e)(3).

288. *Id.* R. 6(e)(4).

289. *Id.* R. 6(e)(5).

290. *Id.* R. 6(e)(6).

291. TENN. CODE ANN. § 40-12-104 to -105 (1978). Actually, direct access to the grand jury theoretically is available not just to eyewitnesses and victims but also to those who have hearsay knowledge of a crime. *Waugh v. State*, 564 S.W.2d 654, 659 (Tenn. 1978); *State v. Grady*, 619 S.W.2d 139 (Tenn. Crim. App. 1979); *Gammon v. State*, 506 S.W.2d 188, 190 (Tenn. Crim. App. 1973); *State v. Marks*, 464 S.W.2d 326, 328 (Tenn. Crim. App. 1970); *Parton v. State*, 455 S.W.2d 645, 648 (Tenn. Crim. App. 1970).

292. Tape of Representative Bussart, remarks before the 90th Tennessee General Assembly (Mar. 9, 1978) (audiotape H-122) (on file with the author and with the Legislative History Staff, State Library and Archives, Department of State, State of Tennessee). *See also* *State v. Crane*, 780 S.W.2d 375, 377 (Tenn. Crim. App. 1989) (stating that the purpose of this act is to provide greater access to the grand jury by "aggrieved citizens," as well as to restore victims' faith in the criminal justice system), *cert. denied*, 495 U.S. 906 (1990). The legislation was a compromise bill, used to head off a competing bill that would have established a citizen's review panel for police misconduct. Tape of Representative Bussart, remarks before the 90th Tennessee General Assembly, *supra*.

293. TENN. CODE ANN. § 40-12-105 (1978). The notice is to be published 30 to 40 days prior to the grand jury's scheduled date to convene. *Id.*

294. *Id.* The notice provides the foreman's name and address and the date and place of the next meeting of the grand jury. *Id.*

295. *Id.* § 40-12-104(d).

296. *Id.* § 40-12-104(a)-(b).

investigation by the entire grand jury.<sup>297</sup> There is some confusion concerning how an applicant can discover the names of two other grand jurors besides the foreman,<sup>298</sup> but the simple fact that the applicant can choose the panel that will review his or her application is itself a remarkable example of populism.<sup>299</sup> The panel's decision on the application is final<sup>300</sup> and is reported promptly to the applicant with the reasons for the decision.<sup>301</sup> That the foreman should serve on all panels may seem an inefficient way to proceed; on the other hand, perhaps the frequency with which the foreman must make decisions on applications will enable him or her to better withstand intimidation by the prosecutor or the court.<sup>302</sup>

In sum, in Tennessee, "no one may prevent a person from appearing before a grand jury. Indeed, *it is his duty to do so* if he has evidence of a crime."<sup>303</sup> In reality, however, few citizens submit

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297. *Id.* § 40-12-104(c). In making the determination whether the grand jury should hear the applicant's case, the panel may consult with the prosecutor or the court. These outside sources of information may provide the panel with background information or broader perspective on why no action was taken previously. *See also supra* notes 285-286 and accompanying text.

298. This confusion arguably is the result of legislative oversight. The original bill required that the newspaper notice list both the foreman and the other members of the grand jury. During consideration of the bill, however, it was pointed out that one could not list the grand jurors one month ahead of time because they frequently were not selected until the day on which the grand jury convened. Consequently, the House deleted the requirement. Tennessee Senate Consent Calendar, March 22, 1978, at 2 (describing Senate Bill 2059 and House Bill 2149). The legislature apparently neglected to revise § 40-12-104(c) to reflect the fact that the applicant could not select two members of that grand jury until after the jury actually was impaneled.

299. In reality, the legislative intent may be frustrated by tactics such as those that occurred in *Gann v. Whitley (In re Reed)*, 770 S.W.2d 557, 559 (Tenn. Crim. App. 1989), in which the foreman of the grand jury created a panel comprised of himself, the two jurors selected by the applicant, and two additional jurors the foreman had chosen. *Id.* at 559. If the foreman is permitted to add two jurors of his own choice to the panel, potentially shifting the alignment against the applicant, then the result, as in *Gann*, may be a denial of the application. *See id.*

300. *Gann*, 770 S.W.2d at 560-61.

301. TENN. CODE ANN. § 40-12-104(c) (1978).

302. It can be valuable to have a more seasoned leader on the grand jury because many grand jurors are intimidated by the technicalities of the judicial process. Thus, "they look[] to the more mature members of the grand jury to represent them in their confrontations with the district attorney." Carp, *Harris County Grand Jury*, *supra* note 93, at 96-97 (discussing juror attitudes in Harris County, Texas).

303. *Watts v. Civil Serv. Bd. For Columbia*, 606 S.W.2d 274, 282-83 (Tenn. 1980) (emphasis added). Nevertheless, the court upheld the dismissal of a police officer who had been fired after appearing before a grand jury because the court believed he was dismissed for other reasons. Chief Justice Brock agreed with the court's sentiments concerning the right to appear before a grand jury, but dissented from the majority's application of those rights in the case of a self-styled "Ralph Nader" of the Columbia,

applications, either for fear of retaliation or repercussions from offering testimony, or out of apathy, helplessness, or ignorance.<sup>304</sup>

3. *Colorado*.—One of the explicit purposes of the Colorado Code of Criminal Procedure is “the effective apprehension and trial of persons accused of crime . . . .”<sup>305</sup> To satisfy this goal, Colorado law provides—in the broadest language—that any person who wants to appear or testify may have access to the grand jury, the district attorney, and the court.<sup>306</sup>

Tennessee police force:

Stripped of the protective verbiage surrounding it, the plain truth is that the plaintiff was fired because he testified before a grand jury in violation of an ultimatum from the Chief of Police that he not do so.

“ . . . .  
This attempted “gag order” is invalid, however, for a different reason, i.e., every citizen has access to testify before the grand jury in this state. Any attempt to cut off that access is against public policy. The grand jury may act by presentment as well as indictment. It is absolutely intolerable in a free society that any public employee may be forbidden to go before a grand jury and give testimony of facts within his knowledge respecting criminal offenses. Police officers sometimes become aware of criminal offenses committed by other police officers or their superiors, or their civilian cronies. When this occurs, is the officer to run the risk of losing his employment if he testified before the grand jury with respect to such offenses in spite of a “gag order” such as the one here? Let us hope not.

*Id.* at 284-85 (Brock, C.J., dissenting).

304. Cases such as *Watts* are likely to chill the exercise of such rights despite the stirring dissents of judges.

305. COLO. REV. STAT. ANN. § 16-1-103 (West 1986).

306. Section 16-5-204(4)(l) states:

Any person may approach the prosecuting attorney or the grand jury and request to testify or retestify in an inquiry before a grand jury or to appear before a grand jury. The prosecuting attorney or the grand jury shall keep a record of all denials of such requests to that prosecuting attorney or grand jury, including the reasons for not allowing such person to testify or appear. If the person making such request is dissatisfied with the decision of the prosecuting attorney or the grand jury, such person may petition the court for hearing on the denial by the prosecuting attorney or the grand jury. If the court grants the hearing, then the court may permit the person to testify or appear before the grand jury, if the court finds that such testimony or appearance would serve the interest of justice.

*Id.*

The Colorado Constitution buttresses the attitude of openness toward the grand jury embodied in the above quoted statute. Article II, § 24, entitled “Right to assemble and petition,” states that “[t]he people have the right peaceably to assemble for the common good, and to apply to those invested with the powers of government for redress of grievances, by petition or remonstrance.” COLO. CONST. art. II, § 24. The petition clause of this section has been interpreted as specifically granting Colorado citizens a right of access to the courts. *Protect Our Mountain Env’t Inc., v. District Court*, 677 P.2d 1361, 1365 (Colo. 1984). Article II, § 6 declares that “[c]ourts of justice shall be open to every

In effect, the grand jury statute gives the victim or witness three bites at the apple. A crime victim may approach the district attorney and request a prosecution.<sup>307</sup> If the prosecutor refuses to prosecute, the victim may ask the grand jury to hear his or her testimony and to conduct an investigation.<sup>308</sup> Both the district attorney and the grand jury must keep a record of denials of such requests, including the reasons for their denial.<sup>309</sup> Finally, if the victim is unsatisfied with the district attorney's or the grand jury's decision, he or she can petition the court to order the grand jury to allow the victim to testify before it.<sup>310</sup> The court's determination is based upon whether the "testimony or appearance would serve the interest of justice."<sup>311</sup>

Because hearsay evidence is admissible at a preliminary hearing in Colorado,<sup>312</sup> it follows that such evidence is admissible before the grand jury. Thus, the phrase "any person" in section 16-5-204(4)(1) would not appear to prohibit someone who has only hearsay evidence to offer from appearing before the grand jury. Furthermore, by permitting the citizen to "approach the prosecuting attorney or the grand jury" this section empowers the applicant to approach both the grand jury and the prosecutor, as necessary. The statute, however, does not provide a mechanism by which the applicant may contact the grand jury. Similarly, although the second sentence of this section mandates that "[t]he prosecuting attorney or the grand jury shall keep a record of all denials of such requests to [testify or appear made to] that prosecuting attorney or grand jury, including the reasons for not allowing such persons to testify or appear,"<sup>313</sup> the

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person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay." COLO. CONST. art. II, § 6.

307. COLO. REV. STAT. ANN. § 16-5-204(4)(1) (West 1986).

308. *Id.* The grand jury may petition the court to appoint an investigator to assist the grand jury, and the investigator may attend the sessions of the grand jury. COLO. R. CRIM. P. 6.5.

309. COLO. REV. STAT. ANN. § 16-5-204(4)(1) (West 1986). The statute does not specify in what manner these records are to be kept, how detailed they must be, or whether they are available to the public. Similarly, nothing in the statute forbids or mandates the keeping of records of *successful* applications to testify. If one wished to know how this statute was working, one would want to know the details of both successful and unsuccessful applications.

310. H. Jeffrey Bayless, *Grand Jury Reforms: The Colorado Experience*, 67 A.B.A. J. 568, 570 (1981).

311. COLO. REV. STAT. ANN. § 16-5-204(4)(1) (West 1986); *see also* Bayless, *supra* note 310, at 570. The grand jury also may issue an indictment based on the knowledge of two of its members. COLO. R. CRIM. P. 6(b).

312. *People v. Quinn*, 516 P.2d 420, 422 (Colo. 1973).

313. COLO. REV. STAT. ANN. § 16-5-204(4)(1) (West 1986).

statute does not specify in what manner these records are to be kept, how detailed they must be, or whether they are available to the public. It is also noteworthy that the statute fails to specify the form of the petition and of the "hearing" this section guarantees to petitioners whose request is denied.<sup>314</sup>

Even a merely "dissatisfied" applicant may "petition the court for hearing" under this section<sup>315</sup> if that applicant's appearance is so constricted by the prosecutor that the prosecutor's restriction could constitute a *de facto* denial of a "hearing."<sup>316</sup> Neither the court nor the grand jury may exclude the district attorney from their proceed-

314. An interpretation of the word "hearing" arose in an unrelated, but analogous, context. In *Moody v. Larsen*, 802 P.2d 1169 (Colo. Ct. App. 1990) the Colorado Court of Appeals construed the word "hearing" in § 16-5-209 to provide:

The convening of a hearing presupposes that evidence will be introduced during such proceeding. "The word ['hearing'] contemplates not only the privilege to be present when the matter is being considered but [also] the right to present one's contention and to support the same by proof and argument." . . .

. . . .

[W]e conclude that § 16-5-209 calls for the usual type of hearing in which both parties are given the opportunity to present evidence and argument. *Id.* at 1171 (quoting *Brown v. Brown*, 422 P.2d 634 (1967)).

In *Moody*, the complainant, the sister of a murder victim, invoked this section in an attempt to have the judge direct the district attorney either to prosecute or to order the appointment of a special prosecutor. In a ruling for the complainant, the court interpreted the word "hearing" in the statute to require that the complainant be allowed to present her own witnesses and rebuttal witnesses. In addition to the right to cross-examine the District Attorney, the court found that the complainant should have had the right to pretrial discovery. *Id.* at 1171-73.

315. COLO. REV. STAT. ANN. § 16-5-204(4)(1) (West 1986).

316. Additional safeguards ensure that the prosecutor's presentation to the grand jury will be fair and objective. For example, all grand jury proceedings are recorded. *Id.* § 16-5-204(f) ("All grand jury proceedings and testimony from commencement to adjournment shall be reported."); COLO. R. CRIM. P. 6.4. The court can entertain a motion by the defense to inspect the record and dismiss an indictment if it is not supported by probable cause. COLO. REV. STAT. ANN. § 16-5-204(4)(k) (West 1986). Even the colloquy between the grand jurors and the prosecutor may be provided to the defense counsel under proper circumstances. *People v. District Court*, 610 P.2d 490, 493 (Colo. 1980). In addition, a specific provision exists under the Colorado rules of procedure that permits a grand jury witness, including the victim or complainant, "for good cause shown," to obtain "a transcript of his own grand jury testimony, or minutes, reports, or exhibits relating to them." COLO. R. CRIM. P. 6.9.

Another powerful tool within the grand jury access law for ensuring a fair grand jury presentation by the prosecutor is the provision under which an applicant may request to retestify in an inquiry before a grand jury. COLO. REV. STAT. ANN. § 16-5-204(4)(l) (West 1986). Because the court must determine whether to permit the person to retestify before the grand jury, the court would have to inspect the minutes of the grand jury proceeding, the applicant's prior testimony in particular, to see if retestifying is warranted. Regular applications to retestify would force the court to monitor the fairness of the prosecutor's original presentations. *Cf. supra* note 250 (discussing safeguards on the fairness of grand jury presentations in Minnesota).

ings.<sup>317</sup> Therefore, protections against a potentially overreaching prosecutor are warranted.

Finally, the statute's concluding sentence leaves room for interpretation: "If the court grants the hearing, then the court may permit the person to testify or appear before the grand jury, if the court finds that such testimony or appearance would serve the interest of justice."<sup>318</sup> No explanation or definition of "the interest of justice" is provided, but giving an alleged victim of either police brutality or other governmental misconduct a right to be heard should come within the purview of such a sweeping proviso. This is especially true in light of the fact that the complainant can be held liable for all costs of the proceeding if the complaint is false and frivolous. There is thus a strong disincentive to bring false complaints.<sup>319</sup>

Notwithstanding the sophistication of Colorado's grand jury statute, that remedy for injustice is greatly underutilized:

The vast majority of prosecutions in Colorado are initiated by information. Only counties with a population of more than 100,000 have a regularly selected standing grand jury. Special grand juries may, of course, be selected for smaller jurisdictions upon proper motion, but that is a rare occurrence. There are generally only a handful of regularly sitting grand juries in Colorado, and the indictment is utilized in less than 1 per cent of all felony cases filed in the state.<sup>320</sup>

The decision to use the grand jury so sparingly is a decision made by the public prosecutors in the state. This underutilization of the grand jury is another reason why citizens who are victims of police criminality, governmental corruption, or even other, more mundane crimes should invoke Colorado law to bring their complaints to the attention of grand juries. Where grand juries are not in session, citizens may apply to the chief judge of the local district court for the convening

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317. See *People ex rel. District Attorney v. District Court*, 205 P.2d 829 (Colo. 1924) (construing a prior similar grand jury statute, Colorado Laws § 5979 (1921), and concluding that the grand jury could not exclude the district attorney when he was examining a witness); see also COLO. REV. STAT. ANN. § 20-1-106 (West 1986) (providing that the district attorney must attend all sessions of the grand jury, advise the jurors on the law, and examine all subpoenaed witnesses).

318. COLO. REV. STAT. ANN. § 16-5-204(4)(1) (West 1986).

319. *Id.* § 16-18-103; see also *id.* § 16-18-104 (providing that if the applicant later fails to provide testimony at trial, or is found to have brought the proceedings "maliciously," the applicant will pay the cost of the proceedings).

320. Bayless, *supra* note 310, at 572.

of a grand jury. The chief judge of any district court is entitled to order a grand jury called "where authorized by law or required by the public interest."<sup>321</sup>

4. *Nebraska*.—Nebraska's system of citizen access to the grand jury is virtually identical to that of Colorado. Indeed, the key section, which permits a citizen who wants to appear or testify before the grand jury to apply to the prosecutor, the grand jury, and the court, is identical.<sup>322</sup> As a result, much of the analysis of Colorado's system also is applicable to Nebraska's scheme and will not be repeated here at length.

As in Colorado, all grand jury proceedings in Nebraska are recorded.<sup>323</sup> Thus, the Nebraska courts may examine the minutes of a grand jury proceeding to determine whether an indictment should be dismissed for lack of probable cause.<sup>324</sup> In addition, a witness/complainant who testifies before the grand jury may apply to the court to review a transcript of his or her testimony in order to show unfairness or improper influence by the prosecutor.<sup>325</sup> Moreover, as in Colorado,<sup>326</sup> a person who has appeared before the grand jury may file an application to "retestify" pursuant to section 29-1410.01 of the Nebraska Code.<sup>327</sup> If the application to retestify

321. COLO. R. CRIM. P. 6(a) ("The chief judge of the district court in each county or a judge designated by him may order a grand jury summoned where authorized by law or required by the public interest.").

322. NEB. REV. STAT. § 29-1410.01 (1989). The only difference is the addition of the letter "s" on the end of the word "interest," in the clause "interests of justice."

At the time of its proposal, discussion over the derivation of the bill's language partially revealed its Coloradan origin. *Public Hearing on LB 534, Comm. on the Judiciary*, Nebraska State Legislature 52 (Feb. 13, 1979) (statement of Senator Ernie Chambers [hereinafter *Public Hearings*]; cf. COLO. REV. STAT. § 16-5-204(4)(l) (West 1986); see *supra* note 306).

323. NEB. REV. STAT. § 29-1407.01 (1989); cf. COLO. REV. STAT. ANN. § 16-5-204(4)(f) (West 1986); COLO. R. CRIM. P. 6.4; see also *supra* note 316 (discussing the use of the recording requirement in Colorado's statute to ensure fairness in prosecutorial grand jury presentations).

324. NEB. REV. STAT. § 29-1418(3) (1989); cf. COLO. REV. STAT. ANN. § 16-5-204(4)(k) (West 1986).

325. NEB. REV. STAT. § 29-1407.01(2) (1989); cf. COLO. REV. STAT. ANN. § 16-5-204(4)(g) (West 1986).

326. See *supra* note 316 (discussing the option to "retestify" within the Colorado statutory scheme).

327.

Any person may approach the prosecuting attorney or the grand jury and request to . . . retestify . . . . If the person making [a] request [to retestify] is dissatisfied with the decision of the prosecuting attorney or the grand jury, such person may petition the court for hearing on the denial by the prosecuting attorney or the grand jury. If the court grants the hearing, then the court may permit the

is denied by the prosecutor and the grand jury, the court can review the grand jury transcript to determine whether retestifying is warranted in the "interests of justice."<sup>328</sup> Although one might logically expect that the application to retestify would become the normal vehicle by which to have the court determine whether the prosecutor's initial presentation to the grand jury was objective and fair toward the victim, section 29-1416(2) presents a potential problem in utilizing the statute in this manner:

Once a grand jury has returned a no true bill based upon a transaction, a set of transactions, event, or events, *a grand jury inquiry into the same transaction or events shall not be initiated unless the court finds, upon proper showing by the prosecuting attorney, that the prosecuting attorney has discovered additional evidence relevant to such inquiry.*<sup>329</sup>

It is unclear how a Nebraska court would attempt to reconcile sections 29-1410.01 and 29-1416(2) when a person applied to *retestify*.<sup>330</sup> In any case, this last section does not affect the *initial* application to testify before the grand jury.

In addition to the safeguards adopted from the Colorado grand jury law, Nebraskans have another statutory weapon to address cases of official misconduct. By statute, the county attorney may always appear before the grand jury to render legal advice and examine witnesses.<sup>331</sup> When it becomes evident that "official acts of county officials" are to be investigated, however, the foreman of the grand jury must immediately contact the governor, who must appoint a special prosecutor for the matter.<sup>332</sup> This section provides a power-

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person to testify or appear before the grand jury if the court finds that such testimony or appearance would serve the interests of justice.

NEB. REV. STAT. § 29-1410.01 (1989).

328. *Id.*

329. *Id.* § 29-1416(2) (1989) (emphasis added). It is unclear whether this applies to the grand jury that voted the no true bill or to subsequent grand juries only.

330. Perhaps the witness would have to submit his application to retestify *before* the grand jury returned a no true bill.

331. *Id.* § 29-1408.

332. *Id.* The relevant portion of this section reads:

[W]henever it shall be made to appear to the judge or judges of the district court that investigation should be made regarding *official acts of county officials*, the foreman shall forthwith notify the Governor of the state, who shall forthwith appoint a special prosecutor to appear and act in the place of the county attorney or the assistant county attorney in all matters relating thereto before such grand jury in like manner as though county attorney; and the county attorney or the assistant county attorney shall be excluded from the presence of the grand jury during all proceedings which relate to the subject matter for which the special prosecutor was appointed . . . .



ful mechanism by which a citizen can bring a case of official misconduct before a grand jury and have a special prosecutor appointed to investigate and prosecute. Although what constitutes "official acts of county officials" is not entirely clear, this category would seem to include police brutality and criminality.

Grand juries are relatively rare in Nebraska.<sup>333</sup> Although this undoubtedly presents a significant barrier, the hurdle is not necessarily an insurmountable one because the Nebraska legislature has also provided a method for *requiring* the district courts to call a grand jury upon the petition of a certain percentage of voters.<sup>334</sup> If the judge fails to assess the sufficiency of the petition or fails to convene the grand jury within the time set forth by statute, the clerk of court must immediately call the grand jury.<sup>335</sup> If the judge and the clerk of court both fail to convene the grand jury, the petitioners may request that the chief justice of the Nebraska Supreme Court review their petition and impanel a grand jury.<sup>336</sup>

Nebraskans have used this petition power several times in recent years. When the state's largest industrial finance and loan institution became insolvent in 1983, a group of citizens formed the Nebraska Depositors Action Committee and called for a grand jury investigation.<sup>337</sup> The Committee submitted more than ten thousand signatures.<sup>338</sup> At other times the mere threat of a grand jury investigation was sufficient. For example, in 1986, the Bellevue, Nebraska, city administrator—who had held that post for more than a decade—indicated his intention to resign in the face of a mounting petition drive.<sup>339</sup> "The resignation reports came on the heels of a disagree-

*Id.* (emphasis added).

333. See *Public Hearings*, *supra* note 322, at 53 (colloquy between Senators Nichol and Chambers); see also NEB. REV. STAT. § 29-1401 (1989) (giving district court judges the power to impanel a grand jury when the "court may deem necessary").

334.

It shall be mandatory for such district courts to call a grand jury in each case upon the petition of the registered voters of the county of the number of not less than ten per cent of the total vote cast for the office of Governor in such county at the most recent general election held therein for such office.

NEB. REV. STAT. § 29-1401 (1989). The statute sets out the precise format for the petition, *id.* § 29-1401.01, and an extraordinarily complicated procedure for its filing. *Id.* § 29-1401.02.

335. *Id.* § 29-1401.02(7). The statute permits the judge 15 days in which to call the grand jury. *Id.*

336. *Id.* § 29-1401.02(8).

337. *Committee Files Petitions For Commonwealth Investigation*, UPI, Mar. 1, 1984, available in LEXIS, News Library, Arcnws File.

338. *Id.*

339. *Regional News*, UPI, May 29, 1986, available in LEXIS, News Library, Arcnws File.

ment over city council expenses and a resulting petition drive that [sought] a grand jury investigation.”<sup>340</sup>

Perhaps the best-known Nebraska case involving petitioning for a grand jury occurred in the case of the disappearance of Joyce Cutshall’s nine-year-old daughter Jill in August 1987.<sup>341</sup> After a long police investigation, the police placed her daughter’s case on “semi-active” status.<sup>342</sup> Cutshall was “outraged.”<sup>343</sup> Volunteers organized and gathered signatures.<sup>344</sup> The grand jury indicted a man who was ultimately convicted of one count of kidnapping with intent to sexually assault a child.<sup>345</sup>

This grand jury petitioning statute was also applied directly in an instance of police brutality, but with only mixed results. Richard Kellin, a thirty-five-year-old African-American man, died of a skull fracture after being arrested for disorderly conduct and having an altercation with Omaha police officers in the jail detention area.<sup>346</sup> An internal police investigation cleared the officers involved;<sup>347</sup> the Douglas County Attorney’s office reviewed the case and found no evidence of police wrongdoing.<sup>348</sup> As a result, a watchdog coalition of African-Americans in Omaha circulated petitions in an attempt to convene a grand jury. Unofficial results indicated that the drive had accumulated the requisite number of valid signatures, with a surplus of 358 names.<sup>349</sup> In January 1987, the district court approved the petition and summoned grand jurors.<sup>350</sup> Although the grand jury

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340. *Id.*

341. Sharon Cohen, *A Mother’s Mission: Ghost of Death Haunts Search For Daughter*, L.A. TIMES, Sept. 2, 1990, at A4.

342. *Id.*

343. *Id.*

344. *Id.* at A33.

In December, while others shopped for Christmas gifts, [Joyce Cutshall] collected signatures. While the local mall was being decorated, she was setting up a table and banner reading: “Jill Cutshall Needs a Grand Jury.”

A dozen volunteers gathered signatures at the mall and braved blizzards to collect more in door-to-door visits. Petitions were presented to authorities on Feb. 20—the day after Jill’s birthday—“my gift to her,” her mother says.

Authorities, she says, certified 1471 signatures, hundreds more than needed.

*Id.*

345. *Man Guilty; Missing Girl a Mystery*, CHI. TRIB., Mar. 21, 1991, at C8.

346. *Regional News, Nebraska*, UPI, May 12, 1986, available in LEXIS, News Library, Arcnws File.

347. *Id.*

348. *Id.*

349. *Kellin Death May Be Investigated By Citizens*, UPI, Dec. 30, 1986, available in LEXIS, News Library, Arcnws File.

350. *Judge Summons Grand Jurors In Black’s Death*, UPI, Jan. 16, 1987, available in LEXIS, News Library, Arcnws File.

investigation resulted in no indictments, the grand jury did issue twenty-three recommendations for improvements in police administration, training, and physical plant.<sup>351</sup> Another positive result of the incident was that Senator Chambers, who had introduced the grand jury access bill in 1979, introduced a new bill *requiring* a district court to hold a grand jury investigation whenever an arrestee dies in police custody.<sup>352</sup> In the wake of the Kellin case publicity, the bill passed the legislature by a vote of forty-two to zero.<sup>353</sup>

Nebraska's right to petition for a grand jury—when combined with the statutory right to apply to the grand jury, the prosecutor, and the court for the opportunity to appear and testify before the grand jury—is a potentially powerful weapon in the hands of whistleblowers and police brutality victims.

*C. West Virginia: Allowing Access to the Grand Jury Through the  
Impaneling Judge as a Constitutional Right*

West Virginia has adopted the unique and salubrious position that citizen access to the grand jury is a state constitutional right. That West Virginia would recognize such a right follows naturally from the state's fiercely independent heritage, which is embodied in its state constitution. For example, the West Virginia Constitution mandates that "[t]he right of the people . . . to instruct their representatives, or to apply for redress of grievances shall be held inviolate."<sup>354</sup> Other sections of the Constitution discuss the dominant role of the people over the government,<sup>355</sup> including the "indefeasible" right of the people to "reform, alter or abolish" the government should it prove to work contrary to the wishes of the

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351. *Grand Jury Seeks No Indictments*, UPI, Mar. 9, 1987, available in LEXIS, News Library, Arcnws File.

352. *Regional News, Nebraska*, UPI, Feb. 5, 1988, available in LEXIS, News Library, Arcnws File.

353. *Id.* Just days after it went into effect, the new law required an investigation of a death by hanging of a suspect in police custody. *Regional News, Nebraska*, UPI, July 14, 1988, available in LEXIS, News Library, Arcnws File. Despite the advancement in protection against brutality resulting from Kellin's death, however, the police officers were neither indicted nor held liable in the subsequent civil suit. *Agreement Reached in Negligence Lawsuit Against City*, UPI, June 27, 1989, available in LEXIS, News Library, Arcnws File.

354. W. VA. CONST. art. III, § 16.

355. *Id.* art. III, § 2 ("All power is vested in, and consequently derived from, the people. Magistrates are their trustees and servants, and at all times amenable to them."); see also *id.* art. II, § 2 ("The powers of government reside in all the citizens of the State, and can be rightfully exercised only in accordance with their will and appointment.").

populace.<sup>356</sup>

The interpretation of the West Virginia Constitution as providing a constitutional right of public access to the grand jury also reflects the fierce independence of West Virginians. Article III, section 17 requires that the State courts "be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial, or delay."<sup>357</sup> Similarly, Article IX, section 4 retains popular sovereignty with respect to governmental officers, who may be removed from office if convicted of "malfeasance, misfeasance, or neglect of official duty."<sup>358</sup> West Virginia courts have found within these passages the guarantee of a right of citizen access to grand juries.

Acknowledging that the prosecutor has strong influence over the grand jury,<sup>359</sup> the state judiciary has shown sympathy for the right of crime victims to ensure that the crime is punished.<sup>360</sup> The leading West Virginia case delineating the state constitutional right of citizen access to the grand jury is *State ex rel. Miller v. Smith*,<sup>361</sup> which arose from an instance of alleged police brutality. The victim, Miller, approached both the local magistrate and the local prosecuting

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356. *Id.* art. III, § 3. "This section is reluctantly but nevertheless commonly held by political scientists and constitutional lawyers as a reservation of the right of revolution under certain circumstances to the sovereign people." *Shobe v. Latimer*, 253 S.E.2d 54, 61 n.7 (W. Va. 1979).

357. *Id.* art. III, § 17.

358. *Id.* art. IX, § 4.

359. *See, e.g., Kerns v. Wolverton*, 381 S.E.2d 258 (W. Va. 1989). The *Kerns* court, noting that both legal and popular culture reflect this prosecutorial influence, invoked literary precedent, quoting Tom Wolfe's description of grand juries in his novel, *The Bonfire of the Vanities*:

Grand-jury hearings had become a show run by the prosecutor. With rare exceptions, a grand jury did whatever a prosecutor indicated he wanted them to do. Ninety-nine percent of the time he wanted them to indict the defendant, and they obliged without a blink. They were generally law-and-order folk anyway. They were chosen from long-time residents of the community. Every now and then, when political considerations demanded it, a prosecutor wanted to have a charge thrown out. No problem; he merely had to couch his presentation in a certain way, give a few verbal winks, as it were, and the grand jury would catch on immediately. But mainly you used the grand jury to indict people, and in the famous phrase of Sol Wachtler, chief judge of the State Court of Appeals, a grand jury would "indict a ham sandwich," if that's what you wanted.

*Id.* at 262 n.4.

360. *See, e.g., State ex rel. Ginsberg v. Naum*, 318 S.E.2d 454, 456 (W. Va. 1984) ("When the legislature has created a crime, right or entitlement, citizens are entitled to executive enforcement and implementation of that legislative dictate.").

361. 285 S.E.2d 500 (W. Va. 1981) (stating that the victim claimed to have been assaulted with mace by two officers).

attorney and submitted evidence of the alleged assault.<sup>362</sup> Both ultimately declined to pursue the case.<sup>363</sup> Then, consistent with the vaguely extra-legal strategies that pervade the nation's lower criminal courts, Miller told the prosecutor that on the day the grand jury was scheduled to convene, Miller would appear and petition the foreman of the grand jury for permission to submit evidence of the assault. Responding in kind, the prosecutor said that he would use all the powers of his office to prevent Miller from appearing before any grand jury to press his complaint.<sup>364</sup> When Miller, along with a witness, arrived at the courthouse on the day the grand jury was scheduled to meet, the prosecutor told him that he would tell the grand jury that Miller was there and wished to testify before them about an alleged crime, but that he intended to use all his persuasive powers to attempt to discourage the grand jurors from receiving Miller or considering his case.<sup>365</sup> *Mirabile dictu*, the grand jury subsequently voted to reject Miller's petition.<sup>366</sup> Rising above the usual hand-to-hand of the criminal courts, Miller then brought an action for a writ of prohibition against the prosecutor.<sup>367</sup>

The West Virginia Supreme Court of Appeals found that Miller's case raised issues going to "the fundamental nature and purpose of the grand jury in our system of justice."<sup>368</sup> Noting that West Virginia's state constitution requires that the grand jury remain both a sword and a shield and not merely the prosecutor's puppet,<sup>369</sup> the court held that a citizen whose rights have been violated is constitutionally entitled to seek justice in the courts.<sup>370</sup> In fact, the court found that it is incumbent upon the circuit courts to ensure that any citizen may bring his complaint before the grand jury.<sup>371</sup> The court stated that

[t]o fulfill its functions of protecting individual citizens and providing them with a forum for bringing complaints within the criminal justice system, the grand jury must be open to the public for the independent presentation of evidence

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362. *Id.* at 501-02.

363. *Id.*

364. *Id.* at 502.

365. *Id.*

366. *Id.*

367. *Id.*

368. *Id.*

369. *Id.* at 504 (construing W. VA. CONST. art. III, § 17, and stating that the prosecutor's duty includes asserting the rights of crime victims).

370. *Id.*

371. *Id.*

before it. If the grand jury is available only to the prosecuting attorney and all complaints must pass through him, the grand jury can justifiably be described as a prosecutorial tool.<sup>372</sup>

As the court explained, such openness was necessary: (1) to prevent abuse; (2) to keep the grand jury “free from all outside interference and prosecutorial control”; and (3) because only the vigilance of the courts can maintain that kind of independence.<sup>373</sup> Thus, the court held, “by application to the circuit judge, whose duty is to insure access to the grand jury, any person may go to the grand jury to present a complaint to it.”<sup>374</sup>

The court further held that it was improper for a grand jury to hear any unsworn testimony from anyone, including the prosecutor,<sup>375</sup> and that engaging in such conduct would vitiate an indictment.<sup>376</sup> Thus, in West Virginia, a prosecutor may appear before the grand jury for only two reasons: to present evidence through sworn witnesses, and to give court-supervised instructions to the jurors; the prosecutor specifically may not attempt to influence the grand jury’s decision.<sup>377</sup>

In *Miller*, the court was unable to determine whether the prosecutor had presented unsworn testimony.<sup>378</sup> The court nevertheless pointed out that conduct such as that displayed by the prosecutor could not be tolerated because it “threaten[ed] the integrity of the grand jury’s judicial function and constitute[d] an ethical violation of standards of acceptable prosecutorial behavior.”<sup>379</sup> Furthermore, the *Miller* court concluded that issuing a writ of prohibition was appropriate in such a case because the prosecutor was attempting to usurp the supervisory powers of the court and the judicial powers of the grand jury itself.<sup>380</sup> As for the former, the court explained that prohibiting the prosecutor from interfering with the court’s supervision was necessary because otherwise the prosecutor could undermine the court’s role in “insur[ing] the fairness of grand jury proceedings.”<sup>381</sup> As for the latter, because grand jurors must

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372. *Id.*

373. *Id.* at 505.

374. *Id.*

375. *Id.*

376. *Id.*

377. *Id.* (citing W. VA. CODE § 7-4-1 (Repl. Vol. 1976)).

378. *Id.* at 505.

379. *Id.*

380. *Id.* at 506.

381. *Id.*

"diligently inquire and true presentment make of all such matters as may be given [them] in charge or come to [their] knowledge,"<sup>382</sup> a prosecutor who attempts to dissuade the jury from considering the matter fully is interfering with the basic duty of the grand jury.<sup>383</sup> Any effort by a prosecutor to persuade the grand jury not to hear a matter is *ultra vires* and, the court held, might rise to the level of obstruction of justice.<sup>384</sup>

In sum, West Virginia courts have found that the citizens of West Virginia have a constitutional right to appear before a grand jury. The court's supervisory role in the process ensures that the prosecutorial presentation is fair. Moreover, because grand jury proceedings are recorded,<sup>385</sup> even if the court does not discover that the prosecutor is denigrating a citizen's complaint until after the grand jury has

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382. *Id.* (quoting W. VA. CODE § 52-2-5 (1981)).

383. *Id.* at 506.

384. *Id.* In granting the requested writ of prohibition, the court summarized its ruling: [A]n individual citizen-complainant has a constitutional right to appear before a grand jury to present evidence of an alleged offense. A prosecuting attorney may not render unsworn testimonial evidence before the grand jury. Prohibition will lie against a prosecuting attorney who attempts to usurp the judicial function of the circuit court and of the grand jury by attempting to discourage it from hearing the independent presentation of evidence by a citizen complainant.

*Id.* at 507.

Other cases have followed *Miller's* holding. For example, in *Cogar v. Strickler*, 570 F. Supp. 34 (S.D. W. Va. 1983), plaintiff had applied to the local circuit court judge for permission to present evidence to the grand jury that two individuals had attempted to murder him. When the judge denied him permission, plaintiff brought a 42 U.S.C. § 1983 action against the state judge in federal court. The federal court agreed that *Miller v. Smith* entitled the plaintiff to appear before a grand jury but found the doctrine of judicial immunity dispositive. *Id.* at 35-36. The court in *State v. Pickens*, 395 S.E.2d 505 (W. Va. 1990), set aside a conviction and declared the underlying indictment a nullity because the prosecution, after learning that the grand jury was only willing to return a true bill for a misdemeanor, but not for a felony charge, coerced the grand jury into reconsidering partly because of the inconvenience of redrafting the indictment. *Id.* at 507-08. Immediately thereafter, the grand jury agreed to the prosecutor's request and returned a felony indictment. *Id.* at 508. The court held that the prosecutor had "exceeded his lawful jurisdiction and usurped the judicial power of the court and the grand jury . . ." *Id.* at 509. As a result, the indictment was defective and the conviction had to be set aside. *Id.*

Similarly, in *State ex rel. Starr v. Halbritter*, 395 S.E.2d 773 (W. Va. 1990), the court set aside the indictment because the prosecutor had drafted the actual indictment *after* the grand jury returned its completed memoranda and forms. *Id.* at 774. In addition, the prosecutor included in the indictment additional counts of which the jurors were unaware. *Id.* The Supreme Court of Appeals held that both the court and the prosecutor are without power to add to or alter an indictment returned by the grand jury. *Id.* at 776. "The failure of the grand jury as a body to vote upon the text of the indictment is a fundamental error so compromising the integrity of the grand jury proceedings as to constitute prejudice *per se*, and the indictment must be dismissed as void . . ." *Id.* at 778-79.

385. W. VA. R. CRIM. P. 6(e)(1).

voted no true bill, the case may be returned to that grand jury or sent to another one.<sup>386</sup> Although this tremendous power may result in grand jury investigations of some frivolous claims,<sup>387</sup> it also makes it equally likely that fewer complainants who have meritorious criminal charges to bring will be denied their day in court. West Virginia's solution to the grand jury access problem, finding a right of access in its state constitution, is a salutary and groundbreaking resolution. It is probably just a matter of time, however, before other states, interpreting their own constitutions, follow suit.

*D. States Allowing Direct Access to the Grand Jury at the Judge's Discretion*

At least three states give judges discretionary authority to rule on citizens' applications to appear before the grand jury: North Carolina, Illinois, and Maine.

1. *North Carolina.*—In 1883, in *United States v. Kilpatrick*,<sup>388</sup> a federal district court concluded that the common law of North Carolina gave citizens no right to contact the grand jury directly.<sup>389</sup> If a citizen fell victim to a crime, he could either attempt to persuade the prosecutor to proceed with his case or make a sworn complaint before a committing magistrate, obtain an arrest warrant, and attend a preliminary hearing on the allegations.<sup>390</sup> A citizen could not approach the grand jury directly; to do so constituted contempt and was punishable as a misdemeanor.<sup>391</sup>

Today, however, a citizen can apply directly to a judge for permission to appear before the grand jury. This change is a result of the North Carolina General Assembly's efforts to recodify its code of criminal procedure.<sup>392</sup> Under the revised code, the grand jury remains an arm of the court.<sup>393</sup> Surprisingly, the district attorney's

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386. W. VA. CODE § 52-2-9 (1981) ("Although a bill of indictment be returned not a true bill, another bill of indictment against the same person for the same offense may be sent to and acted on by the same or another grand jury.").

387. *E.g.*, *Powers v. Goodwin*, 291 S.E.2d 466, 473 (W. Va. 1982) (observing that because a citizen may appear before a grand jury whether or not the prosecutor wishes to seek an indictment, "there are fewer impediments to frivolous criminal prosecutions than there are perhaps elsewhere.").

388. 16 F. 765 (W.D.N.C. 1883).

389. *Id.* at 769.

390. *Id.*

391. *Id.*

392. MATERIALS ON NORTH CAROLINA'S CODE OF PRETRIAL CRIMINAL PROCEDURE 1 (Douglas Gill ed., June 1975).

393. N.C. GEN. STAT. § 15A-621 (1973) (official commentary).



role has been significantly limited. For instance, the prosecutor is not permitted to examine witnesses before the grand jury.<sup>394</sup> The judge, not the prosecutor, is the legal advisor to the grand jury.<sup>395</sup>

Section 15A-626 of the code lists the parties who have the authority to call witnesses before the grand jury and the exclusive method by which one may apply to be a witness in a grand jury proceeding. In the case of bills of indictment, the district attorney lists on the bill the witnesses that he wants called; the clerk must call those witnesses.<sup>396</sup> If the grand jury wishes to hear testimony from witnesses not listed on the bill, the foreman must request the prosecutor to list and call those persons.<sup>397</sup> Whether those persons are called, however, is entirely within the discretion of the prosecutor.<sup>398</sup> "Any person not called as a witness who desires to testify"—such as a crime victim or a witness—"must apply to the district attorney or to a superior court judge. The judge or the district attorney in his discretion may call the witness to appear before the grand jury."<sup>399</sup>

Because judges do not work as closely with police officers as prosecutors do, there is, arguably, a greater chance that a judge will permit a witness to, or victim of, police brutality to appear before the grand jury. Indeed, the fact that the state constitution provides that "[a]ll courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay,"<sup>400</sup> suggests that the judge should err on the side of favoring the applicant. And since the grand jury is part of the court,<sup>401</sup> the court is its legal advisor,<sup>402</sup> and the district attorney

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394. *Id.* The official commentary reads: "The Commission debated the idea of allowing the solicitor in the grand jury room to examine witnesses at least when investigations were being undertaken. It finally decided in all cases to preserve the present arrangement whereby all questioning is by the jurors—and unrecorded." *Id.*

395. *Id.* § 15A-624.

396. *Id.* § 15A-626(b).

397. *Id.*

398. *Id.* The exception to this rule is that members of the grand jury itself may testify. *Id.* § 15A-626(c).

399. *Id.* § 15-626(d). Despite these limitations, the grand jury does have some independent investigatory authority. For example, § 15A-628(a)(4) of the code provides the grand jury with the power to conduct an investigation on a matter not brought to its attention by the prosecutor.

400. N.C. CONST. art. I, § 18; *cf. supra* notes 357 and 368-374 and accompanying text (discussing a nearly identical provision in West Virginia's constitution, which forms the primary basis of a judicially-recognized constitutional right of direct access to the grand jury).

401. *See supra* note 393 and accompanying text.

is not ordinarily allowed in the grand jury,<sup>403</sup> it should not be difficult for the court to achieve a grand jury presentation which is fair to the victim.

2. *Illinois*.—The state of Illinois strictly forbids direct citizen access to members of the grand jury.<sup>404</sup> Illinois has a long and active history of opposition to direct access to grand jurors, beginning in 1940 with *People v. Parker*.<sup>405</sup> In *Parker I*, Harrison Parker had been found guilty of contempt and sentenced to ten days in jail for sending two letters to the Cook County grand jury.<sup>406</sup> The Illinois Supreme Court affirmed the contempt verdict, ruling that any direct communication with grand jurors constitutes contempt of court.<sup>407</sup> Nevertheless, the court's reasoning was expressed in terms that imply that a finding of contempt was proper only when the malicious nature of the language in the letters "could serve no useful purpose . . . [and] [r]ather . . . expose[d] the grand jury to the danger of being misled and abused by one motivated by personal animosity."<sup>408</sup>

402. See *supra* note 395 and accompanying text.

403. See *supra* note 394 and accompanying text.

404. Inexplicably, Illinois has had far more than its fair share of litigation on this issue, including grand jury communicants who were lawyers, former judges, and recidivists. See *infra* notes 405-426 and accompanying text.

405. 30 N.E.2d 11 (Ill. 1940) [hereinafter *Parker I*].

406. *Id.* at 12. The letters alleged that McCormick, the President of the Chicago Tribune, and the State's Attorney had conspired to commit tax evasion. *Id.* Furthermore, he alleged that the two had manipulated the courts, resulting in huge losses to the taxpayers, and that McCormick had secured the imprisonment of two innocent men. *Id.* He also claimed that McCormick had cheated the state out of inheritance tax. *Id.*

407. *Id.* at 14.

408. *Id.* The letters were "couched in exceedingly vicious and inflammatory language." *Id.* at 12. The court's statement in *People v. Doss*, 46 N.E.2d 984 (Ill. 1943), lent greater support to the theory that it was not communication with the grand jury *per se* which was prohibited, but communication pervaded by personal attack and vitriol:

It is now definitely settled in Illinois that written communications to members of a grand jury while in session, containing malicious accusations against private citizens, and public officials, including the State's Attorney, and *couched in such language that they can serve no useful purpose but show only personal enmity*, constitute contempt of court as an unauthorized interference with the administration of justice . . . .

*Id.* at 988 (emphasis added).

Such reasoning fails to withstand scrutiny. Direct communications with the grand jury are *assumed* by the *Parker I* court to be the result of self-interest and personal enmity, unworthy of grand jury consideration. The court's reasoning creates an irrebuttable presumption that public corruption cases either are not real cases or can be prosecuted some other way. The court also assumes that neither grand jurors nor the supervising judge (on a motion to dismiss) are capable of weeding out cases motivated by personal enmity. In reality, shouldn't vitriolic and intemperate language *diminish* the credibility of the letter writer? Contrast this situation to indictments brought by improperly motivated

The court clarified its position seven years later, when Mr. Parker was in court again facing similar contempt allegations.<sup>409</sup> This time, Parker's letter to the foreman of the grand jury was free of all "vicious and inflammatory language."<sup>410</sup> In upholding his sentence for criminal contempt, the Illinois Supreme Court explained that the absence of vituperative language was not determinative.<sup>411</sup> Based on *Parker I* and *Parker II*, therefore, it is quite clear that, no matter what language employed, one may not communicate directly with an Illinois grand jury.

Illinois, however, does permit access to the grand jury through the impaneling judge. The leading case, *People v. Sears*,<sup>412</sup> was the result of a police raid on the Chicago headquarters of the Black Panthers. Two members of the Black Panther Party were killed by the Chicago police during that raid,<sup>413</sup> and certain individuals and organizations petitioned the state circuit court to impanel a grand jury to investigate.<sup>414</sup> Circuit Judge Power granted the petition and appointed a special prosecutor, Barnabas Sears.<sup>415</sup>

After investigating for nearly five months, the grand jury voted to indict the State's Attorney and twelve Chicago police officers.<sup>416</sup> The next day, before the vote had been made public, Judge Power summoned Sears, his staff, and the grand jury members for a conference.<sup>417</sup> Judge Power directed the grand jury to hear additional testimony from specified witnesses.<sup>418</sup> Judge Power then directed Sears to call every witness who had testified before the federal grand jury convened to investigate the incident; when Sears refused, Power held him in contempt.<sup>419</sup> Subsequently, at the

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professional prosecutors; is it not the purpose of the grand jury to protect putative defendants from the state? If it serves that function, why cannot it protect them from a private citizen who lacks all the impressive accoutrements of the district attorney?

409. *People v. Parker*, 74 N.E.2d 523 (Ill. 1947), *aff'd*, 334 U.S. 816 (1948) [hereinafter *Parker II*].

410. *Id.* at 525.

411. *Id.*

412. 273 N.E.2d 380 (Ill. 1971).

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

414. *See Sears*, 273 N.E.2d at 382.

415. *Id.* The State's Attorney was one of those whose conduct was to be investigated. *Id.*

416. *See Shannon*, *supra* note 413, at 149.

417. *Id.*

418. *Id.*

419. *People v. Sears*, 273 N.E.2d 380, 383 (Ill. 1971).

Angry, red-faced and frequently pounding the table, Judge Power excoriated Sears in open court for not calling the additional witnesses before the grand jury.

request of some grand jurors and over the objection of Sears, Judge Power and a court reporter met with the individual members of the grand jury.<sup>420</sup>

The Supreme Court of Illinois reversed Judge Power's order holding Sears in contempt of court for refusing to subpoena the witnesses as ordered, ruling that the facts of the case did not warrant judicial interference with the grand jury's independence.<sup>421</sup> Although the court acknowledged that the Illinois Code of Criminal Procedure provided that "[t]he Grand Jury shall hear all evidence presented by the State's Attorney,"<sup>422</sup> the court concluded that the judge may order the grand jury to hear certain additional evidence under appropriate circumstances.<sup>423</sup> The Illinois Supreme Court found that the judiciary's authority in this regard stems primarily from its relationship with the grand jury: in essence, the grand jury is an "arm of the court."<sup>424</sup> As such, the court necessarily retains supervisory power over the grand jury in order to ensure that the grand jury assists in the process of fairly administering justice and enforcing the law.<sup>425</sup> Furthermore, "[t]he exercise of the power necessary to discharge this 'particular responsibility' does not require a claim of abuse of process of one who has standing to make it, for the court has inherent power to supervise the grand jury so as to prevent the perversion of its process."<sup>426</sup>

Indeed, in the exercise of its inherent power of supervision over the grand jury, the circuit court may order that the minutes of the grand jury proceedings be submitted to it for inspection.<sup>427</sup> To

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"I now order you to subpoena all witnesses," he said. "I don't care who they are. I want them all to appear. Are you going to do that?"

Sears replied . . . "I cannot submit to your direction. . . . You honestly believe you have the power you are seeking to exercise. You have absolutely no such power at all. It would impeach the integrity of the grand jury. . . . I would be in violation of my oath (as special prosecutor) if I were to submit to the order and domination of your honor, and I therefore refuse."

Shannon, *supra* note 413, at 150 (quoting Chicago newspapers' descriptions of the proceedings).

420. *Sears*, 273 N.E.2d at 385.

421. *Id.* at 389.

422. ILL. ANN. STAT. ch. 112, para. 4(a) (Smith-Hurd 1969).

423. *Sears*, 273 N.E.2d at 389 (permitting such a judicial order to hear evidence "only when failure to do so will effect a deprivation of due process or result in a miscarriage of justice").

424. *Id.* at 391 (citing *People v. Ianniello*, 235 N.E.2d 439, 443 (N.Y. 1968)).

425. *Id.* at 387 (quoting *People v. McCauley*, 100 N.E. 182, 184 (Ill. 1912)).

426. *Id.* at 391 (citing *In re National Window Glass Workers*, 287 F. 219, 224 (N.D. Ohio 1922)).

427. *Id.*

prevent "injustice and abuse of process," the court may even act prior to indictment.<sup>428</sup> In sum, although it is clearly illegal in Illinois to contact a grand juror directly, an aggrieved citizen may petition the impaneling judge for a hearing by the grand jury, and the judge has the power to ensure that the citizen will be heard by the grand jury in a fair presentation.

3. *Maine*.—In Maine, a crime victim or witness whose case is rejected by the prosecutor may apply to a Superior Court judge for permission to present evidence directly to a grand jury. The pertinent Maine statute reads:

Grand juries shall present all offenses cognizable by the court at which they attend . . . . Evidence relating to offenses cognizable by the court may be offered to the grand jury by the Attorney General, the district attorney, the assistant district attorney and, at the discretion of the presiding justice, by such other persons as said presiding justice may permit.<sup>429</sup>

Research has disclosed only one case discussing this statute, *In re Thomas*,<sup>430</sup> which involved a citizen's petition to a Superior Court judge requesting permission to present evidence of "Official Oppression" before the grand jury.<sup>431</sup> The parties agreed that state common law had permitted unrestricted citizen access to the grand jury until 1953, when the statute was passed restricting access to grand juries except through the judge.<sup>432</sup> The question to be resolved was whether Thomas had a right of access under the statute.<sup>433</sup> Thomas maintained that the statute merely codified common law and that the language concerning the presiding justice was injected merely to clarify how a citizen might achieve his goal, but not to establish an exclusive way to proceed.<sup>434</sup> The court disagreed:

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428. *Id.*; see also *People v. Melson*, 363 N.E.2d 888, 890 (1977) ("*Sears* stands for the proposition that a court may act *prior* to indictment to prevent injustice and abuse of process.>").

429. ME. REV. STAT. ANN. tit. 15, § 1256 (West 1993).

430. 434 A.2d 503 (Me. 1981).

431. *Id.* at 504. The alleged oppression was caused by the Portland police chief's refusal to issue Thomas a permit for a concealed weapon. *Id.* Thomas already had presented his case to an assistant district attorney and an assistant attorney general. *Id.* at 505. Both had declined to prosecute the Police Chief on the grounds that they felt they would be unable to prove the *mens rea* element of the offense. *Id.*

432. *Id.* at 506-07.

433. *Id.* at 507.

434. *Id.*

In our judgment, the enacted version represents a legislative compromise between unrestricted citizen access to the grand jury and no citizen access at all. If the Legislature had intended a different result, it would not in plain words have conditioned the presentation of evidence to grand jurors on the prior permission of the presiding justice. Whatever the citizen's rights immediately before the passage of Section 1256 may have been, he can today go before the grand jury as a volunteer witness, if, but only if, he has first obtained the court's permission.<sup>435</sup>

The court then exercised its discretion and denied Thomas's petition.<sup>436</sup> The court indicated that the standard of discretion for courts to exercise includes the three basic criteria described in Section 1256. First, the applicant must have "personal knowledge" of the offense.<sup>437</sup> Second, "the petition on its face [must] allege sufficient facts to demonstrate . . . at least a substantial possibility, that the grand jury will be persuaded to indict."<sup>438</sup> Finally, the judge must "be satisfied that the public interest will be served by allowing the petitioner to present his case to the grand jury."<sup>439</sup> Thomas did not meet these criteria.

The Maine Supreme Judicial Court explained the third criterion in terms of considerations similar to those the prosecutor would consider, including doubt as to the accused's actual guilt or the victim's actual harm suffered, the disproportionate amount of punishment in relation to the offense or the offender, and any improper motives of the applicant.<sup>440</sup> As a practical matter, a court would consider significant the fact that the prosecutors who were approached rejected the allegations.<sup>441</sup> This final consideration

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435. *Id.*

436. *Id.* at 505. The trial court indicated that the usual situation in which a private citizen would be appointed to offer evidence before a grand jury is where the prosecutor has a conflict of interest. *Id.* at 507-08.

437. *Id.* at 508. The court may have read this requirement into Section 1256. Previously the court had held that a grand jury may indict on evidence that would not be admissible at trial. *See State v. St. Clair*, 418 A.2d 184, 186 n.2 (Me. 1980).

438. *In re Thomas*, 434 A.2d at 508. Although this standard is not overly precise and undoubtedly is applied differently by different judges, the language "substantial possibility" sets a fairly low threshold. Mr. Thomas, however, had an extremely weak case. *See id.*

439. *Id.*

440. *Id.* at 508-09 (quoting *United States v. Lovasco*, 431 U.S. 783, 794 n.15 (1977) (in turn quoting ABA STANDARDS FOR CRIMINAL JUSTICE RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION 3.9(b) (1971)).

441. The court expressed its instinctive urge to defer to the prosecutor's discretion:

probably should not be decisively significant, however, because in reviewing a petition the judge is supposed "to stand in the shoes of the prosecutor."<sup>442</sup> Thus, the standard for review by the court should not be one of error, but rather a *de novo* review.<sup>443</sup>

*E. Other States: Common or Uncommon Law?*

Whether citizens can gain access to the grand jury in all remaining jurisdictions depends wholly upon whether the state has altered the common law rules concerning grand juries. Early American colonists integrated the English grand jury system into their new judicial systems.<sup>444</sup> After the American Revolution, both the state and federal governments retained the grand jury as an essential part of their criminal justice systems.<sup>445</sup> As the frontier moved West, new territories incorporated the grand jury into their justice systems as well.<sup>446</sup>

The earliest English grand juries brought accusations based on the personal knowledge of the jurors themselves.<sup>447</sup> Gradually, grand juries began to consider accusations made known to them by the crown prosecutors and outsiders as well.<sup>448</sup> The American common law grand juries owe much of their independence to these early English juries; their influence is most evident in the great popularity in the American colonies of English writings on the

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Where, as here, both an assistant attorney general and an assistant district attorney have already chosen not to go to the grand jury, where the record establishes no prejudice underlying their decisions, and where, under 15 M.R.S.A. § 1256, a justice of the Superior Court is subsequently asked to stand in the shoes of the prosecutor, considerations such as the above necessarily come into play.

*Id.* at 509.

442. *Id.*

443. Because evidence may be hard to obtain, the *de novo* review is of practical value as well. It is important to note that recording of grand jury proceedings in Maine is discretionary. ME. R. CRIM. PROC. 6(d); *see, e.g.*, *State v. Rich*, 395 A.2d 1123, 1127 (Me. 1978) (noting that "[t]ranscription of the testimony presented to the grand jury is made permissive, not mandatory."), *cert. denied*, 444 U.S. 854 (1979); *accord*, *State v. Huff*, 469 A.2d 1251, 1254 (Me. 1984) ("In its discretion for good cause shown, the court is authorized to order that a court reporter record the evidence presented to the grand jury."); *State v. Levesque*, 281 A.2d 570 (Me. 1970) (holding that this rule violates no equal protection standard). Therefore, undertaking any review other than a *de novo* review may be quite difficult.

444. Robert G. Johnston, *The Grand Jury—Prosecutorial Abuse of the Indictment Process*, 65 J. CRIM. L. & CRIMINOLOGY 157, 158 (1974).

445. *Id.*

446. *Id.* at 159.

447. *See, e.g.*, YOUNGER, *supra* note 98, at 11 & n.12 (describing the sources of accusations for grand jurors in colonial Virginia).

448. *Id.* at 1 n.1.

subject.<sup>449</sup> One pamphlet of particular importance in America was written by the Lord Chancellor of England, John Somer, entitled *The Security of Englishmen's Lives or the Trust, Power and Duty of Grand Juries*.<sup>450</sup> Somer's work interpreted the powers of the grand jury quite broadly and stressed that grand juries were not limited to investigating only matters brought to their attention by the court, but rather could inquire into all matters that came to their attention.<sup>451</sup>

In England most of the accusations came from the established constabulary; since the colonies had no such established police forces, the grand jury was much more independent in determining whom to accuse.<sup>452</sup> Grand juries in colonial Virginia considered not only the matters given them by the judges and the legislature but also presented matters on their own initiative.<sup>453</sup>

From the inception of American grand juries, there were two competing views of the scope of the grand jury's powers and responsibilities. The majority view was that grand juries were almost wholly unrestricted; the minority view was that grand juries were purely reactive, not proactive.<sup>454</sup> The minority view, which was followed primarily in Tennessee and Pennsylvania,<sup>455</sup> had its share of prominent intellectuals vocally demonstrating their support. United States Supreme Court Justice Joseph Story, in an 1832 article for the *Encyclopedia Americana*, depicted the grand jury as acting only at the behest of the government. Story omitted any reference to the possibility of grand jurors starting their own inquiries or conducting themselves independently of the court.<sup>456</sup> Professor Francis Wharton described such limited access to the grand jury as "the view which may now be considered as accepted in the United States courts and in most of the several states."<sup>457</sup>

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449. *Id.* at 21-22.

450. *Id.* at 21.

451. *Id.* at 21 & n.29. Other influential texts include Sir John Hawles' *The Englishman's Rights*, and Henry Care's *English Liberties or Free Born Subjects*. *Id.* at 21-22. Care's work is notable for his recognition of the importance of sheltering the grand jury from judicial interference. *Id.* at 21.

452. *Id.* at 5.

453. *Id.* at 11 & n.12.

454. *See generally id.* at 5-26.

455. *See id.* at 63-64. Tennessee has since provided for citizen access to the grand jury. *See supra* notes 291-292, 294, 303 and accompanying text.

456. *Id.* at 62 (citing 8 *ENCYCLOPAEDIA AMERICANA* 284 (Francis Lieber ed., 1832)).

457. YOUNGER, *supra* note 98, at 141-42 (quoting FRANCIS WHARTON, *CRIMINAL PRACTICE AND PLEADING* 227-35 (9th ed. 1889)). In support of this proposition, however, Wharton cited only the federal courts and Pennsylvania and Tennessee decisions—the only states that observed such a rule. *Id.* at 142.



Naturally, the majority view was not without its own vocal proponents.<sup>458</sup> The United States Supreme Court, in *Frisbie v. United States*,<sup>459</sup> ruled that grand juries in America could inquire into any crime, "no matter how or by whom suggested to them."<sup>460</sup> Many states were not far behind in ruling similarly, also having adopted the common law.<sup>461</sup> For example, in 1891, Maryland's Court of Appeals held that regardless of how the underlying facts originally came to their attention, the grand jury could proceed to investigate.<sup>462</sup> The New York Court of Appeals held that, in America, grand juries have also been

clothed by the common law with inquisitorial powers and, of their own motion, may make full investigation to see whether a crime has been committed, and, if so, who committed it. They may investigate on their own knowledge, or upon information of any kind derived from any source deemed reliable, may swear witnesses generally, and may originate charges against those believed to have violated the criminal laws.<sup>463</sup>

The grand jury system is part of our common law.<sup>464</sup> States are not mandated by the federal "due process" clause to provide grand juries,<sup>465</sup> but some state constitutions have provisions to the effect that no one shall be held to answer for felonies or other infamous crimes except on presentment or indictment by a grand jury. In those states, such provisions are deemed to refer to the common law grand jury, providing the same protections as at common law, through a grand jury that was traditional at common law, functioning

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458. *Id.* at 60-61, 142.

459. 157 U.S. 160 (1895).

460. *Id.* at 163. Justice James Wilson had espoused the view that the grand jury's area of inquiry knew no bounds as early as 1790. YOUNGER, *supra* note 98, at 60.

461. See, e.g., *Fitts v. Superior Court*, 57 P.2d 510, 515 (Cal. 1936); *accord In re Opinion to the Governor*, 4 A.2d 487 (R.I. 1939); see also *People ex rel. Ferrill v. Graydon*, 164 N.E. 832, 834 (Ill. 1928) (observing that the common law powers and duties attach to offices that existed at common law and that are adopted into the state constitution).

462. *Blaney v. State*, 74 Md. 153, 21 A. 547 (1891). A half century later, the Maryland Court of Appeals said: "The broad common law inquisitorial powers of the grand jury never have been curtailed by statute in this state but have been reaffirmed as set out in the opinion in this case." *Brack v. Wells*, 184 Md. 86, 96, 40 A.2d 319, 324 (1944).

463. *People ex rel. Livingston v. Wyatt*, 79 N.E. 330, 333 (N.Y. 1906).

464. *Fitts*, 57 P.2d at 515 ("The common law was adopted in this state at the meeting of its first Legislature. . . . The grand jury system is a product of the common law."); see also *People v. Graydon*, 164 N.E. 832, 834 (Ill. 1929).

465. *Lem Woon v. Oregon*, 229 U.S. 586, 590 (1913); *Hurtado v. California*, 110 U.S. 516, 534, 538 (1884).

generally as it did at common law.<sup>466</sup> "Where the Legislature has created an office which was known to the common law, and by virtue of the common law was vested with certain powers and duties, those common-law powers and duties attached to the office by reason of its adoption by the Constitution."<sup>467</sup>

States have explicitly provided in their state constitutions that the common law remains in effect except where it is expressly changed by statute.<sup>468</sup> Other states, by general statute, have adopted the common law of England, usually as of 1776, unless changed by the legislature.<sup>469</sup> Still others have incorporated and reincorporated general principles or institutions of the common law into their constitutions and legislation without express declaration.<sup>470</sup>

Therefore, the only way for a state's grand jury to function differently than it did at common law is for the state legislature to have adopted express changes. "The courts of general jurisdiction of North Carolina, including the Superior Court, unless specifically denied them by statute, retain the powers inherent in them at common law."<sup>471</sup> "Such power [to declare a change of venue in a criminal trial] existed at common law, and, therefore, unless specifically denied by statute, still adheres in the courts of the country."<sup>472</sup> As the Rhode Island Supreme Court observed,

[W]e have found no instance, under our charter form of government before the adoption of our constitution or in this state since the adoption of our constitution, where the legislative branch of our government ever attempted to exercise power to make any substantial changes in the

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466. *Fitts*, 57 P.2d at 514-16; *In re Opinion to the Governor*, 4 A.2d 487 (R.I. 1939); see also 38 C.J.S. *Grand Juries* § 1(c) (1943); 38 AM. JUR. 2D *Grand Jury* § 2 (1968).

467. *Graydon*, 164 N.E. at 834.

468. W. VA. CONST. art. VIII, § 13; see also W. VA. CODE § 2-1-1 (1994); *State v. Gory*, 93 S.E.2d 494, 499 (W. Va. 1956) (noting that state statutes had modified the common law rules regarding grand juries).

469. See, e.g., COLO. REV. STAT. ANN. § 2-4-211 (West 1986).

470.

Neither the Illinois Constitution nor the legislature has attempted to define the powers of the grand jury. It has its origin in the common law and has existed for many hundreds of years. Its construction, organization, jurisdiction, and method of proceeding were all well known features of the common law before the organization of the State of Illinois and have been recognized and adopted in all our constitutions and in legislation as it existed at the organization of the State. *People v. Polk*, 174 N.E.2d 393, 395 (Ill. 1961).

471. *In re Superior Court Order*, 318 S.E.2d 843, 845 (N.C. Ct. App. 1984) (citing *English v. Brigman*, 41 S.E.2d 732 (N.C. 1947) (quoting *Miller v. Miller*, 172 S.E. 493, 494 (N.C. 1934) (Stacy, C.J., concurring))).

472. *English*, 41 S.E.2d at 732 (citations omitted).

composition, purpose or prerogatives customarily associated with and accorded to a grand jury under the common law. Nor have we found any such instance in England prior to the declaration of our state's independence on May 4, 1776.<sup>473</sup>

Therefore, unless a state has expressly changed the common law, the common law right to approach grand jurors directly still applies. And even if a state has prohibited direct access to the grand jury, research has not revealed any state that prohibits applications to testify before the grand jury that are directed to the impaneling judge of the grand jury.

#### IV. RODNEY KING REVISITED: THE DOUBLE STANDARD CONTINUES

It may be argued that, in fairness, after their acquittal by a Simi County jury on state charges, the four officers in the Rodney King case were tried on federal civil rights charges; indeed, two were even convicted. But the Rodney King case, accompanied as it was by a videotape of the most horrifying examples of police brutality, was a particularly strong case for the prosecution; in the eyes of the public, it was a slam-dunk.

However, a careful analysis of the King case shows that this most egregious of cases—a case about which people of color said, finally, the police will *have* to be punished<sup>474</sup>—actually confirms that we have a dual system of justice, one for law enforcement officers and another one for everyone else. The King case represents no victory for equality before the law.

There were twenty-three LAPD officers on the scene of the King beating but only one attempted to intervene.<sup>475</sup> Only four of the twenty-two other officers were prosecuted in State court, and they were all acquitted.<sup>476</sup> After that acquittal, only the same four officers were tried in federal court, and only two—Lawrence Powell and Stacey Koon—were convicted.<sup>477</sup> At sentencing, the two convicted officers faced up to ten years in prison<sup>478</sup> and fines of up to

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473. *In re* Opinion to the Governor, 4 A.2d 487, 489 (R.I. 1939).

474. See *supra* note 14 and accompanying text.

475. See *supra* note 19 and accompanying text.

476. See *supra* note 15.

477. See *supra* note 16 and accompanying text.

478. Seth Mydans, *Sympathetic Judge Gives Officers 2 1/2 Years in Rodney King Beating*, N.Y. TIMES, Aug. 5, 1993, at A1 [hereinafter Mydans, *Sympathetic Judge*].

\$250,000.<sup>479</sup>

At the sentencing hearing, the prosecution attempted to introduce evidence of an aggravating factor: defendant Powell had been severely reprimanded by the Los Angeles Police Department for repeatedly hitting a prone, handcuffed prisoner with a flashlight just five months before the Rodney King episode;<sup>480</sup> defendant Stacey Koon was Powell's supervisor in this incident as he was in the Rodney King episode, and Koon, too, had been reprimanded.<sup>481</sup> The sentencing judge, United States District Court Judge John Davies, ruled the prior incident irrelevant and refused to admit it into evidence.<sup>482</sup> Instead, Judge Davies gave each defendant a sentence of two and one-half years in prison and waived all fines,<sup>483</sup> explaining that he was being lenient because their reactions had been "provoked" by Mr. King,<sup>484</sup> and the two defendants were fine police officers and upstanding family men, labelling their plight "fraught with sympathy."<sup>485</sup> That Mr. King or any other nonlaw enforcement officer who had done what the two convicted officers did could have received a similar sentence is extraordinarily unlikely; and the idea that Mr. King had "provoked" the officers in this situation was ludicrous. In imposing this sentence, the judge himself admitted that he had stretched the federal sentencing guidelines.<sup>486</sup> Indeed, Professor Laurie Levenson of Loyola Law School, who had been an observer at the trial, remarked of Judge Davies: "But I think in some ways people felt as if he watched a trial that was different from the trial that we were watching."<sup>487</sup>

The majority of the jurors in the federal trial were disappointed by the leniency of the sentence.<sup>488</sup> One juror scoffed at the idea of King provoking the violence,<sup>489</sup> and another said he felt "betrayed" by the lenient sentences.<sup>490</sup> *The New York Times*, calling the justice meted out in Los Angeles "tepid" and "insipid," made the important point that Judge Davies's sentence "sent an unfortunate message: that

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479. Seth Mydans, *Behind Beating Sentence: Guidelines and Sympathy*, N.Y. TIMES, Aug. 6, 1993, at B6 [hereinafter Mydans, *Guidelines*].

480. *Report Cites Prior Beating by Officer in King Case*, N.Y. TIMES, Aug. 16, 1993, at A10.

481. *Id.*

482. *Id.*

483. See Mydans, *Sympathetic Judge*, *supra* note 478, at A1.

484. See *id.*

485. Mydans, *Guidelines*, *supra* note 479, at B6.

486. *Id.*

487. *Id.*

488. *Jurors Criticize Beating Sentences*, N.Y. TIMES, Aug. 9, 1993, at A11.

489. See *id.*

490. *Id.*

a serious breach of the law by the people who are supposed to enforce it will be treated leniently."<sup>491</sup>

While the Justice Department elected to appeal Judge Davies's lenient sentence,<sup>492</sup> the message sent by that sentence, that there is a dual system of justice in our courts, was received by the entire population. This perception is corroborated by the defendants' treatment under our system of bail; unlike most people charged with assault with deadly weapons, defendants Koon and Powell remained free through two indictments and two trials.<sup>493</sup> Their streak finally broke when a federal appeals court denied bail to the two convicted officers.<sup>494</sup> Even after the United States Court of Appeals for the Ninth Circuit declined to grant the officers bail pending appeal, Judge Davies took the unusual step of allowing them to remain free so that they could petition the United States Supreme Court to give them bail.<sup>495</sup> As one legal expert, Professor Erwin Chemerinsky, explained: "It is very, very unusual for the Supreme Court ever to get involved in bail questions, and therefore it is very unusual for a district court judge to stay the reporting time pending the opportunity for an appeal to the Supreme Court."<sup>496</sup> Although the Supreme Court ultimately turned down the officers' bail requests,<sup>497</sup> there can be little question from this record that both officers were afforded special treatment throughout our bail system. A civilian defendant would never have been treated this way.

Nevertheless, the Rodney King case subjected the Los Angeles Police Department to such scrutiny—by the public, the Christopher Commission, and the courts—that one might expect a fundamental change in attitude or behavior from that organization. However, well after the King affair, the LAPD refused to cooperate with county prosecutors by supplying them with documents from an internal investigation of the fatal shooting, by two white officers, of a black woman.<sup>498</sup> The woman had been shot nine times—seven times in

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491. *Tepid Justice in Los Angeles*, N.Y. TIMES, Aug. 7, 1993, at 20.

492. *U.S. Is Appealing Sentences in Rodney King's Beating*, N.Y. TIMES, Aug. 28, 1993, at 6.

493. Seth Mydans, *Federal Appeals Court Denies Bail to Officers in Rodney King Case*, N.Y. TIMES, Aug. 31, 1993, at A13.

494. *Id.*

495. Seth Mydans, *Sentence Delayed for 2 in Beating*, N.Y. TIMES, Sept. 28, 1993, at A20.

496. *Id.*

497. *Justices Turn Down Bail for One Officer in Rodney King Case*, N.Y. TIMES, Oct. 5, 1993, at A20; *2d Officer in King Case Loses Bid for Bail*, N.Y. TIMES, Oct. 6, 1993, at B8.

498. *Los Angeles Police Refuse to Aid in Inquiry*, N.Y. TIMES, Feb. 6, 1994, at 32.

the back.<sup>499</sup> Because the prosecution of Rodney King's abusers fell far short of sending a clear message that assault by police officers will be taken seriously and punished just as an assault by a civilian would be, it appears that little has changed.

Recently, videotape played a crucial role in an assault case, this time a labor arbitration in New York. Two prison guards were videotaped beating a handcuffed prisoner, who was groaning in pain.<sup>500</sup> The labor arbitrator upheld the firing of the two guards responsible for the actual beating and reduced to suspensions the punishments of two other guards who "merely" lied about the incident to protect their friends.<sup>501</sup> Comparing the beating to the Rodney King episode, the arbitrator said: "The two were fired because it was an unprovoked, unjustified attack. The inmate didn't do anything to deserve it. The force was unnecessary and excessive. Horrible is the only way to describe what's on the tape. It's really disgusting. . . . There was no justification for this whatsoever."<sup>502</sup>

In announcing the results of the labor arbitration, a spokesman for the State Department of Correctional Services "added that the department has not decided whether to pursue criminal charges against the two dismissed guards."<sup>503</sup> Again the double standard, again the hesitation to punish with penal sanctions acts by law enforcement officers which constitute crimes and which, had they been committed by civilians, most assuredly would have been prosecuted.

There are no statistics to show us precisely how often law enforcement officers assault citizens. However, the Justice Department does keep records on how many of these cases they file each year. In fiscal year 1992, the federal government filed criminal charges in 27 of these cases; in 1991, 36 cases; in 1990, 23 cases.<sup>504</sup>

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499. *Id.* ("Five officers have already testified before the grand jury, *The [Los Angeles] Times* said. The officers and other witnesses were questioned about how seven bullets had hit Ms. Taylor in the back.").

500. Ian Fisher, *Filmed Beating of Inmate Leads to Dismissal of 2 Prison Guards*, N.Y. TIMES, Jan. 5, 1994, at B1.

501. *Id.*

502. *Id.*

503. *Id.* Shortly thereafter, the F.B.I., having received a complaint from the beaten inmate a month earlier, announced it was looking into the matter; and the local district attorney, who said he did not know about the incident until the arbitrator's ruling, indicated that he, too, would investigate the matter. *F.B.I. Looks at Inmate's Rights in Filmed Beating by 2 Guards*, N.Y. TIMES, Jan. 6, 1994, at B8.

504. Letter from James P. Turner, Acting Assistant Attorney General, Civil Rights Division, by Lorna Grenadier, Supervisory Paralegal Specialist, Criminal Section, to the author (Aug. 18, 1993) (on file with author) (providing a "Summary [of] Criminal Section

From 1982 through 1992, the minimum number of this category of cases filed was 18; the maximum number was 42.<sup>505</sup>

From these numbers it is clear that the federal government is not making the slightest dent in the problem of police brutality. Therefore, the problem falls, of necessity, to the states. And if local prosecutors will not take the lead, then citizens must act—through their grand juries—to do away with this dual system of justice and hold our law enforcers to the same standard of conduct as the average citizen.

## V. CONCLUSION

Gaining access to a grand jury—either directly or through the impaneling judge—certainly would limit the prosecutor's total monopoly and increase his or her accountability. Of equal importance, it would be a powerful weapon in the hands of citizens who are now all too often shut out of the criminal courts.<sup>506</sup> The crime victim would have a far better chance of securing a criminal prosecution against his victimizer; the whistleblower would have a far better chance of exposing public and private corruption. Battered women, gays, lesbians, minorities, the homeless—society's most marginal and most vulnerable—would be given a chance to tell their stories of victimization to those who are not part of the professional law enforcement system.

Most of all, however, giving citizens direct access to the grand jury helps to ameliorate the problem of the symbiotic relationship between police and public prosecutors. When plain, ordinary citizens are able to approach the grand jury or the empaneling judge, it is likely that far more indictments will issue against brutal police officers—particularly in the less sensational cases.

Permitting citizens to exercise the right to approach the grand jury directly, and ensuring that fairness results once citizens do appear there, puts tremendous responsibility on the shoulders of the judiciary. "The judiciary may be the last hope for salvaging the grand jury from obsolescence. By vigorous use of its powers and discretion, the judiciary could restore the grand jury to a position of independence and usefulness."<sup>507</sup> Although the courts retain this general

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Activities").

505. *Id.*

506. "The advantage of citizen participation in an age when people feel increasingly alienated from the legal system should not be lightly discarded." Coffey & Norman, *supra* note 217, at 767.

507. *Id.* at 757 (quoting Johnston, *supra* note 444, at 157).

authority and the responsibility for supervising the grand jury, the degree of willingness to protect the independence of the grand jury from prosecutorial domination obviously will vary from judge to judge.

In fulfilling this protective role, the judge should seek to appoint a strong foreperson, one who will not be easily intimidated by the prosecutor. In the charge to the grand jury, instead of merely delivering “platitudinous generalizations about the nature and tradition of grand jury investigations,”<sup>508</sup> the judge should make clear to the jurors that they are completely independent from the prosecutor. Not only do they have a right to refuse to vote a true bill requested by the prosecutor, but they also have an affirmative duty to investigate matters referred to them by the court.<sup>509</sup> And in certain jurisdictions, they have the same obligation to investigate matters coming to their attention directly from members of the public. In this way, police brutality—police criminality—can be recriminalized in this country and the deterrent value of penal sanctions can begin to work against this epidemic of police violence.

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508. *Id.* at 758 (quoting Bruce H. Schneider, *The Grand Jury: Powers, Procedures, & Problems*, 9 COLUM. J.L. & SOC. PROB. 681, 703, n.129 (1973)).

509. Johnston, *supra* note 444, at 758.