Grand Jury 2.0

Modern Perspectives on the Grand Jury

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Chapter 6

Implementing the Neighborhood Grand Jury

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As almost everyone now agrees, the criminal justice system is in crisis. The past twenty years have witnessed a revolution in sentencing severity that many criminal justice experts view as unsound and perhaps even counterproductive.[1] The introduction of harsh determinate sentencing schemes—including sentencing guidelines, mandatory minimum penalties, and three strikes laws—led to dramatic increases in the prison population.[2] Disillusioned with the ability of punishment to rehabilitate offenders, the prison system aspires to do little more than warehouse and incapacitate law-breakers.[3] The end result is that large numbers of citizens, a disproportionate number of them African-American,[4] are incarcerated for long periods with little hope of being reintegrated into mainstream society.[5] Although politicians often defend these developments in criminal justice policy as a direct response to a public call for tougher punishments,[6] there is evidence that criminal law policies do not accurately reflect public sentiment. A variety of political pathologies, some of which I describe in more detail below, make our law tougher on criminals than what an informed public might prefer. These developments have damaged the legitimacy of the justice system, particularly in high-crime communities.[7] If recent work on the relationship between law and social norms is correct, this situation will only encourage crime in these communities, as lack of respect for laws and the criminal

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process erodes social norms of law-abidingness.[8] Trying to offer politically realistic solutions to this problem is a key task for everyone who thinks about criminal justice.

This chapter suggests one such reform. I argue that permitting local community members to play an active role in prosecutorial charging decisions and policies would help alleviate some of the political pathologies that have led to mass incarceration and the crisis of legitimacy. I first introduced this proposal, along with locally-drawn petit juries empowered to sentence as well as decide guilt, as a way to apply principles from the community justice movement to serious crimes.[9] This article attempts to work out in more detail how a neighborhood grand jury might operate and to respond to some of the potential objections to this reform proposal.

The reform proposal includes two core elements: localizing the grand jury and expanding its ability to influence charging decisions and policies. Under my proposal, grand juries would be drawn from a smaller catchment area, typically a subsection of a city such as a neighborhood. A series of changes in grand jury procedures would permit community members to take a more active role in individual charging decisions. With the assistance of an attorney independent of the prosecutor's office, the grand jury could consider and recommend alternative charges rather than simply being limited to accepting or rejecting the prosecutor's charges. A separate but related proposal is that grand juries could be convened as focus groups to generate recommendations for local prosecutors regarding charging and plea bargaining policies.

Below I briefly recount the political distortions that result in charging and sentencing policies that do not accurately reflect public sentiment. I then turn to describing the proposed reforms in detail, discussing the selection of a local grand jury, ways to facilitate grand jury independence in individual cases, and the use of investigative grand juries to provide oversight over general charging and bargaining policies.

The Problem: Powerful Prosecutors and Political Pathologies

Power over the enforcement of criminal law has been largely concentrated in the hands of the prosecutor. It was not always so. The rise of the determinate sentencing movement in the final decades of the twentieth century shifted discretion from sentencing judges and parole boards to prosecutors.[10] Prosecutors decide what the charges will be, and the charges became the key to the defendant's sentence. The increasing use of guilty pleas—a trend that began long ago, but has seen increases even over the past twenty years[11]—has severely limited the influence of petit juries and thereby nearly eliminated direct community input on the resolution of individual cases.[12] The end result is that the most important decision point in a criminal case is the decision whether and what to charge, and what plea to accept. In many cases the prosecutor has become the de facto trier of fact and sentencing authority.[13]

The prosecutor's discretion to make these decisions is largely unfettered. Charging decisions are routinely influenced not only by the sufficiency of the evidence in the case, but also by any number of factors such as law enforcement priorities, the prosecutor's assessment of the defendant's likelihood of reoffending and the effect of a given charge on the defendant's future prospects, how involved and vocal the victim is, whether the case has received publicity, and whether the case will advance the prosecutor's career.[14] Charging decisions are not transparent to the public, and are largely unreviewable.[15]

The power wielded by prosecutors might be less troubling if it were adequately checked by the democratic process—if, in other words, the exercise of prosecutorial discretion more or less reflected public sentiment regarding law enforcement priorities and just punishments.[16] Ironically, as crime has become more of a factor in elections, criminal law and enforcement policies have moved farther away from community wishes.[17] In particular, criminal justice policy has been distorted by two political pathologies: (1) a disjuncture between what the public says in the polls about "crime" in general versus how people think about specific criminal cases; and (2) the de facto disenfranchisement of inner city communities most affected by crime and high sentencing.[18]

Current law enforcement and sentencing policies distort the public sentiment they claim to represent. Social science research suggests that the trend toward harsher sentencing policies stems from an oversimplified understanding of public attitudes toward punishment.[19] In general opinion polls, a majority of citizens regularly state that current penalties are too lenient,[20] leading politicians to create new crimes that are easier to prove and to enact harsher sentencing laws; it also undoubtedly causes prosecutors to bring more charges and to seek more severe sentences, all in an attempt to appear "tough on crime." But when given detailed descriptions of specific cases, studies show that respondents often suggest sentences that are more lenient than the mandatory minimum in their jurisdiction.[21]

Recently, three federal district judges conducted a small study which revealed a marked disparity between the Sentencing Guidelines and real jurors' recommended sentences.[22] Following a conviction in twenty jury trials, the judges gave each juror a sheet listing the defendant's past criminal convictions

and asked them to recommend a sentence. The study found that the low-end Guidelines range for each case was almost five times higher than the median jurors' recommendation, and that 92% of jurors recommended a sentence that was below the Guidelines' recommended minimum for the offense.[23]

This discrepancy between general opinion polls calling for harsher sentencing policies and the public's more lenient reaction to specific cases appears to result from the lay tendency to assume that the typical fact pattern for a particular offense is far more serious than it actually is; citizens commonly believe, for example, that most burglars are armed and that more burglaries result in violence than is actually the case.[24] The more lenient response to specific case descriptions and real cases more accurately reflects public views on punishment. Nonetheless, the more general sentiment to "get tough" is the one citizens take with them into the voting booth, and is reflected in politicians' and prosecutors' harsh approach to crime. As a result, sentences have spiraled upward in a manner that would likely horrify a public better informed about specific crimes and criminals.

Sentencing provisions and charging decisions are distorted in another way that particularly affects high-crime communities. Such communities are likely to have less political clout in influencing legislation, law enforcement, and charging policies, both because of reduced social capital and community organization[25] and, in some cases, because of the disenfranchisement of some community members with criminal records.[26] In addition, these communities have a marginal influence because virtually all the entities with influence over criminal law administration are controlled at the county level (juries and prosecutors' offices) or even the state level (legislatures). Yet these are the very communities that have the greatest interest in criminal justice laws and policies. They, far more than any other Americans, are the victims of crime—in the form of appalling rates of violence and theft, but also less directly in that drug gangs are a terrifying social force in many neighborhoods, making it difficult to do business or raise a family. At the same time, high-crime communities are also the chief victims, if you will, of the criminal justice system, in the form of the removal and incarceration of large numbers of male community members.[27] The severity of the current regime has devastating effects on high-crime communities, including reduced employment opportunities, financial hardship, disruption suffered by the offender's family and children, and the erosion of social capital and organization resulting from the aggregation of these effects over the community.[28]

The grand jury reforms I propose in the next section would mitigate these political distortions and make charging decisions more accurately reflect community sentiment.

Reforming the Grand Jury

One way to ensure that prosecutors exercise their broad discretion in a manner that better aligns with community sentiment is to empower the grand jury to provide input into charging decisions and policies. My proposal involves reforming both how grand juries are selected and the nature of their deliberations. First, I argue that grand juries should be drawn from a smaller area, such as a neighborhood. Second, I argue that grand juries should play a more active role in individual charging decisions, which would include proposing alternative charges as well as exercising a veto over prosecutions that it deems inappropriate. Third, I argue that prosecutors should periodically convene grand juries to serve as an advisory group to help set the neighborhood's law enforcement priorities and offer input into charging and plea bargaining policies. This reform would make the prosecutor more accountable by permitting review of general charging trends for common case types as well as some oversight of plea bargaining policies, since individual plea deals would not be subject to grand jury approval.

While these reforms would produce an institution that operates in a manner quite different from the common practice of most contemporary grand juries, these reforms are consistent with the traditional role and function of the grand jury. Although nominally charged with evaluating whether there is probable cause to believe that the defendant committed the crime, commentators have recognized that the grand jury's more fundamental role is to make a non-legal judgment about whether the local community considers the criminal prosecution appropriate.[29] Permitting the grand jury to propose its own charges rather than merely vote on the charges presented by the prosecutor is also not a new invention. The grand jury's traditional powers included issuing charges not proposed by a prosecutor, though this power of presentment is now very rarely used.[30] Finally, the notion of using the grand jury as a focus group to monitor the prosecutor's charging decisions and issue reports with recommendations finds precedent in the grand jury's traditional civil investigative role. Several states continue to use grand juries to provide oversight of local public institutions such as county or city government or jails by conducting an investigation and submitting a report with recommendations to which the agency is obliged to respond.[31]

Below I describe in more detail, along with potential objections, each of the three elements of the reform proposal: localized selection of grand jurors; a more robust role in individual charging decisions; and grand jury input on general charging and bargaining policies.

Selection

One way to better align criminal justice policies with community sentiment is to foster local, popular participation in charging decisions. Grand juries should be drawn from a small catchment area representing the local community, such as a large neighborhood or a subsection of the city. These neighborhood grand juries could then be used to provide input into charging decisions and policies for crimes committed in that community.[32]

Involving local laypeople in charging decisions and policies would make these decisions more reflective of community sentiment. Permitting local community members to participate directly in individual charging decisions would alleviate the political distortion that mars current charging policies by allowing citizens to make an informed judgment based on the facts of a specific case. Perhaps most important, a neighborhood grand jury would allow local communities to strike their own balance between safety and the social costs of harsh law enforcement and sentencing policies.[33] By giving local citizens an active role in criminal justice decisions, this reform can enhance respect for the law and legal process, particularly in high-crime communities.

Using grand juries to foster community involvement has some distinct advantages over the most obvious alternative mechanisms for enhancing public participation: the variety of community justice programs that have developed in the past decade or so such as community prosecution projects, community courts, and community policing programs.[34] Rather than rely on volunteers and open community meetings that are often dominated by small interest groups, mandatory participation on grand juries would eliminate many of the concerns about representativeness that plague current community justice programs.[35] Of course, the current system of calling and seating grand jurors is far from perfect, and much could be done to enhance the representativeness of these bodies. Nevertheless, the proposed approach would be superior to the use of unrepresentative volunteers and would draw on an established procedure to create a body representing a cross-section of the community.

A central issue in designing a localized grand jury system is how to define the relevant "community." One might object that it is difficult, if not impossible, to define the "local community" in such a way that does not exclude individuals and communities affected by any given crime.[36] There are several aspects to this problem, each of which I will try to take up here.

First, drawing the geographical boundaries of each local "community" would not be a clear-cut process. One can imagine two approaches. One could create catchment areas of different sizes in an attempt to capture some meaningful community of interests with respect to crime—creating, for example, a very small high-crime catchment area that includes a housing project and its immediate neighborhood, and much larger suburban catchment areas on the theory that these larger areas have similar crime profiles and therefore shared interests. Alternatively, one might use a more straightforward boundary such as a zip code, as suggested by Kevin Washburn.[37] Although there are obvious advantages to the zip code approach—most notably simplicity and relative lack of controversy—my own instinct would be to attempt to draw meaningful rather than random boundaries. I happen to live in what I think of as one of as an extremely homogenous zip code, the zip code of Harvard University (02138). And yet, this zip code includes both public housing and multi-million dollar homes. It is unclear whether the different kinds of residents of 02138 would have a shared perspective on law enforcement priorities in, for example, drug cases.

Of course, drawing boundaries in a way that creates relatively small communities creates additional complications. Many potential grand jurors might know or know about the victim or defendant, including, for example, any of the defendant's past convictions. As discussed in more detail below, if one takes the view that the grand jury should offer input into the proper charge and disposition of the case rather than simply make a probable cause determination, it is not self-evident that some knowledge of the parties, including information about a defendant's prior convictions, should be disqualifying. After all, prosecutors typically have this information and may take it into account in deciding whether and what to charge. Nevertheless, the potential for personal bias dictates that individuals who know the defendant or victim should be excluded from grand jury service. Members of small, high-crime communities might also be called on repeatedly to serve as grand jurors. This is not entirely a bad thing: it might educate these individuals about criminal justice issues and encourage a sense of ownership over local law enforcement policies.[38] Still, frequent grand jury service might become burdensome and disruptive. This difficulty might be alleviated, at least in part, by offering alternative sessions on the weekends or evenings. And, of course, there is always the option of expanding the boundary of the local "community" somewhat, even if it means creating a less cohesive group.

A related question is whether to limit the grand jury to residents. In metropolitan areas, it is not unusual for individuals to live, work, and play in several different geographical areas.[39] Focusing on individuals who live in a particular neighborhood may exclude people who have a legitimate stake in the law enforcement policies of that neighborhood.[40] Many community justice programs already use an expansive definition of community that includes residents and stakeholders, such as non-resident business owners. Although lim-

iting grand jury selection to local residents is the most straightforward approach, it is possible to imagine a grand jury based on a community of interests that might include individuals who work, own property, or spend significant time in the area.[41]

In addition to pointing out difficulties in working out the specifics of grand jury selection, critics might also offer two potential objections to the general approach of localizing criminal justice decision-making: (1) there are disparities in how different locales respond to similar offenses, which violates the principle of equality before the law; and (2) the effects of crime are not limited to a localized community.

One might object that decentralization can lead to unfairness as different communities adopt disparate approaches to prosecuting, charging, and sentencing similar offenses. Under this view, localized decision-making represents a step backward from determinate sentencing reforms that encouraged a more uniform treatment of offenses. However, the determinate sentencing movement has failed to live up to its promise of eliminating disparity.[42] Determinate sentencing schemes simply shift power and discretion from the sentencing judge to prosecutors, whose decisions are less transparent but still likely to create disparity in outcomes for similar cases, both within and between districts.[43] The proposed reform would simply discipline the exercise of prosecutorial discretion in a way that more accurately reflects the community the prosecutor represents. Some increased disparity between local communities in the approach to crime may be worth the benefits of transparent, flexible policies tailored to local needs and accurately reflecting public sentiment.

The second criticism is that decentralization of criminal justice policies is inappropriate because crime in one "community" is likely to affect other communities. This "boundary problem"[44] is inherent in any system in which states have different substantive criminal laws and districts use different charging and law enforcement practices. To be sure, this potential problem is exacerbated by neighborhood-level decentralization, but it is a question of degree, rather than of kind.[45] In my view, neighborhoods would be better off in a regime that permits local autonomy—even if that autonomy is limited somewhat by spillover effects from other communities—than they are in the current system, which effectively disenfranchises those communities hardest hit by crime.

Individual Charging Decisions

The grand jury was designed in part to permit the community to prevent unjust prosecutions.[46] In practice, however, grand jurors in most jurisdictions almost never exercise their power to screen charging decisions. The grand jury

is often criticized as a mere "rubber stamp" for prosecutors' determinations.[47] In the federal system, for example, grand juries generally refuse to indict in fewer than one percent of cases.[48] For this reason, merely instituting a neighborhood grand jury would be insufficient to restore this institution to its traditional role as a check on unjust prosecutions.

Most mundanely, a prosecutor's ability to simply avoid an unfavorable grand jury determination and seek another[49] suggests that additional reforms are needed to give the grand jury real teeth. Moreover, today a grand jury is less likely to believe that a prosecution is inappropriate because it views the criminal statute as illegitimate or the conduct unworthy of any sort of prosecution, as was often the case in the early days of the grand jury.[50] Rather, a local community is more likely to view the sentence attached to the charge or the prosecutor's choice of charges as inappropriate. But the grand jury currently is not given the information necessary to reject or alter proposed charges on those grounds. In what follows, I propose procedural reforms aimed not at subjecting the prosecutor's evidence of guilt to greater scrutiny,[51] but at enhancing the grand jury's ability to provide meaningful local community input into individual charging decisions, including the ability to alter proposed charges as well as simply to reject them.

The first required change does not involve the grand jury hearing itself. For the grand jury to act as a meaningful check on prosecutors' decisions, a grand jury indictment must be required. In addition, a prosecutor who fails to obtain an indictment must not be permitted simply to resubmit the case to a new grand jury.[52] Permitting a prosecutor to resubmit a case to multiple grand juries increases the chances that a docile grand jury will rubber stamp a prosecution. Few states impose both these restrictions; in all other states and in the federal courts, prosecutors may either resubmit failed cases or avoid the grand jury altogether.[53]

Second, the defendant should have a right to testify at the hearing.[54] Such testimony would give the grand jury more contextual information about the circumstances of the crime and the offender to help them evaluate whether the proposed charges are appropriate. In practice, few defendants will exercise this right.[55] This change will only be implicated in marginal cases where the defendant believes he can persuade the jury that the prosecutor is acting unfairly or overzealously in bringing the charges[56]—i.e., precisely the cases where the local community may want carefully to review the prosecutor's charging decision. Ric Simmons provides an example of such a case from New York City, New York being one of the few states that permit defendant testimony.[57] The defendant in the case was charged with bribery of a police officer. The defendant, who had no prior record, was arrested for possession of a small amount

of marijuana and offered the officer fifty dollars for a Desk Appearance Ticket ("DAT"), which would have allowed him to be released immediately. Although the facts of the case were not in doubt, the defendant testified at the grand jury hearing, explaining that he had never been arrested before, was terrified of spending the night in jail, and that other arrestees told him that it was common practice to pay for a DAT. The grand jury refused to indict. Though rare, this is precisely the kind of case for which defendant testimony would be invaluable.

The third reform I propose to individual charging practices, and the most important one, is to provide an independent attorney for the grand jury. In the past, scholars have proposed this modification on the theory that the lawyer would counteract the prosecutor's dominance and provide independent counsel on the legal question of probable cause facing the grand jurors.[58] From the perspective of expanding the grand jury's policy role, however, a grand jury attorney could serve an entirely different function. One of the difficulties with the indictment process is that the jurors are generally given the choice whether or not to indict the defendant on the charges presented. Except in marginal cases where the grand jurors believe that the defendant should never have been prosecuted, they are unlikely to return a no bill if they believe the defendant should be prosecuted for something, even if they think that the prosecution's particular choice of charges is excessive. A good example of this is the experience of Phyllis Crocker, who was the foreperson of a grand jury in Cuyahoga County, Ohio.[59] Unusually, the grand jury was encouraged by the judge to exercise policy judgment over drug-possession charges, which led the prosecutor to attempt to disband the panel.[60] Crocker's grand jury eventually heard some cases, but it was crippled in its attempt to exercise policy discretion because of its dependence on the prosecutor for information about the law.[61]

In these circumstances, the need for an independent attorney for the grand jury is obvious. An independent attorney can inform the grand jury of the range of charges available. Under this approach, the grand jury procedure would be transformed from a review of the prosecutor's proposed charges to a more interactive process permitting grand jurors to consult their own attorney and to participate in an informed way in formulating the charges. As noted above, the notion of the grand jury rather than the prosecutor formulating charges has precedent in the grand jury's traditional power of presentment.[62] Giving the grand jury its own attorney could revive something akin to this grand jury function.[63]

Of course, it is vital that the grand jury attorney be truly independent from the prosecutor's office. The grand jury counsel could be nominated or appointed by the local bar association or the court. Short terms of service could also help preserve independence and prevent the creation of a new power center unaccountable to the people.[64] In addition, ethical rules would have to be developed to ensure that the attorney acts to aid the grand jury's policy discretion, rather than to push his own agenda. It will be a delicate task to write rules that permit the attorney to provide valuable information (if asked) without authorizing him to overwhelm the jurors with his own opinions. Fortunately, courts and bar associations are adept at developing fine ethical distinctions, and attorneys are capable of interpreting and adhering to them.

What information should the grand jury have access to when deciding whether to accept the prosecutor's proposed charges? Clearly, the independent attorney should advise them as to the range of possible charges that could attach to the behavior alleged by the prosecutor. It would also be vital for the grand jury to know the range of penalties associated with each potential sentence. A more difficult question is whether grand jurors should be informed of a defendant's criminal record and how that might affect the sentence if charged. One might imagine giving the grand jury information about the base sentence, along with information about the effects criminal history would have on that sentence without specifying the criminal history of the particular defendant—on the theory that the defendant's criminal record might unduly prejudice their probable cause determination. On the other hand, knowing the likely sentence that would attach to this particular defendant by virtue of the charge is certainly part of the prosecutor's calculus in a determinate sentencing regime, and probably should also be part of the grand jury's calculus as well.

The value of informing the jury of the defendant's criminal history is clearest in the case of mandatory minimum penalties such as three-strikes laws: the fact that this prosecution would trigger the three-strikes law is certainly relevant to the grand jury's determination of whether the prosecution for a minor felony is just and comports with the local community's law enforcement priorities. In such cases, the grand jury should be given the opportunity to decide whether the application of a three-strikes law or other relevant mandatory minimum was appropriate in a specific case, which would give the prosecutor more direct and less distorted input than public opinion polls or election results. To be sure, telling jurors about the defendant's criminal history may make grand jurors less likely to reject indictments on probable cause grounds, potentially subjecting more innocent defendants to trial. But in practice grand juries rarely reject indictments under the current regime anyway, and the petit jury would not be exposed to potentially prejudicial information about the defendant's criminal history.

What about system-wide information that prosecutors use in their decision-making process? The grand jury attorney could make available any data and recommendations about frequency, number of arrests, charging policies, and sentencing outcomes for the particular crime at issue that might have been put together by one of the investigative grand juries that I describe below. The prosecutor would likely feel obliged to explain any suggested charges that significantly departed from the norm; this procedure might encourage more consistency in charging by making the prosecutor articulate reasons for departures. In some cases, the prosecutor could use these reports to justify his proposed charges: explaining what might seem like severe charges and resulting penalties for a professional car thief, for example, on the grounds that car theft was a significant problem in the neighborhood and car thieves were extremely difficult to catch.

These reforms would help make the grand jury more independent. But what about plea bargaining? What does it matter if grand juries are given more meaningful input into charging decisions if most defendants waive indictment pursuant to a plea bargain? One answer to this problem would be to require that grand juries approve plea bargains. But this proposal strikes me as impractical. In addition to the obvious inefficiency of subjecting each plea to grand jury review, bargains often take into account factors like the likelihood of conviction at trial and the usefulness of a defendant's cooperation in another prosecution that would be very difficult for a grand jury to weigh. But the ability to use plea bargains to opt out of the reformed grand jury procedure does not mean that these reforms would have no impact on plea bargains. A revitalized grand jury would indirectly reign in abusive prosecutorial bargaining practices, because over time plea bargaining would take into account expectations about the grand jury's influence over the indictment. As William Stuntz has pointed out, because many federal and state criminal codes include multiple overlapping statutes that cover similar offenses, "defendants who commit what is, in ordinary terminology, a single crime can be treated as though they committed many different crimes—and that state of affairs is not the exception, but the rule."[65] Prosecutors may, and regularly do, threaten to bring multiple charges, thereby elevating the defendant's potential sentencing exposure under the relevant guidelines or statutory sentencing range and increasing the pressure to plead guilty.[66] But with a reformed grand jury, this threat from piling on charges would likely be reduced, because both parties would know that a grand jury informed of the basic facts of the case and the sentences attached to the proposed charges might well reject or alter those charges. Similarly, negotiations over more controversial charges—for example, prosecutions for minor drug offenses—would occur in the shadow of expectations about the grand jury's willingness to issue indictments for such charges.

Another issue that bears thinking about is what happens if the grand jury wants the prosecutor to charge a *more* serious crime. Because of the social science studies showing that charging and sentencing policies are currently more severe than community sentiment would support, I would expect that most grand jury interventions would involve rejecting or reducing the proposed charges. But it is possible that grand juries would be harsher than prosecutors in some cases—for example, high-crime communities might wish to treat firearms offenses with special severity. In such cases, grand juries should be permitted to indict on additional charges of their own choosing, and it seems likely that in some cases a prosecutor might go forward with the harsher charges because they are a fair sounding of the community's wishes. There is still an obvious safety valve in this, in that if the prosecutor thinks that the charges proposed by the grand jury are too severe, for example because he thinks the case will be difficult to win at trial, because trying the more serious charge would be more expensive, or simply because he thinks the proposed charge is unjust, the prosecutor always has the option of dropping the case or arranging a plea bargain.

The next objection that comes to mind, and the most serious one, is the possibility that the grand jury will use its new powers to make decisions biased by racial or other invidious prejudices. This danger is particularly acute if a defendant from one community commits a crime in another community, especially if most members of the victim community are of a different race than the offender. To take an example, young African-American men from a high-crime neighborhood accused of stealing a car might not be excited to learn that the grand jury considering their indictment has been drawn solely from the suburban, white neighborhood where the car was stolen. In such a case, the grand jury is unlikely to internalize fully the costs and benefits of an aggressive prosecution, or to confer any special legitimacy on the prosecution. It might also be affected by racial bias. This concern has led some to suggest that a localized grand jury might be limited to cases in which both the offender and victim are members of the community.[67] But I think this problem may be overstated. First, most crimes of violence, and many narcotics offenses, are committed near the perpetrator's home.[68] Second, the reality of the status quo is that most inner-city defendants are indicted by county-wide grand juries, even in cases of crimes committed in the inner city. Drawing a grand jury exclusively from a white neighborhood where the crime occurred in such a neighborhood is not likely to be materially worse than the status quo. Perhaps most important, the use of charging and sentencing statistics in deliberations may go a long way in reducing the problem of both racially-motivated severity and leniency by making grand jurors aware that their decision is out of line with the way that the given crime has generally been treated in the past.[69] On this

basis, I would not limit the jurisdiction of the neighborhood grand jury to crimes involving defendants who are members of the community unless disparate treatment of outsiders proved to be a problem.

Providing the grand jury with an independent attorney and sentencing information and permitting it to formulate alternative charges as well as veto prosecutions would transform this institution. Taken together, the proposed reforms would provide for meaningful community input at the most important decision-point in the criminal justice process, particularly in a determinate sentencing regime: the formulation of charges.

General Charging Policies

Most proposals to reform the grand jury involve enhancing its ability to obstruct prosecutions sought by the prosecutor's office. But the grand jury can play a more positive, constructive role, drawing on its traditional powers to act as a civil regulatory body. My proposal here is that prosecutors use grand juries not merely as indictment machines, but as focus groups to set policing and prosecution priorities for the neighborhood. Grand juries could be convened from time to time with this special purpose in mind.

Some community prosecution programs have created community groups intended to carry out some of these functions. Some take the form of informal open public meetings; others are more formal and involve a body of community representatives, usually appointed by the prosecutor, which meets regularly to make recommendations regarding law enforcement priorities.[70] The advantages of convening a grand jury for this purpose are (1) mandatory grand jury service should insure a more representative group than community advisory boards which tend to be dominated by interest groups and politically active citizens;[71] and (2) the recommendations of a grand jury will have more of an official, democratic imprimatur, and therefore are more likely to influence prosecutors.

An advisory grand jury could be used to provide oversight of two different types. First, a grand jury might be convened every three years to investigate general law enforcement priorities for the neighborhood. The District Attorney would be expected to provide data on crime, arrests, and dispositions, and to make a presentation about what he sees as the biggest crime problems in the area and how his office has addressed those problems over the past three years. Based on this presentation, the grand jury would be free, with the assistance of independent counsel, to investigate any aspect of policing, bargaining, or charging policies that it found problematic. The grand jury would then issue a report (again, with the aid of its independent lawyer) detailing

any recommendations for adjusting policing or prosecutorial priorities or practices. It is worth highlighting that the advisory grand jury, unlike grand juries that examine cases where an arrest has been made and a charge brought, would have the ability to urge police and prosecutors to devote resources to crimes that rarely result in arrest or prosecution.

Second, an advisory grand jury can be used to periodically review in more detail the dispositions of a particular category of crime. A few crime types could be considered each year on a rotating basis. In addition to data about arrests, charges, and sentences for this crime, the prosecutor would present a few examples of cases that had been resolved by plea bargain. The goal would not be to provide review of individual plea bargains, but to encourage the prosecutor to articulate some of the criteria that influence charging and bargaining policies for this class of crime, so as to help determine whether the bargained dispositions in these cases contradict community sentiment. The grand jury might also issue recommendations about the types of factors that would, in its view, support more severe or more lenient plea bargaining and charging decisions. As already mentioned, these reports and advisory grand jury recommendations could be used to improve consistency in charging and provide guidance to grand juries considering individual cases.

For less controversial types of crime, the primary impact of this process will be minor—increasing the transparency of prosecutorial charging and bargaining decisions. As Stephanos Bibas points out, making this information public poses few risks because experienced defense attorneys likely already know the going rate for various types of crime.[72] And transparency has its own benefits, making public accurate crime and disposition statistics that may counteract some of the distortions caused by the news media. Would publicizing that, for example, theft under a certain amount is generally not prosecuted serve to encourage these minor crimes? Perhaps there would be some effect on the margins, though thieves savvy enough to research the grand jury report probably would have been aware of charging practices anyway.

Advisory grand jury charging guidelines would be particularly helpful for more controversial crimes, such as quality of life, statutory rape, or non-violent drug offenses, because the advisory grand jury can assist the prosecutor in determining what sorts of cases the local community considers worthy of prosecution, and what factors should be considered in choosing charges. For example, in Dane County, Wisconsin, prosecutors set up a community advisory board to create charging recommendations in statutory rape cases.[73] After a series of facilitated meetings where a number of case scenarios were discussed, the board produced a document with general guidelines for prosecutors regarding the age difference between the victim and defendant necessary to war-

rant criminal statutory rape charges, potential mitigating and aggravating factors, and possible outcomes for defendants under twenty-one years of age.[74]

We should not underestimate the importance of an advisory grand jury's recommendations about general bargaining and charging policies, even if community influence is largely limited to controversial cases. Given the failure of general criminal laws and policies to reflect accurately public sentiment, particularly in high crime communities, the number of "controversial" cases may be significant. Moreover, in a world of guilty pleas, the grand jury as focus group may be the only mechanism to ensure that charging policies do not deviate too much from local community opinion.

Conclusion

The people who live in high-crime communities have a perspective on crime that is bound to be different from that of the legislature and the county District Attorney's office. We cannot know exactly how local residents would respond if given more control over law enforcement. But consider this: the chief defense of the system we have is not that it produces objectively "right" punishments (most people no longer believe in such a thing), but rather that it is the outcome of democratic governance. And yet social science research suggests this political accountability is a mirage. The grand jury reforms I have proposed in this paper would help give local residents of all communities more control over the initiation of criminal proceedings in their neighborhoods, and help to eliminate the disjuncture between simple "get tough" political responses to crime and the more complex response we know people have when they are presented with specific cases. Injecting some of this complexity into our system would go a long way toward creating a criminal justice system we can all believe in.

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Notes

1. *See* Kate Stith & Jose A. Cabranes, Fear of Judging: Sentencing in the Federal Criminal Courts 59–66 (1988); Michael Tonry, Sentencing Matters 98–99 (1996); Sara Sun Beale, *What's Law Got to Do With It? The Political, Social, Psychological, and Other Non-legal Factors Influencing the Development of (Federal) Criminal Law*, 1 Buff. Crim. L. Rev. 23, 23–24 (1997).

2. The federal mandatory minimums for drug crimes and the California three strikes law are among the most well-known of these sentencing schemes.

3. Jonathan Simon, *Introduction: Crime, Community, and Criminal Justice*, 90 Cal. L. Rev. 1415, 1418–19 (2002).

4. *See, e.g.*, Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African-American Communities*, 56 Stan. L. Rev. 1271, 1272–73 (2004).

5. *See* Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. Rev. 255, 262 (2004) ("Political leaders no longer even operate under the pretense that the nation's system of punishment might seek to rehabilitate the offender."); Simon, *supra* note 3, at 1418–19 (stating that prisons aim primarily to incapacitate and warehouse offenders rather than rehabilitate them).

6. *See, e.g.*, Leroy D. Clark, *A Civil Rights Task: Removing Barriers of Ex-Convicts*, 38 U.S.F. L. Rev. 193, 199 (2004) (describing the relationship between tough-on-crime politics and sentencing reforms); Rachel A. Van Cleave, "*Death is Different,*" *Is Money Different? Criminal Punishments, Forfeitures, and Punitive Damages-Shifting Constitutional Paradigms for Assessing Proportionality,* 12 Cal. Interdisc. L.J. 217, 276 (2003) (describing the politics behind the enactment of the California three strikes law).

7. *See* Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. Pa. L. Rev. 1295, 1302 (2001).

8. *See, e.g.*, Tracey L. Meares, *Norms, Legitimacy, and Law Enforcement,* 79 Or. L. Rev. 391, 398–402 (2000) (describing the relationship between the perceived legitimacy of the legal system and compliance with the law).

9. Adriaan Lanni, *The Future of Community Justice*, 40 Harv. C.R.-C.L. L. Rev. 359, 394–405 (2005).

10. *See, e.g.*, Adriaan Lanni, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 Yale L.J. 1775, 1777–1780 (1999) (summarizing the history of determinate sentencing).

11. *See* Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. Rev. 911, 911 n.1 (2006) (noting that the rate of guilty pleas in federal district courts rose from 83.7% in 1990 to 95.4% in 2003); William J. Stuntz, *Unequal Justice*, 121 Harv. L. Rev. 1969, 1988–1989 (2008) (noting the rise in guilty pleas over time).

12. As we will see below, in its current form grand juries rarely have a meaningful impact on charging decisions.

13. *See, e.g.*, Gerard E. Lynch, *Our Administrative System of Criminal Justice,* 66 Fordham L. Rev. 2117 (1998).

14. Roger A. Fairfax, *Grand Jury Discretion and Constitutional Design*, 93 Cornell L. Rev. 703, 734–735 (2008).

15. *Id.* at 736 & n.177.

16. Of course, those who believe that expertise should play a major role in the exercise of discretion in the criminal justice system would not put particular value on increasing political accountability of prosecutors and other criminal justice actors. But the widespread disillusionment with both the rehabilitative ideal and our powers of prediction of dangerousness has led to the abandonment of reliance on expertise in the determination of punishment. *See* Lanni, *supra* note 10, at 1778–1780.

17. *See* Stuntz, *supra* note 11, at 1982–2025.

18. William Stuntz has detailed another form of political pathology in the institutional design and incentive structure that affects criminal law-making. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 510 (2001).

19. Douglas R. Thomson & Anthony J. Ragona, *Popular Moderation Versus Governmental Authoritarianism: An Interactionist View of Public Sentiments Toward Criminal Sanctions*, 33 CRIME & DELINQ. 337, 353–54 (1987); *see also* Lanni, *supra* note 9, at 388–89; Lanni, *supra* note 10, at 1780–82.

20. *See, e.g.*, JULIAN V. ROBERTS & LORETTA J. STALANS, PUBLIC OPINION, CRIME, AND CRIMINAL JUSTICE 207 (1997) (Eighty-one percent of respondents in a 1994 national poll said that sentences are not severe enough.); Loretta J. Stalans & Arthur J. Lurigio, *Lay and Professionals' Beliefs About Crime and Criminal Sentencing: A Need for Theory, Perhaps Schema Theory*, 17 CRIM. JUST. & BEHAV. 333, 344 (1990) (In a 1987 test conducted in Illinois, 72% of laypeople believed judges are too lenient in sentencing burglary.).

21. *See, e.g.*, Howard A. Parker, *Juvenile Court Actions and Public Response, in* BECOMING DELINQUENT: YOUNG OFFENDERS AND THE CORRECTIONAL PROCESS 252, 257–61 (Peter G. Garabedian & Don C. Gibbons eds., 1970) (identifying a similar phenomenon in Washington state); Loretta J. Stalans & Shari Seidman Diamond, *Formation and Change in Lay Evaluations of Criminal Sentencing: Misperception and Discontent*, 14 LAW & HUM. BEHAV. 199, 206 (1990) (finding that while the majority of lay respondents stated that judges are "too lenient" in burglary cases, a majority of the respondents' own sentencing preferences were more lenient than the required minimum sentences for residential burglary); Thomson & Ragona, *supra* note 19, at 348–49 (finding that when given a description of a standard residential burglary, fewer than 7% of subjects suggested a punishment equal to or greater than the two-year minimum penalty under Illinois law).

22. James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, HARV. L. & POL'Y REV. (forthcoming).

23. *Id.*

24. *See, e.g.*, Stalans & Diamond, *supra* note 21, at 202–07 (finding that the laypersons' misperception that the typical burglary is more severe than is actually the case has a significant effect on their tendency to feel that the judiciary is too lenient).

25. *See* TODD R. CLEAR & DAVID R. KARP, THE COMMUNITY JUSTICE IDEAL 42 (1999)(stating that "social disorganization theory in criminology argues that socially disorganized communities are unable to advance collective agendas"); Stuntz, *supra* note 11, at 1981–82, 1997–2010 (describing the decline of local power over crime, and the disempowerment of inner-city communities).

26. *See* Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 104 (2003) (stating that almost four million Americans have been stripped of voting rights because of felony convictions); Pamela S. Karlan, *Convictions and Doubts*, 56 STAN. L. REV. 1147, 1161 (2004) (stating that criminal disenfranchisement laws operate as a "collective sanction," penalizing the communities from which incarcerated prisoners come from and the communities to which they return by "reducing their relative political clout").

27. *See, e.g.*, Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 199–205 (1998) (noting that criminal offending and victimization are concentrated in very poor segregated neighborhoods and detailing the degradation of these neighborhoods by drug crime as well as the social disruption created by tough sentences).

28. *See id.* at 207–11; Brown, *supra* note 7, at 1307.

29. *See* Fairfax, *supra* note 14, at 718–731; Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 30 CORNELL L. REV. 260, 307–310 (1995); Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1, 46 (2002); Kevin K. Washburn, *Restoring the Grand Jury*, 76 FORDHAM L. REV. 2333, 2358–60 (2008). This power is sometimes described as "grand jury nullification," but as Professor Simmons points out, *supra* at 46–47, jurors do not violate the law when they exercise this function.

30. *See* Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1, 57 n.304 (2004).

31. See Susan W. Brenner, *The Voice of the Community: A Case for Grand Jury Independence*, 3 VA. J. SOC. POL'Y & L. 67, 116–119 (1995) (describing various types of civil investigatory roles still played by grand juries in various states).

32. I argue in more detail below why, contra Washburn, I propose that local grand juries have jurisdiction over all crimes committed in that community, even where the defendant is from another community.

33. This argument is commonly made with respect to law enforcement methods such as curfews and anti-gang statutes. *See, e.g.*, Tracey L. Meares & Dan. M. Kahan, *Law and (Norms of) the Inner City*, 32 LAW & SOC'Y REV. 805, 830–32 (1998). Meares and Kahan argue that residents of the inner city see such law enforcement techniques "as tolerably moderate alternatives to the draconian prison sentences." *Id.* at 830. Permitting local communities to have direct input into sentencing permits them to avoid such a Faustian bargain.

34. *See* Lanni, *supra* note 9, at 369–380 (describing various community justice programs).

35. *See* Lanni, *supra* note 9, at 380–383 (describing the difficulties of ensuring representation in community justice programs).

36. For a critique of various methods of defining a community for the purpose of local self-government, see Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371 (2001).

37. *See* Washburn, *supra* note 29, at 2378–80.

38. *See id.* at 2380–82.

39. *See* Schragger, *supra* note 36, at 421.

40. *See id.* at 420–421(criticizing a "residence-based account of local governance").

41. *See id.* at 462–63 (discussing the concept of a "localism of interests").

42. *See, e.g.*, Gerald Heaney, *Revisiting Disparity: Debating Guidelines Sentencing*, 29 AM. CRIM. L. REV. 771, 779 (1992) (reporting that racial disparities persist even under the Federal Sentencing Guidelines).

43. *See, e.g.*, United States v. Banuelos-Rodriguez, 215 F.3d 969, 971–71 (9th Cir. 2000) (noting disparities in charging policies for illegal reentry cases between the Central and Southern California U.S. Attorney's offices); Barkow, *supra* note 26, at 75–76 (noting that studies "on race and capital sentencing have found even greater disparities in the exercise of prosecutorial discretion than in jury discretion"); Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 202–03 (1991) (finding significant disparities in federal prosecution rates among blacks and whites under the Federal Sentencing Guidelines); Cassia Spohn et al., *The Impact of the Ethnicity and Gender of Defendants on the Decision to Reject or Dismiss Felony Charges*, 25 CRIMINOLOGY 175, 181–86 (1987) (finding that race was a factor in charging decisions in Los Angeles County).

44. *See* Schragger, *supra* note 36, at 374 (discussing the boundary problem in local government more generally).

45. Those greatly troubled by this problem-especially as it applies to gun possession crime that can arguably be effectively addressed only on a national level-might support decentralization solely of state law crimes.

46. *See, e.g.*, Washburn, *supra* note 29, at 2358–60.

47. *See, e.g.*, Leipold, *supra* note 29, at 264; *cf.* Simmons, *supra* note 29, at 33–34 (arguing that New York state grand juries refuse to indict about 10% of the time).

48. Leipold, *supra* note 29, at 274.

49. *See* Simmons, *supra* note 29, at 19–20, 71. The Fifth Amendment grand jury right does not apply to the states.

50. *See, e.g.*, Washburn, *supra* note 29, at 2342–44, 2363 (describing the historical role of the grand jury as exercising a veto power on illegitimate laws and prosecutions).

51. Washburn has pointed out that many of the proposals to reform the grand jury are aimed at subjecting the prosecutor's evidence of guilt to more intense scrutiny rather than encouraging the grand jury to nullify laws and prosecutions. *See id.* at 2358. For this reason, Washburn argues that these calls for reform constitute a "wrong turn," *id.* at 2361, and advocates simply reforming selection procedures. I agree with Washburn in that I do not advocate various reform proposals aimed at improving the probable cause determination such as giving witnesses counsel or requiring that exculpatory evidence be presented. However, without the additional reforms suggested here I do not believe a local grand jury would be able to play a meaningful role.

52. *See* Simmons, *supra* note 29, at 17–20.

53. *See id.* at 19–20, 71.

54. *See id.* at 23–24.

55. *See id.* at 37–38 (noting that few defendants will testify because anything the defendant says in the grand jury can be used against him at trial, testifying at the grand jury reveals the defense strategy to the prosecution, and some prosecutors refuse to plea bargain with defendants who testify at the grand jury).

56. *Id.* at 23.

57. *See id.* at 39.

58. *See, e.g.*, Brenner, *supra* note 31, at 124–125; Leipold, *supra* note 29, at 313.

59. Phyllis L. Crocker, *Appointed but (Nearly) Prevented from Serving: My Experiences as a Grand Jury Foreperson*, 2 Ohio St. J. Crim. L. 289 (2004).

60. *Id.* at 290, 293.

61. *Id.* at 298 (noting that the grand jury was "ill-equipped to carry out [its] duty independently" even though the judge had taken the unusual step of providing the grand jury with its own copy of the state criminal code).

62. *See* Kuckes, *supra* note 30, at 57 n.304.

63. Of course, a critical difference between presentment and my proposal is that under my proposal the prosecutor would suggest the initial charges (even if they were altered by the grand jury) and ultimately would retain discretion over whether to pursue or drop the indictment approved by the grand jury.

64. *See* Brenner, *supra* note 31, at 94–95 (describing the system in Hawaii, whereby the Chief Justice of the Hawaii Supreme Court appoints grand jury counsel to serve for a one-year term).

65. *See* Stuntz, *supra* note 18, at 519.

66. *See id.* at 519–20.

67. Washburn, *supra* note 29, at 2379.

68. *Id.* at 2379.

69. This use of this data may alleviate another type of intra-community bias: the potential for grand juror leniency toward a member of the community that is motivated by improper considerations, such as when a Park Avenue grand jury inexplicably declines to indict or reduces the charges against a white defendant, resulting in charges that are much more lenient than those brought against members of other racial groups for the same offense.

70. *See* Lanni, *supra* note 9, at 369–373 (describing community prosecution programs).

71. *See id.* at 380–382 (discussing difficulties of ensuring representation in community justice programs).

72. *See* Bibas, *supra* note 11, at 957.

73. *See* Sandy Nowack, *A Community Prosecution Approach to Statutory Rape: Wisconsin's Pilot Policy Project*, 50 DePaul L. Rev. 865, 886–90 (2001).

74. *See id.* at 888–89.