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Bringing Down a Legend: How Pennsylvania's Investigating Grand Jury Ended Joe Paterno's Career

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*Bringing Down a Legend: How Pennsylvania's Investigating
Grand Jury Ended Joe Paterno's Career*

Brian R. Gallini*

To describe a rapidly declining situation, people often say “things went from bad to worse.”¹ But, no better scenario truly exemplifies that phrase than Joe Paterno's dismissal from Pennsylvania State University as its Head Football Coach. Entering the 2011 season, Paterno was the longest tenured head football coach in the nation,² the winningest coach in Penn State and major college football history,³ and his current Nittany Lion

* Associate Professor of Law, University of Arkansas-Fayetteville School of Law. The author first thanks Thomas Parker for his invaluable research assistance in preparing this Article. Second, the author thanks Professors Richard Leo, Laurent Sacharoff, and Rick Greenstein for their helpful comments on prior drafts. Third, the author thanks Camille Forrest her thoughts on how to explore this topic. Fourth, the author thanks the University of Arkansas-Fayetteville School of Law for a summer research grant that provided support for this project. Last, but far from least, the author thanks his wife to whom he owes a substantial debt for her endless patience in discussing Joe Paterno and Jerry Sandusky.

¹ E.g., Paul Grondahl, *On the Campaign Trail with Romney's Pop*, THE TIMES-UNION, Jan. 10, 2012, at B1 (“Things went from bad to worse by the time the Romney team showed up in Concord.”). The expression seems particularly popular in sports. See, e.g., Charles Paikert, *Ideas & Trends: The Clock Was Ticking . . . ; The Man Who Saved the N.B.A.*, N.Y. TIMES, May 14, 2000 (“‘Things went from bad to worse,’ said Maurice Podoloff, the league commissioner at the time.”); Robin Finn, *Islanders Incur Their Fans' Ire*, N.Y. TIMES, Feb. 24, 1991 (“According to Coach Al Arbour, ‘Things went from bad to worse.’”); Joseph Durso, *Christopher Hits Key 2-Run Homer; Drive Sends Mets Ahead*, N.Y. TIMES, Aug. 26, 1965, at 26 (“Things went from bad to worse for the Los Angeles Dodgers last night when New York Mets reached from the cellar and defeated them for the second straight time, 7-5.”).

² Associated Press, *Paterno Could be Last of Ilk in College Football*, ESPN.COM, Jan. 23, 2012, <http://sports.espn.go.com/espn/wire?section=nfc&id=7492333> (“After Paterno was fired, Virginia Tech's Frank Beamer became the longest-tenured coach working in the highest level of Division I football.”).

³ Tim Layden, *Joe Paterno 1926-2012*, SIVVAULT, Jan. 30, 2012, <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1194183/index.htm>. Paterno is no longer the winningest coach in major college football history. The NCAA punished Penn State's football program as a result of the Sandusky scandal, which included stripping Paterno of 111 wins. Matt Brooks, *Joe Paterno Stripped of 111 Victories; No Longer Winningest Coach*, WASHINGTONPOST.COM, July 23, 2012, http://www.washingtonpost.com/blogs/early-lead/post/penn-state-stripped-of-112-wins-joe-paterno-no-longer-winningest-coach/2012/07/23/gJQAN64J4W_blog.html.

squad was enjoying another standout season.⁴ Things changed almost overnight.

On November 5, 2011, Pennsylvania State Police arrested Jerry Sandusky, an ex-assistant defensive coach to Joe Paterno, for sexually abusing eight boys.⁵ The arrest followed what Pennsylvania Attorney General Linda Kelly called a “wide-reaching grand jury investigation,”⁶ the results of which—contained in a grand jury presentment—became publicly available on the same day Sandusky was arrested.⁷ Although the presentment was replete with horrific sexual abuse allegations related specifically to Sandusky, it also included a handful of “facts” relevant to Paterno.⁸

In general, the presentment described inappropriate sexual contact between Sandusky and eight young boys.⁹ When describing an incident on March 1, 2002, between Sandusky and “victim 2,” the presentment indicated that a “graduate assistant” (later identified as

⁴ ESPN.com news services, *Joe Paterno, Graham Spanier removed*, ESPN.COM, Nov. 10, 2011, http://espn.go.com/college-football/story/_/id/7214380/joe-paterno-president-graham-spanier-penn-state (noting that Penn State was 8-1 at the time of Paterno’s dismissal).

⁵ Mark Viera, *Former Coach at Penn State is Charged With Abuse*, N.Y. TIMES, Nov. 5, 2011, http://www.nytimes.com/2011/11/06/sports/ncaafootball/former-coach-at-penn-state-is-charged-with-abuse.html?_r=1&pagewanted=all#. Sandusky has since been convicted of many of the initial charges. Joe Drape, *Sandusky Guilty of Sexual Abuse of 10 Young Boys*, N.Y. TIMES, June 22, 2012, <http://www.nytimes.com/2012/06/23/sports/ncaafootball/jerry-sandusky-convicted-of-sexually-abusing-boys.html?pagewanted=all>.

⁶ Pennsylvania Attorney General Press Release, *Child sex charges filed against Jerry Sandusky; two top Penn State University officials charged with perjury & failure to report suspected child abuse*, ATTORNEYGENERAL.GOV, Nov. 5, 2011, <http://www.attorneygeneral.gov/press.aspx?id=6270>.

⁷ *Id.* A link was embedded into the phrase “wide-reaching grand jury investigation,” which if clicked directed the user to the Pennsylvania investigating grand jury’s “findings of fact.” *Id.*

⁸ Jerry Sandusky Investigative Grand Jury Presentment, *Findings of Fact* (Nov. 5, 2011), <http://www.attorneygeneral.gov/uploadedFiles/Press/Sandusky-Grand-Jury-Presentment.pdf>.

⁹ *Id.* at 1-23. The investigative grand jury issued a subsequent presentment detailing alleged sexual abuse by Sandusky against two additional victims. Jon Schmitz & Ron Musselman, *Sandusky Charged with Abusing Two More Juveniles*, PITTSBURGH POST-GAZETTE, Mar. 12, 2012, <http://www.post-gazette.com/stories/local/breaking/sandusky-charged-with-abusing-two-more-juveniles-220165/>.

Mike McQueary)¹⁰ witnessed Sandusky showering with “a naked boy . . . whose age he estimated to be ten years old, with his hands up against the wall, being subjected to anal intercourse by a naked Sandusky.”¹¹ The next day, according to the presentment, the graduate assistant “telephoned Paterno and went to Paterno’s home, where he reported what he had seen.”¹² Paterno responded by calling Penn State’s athletic director at his home the next day to report “that the graduate assistant had seen Jerry Sandusky in the Lasch Building showers fondling or doing something of a sexual nature to a young boy.”¹³

A media frenzy erupted immediately after the report came out.¹⁴ News about the so-called “Penn State scandal”¹⁵ was all over every major newspaper in the nation and occupied time on almost every major network and cable news station for days.¹⁶ Alongside the understandable public outcry surrounding Sandusky’s horrid alleged behavior lingered some basic questions about Joe Paterno:¹⁷ how much did he know about Sandusky’s conduct and, correspondingly, when did he know it?¹⁸

¹⁰ Sara Ganim, *Former Coach Jerry Sandusky Used Charity to Molest Kids*, THE PATRIOT NEWS, Nov. 6, 2011, http://www.pennlive.com/midstate/index.ssf/2011/11/report_former_coach_jerry_sand.html.

¹¹ Sandusky Presentment, *supra* note 8, at 6.

¹² *Id.* at 7.

¹³ *Id.*

¹⁴ Staff & Wire Reports, *Stamford’s Role in Paterno’s Legacy Mourns the Loss of a Legend*, THE STAMFORD TIMES, Jan. 26, 2012, http://www.thehour.com/stamford_times/sports/stamford-s-role-in-paterno-s-legacy-mourns-the-loss/article_ffd69ef0-55bb-50be-bef3-b0eebe348ff0.html.

¹⁵ *E.g.*, *The Penn State Scandal*, CBSNEWS.COM, http://www.cbsnews.com/2718-400_162-1332.html.

¹⁶ Michael McCarthy, *TV Networks Pounce on Penn State Sex Scandal*, USA TODAY, Nov. 7, 2011, <http://content.usatoday.com/communities/gameon/post/2011/11/tv-networks-pounce-on-penn-state-sex-scandal-joe-paterno-jerry-sandusky-espn-abc-nbc-cbs/1#.T7a9oI6dhCA>.

¹⁷ Audrey Snyder, *Tight-Knit Penn State Community Shocked by Allegations*, USA TODAY, Nov. 6, 2011, <http://www.usatoday.com/sports/college/football/bigten/story/2011-11-05/Penn-State-allegations-town-reaction/51086340/1>.

¹⁸ Espn.com News Services, *Joe Paterno, Graham Spanier removed*, ESPN.COM, Nov. 10, 2011, http://espn.go.com/college-football/story/_/id/7214380/joe-paterno-president-graham-spanier-penn-state (“A key question throughout the scandal has been why Paterno and other top school officials didn’t go to police in 2002 after being told by Mike McQueary,

On November 7, Pennsylvania Attorney General Linda Kelly clarified that Paterno was not the subject of the state's criminal investigation into how the school handled the allegations against Sandusky.¹⁹ That, however, did not satisfy the court of public opinion.²⁰ Sensing the end of his career was perhaps near,²¹ and seeking to unilaterally decide the date of his retirement,²² Paterno announced on the morning of November 9 that he would retire at the end of the 2011 season.²³ The University's Board of Trustees ignored Paterno's announcement and dismissed him, effective immediately, that same evening.²⁴ The University community reacted violently to the news of Paterno's firing.²⁵ Paterno tried to

who is receivers coach now but was a graduate assistant at the time, that he had seen Sandusky assaulting a boy in a school shower.”).

¹⁹ Marc Levy & Mark Scolforo, *Football Coach Joe Paterno, Other Penn State Officials, Failed in Their “Moral Responsibility,” Police Commissioner Says*, MASSLIVE.COM, Nov. 7, 2011, http://www.masslive.com/sports/index.ssf/2011/11/football_coach_joe_paterno_oth.html (“Pennsylvania Attorney General Linda Kelly said Paterno is not a target of the investigation into how the school handled the accusations.”).

²⁰ See, e.g., Jemele Hill, *Penn State Had to Get Rid of Joe Paterno*, ESPN.COM, Nov. 10, 2011, http://espn.go.com/espn/commentary/story/_/page/hill-111109/penn-state-did-right-thing-getting-rid-joe-paterno; Bill Plaschke, *Forget Sympathy, What Joe Paterno Deserves is to be Fired Immediately*, L.A. TIMES, Nov. 9, 2011, <http://articles.latimes.com/2011/nov/09/sports/la-sp-1110-plaschke-joe-paterno-20111109>; Andy Staples, *With No Explanation for Inaction, Joe Paterno Must Go Now*, SI.COM, Nov. 8, 2011, http://sportsillustrated.cnn.com/2011/writers/andy_staples/11/08/penn-state-joe-paterno-scandal/index.html.

²¹ *Penn State's Paterno Faces Pressure to Quit Over Sex Abuse Case*, CNN.COM, Nov. 8, 2011, <http://news.blogs.cnn.com/2011/11/08/penn-states-paterno-faces-pressure-to-quit-over-sex-abuse-case/>.

²² *Joe Paterno Fired Immediately as Penn State Football Coach, Board of Trustees Announces*, THE PATRIOT NEWS, Nov. 9, 2011, http://www.pennlive.com/midstate/index.ssf/2011/11/joe_paterno_is_out_as_penn_sta.html (“Paterno tried to go out on his own terms by announcing his retirement without talking to the board.”).

²³ Espn.com News Services, *Joe Paterno to Retire; President Out?*, ESPN.COM, Nov. 9, 2011, http://espn.go.com/college-football/story/_/id/7211281/penn-state-nittany-lions-joe-paterno-retire-end-season.

²⁴ Espn.com News Services, *Joe Paterno, Graham Spanier removed*, ESPN.COM, Nov. 10, 2011, http://espn.go.com/college-football/story/_/id/7214380/joe-paterno-president-graham-spanier-penn-state.

²⁵ Brian Bennett & Wayne Drehs, *Surreal Scene After Joe Paterno's Firing*, ESPN.COM, Nov. 9, 2011, http://espn.go.com/college-football/story/_/id/7214792/students-react-firing-penn-state-nittany-lions-coach.

calm supporters who had gathered outside his home shortly after news of his firing became public by telling them “we still have things to do.”²⁶ He was wrong. Just sixty-four days later,²⁷ Paterno died on January 22, 2012, at the age of eighty-five due to metastatic small cell carcinoma of the lung.²⁸

Paterno’s downfall began with the investigative grand jury naming Paterno in the presentment targeted toward Sandusky. But Paterno was denied the opportunity to legally respond—there existed no venue for him to file any kind of response or seek to strike portions of the Sandusky presentment. In federal court and many state courts, strict secrecy rules governing grand jury activity would likely have ensured that Paterno would never have had to respond—publically or legally—to a presentment issued by an investigating grand jury that investigated *someone else*. Secrecy rules aside, federal grand jury targets, defendants, and/or witnesses never have to respond to grand jury presentments because presentments have been disallowed in the federal criminal justice system since 1946.²⁹ Federal courts, and the majority of state courts, also disallow so-called grand jury reports—documents that,

joe-paterno (“Students turned over a TV station’s satellite truck on College Avenue and also tore down a light post and some street signs before police in riot gear used mace to disperse the crowd.”).

²⁶ *Joe Paterno Speaks Outside His Home After Being Fired*, KATU.COM, Nov. 9, 2011, <http://www.katu.com/home/related/133593893.html>.

²⁷ Will Bunch, *A Hero’s Life, a Mortal’s End: JoePa’s “Grand Experiment,”* PHILLY.COM, Jan. 23, 2012, http://articles.philly.com/2012-01-23/news/30655915_1_joe-paterno-plain-blue-and-white-uniforms-coach-in-major-college.

²⁸ Jack Carey, *Penn State Coaching Legend Joe Paterno Dies at 85*, USA TODAY, Jan. 23, 2012, <http://www.usatoday.com/sports/college/football/story/2012-01-21/former-penn-state-coach-joe-paterno-dead/52737230/1>. Paterno’s termination was likewise hard on his former players. *E.g.*, *Penn State Scandal: Matt Millen Cries Discussing Joe Paterno, Jerry Sandusky Investigation*, HUFFINGTON POST, Nov. 8, 2011, http://www.huffingtonpost.com/2011/11/08/penn-state-scandal-matt-millen-cries-joe-paterno-sandusky_n_1082167.html?ref=sports. Millen was particularly close to Sandusky and presumably the allegations were particularly hard on him. Paul Reinhard, *Millen’s Seen Coach’s Fire, Compassion*, THE MORNING CALL (Allentown, PA), June 2, 2000, at C1 (noting that Millen played for Sandusky and that the two had remained close since Millen’s playing days).

²⁹ The federal system relies exclusively on indictments to charge felony offenses. FED. R. CRIM. P. 7(a)(1). An indictment is a document signed by the prosecutor, and returned by the grand jury, that provides the basic elements of the offense. FED. R. CRIM. P. 7(c). The document serves to inform the defendant of the charges against him, *Russell v. United States*, 369 U.S. 749, 763-68 (1962), though it is not evidence of his guilt, *e.g.*, *United States v. Ciambrone*, 601 F.2d 616, 622 (2d Cir. 1979).

historically speaking, report on matters of public concern or the conduct of public officials.³⁰

Pennsylvania is different; it continues to authorize both presentments and reports but, in doing so, does not regulate with precision what and who is permissibly included in those documents. Its failure to do so allows the grand jury to name *anyone*, such as an uninvestigated third party like Paterno, in a presentment or report without correspondingly providing that third party with the ability to defend himself meaningfully. The Supreme Court's historic emphasis on the grand jury's independence is to blame;³¹ the Court has long characterized the grand jury as a body "acting independently of either prosecuting attorney or judge,"³² a position that Pennsylvania has taken to an extreme.

Accordingly, this Article argues that the Pennsylvania grand jury system and its use of a presentment needlessly and unfairly included Paterno, practically accusing him of a crime. An important job of the grand jury is to investigate crimes, but by naming Paterno in the Sandusky presentment it implicitly said that Paterno committed a crime without having gone through the appropriate steps to establish probable cause that he did commit a crime. Doing so abuses the grand jury system and would not happen in the federal system or in most other states.

Paterno's involvement may certainly have become public absent his being named in the Sandusky presentment, but a grand jury investigation into someone *else*—in this case Sandusky—should have no role in that eventuality. It may likewise be the case that what appeared in the Sandusky presentment about Paterno is absolutely true. Indeed, Paterno may well have protected a child molester for a decade for the most selfish of reasons—but his personal guilt is not the point. Paterno's story simply makes for an outstanding illustration of the problem: a grand jury presentment

³⁰ RICHARD D. YOUNGER, *THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634-1941* 5-34 (1963).

³¹ The Supreme Court's emphasis on grand jury independence has led the Court to thematically provide little guidance to states on how best to oversee grand juries. *Accord* John F. Decker, *Legislating New Federalism: The Call for Grand Jury Reform in the States*, 58 OKLA. L. REV. 341, 393 (2005) ("The U.S. Supreme Court's consistent lack of oversight of state grand juries thus creates an obligation for states to impose meaningful standards for their grand jury procedures.").

³² *United States v. Dionisio*, 410 U.S. 1, 16 (1973).

investigating one person may not explicitly or implicitly accuse an uninvestigated third party of impropriety.

The problem of naming third parties in a suspect's presentment is not limited to Pennsylvania.³³ Like this Article's discussion of Paterno, Pennsylvania is merely an illustration of the broader problem that allows for naming uninvestigated third parties in a grand jury presentment. Indeed, any grand jury that names an uninvestigated person in a presentment or report subverts the grand jury's investigative purpose and abuses the grand jury system. That problem, as it has played out in Pennsylvania, has historically been exacerbated by those sensitive and inflammatory grand jury documents appearing in public. Pennsylvania's doing so undermines the fact-finding mission that is central to our jury system. Indeed, allowing the public to view sensitive grand jury documents—untested by a proof beyond a reasonable doubt standard—harms the reputation of any named third party and unduly prejudices the suspect's potential jury pool.³⁴ Finally, it inappropriately allows for a trial by media that can ensnare third parties, like Joe Paterno, who are not the subject of the grand jury's investigation.

Part I tells the fascinating backstory of Paterno's life, almost Forrest Gump-like in his wealth of historical experience.³⁵ Doing so in this piece is necessary for two reasons. First, Paterno's sudden and dramatic overnight downfall—despite his coaching and teaching legacy—powerfully illustrates how dangerous it is for jurisdictions to publish so-called "findings" in an investigative grand jury presentment and/or report. Second, and more

³³ See *infra* note 394 (providing a detailed list of state jurisdictions that actively rely on presentments).

³⁴ Similar prejudice to a prospective defendant may undoubtedly exist anytime a public discussion about a police report arises. Unlike that example, however, grand jury materials are considered sacred because of the strong tradition of secrecy that surrounds them. See *Butterworth v. Smith*, 494 U.S. 624, 629-30 (1990) (discussing the tradition of grand jury secrecy); see also Jennifer M. Collins, *And the Walls Came Tumbling Down: Sharing Grand Jury Information with the Intelligence Community under the USA PATRIOT Act*, 39 AM. CRIM. L. REV. 1261, 1262 (2002) (noting that "[s]ecrecy has been an important component of the grand jury process since at least the seventeenth century").

³⁵ Joe Paterno, like Tom Hanks' character in the movie, "manages between the 1950s and the 1980s to become involved in every major event in American history." Roger Ebert, *Forrest Gump*, ROGEREBERT.SUNTIMES.COM, July 6, 1994, <http://rogerebert.suntimes.com/apps/pbcs.dll/article?AID=/19940706/REVIEWS/407060301/1023>.

specifically, Paterno’s downfall illustrates the importance of grand jury secrecy—both during and *after* its investigation. That secrecy, present in all federal grand jury proceedings, prevents collateral damage—like job loss—to unindicted criminally innocent third parties. The absence of that secrecy in Pennsylvania’s investigative grand jury proceedings took Paterno’s job, tarnished his legacy, and perhaps even shortened his life.

Part II thereafter carefully explains the inner workings of the federal grand jury process—a process that of course must abide by the Fifth Amendment’s Grand Jury clause. In contrast, and as Part II details, Pennsylvania is not bound by the Fifth Amendment and has accordingly constructed a charging system that deviates substantially from its federal counterpart. Not unlike a handful of other states, Pennsylvania’s “presentment” system bypasses many of the procedural protections provided by the federal criminal law.

Finally, Part III argues that Pennsylvania’s presentment system unfairly and unnecessarily involved Joe Paterno. The Sandusky presentment unnecessarily named Joe Paterno, which led to his dismissal as head coach of the Penn State football team and may have hastened his death. Part III contends that the Supreme Court’s desire for grand jury independence does not equate to or permit the investigative grand jury recklessness so prevalent in Pennsylvania’s system. Indeed, had Sandusky been federally investigated, the public may never have known about Paterno’s involvement. Accordingly, Paterno might never have been fired, might still be coaching and, most importantly, might still be alive.

I.

This Article is not the first to recount details of Paterno’s life; others have indeed told his story.³⁶ Others have also told the story of his accomplishments on the football field, both as a player and as a coach.³⁷ And still others have explained what he meant to the Penn State community.³⁸ Finally, even more have explored his

³⁶ See, e.g., FRANK FITZPATRICK, *THE LION IN AUTUMN: A SEASON WITH JOE PATERNO AND PENN STATE FOOTBALL* (2005); JACK NEWCOMBE, *SIX DAYS TO SATURDAY: JOE PATERNO & PENN STATE* (1974); MERVIN D. HYMAN & GORDON S. WHITE, JR., *JOE PATERNO: “FOOTBALL MY WAY”* (1971).

³⁷ E.g., MICHAEL O’BRIEN, *NO ORDINARY JOE* (1998).

³⁸ E.g., Torie Bosch, *He Was Penn State*, SLATE.COM, Jan. 22, 2012, http://www.slate.com/articles/news_and_politics/obit/2012/01/joe_paterno_dead_is_it_appropriate_to_mourn_the_death_of_theLegendary_coach_.html.

legacy and struggled with where his proper place in history in light of his role in the Penn State scandal.³⁹

But, in order to understand the true impact of the Pennsylvania Sandusky investigative grand jury, some context for Paterno's extraordinary life and career is necessary. Accordingly, Section A recounts Paterno's early life, while Section B discusses his tenure as Head Coach for Penn State, and Section C concludes by examining his role in the Sandusky controversy. Taken together, consider the story that follows not in a biographical context, but rather in the context of whether a state criminal grand jury investigation of someone *else* should properly have ended Paterno's career and life.

A. *The Early Years.*

"A coach? *You didn't have to go to college to be a coach!*"
Florence de la Salle Paterno⁴⁰

Joseph Vincent "Joe" Paterno was born on December 21, 1926, in Brooklyn, New York, to mother Florence de la Salle Paterno and father Angelo Lafayette Paterno.⁴¹ Raised in Brooklyn, or what Paterno called a home "quite Italian in atmosphere,"⁴² Paterno and his younger brother George grew up in a disciplined hard-working household.⁴³ The two brothers attended Saint Edmonds, a Catholic grade school nearby their home.⁴⁴ Beginning in seventh and eighth grade, Paterno began playing football on an unofficial school team and with older boys at a nearby park.⁴⁵ His drive in the classroom

³⁹ E.g., Dick Weiss, *Joe Paterno's legacy at Penn State is tainted as late coach failed to use his power to stop Jerry Sandusky's crimes*, NYDAILYNEWS.COM, June 24, 2012, <http://www.nydailynews.com/sports/college/joe-paterno-legacy-penn-state-tainted-late-coach-failed-power-stop-jerry-sandusky-crimes-article-1.1101354>; Jonathan Mahler, *Grand Experiment Meets an Inglorious End*, N.Y. TIMES, Nov. 8, 2011, <http://www.nytimes.com/2011/11/09/sports/ncaafotball/joe-paternos-grand-experiment-meets-an-inglorious-end.html>.

⁴⁰ O'BRIEN, *supra* note 37, at 40.

⁴¹ JOE PATERNO & BERNARD ASBELL, PATERNO BY THE BOOK 24 (1989).

⁴² *Id.*

⁴³ O'BRIEN, *supra* note 37, at 4.

⁴⁴ *Id.* at 9.

⁴⁵ *Id.* at 10.

was equally notable; he was frequently recognized at school convocations for his impressive grades.⁴⁶

Following his time at Saint Edmonds, Paterno enrolled at Brooklyn Prep—a high school staffed predominantly by Jesuit priests and Jesuits in training—where he continued playing football and excelled in basketball.⁴⁷ Paterno played a variety of positions during his high school football career, but arguably began establishing his future as a coach when he played quarterback in 1944 during the second half of his senior season.⁴⁸ As quarterback, he alone called plays, established himself as a fierce competitor, and was dubbed the “brains of the team” by the school newspaper.⁴⁹ Paterno’s team outscored opponents 197 to 52 during the ’44 season on its way to a 6-1-1 record and a 20-13 win over undefeated Saint Cecilia High School—then coached by a young Vince Lombardi.⁵⁰

Paterno graduated as salutatorian from high school on January 25, 1945, and considered continuing his football career at the College of the Holy Cross, playing basketball at Fordham, or securing a commission to West Point.⁵¹ Ultimately, though, Paterno selected Brown University, where he began summer school in 1945 until his draft notice abruptly interrupted his studies.⁵² Paterno served in the army until August 1946 when he resumed his coursework at Brown in the fall term.⁵³ During his time at Brown, from 1946 until his graduation in 1950, Paterno played quarterback and cornerback for the football team, guard for the basketball team, and joined the Delta Kappa Epsilon fraternity.⁵⁴

But his true love was football, where flashes of his coaching future continued to emerge. During his senior football season, the players

⁴⁶ *Id.*

⁴⁷ *Id.* at 12-13. Joe thought himself a better basketball player than football; he was the team’s starting guard by his junior year and was named team captain as a senior. *Id.* at 18.

⁴⁸ O’BRIEN, *supra* note 37, at 13-14.

⁴⁹ *Id.* at 15.

⁵⁰ *Id.* at 17.

⁵¹ *Id.* at 25.

⁵² *Id.* at 27.

⁵³ *Id.*

⁵⁴ *See* O’BRIEN, *supra* note 37, at 28-38.

elected Paterno co-captain.⁵⁵ Paterno led the team to an 8-1 overall record—one Brown’s best ever—during which Paterno led the team in scoring, punt returns, kickoff returns, and was second in pass interceptions.⁵⁶ What stood out most, though, was his leadership and motivational skills. His teammates, in reflecting on Paterno’s college career at Brown, said “[h]e was an excellent play caller” who was “two steps ahead of everybody else.”⁵⁷ His Head Coach, Rip Engle, said he let Paterno direct the team because “he was a real strategist” and “the type who can carry a team.”⁵⁸

Following his graduation from Brown in 1950, Paterno was accepted into Boston University Law School where he planned to enroll that fall.⁵⁹ But football had other plans. Engle asked Paterno to help him with the quarterbacks during Brown’s spring practices, which by itself did not change Paterno’s plans.⁶⁰ When Engle accepted an offer to become Penn State’s Head Coach that same spring, he asked Paterno to join him as an assistant.⁶¹ Paterno elected to postpone law school and accepted the position.⁶²

When Paterno moved to State College, Pennsylvania, it was referred to as “Happy Valley” for a reason—residents took pride in living in an area isolated from Harrisburg, Pittsburgh, and Philadelphia.⁶³ Paterno initially disliked State College and friends teased him about moving to a “cow college in the middle of nowhere.”⁶⁴ But, assigned to the quarterbacks, Paterno quickly made his mark on the football field as a coach who demanded a lot from his players and spent hours in the office every night studying plays.⁶⁵ Paterno pushed himself and his players so hard that his players wished he would find a hobby to take his mind off of football.⁶⁶

⁵⁵ *Id.* at 31.

⁵⁶ *Id.* at 31-34.

⁵⁷ *Id.* at 32.

⁵⁸ *Id.*

⁵⁹ *Id.* at 39.

⁶⁰ O’BRIEN, *supra* note 37, at 39.

⁶¹ *Id.* at 39.

⁶² *Id.*

⁶³ *Id.* at 41.

⁶⁴ *Id.* at 43.

⁶⁵ *Id.* at 44.

⁶⁶ O’BRIEN, *supra* note 37, at 44-45.

Paterno, however, was hooked and informed his father at the end of the 1950 season that he wished to make coaching his career.⁶⁷ He remained at Penn State as an assistant for the next fifteen years—until 1965.⁶⁸ During that time, Paterno established himself as a hard-driving relentless coach who wanted everything done “yesterday.”⁶⁹ He worked diligently to establish new offensive and defensive variations, attended coaching clinics, tutored his older coaching peers,⁷⁰ and even found time to supervise the academic progress of the players he coached.⁷¹ One former Penn State player from 1951-54, Jesse Arnelle, reflectively said of Paterno that he was a clear leader even in those early days.⁷² By the mid-1950s, Paterno established himself as the brain of the team’s offense.⁷³

Amidst his coaching rise, Paterno met Suzanne Pohlund in the winter of 1959.⁷⁴ Although Sue was only a freshman at the time, the pair’s relationship blossomed over their mutual interest in English literature.⁷⁵ The two spent a summer on the New Jersey shore in 1961 where they talked on the beach “discussing Camus, Nietzsche, Hemingway, and Faulkner.”⁷⁶ Toward the end of the summer, a thirty-five-year-old Paterno asked Sue, then twenty-two, to marry him.⁷⁷ She agreed and they married in May of 1962.⁷⁸

Paterno’s success continued on the football field where Penn State compiled a cumulative record of 104-48-4 during his fifteen years as an assistant coach.⁷⁹ Most notably, those teams earned victories

⁶⁷ *Id.* at 45.

⁶⁸ Leonard Shapiro, *Joe Paterno, former Penn State football coach, dies at 85*, THE WASHINGTON POST, Jan. 22, 2012, http://www.washingtonpost.com/local/obituaries/joe-paterno-dies-at-85/2011/12/09/gIQAS9eXIQ_print.html.

⁶⁹ O’BRIEN, *supra* note 37, at 50.

⁷⁰ *Id.* at 51-52.

⁷¹ *Id.* at 55.

⁷² *Id.* at 52.

⁷³ *Id.* at 52.

⁷⁴ *Id.* at 59.

⁷⁵ O’BRIEN, *supra* note 37, at 59-60.

⁷⁶ *Id.* at 60.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 60.

in three of their four bowl game appearances.⁸⁰ Given his prominent role in Penn State's success, Paterno not surprisingly received interest elsewhere for his services from the likes of the Baltimore Colts, Oakland Raiders, Philadelphia Eagles, and Yale.⁸¹ Ultimately, Paterno elected to stay at Penn State where he was named Head Coach after Engle's retirement at the end of the 1965 season.⁸²

B. *Paterno's tenure as Penn State's Head Coach.*

"[W]e came to Penn State as young kids and when we left there we were men and the reason for that was Joe Paterno."⁸³
Lydell Mitchell, Running Back, Penn State (1968-72)⁸⁴

During his time as Penn State's Head Coach, Paterno amassed a shocking number of achievements, including the following:

- two national championships (1982, 1986);⁸⁵ t
- three Big Ten championships (1994, 2005, 2008);⁸⁶ t
- Sports Illustrated Sportsman of the Year (1986);⁸⁷ S

⁸⁰ *Id.* at 60-61.

⁸¹ O'BRIEN, *supra* note 37, at 61-62.

⁸² *Id.* at 62-63.

⁸³ Ralph D. Russo, *Paterno's Grand Experiment Produced Perfection*, BOSTON.COM, Jan. 23, 2012, http://articles.boston.com/2012-01-23/sports/30656213_1_joe-paterno-paterno-era-charlie-pittman.

⁸⁴ Ralph D. Russo, *Joe Paterno Dead: Former PSU Star Lydell Mitchell Says, 'We Won't Let Joe's Legacy Die,'* HUFFINGTON POST, Jan. 22, 2012, http://www.huffingtonpost.com/2012/01/22/joe-paterno-dead-lydell-mitchell-penn-state_n_1222149.html (noting the duration of Mitchell's tenure with Penn State).

⁸⁵ *Past FBS Champions*, CBSSPORTS.COM, <http://www.cbssports.com/collegefootball/story/2554072> (last visited May 20, 2012).

⁸⁶ *Big 10 College Football Champions*, COLLEGEFOOTBALLPOLL.COM, http://www.collegefootballpoll.com/champions_bigten.html (last visited July 2, 2012).

⁸⁷ Rick Reilly, *Not An Ordinary Joe*, SIVVAULT.COM, Dec. 22, 1986, <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1065673/index.htm?eref=sisf>.

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ive American Football Coaches Association Coach of the Year awards (1968, 1978, 1982, 1986, 2005);⁸⁸
- t
hree Walter Camp Coach of the Year awards (1972, 1994, 2005);⁸⁹
- t
hree Eddie Robinson Coach of the Year (1978, 1982, 1986);⁹⁰
- t
wo Bobby Dodd Coach of the Year awards (1981, 2005);⁹¹
- t
he Paul “Bear” Bryant Award (1986);⁹²
- t
hree George Munger Awards (1990, 1994, 2005);⁹³
- t
he Amos Alonzo Stagg Award (2002);⁹⁴

⁸⁸ *Past National COTY Winners*, AMERICAN FOOTBALL COACHES ASSOCIATION, <http://www.afca.com/article/article.php?id=1052> (last visited May 20, 2012).

⁸⁹ Press Release, *LSU’s Les Miles Named 2011 Walter Camp Coach of the Year*, WALTERCAMP.ORG, Jan. 4, 2012, <http://waltercamp.org/index.php/news/788/> (listing past award recipients).

⁹⁰ *Coach of the Year Winners*, FIESTABOWL.ORG, <http://www.fiestabowl.org/media-room/eddie-robinson-coach-of-the-year/award-winners.php> (last visited May 21, 2012).

⁹¹ *Past Winners*, BOBBY DODD COACH OF THE YEAR FOUNDATION, <http://www.bobbydoddfoundation.com/pastwinners2.html> (last visited May 20, 2012).

⁹² *Coach of the Year Award: List of Past Recipients*, THE BRYANT AWARDS, <http://www.bryantawards.com/about/coach-of-the-year-award/> (last visited May 20, 2012).

⁹³ *George Munger Award Winners*, NCAAFOOTBALL.COM, <http://www.ncaafootball.com/News/tabid/729/Article/2349/george-munger-award-winners.aspx> (last visited June 27, 2012).

- he Home Depot Coach of the Year Award (2005);⁹⁵ t
- he Sporting News College Football Coach of the Year (2005);⁹⁶ t
- hree Big Ten Coach of the Year (1994, 2005, 2008);⁹⁷ t
- he most Division I-A wins (409);⁹⁸ and t
- he most bowl wins (24).⁹⁹ t

Despite his many achievements, success as a Head Coach did not come immediately for Paterno. To his immense frustration, Paterno's first team in 1966 finished 5-5 and, in response, hate mail arrived at his doorstep.¹⁰⁰ Feeling as though he let the school down, Paterno isolated himself from his family during the summer

⁹⁴ *Joe Paterno Profile*, GOPSUSPORTS.COM, http://www.gopsusports.com/sports/m-footbl/mtt/paterno_joe00.html (last visited June 27, 2012).

⁹⁵ *College Football Awards - The Home Depot Award*, ESPN.COM, http://espn.go.com/college-football/awards/_/id/33 (last visited June 27, 2012).

⁹⁶ *Sporting News College Football Coach of the Year*, JONFMORSE.COM, http://www.jonfmorse.com/wiki/index.php?title=Sporting_News_College_Football_Coach_of_the_Year (last visited Jun 27, 2012).

⁹⁷ *Big Ten Coach of the Year Winners*, SPORTS-REFERENCE.COM, <http://www.sports-reference.com/cfb/awards/big-ten-coy.html> (last visited May 20, 2012).

⁹⁸ William C. Rhoden, *409 Wins? The Coach Who Has Paterno Beat*, N.Y. TIMES, Oct. 30, 2011, <http://www.nytimes.com/2011/10/31/sports/ncaafootball/gagliardi-still-has-paterno-beat.html?pagewanted=all>.

⁹⁹ *Joe Paterno's Statistical Legacy*, ESPN.COM, http://espn.go.com/blog/statsinfo/post/_/id/37192/pateros-statistical-legacy (last visited May 20, 2012).

¹⁰⁰ O'BRIEN, *supra* note 37, at 65.

of 1967 in an effort to remodel his approach to defense.¹⁰¹ His efforts paid off with an 8-2 record in 1967.

But the predominant “winning at all costs” mentality of college football left Paterno unsatisfied.¹⁰² He therefore began to develop what many regard as his most lasting legacy—the Grand Experiment.¹⁰³ A reporter with the *Philadelphia Inquirer* recorded Paterno’s thoughts about the Grand Experiment in October 1967:

I’m thinking in terms of a Grand Experiment. It sounds a little corny, I know, but it’s that kind of thing for us because we intend doing it with people who belong at Penn State. Everybody assumes if you have a great football team there have to be sacrifices in the area of [academic] standards. They tell me it can’t be done without sacrificing standards. They tell me I’m daydreaming. [But I want to] play good football in the best league possible, with people who belong in college, and who kept things in perspective. Look, I want these kids to enjoy football. But I also want them to enjoy college. I want them to learn art and literature and music and all the other things college has to offer. There’s room for it. College should be a great time. It’s the only time a person is really free. I don’t want my players just tied to a football program.^[104]

In short, the Grand Experiment reflected Paterno’s belief that programs could win football games *and* follow the rules,¹⁰⁵ or, as

¹⁰¹ *Id.* at 67-70.

¹⁰² O’BRIEN, *supra* note 37, at 72.

¹⁰³ E.g., Jack McCallum, *Joe Paterno Wasn’t Perfect, but Legacy More than Final Chapter*, SI.COM, Jan. 23, 2012, http://sportsillustrated.cnn.com/2012/writers/jack_mccallum/01/21/joe.paterno/index.html#ixzz1vRYNU1bM; Ivan Maisel & Mark Schlabach, *Joe Paterno Leaves Lasting Legacy*, ESPN.COM, Jan. 22, 2012, http://espn.go.com/college-football/story/_/id/7488107/joe-paterno-leaves-legacy-penn-state. A film, titled “The Joe We Know,” was recently released highlighting Paterno’s Grand Experiment. *The Grand Experiment & the film “The Joe We Know,”* GRANDEXPERIMENT.ORG, <http://www.grandexperiment.org/about/> (last visited May 20, 2012).

¹⁰⁴ PATERNO & ASBELL, *supra* note 41, at 118.

¹⁰⁵ Jeff Preval, *PSU President: Paterno Realized ‘Grand Experiment’*, WEARECENTRALPA.COM, Jan 24, 2012, http://wearecentralpa.com/fulltext?nxd_id=339172.

he summarized, “first-class football played by students who put first-class lives first.”¹⁰⁶

He followed his thoughts on the Grand Experiment by coaching his Nittany Lions to an undefeated season (10-0) and Orange Bowl victory over Kansas in 1968.¹⁰⁷ The American College Football Coaches’ Association named Paterno Coach of the Year.¹⁰⁸ His on-field success would continue, but the seeds of his ultimate undoing were, without his knowledge, already taking hold.

Joe Paterno first met Jerry Sandusky, then a player, in the fall of 1963 when Paterno was still an assistant coach.¹⁰⁹ On September 20, the day before Penn State was set to take on Oregon, Paterno held a meeting during which he quizzed Sandusky about certain offensive formations.¹¹⁰ Sandusky stuttered in response without providing an answer.¹¹¹ Despite that inauspicious beginning, Sandusky went on to start at defensive end for two seasons under Coach Rip Engle from 1963-65.¹¹² He then returned as a graduate assistant in 1966 after finishing first in his undergraduate class and earning a Bachelor of Science degree in health and physical education.¹¹³

¹⁰⁶ Will Bunch, *A Hero’s Life, a Mortal’s End: JoePa’s “Grand Experiment,”* PHILLY.COM, Jan. 23, 2012, http://articles.philly.com/2012-01-23/news/30655915_1_joe-paterno-plain-blue-and-white-uniforms-coach-in-major-college.

¹⁰⁷ O’BRIEN, *supra* note 37, at 70-72.

¹⁰⁸ *Past National COTY Winners*, AMERICAN FOOTBALL COACHES ASSOCIATION, <http://www.afca.com/article/article.php?id=1052> (last visited May 20, 2012). The Pittsburgh Steelers sought to lure Paterno away from Penn State during the off-season by offering him a long-term contract. O’BRIEN, *supra* note 37, at 79. He rejected the offer. *Id.* at 80.

¹⁰⁹ JERRY SANDUSKY & KIP RICHEAL, *TOUCHED: THE JERRY SANDUSKY STORY* 72 (2000). Tracking this book down is no easy task given that it is no longer available on Amazon.com. Ray Downs, *Jerry Sandusky Biography on Amazon Turns Into Outlet of Rage Toward Accused Child Rapist*, THE CHRISTIAN POST, Nov. 11, 2011, <http://www.christianpost.com/news/jerry-sandusky-biography-on-amazon-turns-into-outlet-of-rage-toward-accused-child-rapist-61568/>.

¹¹⁰ SANDUSKY & RICHEAL, *supra* note 109, at 72.

¹¹¹ *Id.*

¹¹² Mark Viera, *A Reputation Lies in Tatters*, N.Y. TIMES, Nov. 7, 2011, at B16.

¹¹³ *Id.*

Sandusky formally joined Paterno's staff as a full-time assistant in 1969,¹¹⁴ when the Nittany Lions' encore to the 1968 season was *another* 10-0 undefeated season that culminated in an Orange Bowl victory over Missouri.¹¹⁵ Sandusky coached the tackles on the offensive line during that season under Assistant Coach Dan Radakovich, "who had such success developing star players that he was called the Dean of Linebacker U."¹¹⁶ Radakovich left in 1970 and Sandusky directly coached the linebackers for the next eight seasons until his promotion to defensive coordinator.¹¹⁷

Over that period, Paterno continued his Grand Experiment by producing quality teams in 1970 (7-3), 1971 (11-1), and 1972 (10-2), which success caught the eye of the NFL's New England Patriots.¹¹⁸ The Patriots offered Paterno a home, two cars, a significant salary, and a percentage interest in the franchise.¹¹⁹ Although Paterno nearly accepted the offer, he ultimately elected to stay at Penn State.¹²⁰ Many viewed his rejection of the Patriots as a victory of idealism over greed,¹²¹ and prompted one columnist at *Sports Illustrated* to label Paterno as "an authentic folk hero."¹²² The Grand Experiment was working and Paterno was staying at Penn State.

During the span from 1973-77, Paterno's teams continued blazing a trail of success by earning top-ten rankings in four of those five seasons.¹²³ For his part, Sandusky was promoted to defensive coordinator beginning with the 1977 season.¹²⁴ That same year,

¹¹⁴ *Id.*

¹¹⁵ O'BRIEN, *supra* note 37, at 82-83.

¹¹⁶ BILL MOUSHEY & BOB DVORCHAK, *GAME OVER: JERRY SANDUSKY, PENN STATE, AND THE CULTURE OF SILENCE* 24 (2012).

¹¹⁷ *Id.* at 25.

¹¹⁸ C.J. Schexnayder, *Joe Paterno: A Legend's Career*, SBINATION.COM, Jan. 22, 2012, <http://www.sbnation.com/ncaa-football/2012/1/22/2725465/joe-paterno-dies-career-highlights>.

¹¹⁹ O'BRIEN, *supra* note 37, at 91.

¹²⁰ *Id.* at 91-94.

¹²¹ Associated Press, *Idealism Wins Out Over Money As Paterno Stays at Penn State*, THE MORNING RECORD (Connecticut), Jan. 8, 1973, at 17.

¹²² William Johnson, *Not Such an Ordinary Joe*, SIVVAULT.COM, Nov. 19, 1973, <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1088024/index.htm>.

¹²³ O'BRIEN, *supra* note 37, at 101.

¹²⁴ MOUSHEY & DVORCHAK, *supra*, note 116, at 25.

Sandusky wrote a self-published manual titled *Developing Linebackers the Penn State Way*, the proceeds from which he used to open The Second Mile—a charity for underprivileged youth.¹²⁵

Penn State's 1978 11-0 regular season campaign was equally successful, but Paterno's loss to Bear Bryant's Alabama squad in the Sugar Bowl "badly hammered"¹²⁶ Paterno's ego and led *Newsweek* to conclude that "[t]he crafty old Bryant coached rings around Joe[.]"¹²⁷ Perhaps that loss foretold a temporary lull in Penn State's football prowess; the team went 8-4 in 1979.¹²⁸ Paterno blamed himself for the season and viewed it as a low point in his career.¹²⁹

Penn State regained its form almost immediately; the team earned a 10-2 record in 1980, 10-1 in 1981, and its first National Championship the following season by defeating Georgia in the 1983 Sugar Bowl.¹³⁰ During that season, Sandusky's defense received significant notoriety,¹³¹ as it did following Penn State's Sugar Bowl victory.¹³² Alongside Sandusky's work with the Penn State defense, the media also began taking notice of his charitable work with The Second Mile.¹³³ An article in the December 6,

¹²⁵ *Id.* at 25-26. The Second Mile's name comes from the Sermon on the Mount: "And whosoever shall compel thee to go a mile, go with him twain." Bill Lyon, *Sandusky's Last Stand; Paterno's Right-Hand Man Puts Forth a Final Defense Before Turning his Full Attention to The Second Mile*, LANCASTER NEW ERA, Dec. 28, 1999, at C6.

¹²⁶ O'BRIEN, *supra* note 37, at 104.

¹²⁷ Pete Axthelm, *Woody's Last Punch*, NEWSWEEK, Jan. 15, 1979, at 59.

¹²⁸ O'BRIEN, *supra* note 37, at 106.

¹²⁹ *Id.* at 109-10.

¹³⁰ *Id.* at 115-16. Following the 1982 season, Paterno received renewed interest from the Patriots for his services. Associated Press, *Paterno Denies Interest in N.F.L. Job—Again*, N.Y. TIMES, Jan. 3, 1982, at S9. He indicated that he was not interested in leaving Penn State. *Id.*

¹³¹ N. Brooks Clark, *Linebackers Are Jerry Sandusky's Business, But Not His Only Business*, SIVALT.COM, Dec. 6, 1982, <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1126185/index.htm>.

¹³² Mark Viera, *A Reputation Lies in Tatters*, N.Y. TIMES, Nov. 7, 2011, at B16 ("[T]he second-ranked Nittany Lions limited Georgia's Herschel Walker, who had won the Heisman Trophy that season, to just 3.6 yards per carry, well below his season average of 5.2 yards per carry.").

¹³³ N. Brooks Clark, *Linebackers Are Jerry Sandusky's Business, But Not His Only Business*, SIVALT.COM, Dec. 6, 1982, <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1126185/index.htm>.

1982, issue of *Sports Illustrated* praised Sandusky's continued charitable work with The Second Mile alongside his effort to open a group home.¹³⁴

For his efforts that National Championship season, Paterno was recognized with the Eddie Robinson Coach of the Year Award,¹³⁵ and the Joseph M. Sheehan Memorial Award.¹³⁶ He capitalized on Penn State's newfound prominence,¹³⁷ alongside the individual recognition he received,¹³⁸ by continuing his crusade against what he perceived as the abuses in college football. He gave a talk at the National Collegiate Athletic Association convention on January 17, 1983, where he alleged that major colleges "raped" many athletes—particularly blacks—for taking from them and not giving enough back.¹³⁹ Paterno spoke on a lecture circuit that included the Phil Donohue Show, during which he sought to raise awareness about the "corruption in college athletics."¹⁴⁰

Back home, at a Penn State trustees' meeting on January 27, 1983, Paterno gave a speech—designed to inspire those around him—that criticized some of the academic departments as "lousy" and filled with "lazy" professors who were "only concerned with tenure and only concerned with getting tenure for some of their mediocre colleagues."¹⁴¹ Not everyone agreed with the way Paterno handled what he perceived to be athletic exploitation,¹⁴² but he certainly left his mark. After assessing Paterno's substantial efforts that off-season to raise awareness about the importance of academics in college athletics, *The New York Times* concluded that

¹³⁴ *Id.* ("With legal help donated by a Penn State professor, they were granted tax-exempt status, and by 1980 they had raised enough money, \$64,000, to buy 20 acres of farmland two miles from Beaver Stadium.").

¹³⁵ *Coach of the Year Winners*, FIESTABOWL.ORG, <http://www.fiestabowl.org/media-room/eddie-robinson-coach-of-the-year/award-winners.php> (last visited May 21, 2012).

¹³⁶ *Paterno Honored Again as Top Eastern Coach*, N.Y. TIMES, Jan. 9, 1983, at S7.

¹³⁷ *E.g.*, Gordon S. White, Jr., *Penn State Chosen Top 1982 Team in Nation*, N.Y. TIMES, Jan. 3, 1983, at C1.

¹³⁸ *E.g.*, Ira Berkow, *Paterno's No. 1 Platform*, N.Y. TIMES, Feb. 28, 1983, at C3.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ O'BRIEN, *supra* note 37, at 121.

¹⁴² *Paterno Criticized*, N.Y. TIMES, Jan. 28, 1983, at A23.

“[h]e has always been outspoken on [academic] subjects, but his voice is heard more loudly than ever.”¹⁴³

Amidst his aggressive speaking schedule, Paterno returned to the gridiron where his time away from the field showed. The 1983 squad finished 8-4-1 and the 1984 campaign produced a 6-5 finish—Paterno’s worst team since 1966.¹⁴⁴ Although Paterno continued his push to raise awareness about abuses in college sports,¹⁴⁵ he took his teams’ poor performances hard.¹⁴⁶ He customarily took the blame for his teams’ performances and this occasion was no different.¹⁴⁷ Said Paterno reflectively afterward, “I was getting up, going to the office at 4:30 in the morning[.] By midafternoon, I was tired. And maybe I was making some bad decisions as a result.”¹⁴⁸

Paterno turned to Sandusky for help. Sandusky, in turn, brought in defensive tacticians from the Denver Broncos and Chicago Bears who shared concepts Sandusky would incorporate into Penn State’s defensive system.¹⁴⁹ The changes worked. In 1985, the team went 11-1, their only loss coming to Oklahoma in the Orange Bowl.¹⁵⁰ Despite the loss, optimism in the program abounded; thirty-seven of forty-four players on the 1985 squad would return for the 1986 season.¹⁵¹ Paterno, meanwhile, continued his crusade to push an increased focus on academics in college athletics.¹⁵²

¹⁴³ Berkow, *supra* note 138, at C3.

¹⁴⁴ O’BRIEN, *supra* note 37, at 129-30.

¹⁴⁵ *E.g.*, Special to The New York Times, *Rise in Cheating by Colleges Seen*, N.Y. TIMES, Aug. 1, 1984, at B11.

¹⁴⁶ Malcolm Moran, *For Joe Paterno, Tough Climb Back*, N.Y. TIMES, Nov. 17, 1985, at S1.

¹⁴⁷ O’BRIEN, *supra* note 37, at 130.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Malcolm Moran, *25-10 Victory by Sooners*, N.Y. TIMES, Jan. 2, 1986, at A1.

¹⁵¹ O’BRIEN, *supra* note 37, at 131.

¹⁵² *See, e.g.*, Michael Goodwin, *Reform: Many Ideas, Little Agreement*, N.Y. TIMES, June 12, 1986, at D25 (reporting on Paterno’s argument in favor of “more enforcement of academic regulations requiring athletes to be legitimate students”); Michael Goodwin, *When the Cash Register is the Scoreboard*, N.Y. TIMES, June 8, 1986, at S1 (quoting Paterno as saying “we’ve got to break the athletic cycle and interject the academic cycle”); Dave Anderson, *Joe Paterno’s Morality Plays*, N.Y. TIMES, Dec. 5, 1985, at B27 (discussing Paterno’s argument in favor of a bowl playoff system that would allow players to play the games during their holiday break).

That same off-season, Paterno also “put his wallet where his mouth [was] with a gift of \$150,000 to help build Penn State’s library collection and to provide scholarships for minority students.”¹⁵³

This time, however, Paterno’s off-field efforts to better things academically did not detract from his on-field success. In 1986, Paterno secured more evidence to support the success of his Grand Experiment when Penn State posted a perfect 11-0 regular season record and secured a date with #1 ranked Miami in the Fiesta Bowl.¹⁵⁴ As *The New York Times* reported in the lead-up to the game, “[f]or 21 years as the head coach at Penn State, Paterno has presided over a prosperous program in every sense, fielding winning teams without sacrificing academics.”¹⁵⁵ The article went on to report that “[Paterno] has won more than 80 percent of his games (198-44-2) and seen 80 percent of his players graduate. He has done this without cheating, when bending the rules—if not breaking them—is sanctioned at some schools.”¹⁵⁶

Penn State went on to win its second National Championship by defeating Miami by a score of 14-10 on January 2, 1987.¹⁵⁷ Sandusky’s defensive scheme was largely cited as the reason for what one player called “the greatest game in Penn State history.”¹⁵⁸ Sandusky, then in his eighteenth season on Paterno’s staff, was emotional after the win and commented, “[t]o have a feeling for what it takes, and seeing people believe in that and have the courage and strength to do it, and then have it work, it means so much.”¹⁵⁹ When Paterno was asked after the victory how Sandusky contained Miami’s high-octane offense all night, Paterno

¹⁵³ *Sports People: Gift from Paterno*, N.Y. TIMES, May 22, 1986, at D32.

¹⁵⁴ Malcolm Moran, *Winning is Helping Miami Overcome its Complex*, N.Y. TIMES, Dec. 29, 1968, at C11.

¹⁵⁵ Peter Alfano, *Penn State Philosophy*, N.Y. TIMES, Dec. 23, 1986, at B11.

¹⁵⁶ *Id.*

¹⁵⁷ Malcolm Moran, *Penn State Intercepts Miami for National Title*, N.Y. TIMES, Jan. 3, 1987, at 41.

¹⁵⁸ Malcolm Moran, *Salute to Penn State Defense*, N.Y. TIMES, Jan. 4, 1987, at S7; see Mark Viera, *A Reputation Lies in Tatters*, N.Y. TIMES, Nov. 7, 2011, at B16 (“Sandusky’s defense had probably its most memorable game in a 14-10 win over top-ranked Miami in the 1987 Fiesta Bowl, for the Nittany Lions’ second title.”).

¹⁵⁹ Malcolm Moran, *Salute to Penn State Defense*, N.Y. TIMES, Jan. 4, 1987, at S7.

said half-jokingly, “I don’t know exactly. Jerry hasn’t explained to me the details of what we were doing yet.”¹⁶⁰

Although Paterno was honored after the season once again for his coaching accomplishments,¹⁶¹ so too was Sandusky.¹⁶² Sandusky received the 1987 Athlon Sports Assistant Coach of the Year Award.¹⁶³ In an article recognizing the accomplishment, Paterno is quoted as saying the following about Sandusky:

He has great teaching ability and a gift for setting up the sort of drills that teach the kids to execute all of the things we ask them to do as linebackers. Jerry has been reluctant to talk to anybody about a head coaching job, though, because of all the commitments he has in this community.[¹⁶⁴]

Paterno’s reference to Sandusky’s community commitments were, of course, a reference to The Second Mile, by now built and housing six children at a time on twenty-acres of land located two miles from Beaver Stadium.¹⁶⁵

Paterno and Sandusky stayed coaching together, though their success waned for a time following Penn State’s 1986 National Championship. The 1987 team earned an 8-4 overall record followed by a 1988 season that culminated in a 5-6 effort¹⁶⁶—the

¹⁶⁰ 1987 Assistant Coach of the Year: Jerry Sandusky, *Nittany’s Defensive Lion*, ATHLONSPORTS.COM, <http://www.athlonsports.com/college-football/jerry-sandusky-rising-star-most-hated-man-america> (last visited May 21, 2012).

¹⁶¹ *Paterno Honored Again*, N.Y. TIMES, Feb. 12, 1987, at B30 (noting that Paterno was selected to receive his *seventh* Joseph M. Sheehan Memorial award as major college coach of the year in the East); O’BRIEN, *supra* note 37, at 133 (noting that Paterno received the *Sports Illustrated* Sportsman of the Year award, the Bear Bryant Award, and the AFCA Coach of the Year Award).

¹⁶² 1987 Assistant Coach of the Year: Jerry Sandusky, *Nittany’s Defensive Lion*, ATHLONSPORTS.COM, <http://www.athlonsports.com/college-football/jerry-sandusky-rising-star-most-hated-man-america> (last visited May 21, 2012).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Game by Game Under Joe Paterno*, NITTANY LION FOOTBALL, http://grfx.cstv.com/photos/schools/psu/sports/m-footbl/auto_pdf/game-by-game-under-joepa.pdf. One bright spot in the 1987, however, was Paterno’s 200th win when Penn State defeated Bowling Green in the first game of the

first losing season in nearly half a century at Penn State.¹⁶⁷ Those collective performances got administrators thinking about a life without Paterno, though Paterno himself had no immediate plans to retire.¹⁶⁸ Of the 1988 squad, Paterno reflectively said that the “hallmark of [that] whole team was inexperience[,]”¹⁶⁹ though he characteristically blamed himself for failing to get more out of his young players.¹⁷⁰

Equally characteristic of Paterno’s teams, Penn State rebounded quickly. With credit to Sandusky,¹⁷¹ Paterno’s 1989 team posted an 8-3-1 record that included a post-season bowl victory.¹⁷² Things improved in 1990 when the squad finished 9-3 and a #11 Associated Press national ranking.¹⁷³ Paterno’s renewed push

season. Chuck Finder, *Big Plays Help Paterno to 200th*, N.Y. TIMES, Sept. 6, 1987, at S6.

¹⁶⁷ Special to the New York Times, *Paterno Tastes a Bit of Defeat*, N.Y. TIMES, Nov. 20, 1988, at S6 (“The last time Penn State had a losing football season, it was 1938 and Joe Paterno was 11 years old.”).

¹⁶⁸ FRANK FITZPATRICK, *PRIDE OF THE LIONS 207-08* (2011). Paterno himself considered retirement following the team’s 5-6 finish. *Paterno: Teaching a Lesson*, ST. LOUIS POST-DISPATCH, Dec. 31, 1989, at 4F.

¹⁶⁹ PATERNO & ASBELL, *supra* note 41, at 252 (“More players faced their first year of college football—either as redshirts or ‘true’ freshmen—than on any team in my coaching career.”).

¹⁷⁰ *See id.* at 267 (“We babied several of the best younger kids, particularly the young [running] backs, and I think we paid heavily for it.”); *see also* William N. Wallace, *Paterno is Rolling up his Sleeves and Cuffs*, N.Y. TIMES, Oct. 6, 1989, at D23 (“Paterno accused himself of various faults, one of which was bad management of time.”).

¹⁷¹ Bill Center, *They Don’t Call the Place “Linebacker U” for Nothing*, SAN DIEGO UNION-TRIBUNE, Dec. 26, 1989 (crediting Sandusky for Penn State’s defensive mind and noting that “[i]t has been during the reign of Sandusky that Penn State earned the nickname of Linebacker U”).

¹⁷² Curt Holbreich, *Back to Normal: Penn State Wins Wild One*, L.A. TIMES, Dec. 30, 1989, at C1.

¹⁷³ *Blockbuster Bowl*, THE SPORTING NEWS, Jan. 7, 1991, at 16; *Penn State Final AP Rankings*, COLLEGE POLL ARCHIVE, http://www.collegepollarchive.com/football/ap/app_final_team.cfm?TeamID=68 (last visited May 22, 2012). Paterno also continued his characteristic push for academic recognition during the off-season, though in a slightly different form. He wrote an editorial in the *New York Times* arguing that college football would survive just fine despite a growing number of players electing to leave early for the N.F.L. Joe Paterno, *They Shouldn’t Be Hostages*, N.Y. TIMES, Jan. 21, 1990, at S10. No matter whether a player stays in college, moves to the N.F.L., or fails to succeed in college football, “[t]he college degree,” he said, “not the Pro Bowl bonus, should remain the No. 1 priority.” *Id.* Later that same off-season, Paterno received the National Football Foundation award for Distinguished

continued in 1991 when the team finished 11-2 with a #3 national ranking and a 42-17 Fiesta Bowl victory over Tennessee.¹⁷⁴ When the team finished 7-5 against the backdrop of off-field drama in 1992,¹⁷⁵ though, Paterno's critics reemerged despite his continued philanthropic dedication to the University.¹⁷⁶

That criticism was soon dwarfed by the prospect of Penn State playing its first game as a member of the Big Ten conference. Although Penn State had accepted an invitation to join the Big Ten back in 1990,¹⁷⁷ the same year then-President George Bush publicly recognized The Second Mile,¹⁷⁸ the reality that Penn State had officially abandoned its position as an "Independent" University to join the Big Ten conference was just sinking in.¹⁷⁹ Although some, most notably the University of Michigan,¹⁸⁰ were incensed by the admission of Penn State—the eleventh team in the

American. Associated Press, *Honor for Paterno*, N.Y. TIMES, June 6, 1991, at B19.

¹⁷⁴ *21st Annual Fiesta Bowl: Penn State 42, Tennessee 17*, FIESTABOWL.ORG, <http://www.fiestabowl.org/tostitos-fiesta-bowl/tostitos-fiesta-bowl-game-history/game-results-recaps/21st-annual-fiesta-bowl.php> (last visited May 22, 2012 (providing game result and summary)); *Penn State Final AP Rankings*, COLLEGE POLL ARCHIVE, http://www.collegepollarchive.com/football/ap/app_final_team.cfm?TeamID=68 (last visited May 22, 2012) (providing Penn State's final AP ranking in 1991).

¹⁷⁵ Robert McG. Thomas, Jr., *New Problems for Paterno*, N.Y. TIMES, Aug. 27, 1992, at B10 (noting that five total players were arrested just prior to the season for a variety of incidents).

¹⁷⁶ *Compare* GEORGE PATERNO, JOE PATERNO: THE COACH FROM BYZANTIUM 128 (1997) (noting the existence of rumors of a race problem on the team or that Paterno had lost the team entirely), with Patrick Reusse, *Paterno Instincts: Penn State's Success Has Happy Valley Living up to its Name Almost Every Autumn*, STAR TRIBUNE, Nov. 29, 1992, at 1C (reporting that Paterno gave \$250,000 to support an addition to the University's main library).

¹⁷⁷ *Penn State Voted Into Big Ten*, ORLANDO SENTINEL, June 5, 1990, at D2 (noting that Penn State was officially voted into the Big Ten); *Penn State to Make Big 10 into Big 11?* THE SPORTING NEWS, Jan. 1, 1990, at 26 (reporting the invitation).

¹⁷⁸ Lori Shontz, *Penn State's Sandusky to Retire*, PITTSBURGH POST-GAZETTE, July 2, 1999, at C8 ("In 1990, then-President George Bush recognized The Second Mile as the 294th of his Points of Light.").

¹⁷⁹ See GEORGE PATERNO, *supra* note 176, at 137 (noting that the reality of Penn State joining the Big 10 meant the termination of some traditional rivals like Pittsburgh, Syracuse, and West Virginia).

¹⁸⁰ FITZPATRICK, *supra* note 168, at 212 ("The anti-merger sentiment was strongest at Michigan where, as 1993 drew nearer, players were forbidden even to utter the words "Penn State.").

conference—into the Big Ten,¹⁸¹ the move seemed to rejuvenate Paterno.¹⁸²

Paterno was sixty-six when he coached his first Big Ten game and he showed no signs of slowing.¹⁸³ His rejuvenation sparked an impressive run by Penn State over the next seven seasons that ended—coincidentally or not—immediately after Sandusky retired in 1999.¹⁸⁴ Indeed, from 1993 until 1999, Penn State posted an impressive 70-16 record that saw them earn a 41-15 Big Ten conference record and a perfect 1994 season capped by a Rose Bowl victory over Oregon.¹⁸⁵ Along the way, Paterno earned his 300th win,¹⁸⁶ and donated \$3.5 million dollars to the University for “scholarships, faculty positions and the construction of an interfaith spiritual center and a sports hall of fame[.]”¹⁸⁷ Paterno even capped off the 1999 season by signing a five year extension at the age of seventy-three.¹⁸⁸

¹⁸¹ *Id.* at 211 (“The league’s familiar name, though no longer numerically accurate, would not be changed.”).

¹⁸² *Id.* at 212 (noting that the new challenge of the Big Ten prompted Paterno to begin “exercising more vigorously, lifting weights, and dieting”); Michael Sisak, *Big Ten is Paterno’s Biggest Challenge*, N.Y. TIMES, Sept. 4, 1993, at 32 (reporting Paterno saying “I feel like a rookie coach, edgy, excited, all the things I was when I was beginning to coach”); Ray Parrillo, *Paterno’s Enthusiasm Rekindled by Penn State’s Move to Big 10*, CHICAGO TRIBUNE, Sept. 6, 1992, at C14 (“If the Big 10 thing hadn’t happened, I probably wouldn’t be as enthusiastic as I am[.]”).

¹⁸³ Compare FITZPATRICK, *supra* note 168, at 212 (noting Paterno did not plan to retire at the age of seventy), with C.W. Nevius, *The Blockbuster Bowl: Stanford vs. Penn State*, THE SAN FRANCISCO CHRONICLE, Jan. 1, 1993, at D1 (noting that Paterno had originally projected his retirement at the age of seventy).

¹⁸⁴ MOUSHEY & DVORCHAK, *supra*, note 116, at 60; FITZPATRICK, *supra* note 168, at 237.

¹⁸⁵ *Game by Game Under Joe Paterno*, NITTANY LION FOOTBALL, http://grfx.cstv.com/photos/schools/psu/sports/m-footbl/auto_pdf/game-by-game-under-joepa.pdf; Paterno individually also received the Maxwell Football Club Coach of the Year. *Paterno Wins Award*, N.Y. TIMES, Dec. 13, 1994, at B16.

¹⁸⁶ Joe Drape, *The Stories and Tears Flow for Paterno’s 300th*, N.Y. TIMES, Sept. 13, 1998, at 572.

¹⁸⁷ Malcolm Moran, *A Grateful Paterno Promises \$3.5 Million to Penn State*, N.Y. TIMES, Jan. 17, 1998, at C2. Paterno and his wife, Sue, also led a fund-raising effort that generated an additional \$21 million for the library project. Mark Stewart, *He’s Just an Ordinary Joe: Paterno’s 50 Years Make Penn State a Happy Place*, MILWAUKEE JOURNAL SENTINEL, Sept. 3, 1999, at Sports pg. 1.

¹⁸⁸ Associated Press, *Penn State: Paterno, 73, Signs Five-Year Extension*, N.Y. TIMES, Jan. 25, 2000, at D7.

Following Sandusky's retirement, Paterno promoted another of his longtime assistants, Tom Bradley, to replace Sandusky as defensive coordinator.¹⁸⁹ But Penn State struggled mightily without Sandusky; immediately after Sandusky's retirement, Paterno's teams posted a 26-33 overall record from 2000-04 during a period Penn State fans refer to as the Dark Ages.¹⁹⁰ Yet, prior to what was a disastrous 4-7 2004 season—and despite rising frustration amongst the fan base about Penn State's increasingly poor performances¹⁹¹—the University awarded Paterno with a four-year extension in May of that year.¹⁹²

As he had done so many times before, though, Paterno rebounded. His 2005 team posted an 11-1 record that reignited the fan base—particularly the students, who began to camp outside the stadium days before games in an area the media would dub “Paternoville.”¹⁹³ At the age of seventy-nine, and amid a slew of coaching awards for Penn State's dramatic turnaround,¹⁹⁴ he

¹⁸⁹ Mark Wogenrick, Next in Lion: With Joe Paterno Still at the Helm, the Penn State Football Coaching Staff Has Taken on a New Look, THE MORNING CALL (Allentown, PA), Feb. 8, 2000, at C1.

¹⁹⁰ MOUSHEY & DVORCHAK, *supra*, note 116, at 60 (“Whether it was coincidence or Sandusky meant that much to the program, Penn State football entered into what fans called the Dark Ages.”). Perhaps the lone bright spot for fans during that time was Paterno passing legendary Alabama coach Bear Bryant for most wins among major-college coaches. Jere Longman, *With an Emotional Victory, Paterno Finally has the Record*, N.Y. TIMES, Oct. 28, 2011, at SP1.

¹⁹¹ See, e.g., Pete Thamel, At Penn State, Concerns Grow Over a Fading Football Legend, N.Y. TIMES, Nov. 20, 2004, at A1; Bill Finley, Paterno in Trouble in Happy Valley, N.Y. TIMES, Nov. 5, 2003, at D1; Jere Longman, Long Fall for Paterno in the Autumn of His Career, N.Y. TIMES, Oct. 17, 2001, at S1; Joe LaPointe, For Nittany Lions, the Spiral is Ever Downward, N.Y. TIMES, Sept. 23, 2001, at SP1.

¹⁹² Joe LaPointe, *Paterno Gets a 4-Year Extension at Age 77*, N.Y. TIMES, May 14, 2004, at D6.

¹⁹³ FITZPATRICK, *supra* note 168, at 246.

¹⁹⁴ *Joe Paterno Selected Walter Camp Coach of the Year for Record Third Time*, GOPSUSPORTS.COM, Jan. 27, 2006, <http://www.gopsusports.com/sports/m-footbl/spec-rel/012706aaa.html>; *Joe Paterno Selected AFCA Coach of the Year for Record Fifth Time*, GOPSUSPORTS.COM, Jan. 10, 2006, <http://www.gopsusports.com/sports/m-footbl/spec-rel/011006aaa.html>; *Paterno Becomes First Multiple Winner of Bobby Dodd Coach of the Year Award*, GOPSUSPORTS.COM, Dec. 30, 2005, <http://www.gopsusports.com/sports/m-footbl/spec-rel/123105aaa.html>; Associated Press, *Joe Paterno Wins Associated Press Coach of the Year Award*, GOPSUSPORTS.COM, Dec. 20, 2005, <http://www.gopsusports.com/sports/m-footbl/spec-rel/122005aad.html>.

capped that memorable season with a triple overtime victory over Florida State in the Orange Bowl.¹⁹⁵ His impressive post-Sandusky success continued until his retirement. From the first day of the 2005 season until his termination on November 9, 2011,¹⁹⁶ Paterno's final seven Penn State teams posted an overall record of 66-20 including a 38-15 conference record,¹⁹⁷ two more Big Ten titles,¹⁹⁸ and four bowl wins.¹⁹⁹

The end, though, came quickly. Sandusky was arrested on November 5, 2011, and charged with forty counts of sexually abusing young boys.²⁰⁰ Paterno was fired on November 9 in part because, according to the school's Board of Trustees, Paterno could have done more to prevent Sandusky's criminal conduct.²⁰¹ Then Paterno was then diagnosed with a "treatable" form of lung cancer on November 18.²⁰² But, what appeared treatable quickly

¹⁹⁵ Charlie Nobles, *In Battle of Old Lions, Paterno Gets Final Roar*, N.Y. TIMES, Jan. 4, 2006, at D1.

¹⁹⁶ *Paterno Fired Over Penn St. Child Abuse Scandal*, CBSNEWS.COM, Nov. 9, 2011, http://www.cbsnews.com/8301-400_162-57321984/paterno-fired-over-penn-st-child-abuse-scandal/.

¹⁹⁷ *Penn State Nittany Lions*, COLLEGEFOOTBALL.BZ, <http://www.collegefootball.bz/penn-state> (last visited June 27, 2012). This page lists the season-by-season records of Penn State's football teams from the time of Sandusky's retirement to the present. Relying on this page, some math is admittedly required to arrive at the figure provided in the body text.

¹⁹⁸ Penn State won the Big Ten in 2005 and 2008. Mark Viera, *Moving Slowly, but Firmly, Into the Future*, N.Y. TIMES, Dec. 19, 2008 (noting 2008 Big Ten title and Paterno's new three-year contract); Joe LaPointe, *With First Big Ten Title in 11 Years, Penn State Takes Revival to B.C.S.*, N.Y. TIMES, Nov. 20, 2005, at H1 (noting 2005 Big Ten title).

¹⁹⁹ Penn State defeated (1) Florida State in the 2006 Orange Bowl, (2) Tennessee in the 2007 Outback Bowl, (3) Texas A&M in the 2007 Alamo Bowl, and (4) LSU in the 2009 Capital One Bowl. Glenn Guilbeau, *LSU Offense Never Got Going*, THE TIMES (Shreveport, Louisiana), Jan. 3, 2010 (Capital One Bowl); Viv Bernstein, *Paterno Sits Out Penn State Victory*, N.Y. TIMES, Jan. 2, 2007, at D3 (Outback Bowl); Thayer Evans, *Paterno Has Last Laugh Against Texas A&M*, N.Y. TIMES, Dec. 30, 2007, at G5 (Alamo Bowl); Charlie Nobles, *In Battle of Old Lions, Paterno Gets Final Roar*, N.Y. TIMES, Jan. 4, 2006, at D1 (Orange Bowl).

²⁰⁰ Mark Viera, *Former Coach at Penn State is Charged With Abuse*, N.Y. TIMES, Nov. 5, 2011, <http://www.nytimes.com/2011/11/06/sports/ncaafootball/former-coach-at-penn-state-is-charged-with-abuse.html?pagewanted=all>.

²⁰¹ Pete Thamel & Mark Viera, *Penn State's Trustees Recount Painful Decision to Fire Paterno*, N.Y. TIMES, Jan. 18, 2012, at B15.

²⁰² Genaro C. Armas, *Joe Paterno Cancer: Scott Paterno Says Former Penn State Coach Undergoing Lung Cancer Treatment*, HUFFINGTON POST,

became life threatening. Paterno was admitted to the hospital on January 13, 2012, because of complications with his treatment.²⁰³ By January 21, he was in serious condition and passed away the next day.²⁰⁴

When all was said and done, Paterno had set out to do one thing: make an impact.²⁰⁵ That he did. In addition to the numerous individual coaching awards and team accomplishments,²⁰⁶ the Paternos contributed more than \$4 million to the University during his tenure, he sent more than 250 players to the National Football League, and some estimate that his presence alone helped Penn State raise more than \$1 billion.²⁰⁷ And what about the Grand Experiment? It worked. According to a 2009 survey released by Penn State, Paterno's teams finished with an 85% graduation rate,²⁰⁸ though some suspect it was as high as 89%.²⁰⁹

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Nov. 18, 2011, http://www.huffingtonpost.com/2011/11/18/joe-paterno-lung-cancer-scott-treatable-disease_n_1102071.html.

²⁰³ Associated Press, *Joe Paterno in Serious Condition with Complications from Lung Cancer*, OREGONLIVE.COM, Jan. 21, 2012, http://www.oregonlive.com/sports/index.ssf/2012/01/joe_paterno_in_serious_condition.html.

²⁰⁴ Darren Everson, *Joe Paterno Dies at 85*, THE WALL STREET JOURNAL, Jan. 22, 2012, <http://online.wsj.com/article/SB10001424052970203750404577175892468065470.html>.

²⁰⁵ Sara Ganim, *Late Penn State Football Coach Joe Paterno Lived by Philosophy 'Make an Impact'*, THE PATRIOT NEWS, Feb. 16, 2012, http://www.pennlive.com/midstate/index.ssf/2012/02/late_penn_state_football_coach.html.

²⁰⁶ See notes 85-99, *supra*, and accompanying text (providing a list of all awards that Paterno won during his coaching career).

²⁰⁷ Jack Carey, *Penn State Coaching Legend Joe Paterno Dies at 85*, USATODAY.COM, Jan. 23, 2012, <http://www.usatoday.com/sports/college/football/story/2012-01-21/former-penn-state-coach-joe-paterno-dead/52737230/1>; Jan Murphy, *Joe Paterno: A Life-A Fundraiser Supreme*, THE PATRIOT-NEWS, Jan. 24, 2012, http://www.pennlive.com/specialprojects/index.ssf/2012/01/joe_paterno_a_life_-_a_fundrai.html.

²⁰⁸ CNN Wire Staff, *Legendary Penn State Coach Paterno Dead at 85*, CNN.COM, Jan. 22, 2012, http://articles.cnn.com/2012-01-22/us/us_pennsylvania-obit-paterno_1_joe-paterno-legendary-penn-state-mount-nittany-medical-center?_s=PM:US.

²⁰⁹ Mark Herrmann, *Legendary Penn State Coach Joe Paterno Dies*, NEWSDAY.COM, Jan. 22, 2012, <http://www.newsday.com/sports/college/college-football/legendary-penn-state-coach-joe-paterno-dies-1.3471514>.

“What did ‘St. Joe’ know, and when did he know it?”²¹⁰

Although Paterno hoped to coach until 2015,²¹¹ everything about Paterno and his legacy changed in the fall of 2011 when Pennsylvania State Police arrested Sandusky.²¹² A grand jury investigation preceded Sandusky’s arrest, the results of which were made publicly available on the day of Sandusky’s arrest.²¹³ The twenty-three-page “presentment” that followed the investigation, titled Findings of Fact, provides graphic detail alleging that eight victims, a number that subsequently went to ten,²¹⁴ endured sexual abuse from Sandusky over a prolonged period of time.²¹⁵

The grand jury’s report on Victim 2 is the only portion of the presentment that mentions Paterno. The grand jury’s report on Victim 2 revealed the following: Mike McQueary, then a twenty-eight-year-old graduate assistant on Paterno’s staff,²¹⁶ testified before the grand jury that he entered the Lasch Football Building at approximately 9:30 pm on March 1, 2002.²¹⁷ (The prosecution has

²¹⁰ David Clark Scott, *Jerry Sandusky, What Did Penn State’s Joe Paterno Know About Him?* THE CHRISTIAN SCIENCE MONITOR, Nov. 7, 2011, <http://www.csmonitor.com/USA/Sports/2011/1107/Jerry-Sandusky-What-did-Penn-State-s-Joe-Paterno-know-about-him-video>.

²¹¹ Joe Lapointe, *Paterno Takes Quest and Critics in Stride*, N.Y. TIMES, Aug. 27, 2000, at SP10 (noting Paterno’s suggestion that he would like to remain head coach for a total of fifty years, which would have taken him to 2015).

²¹² Mark Viera, *Former Coach at Penn State is Charged With Abuse*, N.Y. TIMES, Nov. 5, 2011, http://www.nytimes.com/2011/11/06/sports/ncaafootball/former-coach-at-penn-state-is-charged-with-abuse.html?_r=1&pagewanted=all#.

²¹³ Pennsylvania Attorney General Press Release, *Child sex charges filed against Jerry Sandusky; two top Penn State University officials charged with perjury & failure to report suspected child abuse*, ATTORNEYGENERAL.GOV, Nov. 5, 2011, <http://www.attorneygeneral.gov/press.aspx?id=6270>.

²¹⁴ Mark Viera, *Sandusky Arrested on Charges Involving Two New Accusers*, N.Y. TIMES, Dec. 17, 2011, at B17.

²¹⁵ Sandusky Presentment, *supra* note 8, at 1-23.

²¹⁶ The presentment refers to McQueary only as a “graduate assistant.” Charlie Wilmoth, *Jerry Sandusky Investigation: Mike McQueary Was Graduate Assistant Witness, According to Report*, PITTSBURGH SB NATION.COM, Nov. 6, 2011, <http://pittsburgh.sbnation.com/2011/11/6/2542521/jerry-sandusky-investigation-mike-mcqueary-was-graduate-assistant-penn-state>.

²¹⁷ Sandusky Presentment, *supra* note 8, at 6.

since changed the alleged date to February 2001.)²¹⁸ There, according to McQueary's testimony, he saw Sandusky engaging in anal intercourse with a ten-year-old boy.²¹⁹ McQueary testified that he told Paterno about the incident the next day, a Saturday.²²⁰

Paterno also testified before the Sandusky investigative grand jury.²²¹ According to the presentment, Paterno acknowledged that McQueary told him about the incident and, in response, Paterno called Tim Curley, Penn State's Athletic Director and Paterno's supervisor, at his home the next day.²²² Specifically, Paterno "reported to [Curley] that the graduate assistant had seen Jerry Sandusky in the Lasch Building showers fondling or doing something of a sexual nature to a young boy."²²³ Paterno was not present one and one-half weeks later when Curley and Gary Shultz, Senior Vice President for Finance and Business, sat down with McQueary to discuss the incident.²²⁴ A couple weeks after the meeting, Curley told McQueary that Sandusky's keys to the football lockerroom were taken from him and the incident was reported to The Second Mile.²²⁵ According to the presentment, University Police did not question McQueary about the incident and nothing more was done.²²⁶

Given the wide-ranging scope of the allegations against Sandusky, alongside the grand jury's mention of Paterno, a thematic question emerged: what did Paterno know and when?²²⁷ Paterno may have

²¹⁸ Associated Press, *Date Change of Shower Allegation vs. Sandusky May Help Penn State Officials Get Charge Tossed*, THE WASHINGTON POST, May 11, 2012, http://www.washingtonpost.com/sports/date-change-of-alleged-shower-incident-in-sandusky-case-may-benefit-penn-state-officials/2012/05/11/gIQAPYfcIU_story.html.

²¹⁹ Sandusky Presentment, *supra* note 8, at 6-7.

²²⁰ *Id.* at 7.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ Sandusky Presentment, *supra* note 8, at 7.

²²⁶ *Id.* at 7-8.

²²⁷ See, e.g., Tom McGrath, *Did Joe Paterno Know More About Jerry Sandusky Than He Let On?* PHILLYMAG.COM, Feb. 24, 2012, http://blogs.phillymag.com/the_philly_post/2012/02/24/joe-paterno-jerry-sandusky-on/; Max Brantley, *What Did Paterno Know and When Did He Know it?* ARKTIMES.COM, Nov. 9, 2011, <http://www.arktimes.com/ArkansasBlog/archives/2011/11/09/what-did-paterno-know-and-when-did-he-know-it>; Bob Lutz, *What Did Paterno Know?* THE

taken the precise answer with him to the grave. But common sense suggests, given that Sandusky coached with Paterno for thirty-one years,²²⁸ that Paterno must have known plenty. That certainly is what a majority of the media and public seem to believe,²²⁹ and was the conclusion reached by the so-called “Freeh report”—the July 12, 2012 release of Penn State’s internal investigation headed by former FBI director Louis J. Freeh.²³⁰ But a similarly close look at the specific relationship between Paterno and Sandusky at least suggests a plausible explanation otherwise. As one media commentator recently observed, “[t]he relationship between Sandusky and Paterno seems complicated[.]”²³¹

At first blush, Paterno and Sandusky seemingly enjoyed a close relationship. Paterno spoke in glowing terms about Sandusky’s

WITCHITA EAGLE, Nov. 8, 2011, <http://blogs.kansas.com/lutz/2011/11/08/what-did-paterno-know/>.

²²⁸ LOU PRATO & SCOTT BROWN, *WHAT IT MEANS TO BE A NITTANY LION* 70 (2006).

²²⁹ See, e.g., Robert Huber, *The Sins of Penn State: The Untold Story of Joe Paterno’s Fall*, PHILLYMAG.COM, Feb. 24, 2012, <http://www.phillymag.com/articles/the-sins-of-penn-state-the-untold-story-of-joe-paterno-s-fall/> (arguing that Paterno actually knew about Sandusky’s criminal behavior back in 1998 but that his ego “got so big that when evil lurked, hiding in plain sight, no one saw it”); Victor Fiorillo, *Joe Paterno Wasn’t a Hero*, PHILLYMAG.COM, Jan. 23, 2012, http://blogs.phillymag.com/the_philly_post/2012/01/23/joe-paterno-hero/ (asserting that the available circumstantial evidence means “[t]here’s no question that Paterno was aware of sexual-abuse allegations against Jerry Sandusky”); *Chris Raymond, Joe Paterno’s Code: Reckoning with the Penn State Betrayal*, ESQUIRE.COM, Nov. 11, 2011, http://www.esquire.com/the-side/opinion/joe-paterno-6556323?click=main_sr (acknowledging the possibility “that Paterno made a conscious choice to protect his prerogatives or his legacy or a friend, or—worse—that he somehow forgot to follow up on the horrific discovery he passed on to the university’s athletic director”); Nathan Rush, *Joe Paterno: Paternal Failure*, AthlonSports.com, Nov. 10, 2011, <http://www.athlonsports.com/college-football/joe-paterno-paternal-failure> (contending that “[a]t best, Paterno went the better part of a decade allowing, rather than stopping, Sandusky’s horrific behavior”); Mike Wise, *If Jerry Sandusky Allegations are True, Penn State and Joe Paterno Deserve Part of the Blame*, THE WASHINGTON POST, Nov. 5, 2011, http://www.washingtonpost.com/sports/if-jerry-sandusky-allegations-are-true-penn-state-and-joe-paterno-deserve/2011/11/05/gIQAYIucqM_story.html (“They all knew.”).

²³⁰ Freeh Sporkin & Sullivan LLP, *Report of the Special Investigative Counsel Regarding the Actions of The Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky*, ESPN.COM, July 12, 2012, <http://assets.espn.go.com/pdf/2012/0712/psupressrelease.pdf>.

²³¹ Mark Viera, *A Reputation Lies in Tatters*, N.Y. TIMES, Nov. 7, 2011, at B16.

defense after Penn State won the 1986 National Championship,²³² and about Sandusky specifically when he received an award in 1987 for Assistant Coach of the Year.²³³ More recently, in 1995, Paterno wrote the foreword in Sandusky's second coaching-related publication, titled *The Art & Science of Coaching Linebackers*.²³⁴ In it, Paterno wrote, in part, the following:

Jerry Sandusky is a man of high standards and deep-seated beliefs in hard work, dedication, and honesty. He has strong feelings toward America, Penn State University, and the community in which he lives. He gives of himself to others both on and off the football field—a commitment perhaps best reflected by his work with disadvantaged children with his Second Mile program. And, he is an extraordinarily fine teacher.²³⁵

That complimentary language hardly tells the full story, though. Paterno's son, Scott, spoke recently of a distance between Paterno and Sandusky: “[w]hen Joe liked to relax and socialize, he liked to have a beer or a cocktail[.] Jerry never drank. Once they were done with work, they went their separate ways.”²³⁶

The seeds for that distance may have been planted as early as when Sandusky first joined Paterno's staff in the late 60s. At that time, Sandusky said he was “responsible for looking at films, getting medical reports from the trainers and anything else Coach Paterno could yell at me about after I turned everything over to him.”²³⁷ Following a game in 1977, Paterno expressed his displeasure with

²³² See Randy Harvey, *Nittany Lion Eyes Testaverde, Who Had No Lyin' Eyes*, LOS ANGELES TIMES, Jan. 3, 1987, at S4 (quoting Paterno as saying “[o]ur defense played about as well as I've ever seen a college football team play defense”)

²³³ *1987 Assistant Coach of the Year: Jerry Sandusky, Nittany's Defensive Lion*, ATHLONSPORTS.COM, <http://www.athlonsports.com/college-football/jerry-sandusky-rising-star-most-hated-man-america> (last visited May 21, 2012).

²³⁴ Jerry Sandusky & Cedric X. Bryant, *The Art & Science of Coaching Linebackers* (1995).

²³⁵ *Id.* at 5.

²³⁶ Mark Viera, *A Reputation Lies in Tatters*, N.Y. TIMES, Nov. 7, 2011, at B16.

²³⁷ SANDUSKY & RICHEAL, *supra* note 109, at 122.

Sandusky’s defensive play calling by telling Sandusky, “I wanted to punch you right in the nose.”²³⁸

Then, in an interview for a 1998 book about Paterno, Sandusky said Paterno was “too impatient[.]”²³⁹ A snapshot of that impatience appears in *Six Days to Saturday*, a 1974 book written by Jack Newcombe—a Brown classmate of Paterno’s²⁴⁰—detailing Penn State’s preparation for its tenth game of the 1973 season.²⁴¹ In a pre-practice meeting with his coaches on the Monday before the game (against Ohio University), Newcombe details the following:

But before listing the defenses he wants in the game plan Paterno continues with his human concerns. What were the reasons for the weak performance last Saturday? “Are they playing tight?” he asks the four assistants seated with him. “Is it a question of confidence? We made mental mistakes. We weren’t even lined up properly!”

He turns to individuals. “He never really hit anyone,” he says. “Is it because he’s that tense? *He’s had a couple of bad games, Jerry. Maybe you’d better give someone else a shot.*”^[242]

Sandusky added in 1998: “sometimes [Paterno] may not get the most out of some people because he will not delegate enough. He may have more creative people than he realizes. He can sometimes stifle that [creativity] because of his own involvement.”²⁴³

One year later, Paterno was the one who told Sandusky in May of 1999 that Sandusky would not become Penn State’s next Head Coach.²⁴⁴ Sandusky’s response—to retire—at the end of the 1999

²³⁸ *Id.* at 167.

²³⁹ O’BRIEN, *supra* note 37, at 149.

²⁴⁰ *Id.* at 159.

²⁴¹ NEWCOMBE, *supra* note 36, at 21.

²⁴² *Id.* (emphasis added).

²⁴³ O’BRIEN, *supra* note 37, at 150.

²⁴⁴ Mark Viera, *Sandusky Investigation Drew Psychologist’s Alert in 1998*, *Report Says*, N.Y. TIMES, Mar. 25, 2012, at SP2.

season is concededly a puzzle.²⁴⁵ In his autobiography, Sandusky indicates that he “spoke to Coach Paterno, [who] turned me over to Tim Curley, Penn State’s athletic director[.]”²⁴⁶ But, contemporaneous media reports covering Sandusky’s retirement suggest otherwise.²⁴⁷ One story quoted Sandusky as saying, “I didn’t really tell (Paterno) the decision. I talked to Tim[.] (Paterno) wasn’t the first person to know the decision, Tim was.”²⁴⁸ According to the same story, “Sandusky and Paterno didn’t confer on the subject very much at all, even before a decision was reached.”²⁴⁹

Perhaps Sandusky was frustrated that he never became Penn State’s head football coach—as commentators had long predicted.²⁵⁰ But Paterno never retired, and Sandusky stepped away disappointed: “‘I wouldn’t call it devastating,’ [said] Sandusky . . . ‘but I would call it a little disappointing. That was definitely a goal of mine when I started.’”²⁵¹ Some therefore thought that Sandusky retired because he got tired of waiting for Paterno to step down,²⁵² though Sandusky publicly said he wanted to take advantage of a new University retirement plan and spend more time at The Second Mile.²⁵³ Over the years, Sandusky turned

²⁴⁵ At the time, even his own son, E.J., thought his father’s decision to retire was “slightly premature.” Gwenn Miller, *Linebacker U. Architect gets Ready to Move on After 32 years at Penn St.*, DAILY COLLEGIAN, Nov. 12, 1999.

²⁴⁶ SANDUSKY & RICHEAL, *supra* note 109, at 225.

²⁴⁷ Kati Cardoni & Mike Yoder, *Sandusky to Retire After 31 Years as Penn State Assistant*, DAILY COLLEGIAN, July 2, 1999 (“Many in the football office, including head coach Joe Paterno, did not know Sandusky had made a final decision.”).

²⁴⁸ Greg Grasa, *Exit Strategy: Is Sandusky’s Final Season at PSU Really His Final Season in Coaching?* LANCASTER NEW ERA, Aug. 26, 1999, at C1.

²⁴⁹ *Id.*

²⁵⁰ John Giblin, *Architect of Linebacker U. Focusing on Final Season*, DAILY COLLEGIAN, Aug. 24, 1999 (“Sandusky, a Washington, Pa., native, was considered by many as the leading candidate to succeed Joe Paterno as head coach when Paterno finally relinquished his role.”).

²⁵¹ Jack McCallum, *Last Call: Jerry Sandusky, the Dean of Linebacker U, is Leaving Penn State After 32 Years to Devote Himself to a Different Kind of Coaching*, SIVAUULT.COM, Dec. 20, 1999, <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1017979/index.htm>.

²⁵² Jack Bogaczyk, *Following A Legend’s Act Takes its Toll*, THE ROANOKE TIMES, July 2, 2000, at C1.

²⁵³ Chris Buchignani, *Sandusky Settling Into Life Away From Football*, DAILY COLLEGIAN, Aug. 8, 2000; *see* Ken Denlinger, *Coaching Players, Helping Children*, THE WASHINGTON POST, Dec. 28, 1999, at D6 (noting that

down head coaching opportunities at Marshall, Temple, and Maryland.²⁵⁴ Even post-retirement he sought to establish football at Penn State-Altoona,²⁵⁵ and was considered for the head coaching vacancy at the University of Virginia.²⁵⁶

When he finalized his retirement, Sandusky was asked whether he would miss Paterno.²⁵⁷ Sandusky replied, “[w]ell, not exactly[.] You have to understand that so much of our time was spent under stress, figuring out how to win. That takes a toll. We’ve had our battles. I’ve quit. I’ve been fired. I’ve walked around the building to cool off.”²⁵⁸ For his part, Paterno was critical of Sandusky’s pre-retirement recruiting efforts and the performance of his defenses while Penn State was in the Big Ten²⁵⁹ (a sentiment he echoed in the final interview he ever gave).²⁶⁰ Paterno would later

Penn State “during the spring offered anyone on the staff for more than 30 years a chance to retire with benefits as though they were 65”); Ray Parrillo, *Long-time Paterno Aide Sandusky to Retire*, THE PHILADELPHIA INQUIRER, July 1, 1999 (“Sandusky said he decided to make the announcement before this season to take advantage of a retirement option available to long-time Penn State employees only for a limited time.”). Sandusky’s retirement package allowed him to draw a lump sum of \$148,271 and a \$58,898 yearly pension. MOUSHEY & DVORCHAK, *supra*, note 116, at 31. He was a tenured professor of physical education, which allowed him to keep his rank and title and, most notably, he retained unlimited access to all football and recreation facilities. *Id.*

²⁵⁴ McCallum, *supra*, note 251; Larry O’Rourke, *Sandusky Says He Has No Regrets*, THE MORNING CALL (Allentown, PA), June 27, 2000, at C1.

²⁵⁵ SANDUSKY & RICHEAL, *supra* note 109, at 225.

²⁵⁶ See, e.g., Sun-Sentinel Wire Services, *Sandusky May be Top Choice to Replace Welsh*, SUN-SENTINEL, Dec. 27, 2000, at 11C; Josh Barr, *Sandusky Now Front-Runner for U-Va. Job*, WASHINGTON POST, Dec. 27, 2000, at D1; Jeff White, *Virginia’s Search Narrows; Richt, Sandusky Reportedly Are Top Candidates*, THE RICHMOND TIMES DISPATCH, Dec. 25, 2000, at C1.

²⁵⁷ McCallum, *supra*, note 251.

²⁵⁸ *Id.*

²⁵⁹ Gordie Jones, *Loyalty Counts with Paterno; Stands Behind Knight, as Well as Sandusky*, INTELLIGENCER JOURNAL, May 12, 2000, at C1; see Jeff Schuler, *Blue-White Game at Penn State*, THE MORNING CALL (Allentown, PA), Apr. 16, 2000, at C12 (quoting Paterno as saying “People don’t realize we have not been a good defensive football team since we’ve been in the Big Ten”).

²⁶⁰ Sally Jenkins, *Joe Paterno’s Last Interview*, THE WASHINGTON POST, Jan. 14, 2012, http://www.washingtonpost.com/sports/colleges/joe-paternos-first-interview-since-the-penn-state-sandusky-scandal/2012/01/13/gIQA08e4yP_print.html (reporting that, at the time of Sandusky’s retirement, “Paterno was frustrated that Sandusky spent so much time working on his youth foundation, The Second Mile, [and] that he was not available to help in recruiting and other coaching duties”).

apologize for that criticism,²⁶¹ though he still had little reaction to Sandusky's actual retirement; in fact, it was confined to a single University press release.²⁶²

Perhaps that's because Paterno knew at the time of Sandusky's retirement about a 1998 campus police investigation into an eleven-year-old boy's claim that Sandusky showered with the boy at the Penn State football facilities.²⁶³ Paterno later indicated that no one talked to him about the 1998 allegations,²⁶⁴ though his own personal papers curiously reflect that he cancelled a fundraising trip and a vacation during the investigation into Sandusky.²⁶⁵ Those same papers reflect that Paterno resumed scheduling fundraising trips about a week after the 1998 investigation against Sandusky was dropped.²⁶⁶

After Sandusky's retirement in 1999, it's unclear how much contact Paterno would have had with Sandusky.²⁶⁷ By 2000, Sandusky's first full year of retirement from Penn State, media reports at that time portrayed Sandusky as uniquely involved in The Second Mile to the exclusion of the day-to-day activities of Penn State football.²⁶⁸ At that time, The Second Mile boasted eighteen full-time employees in addition to event counselors, camp counselors, tutors, and a significant volunteer force comprised mostly of Penn State students.²⁶⁹ In total, The Second Mile was

²⁶¹ Gordie Jones, *Loyalty Counts with Paterno; Stands Behind Knight, as Well as Sandusky*, INTELLIGENCER JOURNAL, May 12, 2000, at C1.

²⁶² Press Release, *Jerry Sandusky Retires! Defensive Coordinator Sandusky To Retire Following 1999 Football Season*, PSU.EDU, July 1, 1999, <http://www.psu.edu/dept/psusportsinfo/football/profiles/sanduskyretires.html>.

²⁶³ MOUSHEY & DVORCHAK, *supra*, note 116, at 33-34.

²⁶⁴ Mark Viera, *Sandusky Investigation Drew Psychologist's Alert in 1998*, *Report Says*, N.Y. TIMES, Mar. 25, 2012, at SP2.

²⁶⁵ Luke Dittrich, *In the Ruins of a Blue and White Empire*, ESQUIRE.COM, June 5, 2012, <http://www.esquire.com/features/joe-paterno-0612>.

²⁶⁶ *Id.*

²⁶⁷ Paterno reflectively said in his final interview that he could not even remember the last time he had seen or spoken to Sandusky. Jenkins, *supra* note 260, and accompanying text.

²⁶⁸ Chris Buchignani, *Sandusky Settling Into Life Away From Football*, DAILY COLLEGIAN, Aug. 8, 2000 (noting Sandusky's comments that he would not miss game-planning and did not plan on attending future PSU practices because he was so busy elsewhere).

²⁶⁹ Anthony Miller, *After Founding a Foster Home, Former PSU Coach Enjoys Active Retirement*, DAILY COLLEGIAN, Dec. 6, 2000.

serving more than 100,000 boys and girls every year,²⁷⁰ and Sandusky was pushing hard to grow the charity even more.²⁷¹

Although he maintained offices on the Penn State campus and at The Second Mile,²⁷² local media reported that he spent significant time with The Second Mile's children.²⁷³ A lengthy newspaper article about Sandusky's charitable work described his post-retirement routine as follows:

Sometimes, he would go to their football or soccer games. Other times, Second Mile children would join the Sandusky family for dinner or go to their house to watch television or play video games. Also, if he could get someone to sponsor them, a child would accompany Sandusky to a bowl game.

Since his retirement, Sandusky has been able to have children join him at nearly every Penn State home game. *** Sandusky also took Second Mile kids to training camp for the Washington Redskins this summer and later to the Redskins - Philadelphia Eagles game at Veterans Stadium.²⁷⁴

But even if the foregoing discussion makes closer the issue of whether Paterno knew about Sandusky's criminal behavior, there are still the matters of (1) Paterno's January 14, 2012, interview with *The Washington Post*,²⁷⁵ and (2) the Freeh report.²⁷⁶

The interview, which took place shortly before his death, comprises the only public comments Paterno made about the Sandusky grand jury investigation.²⁷⁷ When asked about how

²⁷⁰ *Id.*

²⁷¹ Chris Buchignani, *Sandusky Settling Into Life Away From Football*, DAILY COLLEGIAN, Aug. 8, 2000 ("A five-year strategic plan to expand the existing [Second Mile] programs, and possibly add more, guides the organization.").

²⁷² Sandusky maintained an office on Penn State's campus because he worked as a volunteer with the Penn State Athletic Department's Lifeskills and Outreach programs. Grasa, *supra*, note 248.

²⁷³ Miller, *supra*, note 269.

²⁷⁴ *Id.*

²⁷⁵ Jenkins, *supra* note 260, and accompanying text.

²⁷⁶ Freeh Report, *supra* note 230.

²⁷⁷ *Id.*

Sandusky could have evaded detection by Paterno for so many years, Paterno responded by saying “I wish I knew[.] I don’t know the answer to that. It’s hard.” He added this when asked about McQueary’s visit to his home:

I didn’t know exactly how to handle it and I was afraid to do something that might jeopardize what the university procedure was[.] So I backed away and turned it over to some other people, people I thought would have a little more expertise than I did. It didn’t work out that way.^[278]

Paterno was also asked more specifically what he did in response to hearing about the prospect that Sandusky anally raped a ten-year-old boy in the shower of the football facility.²⁷⁹ To that question, he responded as follows:

[McQueary] told me what he saw, and I said, what? He said it, well, looked like inappropriate, or fondling, I’m not quite sure exactly how he put it. I said you did what you had to do. It’s my job now to figure out what we want to do. So I sat around. It was a Saturday. Waited till Sunday because I wanted to make sure I knew what I was doing. And then I called my superiors and I said: “Hey, we got a problem, I think. Would you guys look into it?” Cause I didn’t know, you know. We never had, until that point, 58 years I think, I had never had to deal with something like that. And I didn’t feel adequate.

Paterno also commented, “In hindsight, I wish I had done more.”²⁸⁰

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.* During the same interview, he said of McQueary that “he didn’t want to get specific[.]” *Id.* Moreover, said Paterno:

And to be frank with you I don’t know that it would have done any good, because I never heard of, of, rape and a man. So I just did what I thought was best. I talked to people that I thought would be, if there was a problem, that would be following up on it.

Jenkins, *supra* note 260, and accompanying text.

Paterno's final comments, reason some, are difficult to credit given that Paterno knew about his players' day-to-day lives; surely, he also knew about activities involving his staff.²⁸¹ And, over time, the "insular" nature of the Penn State culture Paterno created made it easy for him to intentionally or recklessly ignore Sandusky's behavior²⁸²—particularly given that some believe Paterno helped Curley to secure his position as Athletic Director at Penn State.²⁸³

The Freeh report seemingly drives home many of these points. The 267-page report makes a number of conclusions relevant to Paterno. Most relevant to this Article is its conclusions that Paterno, among others, "failed to protect against a child sexual predatory harming children for over a decade"²⁸⁴ and "repeatedly concealed critical facts relating to Sandusky's child abuse from the authorities, the University's Board of Trustees, the Penn State community, and the public at large."²⁸⁵ To support those conclusions, the report highlights email exchanges around the time of the 1998 investigation into Sandusky wherein Curley says to former Penn State vice president Gary Schultz, "I have touched base with the coach."²⁸⁶ In another exchange, the Freeh report explains, "Curley emailed Schultz a message captioned 'Jerry' and asked, 'Anything new in this department? Coach is anxious to know where it stands.'"²⁸⁷

Collectively, the inferences to be drawn are that (1) Paterno was keeping up with the 1998 inquiry into Sandusky's behavior; (2)

²⁸¹ *Book: Culture Of Silence Led To Penn State Scandal*, PITTSBURGH.CBSLOCAL.COM, Apr. 17, 2012, <http://pittsburgh.cbslocal.com/2012/04/17/book-culture-of-silence-led-to-penn-state-scandal/> (quoting the author of the book *Game Over* as saying "[p]eople have told us he knew what the light bill was in that football locker room").

²⁸² See, e.g., Associated Press, *Penn State's Insular Culture Shielded Sandusky*, CBSNEWS.COM, Dec. 12, 2011, http://www.cbsnews.com/8301-201_162-57341586/penn-states-insular-culture-shielded-sandusky/; Richard Perez-Pena, *Rich in Success, Rooted in Secrecy*, N.Y. TIMES, Nov. 21, 2011, at B14; Libby Sander & Jack Stripling, *An Insular Penn State Stayed Silent*, CHRONICLE.COM, Nov. 10, 2011, <http://chronicle.com/article/An-Insular-Penn-State-Stayed/129713/>.

²⁸³ Robert Huber, *The Sins of Penn State: The Untold Story of Joe Paterno's Fall*, PHILLYMAG.COM, Feb. 24, 2012, <http://www.phillymag.com/articles/the-sins-of-penn-state-the-untold-story-of-joe-paterno-s-fall/>.

²⁸⁴ Freeh Report, *supra* note 230, at 14.

²⁸⁵ *Id.* at 16.

²⁸⁶ *Id.* at 48.

²⁸⁷ *Id.* at 49.

Paterno's doing so put him on notice about Sandusky possibly engaging in criminal behavior; and (3) despite possessing such notice, Paterno declined to limit Sandusky's access to the Penn State facilities.²⁸⁸ Regardless of the precise accuracy of the Freeh report's findings,²⁸⁹ the media and general public have relied on the report to conclude that Paterno knew about Sandusky's criminal behavior back in 1998.²⁹⁰

But whether Paterno knew about Sandusky's conduct is not the point. Rather, the point is that (1) Sandusky, not Paterno, was the subject of a criminal investigation, and (2) the only reason debate exists about what Paterno knew about Sandusky and when he knew it is because of the Sandusky investigative grand jury's Findings of Fact. The Sandusky grand jury's "findings," however, are hardly "fact," at least not in the sense that a trial jury found them. As a result, the question becomes whether it's appropriate for a grand jury investigating Sandusky—or anyone else—to serve as the vehicle to end a third party's career and, in this case, his life. Remember, we might never have been so focused on Paterno's role in the Sandusky investigation were it not for the Pennsylvania Attorney General's decision to publicly disclose the grand jury's unredacted findings.

II.

²⁸⁸ The Freeh report implicitly acknowledges that only inferences can be drawn. *E.g., id.* at 51 ("After Curley's initial updates to Paterno, the available record is not clear as to how the conclusion of the Sandusky investigation was conveyed to Paterno.").

²⁸⁹ The document's findings have obviously not been tested in an adversary system. And, since its release, a handful of Paterno's former players have criticized the Freeh report, alleging that it was not sufficiently thorough and did not interview all of the central figures in the case. Ralph D. Russo, Harris, *Other Former Players Defend Joe Paterno in Email*, POST-GAZETTE.COM, July 28, 2012, <http://www.post-gazette.com/stories/local/state/harris-other-former-players-defend-joe-paterno-in-email-646549/>.

²⁹⁰ *See, e.g.,* Joanna Weiss, *Paterno Supporters Show Tendency to Defend the Indefensible*, THE BOSTON GLOBE, July 17, 2012, <http://www.bostonglobe.com/opinion/2012/07/16/joe-paterno-supporters-show-human-tendency-defend-indefensible/rhlyq8WXDerL9KMJPnly7O/story.html>; Ronald S. Martin, *Joe Paterno Was a Coward*, CNN.COM, July 15, 2012, <http://www.cnn.com/2012/07/15/opinion/martin-paterno-coward/index.html>; Jeremy Roebuck, *Report: Paterno, PSU Officials in 14-Year Cover-Up*, PHILLY.COM, July 13, 2012, http://articles.philly.com/2012-07-13/news/32649453_1_jerry-sandusky-second-mile-child-victims.

The words “grand jury” appear often in the media, yet media reports rarely contain either an accessible definition of who the grand jury is, or what it does. Things become more complicated when, as in the Paterno example, state grand jury practice differs so dramatically from its federal counterpart. The absence of any accessible explanation becomes even more problematic when, as in Pennsylvania, its state practice in particular relies on procedures—like a grand jury presentment and/or report—used by only a minority of state jurisdictions.

Part II therefore seeks, in Section A, to define who the grand jury is and explain where the grand jury process originated. As part of that, Section A also seeks to explain, from a historical standpoint, how grand jury practice became so hopelessly confusing. Section B describes federal grand jury practice, the fundamental characteristics of which have been largely influential on state grand jury practice nationwide. Doing so helps to setup Section C, which explains grand jury practice in Pennsylvania and simultaneously seeks to highlight features of Pennsylvania’s system that are, in modern grand jury practice, largely unused by other states.

A. *Where did the grand jury come from and why aren’t grand jury practices uniform?*

A grand jury is a body independent from any of the three branches of government, comprised of laypersons, that investigates crimes.²⁹¹ If appropriate, based on that investigation, it indicts defendants in felony cases.²⁹² In state grand jury practice,²⁹³ grand juries are generally unnecessary in the investigation and prosecution of most day-to-day crimes.²⁹⁴ But, speaking generally, the need for a grand jury corresponds with a crime’s complexity; the more complex the crime, the more of a role the grand jury typically plays in investigating that crime.²⁹⁵ Regardless, “the

²⁹¹ See Roger Roots, *If It’s Not a Runaway, It’s Not a Real Grand Jury*, 33 CREIGHTON L. REV. 821, 822 (2000).

²⁹² BOUVIER LAW DICTIONARY 595 (Compact ed. 2011).

²⁹³ As discussed in more detail below, states are not constitutionally required to proceed against criminal defendants by indictment. Accordingly, states are not required to utilize grand juries.

²⁹⁴ See John Q. Barrett, *The Leak and the Craft: A Hard Line Proposal to Stop Unaccountable Disclosures of Law Enforcement Information*, 68 FORDHAM L. REV. 613, 628 (1999).

²⁹⁵ SUSAN W. BRENNER & LORI E. SHAW, FEDERAL GRAND JURY: 1 A GUIDE TO LAW AND PRACTICE 1-2 (2d ed. 2006).

grand jury is both a ‘sword’ investigating criminal conduct, and a ‘shield’ to protect individuals from the prosecutor’s powers.”²⁹⁶ In its investigatory capacity, or “sword” function, the grand jury plays a “unique role” in the sense that, unlike a court’s limited “case or controversy” jurisdiction,²⁹⁷ the grand jury has sweeping jurisdiction to investigate in *secret* “merely on suspicion that the law is being violated or even just because it wants assurance that it is not.”²⁹⁸ But where does that inordinately broad authority come from? As the Supreme Court has said time and again: history.²⁹⁹

The grand jury’s roots far predate its presence in the 1789 draft Bill of Rights. Step back much further—to 1066—when William the Conqueror, the first Norman King of England,³⁰⁰ relied on respected men in a community, summoned by a public officer, to provide an answer under oath to some question he posed.³⁰¹ He reduced their answers to *The Domesday Book*, which inventoried England’s property, both real and personal, in order to assemble the Crown’s tax rolls and resolve land ownership disputes.³⁰² When Henry II ruled as King of England almost a century later in 1166, he applied William’s approach to criminal behavior.³⁰³

To do so, King Henry II established a series of statutory enactments—known as assizes—that broadened William the Conqueror’s use of neighborhood men into a criminal investigatory

²⁹⁶ Niki Kuckes, *The Useful Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1, 10 (2004).

²⁹⁷ *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 297 (1991).

²⁹⁸ *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950). Only jurors, witnesses, and the prosecuting attorney are permitted in the grand jury room. FED. R. CRIM. P 6(d).

²⁹⁹ *E.g.*, *United States v. Williams*, 504 U.S. 36, 51 (1992) (explaining that grand jury requires “the traditional functioning of the institution” in its “historic role”); *United States v. Calandra*, 414 U.S. 338, 379 (1974) (articulating the need to evaluate modifications to the grand jury by “weigh[ing] the potential injury to the historic role and functions of the grand jury”).

³⁰⁰ *See generally* PAUL HILLMAN, *WILLIAM THE CONQUEROR: FIRST NORMAN KING OF ENGLAND* (2005) (providing a biographical account of William the Conqueror’s life).

³⁰¹ Wayne L. Morse, *A Survey of the Grand Jury System*, 10 OR. L. REV. 101, 106 (1931).

³⁰² *See* Stephan Landsman, *The Civil Jury in America: Scenes From an Unappreciated History*, 44 HASTINGS L.J. 579, 582-83 (1993).

³⁰³ SIR WILLIAM SEARLE HOLDSWORTH ET AL., 1 A HISTORY OF ENGLISH LAW 43 (1903).

body.³⁰⁴ Of particular historical relevance is the Assize of Clarendon, which required that “in every county and in every hundred the twelve most lawful men of each hundred and the four most lawful men of each vill should be sworn to *present* any man who was suspected of serious crime either to the King’s Justice or to the sheriff.”³⁰⁵ The definition of a “presentment,” as later articulated by Blackstone in 1758,³⁰⁶ “is the notice taken by a grand jury of any offence *from their own knowledge or observation*, without any bill of indictment laid before them at the suit of the king[.]”³⁰⁷ Stated more modernly, and perhaps more helpfully, the term “presentment” meant, even early on, that a grand jury was investigating the possibility of a crime based on its own knowledge.³⁰⁸

Once issued, such presentments—unlike indictments³⁰⁹—were not equivalent to an assertion of guilt; rather, they represented the grand jury’s suspicion regarding a crime’s commission.³¹⁰ If “a probable ground of suspicion” existed, then a petty (or trial) jury thereafter answered the question of guilt or innocence.³¹¹ At that time, though, the grand jury was hardly a “shield” to protect the people; rather, the grand jury was an oppressive body, feared by the people, designed to raise money for King Henry’s wars.³¹²

By the thirteenth century, the process of selecting presenting juries changed to correspond with changes in court structure. At that time, a justice issued a general charge “as to matters subject to

³⁰⁴ Morse, *supra* note 301, at 110-11.

³⁰⁵ THEODORE FRANK THOMAS PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 88 (5th ed. 2011) (emphasis added).

³⁰⁶ Renee B. Lettow, *Reviving Federal Grand Jury Presentments*, 103 YALE L.J. 1333, 1335-36 (1994) (providing the original date of Blackstone’s definition).

³⁰⁷ William Blackstone, IV Commentaries 301 (1860).

³⁰⁸ *United States v. Cox*, 342 F.2d 167, 187 (5th Cir. 1965) (Wisdom, J., concurring) (noting “the English common law presenting jury could act on its own knowledge”).

³⁰⁹ *See* note 29, *supra*, and accompanying text (defining an indictment).

³¹⁰ HOLDSWORTH, *supra* note 303, at 322.

³¹¹ *Id.* at 148. Although, for a time, members of a presenting jury also decided the suspect’s guilt or innocence, that practice was terminated by 1352 and presenting juries were divested from petty (or trial) juries. Morse, *supra* note 301, at 114.

³¹² Helene E. Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 AM. CRIM. L. REV. 701, 709 (1972).

inquiry”³¹³ and “[t]he sheriff was directed to choose . . . 24 persons from the body of the county. Of these, 23 are chosen, a majority of whom decides whether to find ‘a true bill,’ or to ‘ignore’ the accusations preferred.”³¹⁴ If the presentment contained criminal charges,³¹⁵ then those charges were formalized and translated into formal charging instruments, or indictments.³¹⁶

As the seventeenth century approached, the grand jury came to look even more like its modern day counterpart.³¹⁷ As the English Parliament rose to power, the importance of relying on the judicial system for revenue diminished,³¹⁸ which fostered a new view of the grand jury as a protector of citizens.³¹⁹ That view was solidified by two events: first, the grand jury began to hear witnesses in private.³²⁰ Second, in two 1681 English cases often called the Colledge and Shaftesbury cases,³²¹ grand jurors refused to indict defendants targeted solely because of their political affiliations.³²² As one federal court commented hundreds of years later, “[t]hese two cases are celebrated as establishing the grand jury as a bulwark against the oppression and despotism of the Crown.”³²³

As the view of the grand jury changed, so too did the breadth of the grand jury’s role. In the seventeenth and eighteenth centuries, in addition to acting as an accusatory body by evaluating indictments or engaging independent investigations to issue

³¹³ *Id.* at 115.

³¹⁴ HOLDSWORTH, *supra* note 303, at 148.

³¹⁵ SIR FREDERICK POLLOCK ET AL., 2 THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 520 (1899) (discussing thirteenth century use of presentments).

³¹⁶ Richard H. Kuh, *The Grand Jury “Presentment”: Foul Blow or Fair Play*, 55 COLUM. L. REV. 1103, 1103 n.1 (1955). Even as the seventeenth century approached, though, “an indictment in 1681 was generally tantamount to a speedy conviction in a trial lacking all the safeguards now assured by ‘due process of law.’” *Id.* at 1108.

³¹⁷ Schwartz, *supra* note 312, at 710-11.

³¹⁸ *Id.* at 711.

³¹⁹ Kuh, *supra* note 316, at 1107.

³²⁰ *Id.*

³²¹ Niki Kuckes, *Retelling Grand Jury History*, in GRAND JURY 2.0: MODERN PERSPECTIVES ON THE GRAND JURY 133 (Roger A. Fairfax, Jr. ed. 2011).

³²² *Id.* at 1107-08; Schwartz, *supra* note 312, at 710-21.

³²³ *In re Russo*, 53 F.R.D. 564, 568 (CD. Cal. 1971).

presentments,³²⁴ English grand juries began issuing opinions on matters of public concern.³²⁵ Though these documents are often also confusingly referred to as “presentments,”³²⁶ they served a different function—a check against public corruption—from the traditional presentments.³²⁷ This type of presentment, more properly referred to as a grand jury “report,”³²⁸ did not necessarily produce criminal charges but their criticisms of public officials helped the grand jury to build public trust.³²⁹ For example, grand jury reports from the seventeenth and eighteenth centuries “criticized justices of the peace who accepted excessive fees, constables who were lax in enforcing the law, and other officials who failed to maintain bridges, jails, highways, and other county property.”³³⁰

Collectively, the foregoing history illustrates one of the primary characteristics of the grand jury, often highlighted by the modern

³²⁴ See Robert L. Misner, *In Partial Praise of Boyd: The Grand Jury as Catalyst for Fourth Amendment Change*, 29 ARIZ. ST. L.J. 805, 828-30 (1997).

³²⁵ SIDNEY WEBB & BEATRICE WEBB, *ENGLISH LOCAL GOVERNMENT FROM THE REVOLUTION TO THE MUNICIPAL CORPORATIONS ACT 1835* (1906) (“More significant to the student of local government is the ancient habit of this ‘Grand Inquest’ of acting as a sort of ‘third estate’ of the shire, or county ‘House of Commons,’ giving the opinion of the county on matters of public concern, and even, in many cases, exercising a sort of right, if not to vote supplies, at any rate to sanction in advance the county expenditure.”).

³²⁶ “A grand jury report should be carefully distinguished from either an indictment or a presentment because the report does not charge the commission of any crime. Rather, it is a publication by the grand jury in its official investigative capacity, disclosing findings on matters purportedly of public concern.” Note, *The Grand Jury Report as an Infringement of Private Rights*, 23 HASTINGS L.J. 564-65 (1972); see Barry Jeffrey Stern, *Revealing Misconduct by Public Officials Through Grand Jury Reports*, 136 U. PA. L. REV. 73, 78 n.9 (1987) (“To avoid confusion between the generally obsolete use of a presentment to initiate a criminal prosecution and the use of a presentment to perform the reporting function, this Article refers to any grand jury document used to reveal official misconduct without initiating a prosecution as a report.”).

³²⁷ Kuh, *supra* note 316, at 1109-10 (listing certain instances of presentment reports “on matters of public concern”).

³²⁸ See Stern, *supra* note 326, at 78 n.9; Lettow, *supra* note 306, at 1333 n.4; see also Note, 54 TEX L. REV. 663, 664-65 (1976) (“Although some courts and commentators have tended to speak loosely of reports as presentments, the two are distinct, historically and practically.”).

³²⁹ Lettow, *supra* note 306, at 1336 (noting that “grand juries also won respect for making accusations against the Crown's desires”).

³³⁰ *Id.* at 1336 n.12.

Supreme Court: its independence.³³¹ As the grand jury made its way across the Atlantic, Colonial America incorporated the idea of grand jury independence,³³² and further expanded the grand jury's reporting function.³³³ The Colonial grand jury's reporting role became increasingly important as the Revolution approached.³³⁴ Indeed, in addition to the colonial grand juries' accusatory function (via indictment or presentment),³³⁵ they "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."³³⁶

Because of its successful pre-Revolution independent efforts to both defend and accuse,³³⁷ the grand jury "emerged from the Revolution with enhanced prestige."³³⁸ Although post-revolution Union states almost uniformly recognized the grand jury's traditional powers to accuse or defend, the concept of the state grand jury was recognized "more generally as a method of furthering popular control over government."³³⁹ Oddly, however,

³³¹ *United States v. Williams*, 504 U.S. 36, 48 (1992) ("The grand jury's functional independence from the Judicial Branch is evident both in the scope of its power to investigate criminal wrongdoing and in the manner in which that power is exercised."); *Bank of Nova Scotia v. United States*, 487 U.S. 250, 259 (1988) (discussing "whether, despite the grand jury's independence, there was any misconduct by the prosecution that otherwise may have influenced substantially the grand jury's decision to indict").

³³² See Ronald F. Wright, *Why Not Administrative Law Grand Juries?* 44 ADMIN. L. REV. 465, 468 (1992) (noting that the grand jury "thrived when first transplanted to England's American colonies").

³³³ Stern, *supra* note 326, at 84.

³³⁴ Lettow, *supra* note 306, at 1336-37.

³³⁵ Niki Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury* 94 GEO. L.J. 1265, 1301 (2006) (discussing the colonial grand jury's use of its charging powers).

³³⁶ YOUNGER, *supra* note 30, at (noting the colonial grand jury played "an important role in America and became a vital force in local government, just as it had in England").

³³⁷ *E.g., id.* at 28 ("In 1765, Boston [grand] jurors refused to indict the leaders of the Stamp Act riots, while in Williamsburg, Virginia, jurors assembled for the general court joined the mob that hanged the stamp master in effigy."); James P. Whyte, *Is the Grand Jury Necessary?*, 45 VA. L. REV. 461, 466-71 (1959) (describing the grand jury in colonial Virginia); JAMES THACHER, *A MILITARY JOURNAL DURING THE AMERICAN REVOLUTIONARY WAR, FROM 1775 TO 1783* (1823) (noting dates of the war).

³³⁸ Lettow, *supra* note 306, at 1337.

³³⁹ Wright, *supra* note 332, at 476,

the grand jury was omitted from the Constitution, adopted in 1787 and put into effect in 1789,³⁴⁰ a fact that drew Anti-Federalist criticism that argued in favor of establishing the grand jury's ability to locally monitor government.³⁴¹ Collectively, that sentiment ultimately led to the inclusion in the Fifth Amendment of the 1791 Bill of Rights a requirement of grand jury indictment in all serious prosecutions.³⁴² Accordingly, the Fifth Amendment now guarantees that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a *presentment or indictment* of a Grand Jury."³⁴³

Inclusion of the word "presentment" in the text of the Fifth Amendment assured the constitutionality of a grand jury's issuance of a criminal presentment based on its own knowledge—in other words, the grand jury's recommendation to prosecute.³⁴⁴ But, it simultaneously left unclear what continued role the grand jury might have in issuing reports.³⁴⁵ Further complicating the state of the grand jury was the Supreme Court's 1884 decision, in *Hurtado v. California*,³⁴⁶ holding that prosecution by indictment is not a fundamental right applicable to the states through the Fourteenth Amendment's Due Process clause.³⁴⁷ In short, *Hurtado* made state grand jury practice reliant on each state's constitution and separated state grand jury practice from its federal counterpart.³⁴⁸

It is accordingly in 1884 where federal and state grand jury practice part ways.³⁴⁹ States post-*Hurtado* became free to rely on the grand jury entirely, eliminate it entirely, or create some form of

³⁴⁰ BRENNER & SHAW, *supra* note 291, at 9 (noting omission of the grand jury from the constitution); PAUL RODGERS, UNITED STATES CONSTITUTIONAL LAW: AN INTRODUCTION 108-09 (2011) (providing background dates).

³⁴¹ Wright, *supra* note 332, at 476-77.

³⁴² *Id.* at 477; RODGERS, *supra* note 340, at 110 (providing that the Bill of Rights "was ratified on December 15, 1791, as the first ten amendments").

³⁴³ U.S. CONST. amend. V (emphasis added).

³⁴⁴ Kuckes, *supra* note 335, at 1301.

³⁴⁵ See Stern, *supra* note 326, at 85 (discussing common law grand jury powers at the time and noting "[i]n the public's mind, the distinction between a public report that revealed official misconduct and an indictment that initiated a prosecution may have become blurred").

³⁴⁶ 110 U.S. 516 (1884).

³⁴⁷ *Id.* at 538.

³⁴⁸ Misner, *supra* note 324, at 833.

³⁴⁹ *Id.* at 833-34.

hybrid that, for example, keeps the grand jury’s “sword” component but deletes the “shield” function. The Fifth Amendment, in contrast, bound the federal system. At this proverbial “fork in the road,” this Article now turns to examining where federal practice went post-*Hurtado* and where Pennsylvania fits in.

B. *Modern federal grand jury practice.*

Important questions about grand jury practice arose post-*Hurtado* and two are most relevant to this Article. First, there existed the issue of what role the presentment would continue to play in day-to-day charging decisions at the federal and state level. Second, there remained the question of what role, if any, grand jury reports would continue to play at the federal and state levels. Finally, and relatedly, was the question of what post-*Hurtado* authority the grand jury had—either in the presentment or reporting context—to name third parties unrelated to the basis of the presentment or report.

To the first issue, post-*Hurtado* federal grand jury practice spent little time relying on the presentment as a charging method. Indeed, federal practice eliminated presentments in 1946 when, in seeking to provide uniformity to federal prosecutions,³⁵⁰ the Federal Rules of Criminal Procedure were promulgated. The Advisory Committee Notes to the Federal Rules included this statement: “Presentment is not included as an additional type of formal accusation, since presentments as a method of instituting prosecutions are obsolete, at least as concerns the Federal courts.”³⁵¹

Perhaps the federal presentment’s demise was pre-ordained. At the time of *Hurtado*’s issuance, the grand jury’s popularity had already begun to wane.³⁵² Beginning in 1865 when the Civil War ended, critics began attacking the institution of the grand jury as “secret conclaves of criminal accusers, repugnant to the American system.”³⁵³ More relevant to presentments specifically,

³⁵⁰ Thaddeus Hoffmeister, *The Grand Jury Legal Advisor: Resurrecting the Grand Jury’s Shield*, 98 J. CRIM. L. & CRIMINOLOGY 1171, 1191 (2008).

³⁵¹ FED. R. CRIM. P. 7 advisory committee’s note.

³⁵² GEORGE EDWARDS, JR., *THE GRAND JURY* 35 (1973).

³⁵³ YOUNGER, *supra* note 30, at 149. Indeed, as one scholar put it: “[i]n the decade following the Civil War, efforts to abolish use of the grand jury in the United States assumed almost epidemic proportions.” Richard D. Younger, *The Grand Jury Under Attack*, 46 J. CRIM. L. & CRIMINOLOGY 26, 37 (1955).

commentators became increasingly skeptical of the grand jury's knowledge of community affairs as populations grew.³⁵⁴ That skepticism extended to whether the grand jury could independently understand increasingly complex laws and investigatory techniques.³⁵⁵ Alongside the pervasive grand jury criticism was an increase in federal prosecutors who relied less on the grand jury's ability to initiate criminal charges on its own. Collectively, so the argument went, professional prosecutors were both more efficient and smarter.³⁵⁶

The federal system's limited reliance on presentments between 1865-1946 reflected the grand jury's declining power. There were indeed few post-Civil War presentments and, of those few, the grand jury focused on uncooperative witnesses.³⁵⁷ Even the Supreme Court acknowledged during this period that reliance on the presentment was falling into "disuse."³⁵⁸

And what of reports in federal practice? Those too were limited and, substantively, appeared similar to a presentment. Indeed, in the few published cases involving federal grand jury "reports" prior to 1946, one focuses on voting fraud,³⁵⁹ whereas another addresses violations of an interstate commerce law.³⁶⁰ Still another focuses on legal malpractice involving bankruptcy laws.³⁶¹ The point, of course, is that federal grand jury reports after the Fifth Amendment was finalized did not mirror the historic reports focused on public affairs or matters of public concern.³⁶²

³⁵⁴ Lettow, *supra* note 306, at 1340.

³⁵⁵ *Id.* at 1340-41.

³⁵⁶ Wright, *supra* note 332, at 483-84.

³⁵⁷ *Wilson v. United States*, 221 U.S. 361, 369 (1911); *Blim v. United States*, 68 F.2d 484, 485 (7th Cir. 1934); *United States v. Hurschman*, 53 F. 543 (D. Wash. 1892).

³⁵⁸ *Hale v. Henkel*, 201 U.S. 43, 61 (1906).

³⁵⁹ *United States v. Clark*, 19 F. Supp. 981, 985 n.1 (W.D. Mo. 1937).

³⁶⁰ *In re Peasley*, 44 F. 271, 272 (N.D. Ill. 1890).

³⁶¹ *Cook v. Commissioner*, 30 B.T.A. 292, 293 (B.T.A. 1934).

³⁶² *Accord* *Ex parte Robinson*, 86 U.S. 505, 510-11 (1874) (discussing grand jury report on a contempt charge); *Poston v. Washington, Alexandria & Mt. Vernon Railroad Company*, 36 App. D.C. 359, 370 (D.C. Cir. 1911) ("[T]he report of the grand jury charged with the investigation of the complaint in this case was neither an indictment nor a presentment of the commission of an offense."); *United States v. Toledo Newspaper, Co*, 220 F. 458, 483 (N.D. Ohio 1915) (discussing briefly the contents of an investigative grand jury's report).

Grand jury reports of the public affairs type reemerged in a limited context after the federal rules were enacted, though federal courts were hopelessly confused about what to do with them. One court recognized that the grand jury has the power to report³⁶³ (derived from the common law),³⁶⁴ but another indicated that it is beyond that power “to accuse an individual, by name, of criminal misconduct in an indictment and then fail to return an indictment against him.”³⁶⁵ Some suggested that, consistent with history, a grand jury report could only address “public affairs as opposed to public persons, or if permitted to extend to named public officials they usually may comment upon only their conduct of affairs short of crime.”³⁶⁶ Still other courts went further by holding that federal grand juries were powerless to issue reports.³⁶⁷

But, to be clear, nearly all federal courts agreed that private persons were not fairly the subjects of grand jury reports.³⁶⁸ In doing so, courts were concerned about the absence of due process for the named private individual.³⁶⁹ Indeed, a named private party has no means of recourse,³⁷⁰ no opportunity to be heard, and could experience significant damage to his reputation.³⁷¹ Even named public persons may experience similar difficulties.³⁷² At least an

³⁶³ United States v. Christian, 660 F.2d 892, 902 (3d Cir. 1981).

³⁶⁴ *In re* Grand Jury Proceedings, Special Grand Jury 89-2, 813 F. Supp. 1451, 1460 (D. Colo. 1992).

³⁶⁵ Application of Jordan, 439 F. Supp. 199, 202 (S.D. W. Va. 1977).

³⁶⁶ United States v. Briggs, 514 F.2d 794, 801 (5th Cir. 1975); *see In re* Report and Recommendation of June 5, 1972 Grand Jury, 370 F. Supp. 1219, 1226 (D.D.C. 1974) (allowing for disclosure of a grand jury report involving President Nixon); *In re* Grand Jury Proceedings filed on June 15, 1972, 479 F.2d 458, 461 (5th Cir. 1973) (concluding that the matter in dispute bore “little relevance to federal subject matter and is concerned mostly with a purely local affair”).

³⁶⁷ *E.g.*, Hammond v. Brown, 323 F. Supp. 326 (N.D. Ohio), *affirmed* 450 F.2d 480 (6th Cir. 1971); Application of United Electrical, Radio & Machine Workers, 111 F. Supp. 858, 868-69 (S.D.N.Y. 1953).

³⁶⁸ *See, e.g.*, *In re* Grand Jury Sitting in Cedar Rapids, Iowa, 734 F. Supp. 875, 876 (N.D. Iowa 1990); *In re* Grand Jury, 315 F. Supp. 662, 675 (D. Md. 1970).

³⁶⁹ Flanders v. Schoville, 350 F. Supp. 371, 374 (N.D. Iowa 1972).

³⁷⁰ *In re* Oliver, 333 U.S. 257, 273-74 (1948).

³⁷¹ *In re* Grand Jury Sitting in Cedar Rapids, Iowa, 734 F. Supp. at 876.

³⁷² Note, *Powers of Federal Grand Juries*, 4 STAN. L. REV. 68, 69 (1951) (“When a report directed at a public officer impugns his conduct without formally indicting him, doubt is cast upon his character without adequate opportunity to explain.”).

indicted person, noted one court, “ha[s] a forum in which to answer and to appeal[,]”³⁷³ whereas the only recourse for the named unindicted person is to ask the district court to seal the report or expunge the person’s name.³⁷⁴

Apart from the judiciary’s view, Congress seemingly complicated matters by creating a new grand jury—the special grand jury—in 1970 and authorized it to issue reports.³⁷⁵ That legislation, however, was limited to investigating “noncriminal misconduct, malfeasance, or misfeasance in office involving organized criminal activity by an appointed public officer or employee as the basis for a recommendation of removal or disciplinary action.”³⁷⁶ Moreover, as part of that legislation, Congress specifically included a detailed series of procedures that were simultaneously limited, and sought to avoid any of prior caselaw holding that grand juries had no reporting power.³⁷⁷ To some attorneys, the specific legislation and accompanying procedures were evidence that grand juries lacked reporting powers at common law.³⁷⁸

For a handful of reasons, the collective confusion in federal courts surrounding grand jury reports has never been resolved. First, questions about the federal grand jury’s power to promulgate reports rarely arise.³⁷⁹ Second, administrative agencies now perform much of the work that grand jury reports of the public affairs type previously performed.³⁸⁰ Finally, modern grand juries are generally not aware of their reporting power³⁸¹—assuming it

³⁷³ *Schoville*, 350 F. Supp. at 374.

³⁷⁴ *E.g.*, Application of Johnson, 484 F.2d 791, 795-97 (7th Cir. 1973).

³⁷⁵ Pub. L. No. 91452, § 101, 84 Stat. 922, 923 (1970) (codified at 18 U.S.C. §§ 3331-3334).

³⁷⁶ 18 U.S.C. § 3333(a)(1).

³⁷⁷ *In re Report and Recommendation of June 5, 1972 Grand Jury*, 370 F. Supp. 1219, 1224 n.19 (D.D.C. 1974).

³⁷⁸ *Id.*

³⁷⁹ BRENNER & SHAW, *supra* note 295, at 87, 91.

³⁸⁰ *See* Wright, *supra* note 332, at 505-09 (discussing how the administrative process allows for more citizen involvement).

³⁸¹ BRENNER & SHAW, *supra* note 295, at 89-90; accord Susan W. Brenner, *The Voice of the Community: A Case for Grand Jury Independence*, 3 VA. J. SOC. POL’Y & L. 67, 74 (1995) (“Because neither judges nor prosecutors have any incentive to inform grand jurors about their powers to investigate and issue reports, jurors predictably remain ignorant of these abilities and limit themselves to conducting investigations and returning charges in accordance with a prosecutor’s wishes.”); Kuckes, *supra* note 296, at 33 n.183 (noting that

does exist—and the U.S. Attorneys’ Manual even cautions federal prosecutors to stay away from the issue; grand jury reporting is, says the Manual, “a difficult and complex question.”³⁸² For these reasons, today’s modern federal grand jury operates in secret,³⁸³ unburdened by the question of its reporting authority, in order “to determine whether or not there is probable cause to believe that one or more persons committed a certain Federal offense within the venue of the district court.”³⁸⁴

But even if a modern grand jury were somehow to issue a report, and that report mentioned an unindicted or uninvestigated third party, the federal rules of criminal procedure provide strict rules to prevent the report’s disclosure.³⁸⁵ Indeed, to prevent unauthorized disclosure of “matters occurring before” a grand jury,³⁸⁶ which language includes grand jury reports,³⁸⁷ a federal district court can seal the report “as long as necessary to prevent the unauthorized disclosure[.]”³⁸⁸ Most importantly, the federal rules do not authorize disclosure of grand jury materials—including a report—to the public, press, or public agencies.³⁸⁹ Although the grand jury’s common law power may authorize disclosure in certain circumstances,³⁹⁰ a report that mentions a specific individual acting

the grand jury’s historic reporting power was lost “by failing to instruct grand jurors of that power”).

³⁸² U.S. ATTORNEYS’ MANUAL § 9-11.101 (2012), http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/11mcrim.htm#9-11.101.

³⁸³ FED. R. CRIM. P. 6(d)(1). Only jurors, witnesses, the prosecuting attorney, and a stenographer (or recording device operator or interpreter) are permitted inside the grand jury room. *Id.* The target of grand jury proceedings has no right to be present, nor does his attorney. *See id.*

³⁸⁴ U.S. Attorneys’ Manual § 9-11.101 (2012), http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/11mcrim.htm#9-11.101.

³⁸⁵ FED. R. CRIM. P. 6(e)(2)(B)(i)-(vii).

³⁸⁶ FED. R. CRIM. P. 6(e)(2)(B).

³⁸⁷ *In re Grand Jury Proceedings, Special Grand Jury 89-2*, 813 F. Supp. 1451, 1465 (D. Colo. 1992) (“Even under a liberal construction of the exceptions to the secrecy rule, only the Court has the power to release to the public a report from a special grand jury.”).

³⁸⁸ FED. R. CRIM. P. 6(e)(6).

³⁸⁹ *E.g.*, *In re Petition for Disclosure of Evidence Before the October, 1959 Grand Jury*, 184 F. Supp. 38, 39 (E.D. Va. 1960).

³⁹⁰ *In re Grand Jury Sitting in Cedar Rapids, Iowa*, 734 F. Supp. 875, 876 (N.D. Iowa 1990) (providing factors for a district court to weigh when evaluating the propriety of disclosing a grand jury report pursuant to the grand jury’s common law powers).

in their private capacity “weighs strongly in favor of nondisclosure.”³⁹¹

The point of this primer on federal grand jury practice is hopefully clear: had Sandusky been federally investigated, the public would likely never have known that McQueary told Paterno about victim number two. Remember, federal grand juries rarely issue reports and, in the exceedingly rare chance that they do, those reports are generally kept secret. We might therefore assume—had this been a federal investigation—that Paterno might never have been fired, might still be coaching and, most importantly, might still be alive.

But there is another point to the foregoing discussion of federal law: the federal trend away from grand jury presentments and reports has been exceedingly persuasive in the states. Currently, although all states authorize the optional use of the investigative grand jury,³⁹² twenty-eight routinely proceed via a prosecutor’s information.³⁹³ Of the remaining states that rely, even sporadically, on the investigative grand jury, presentments as a tool for charging have become “obsolete.”³⁹⁴

³⁹¹ BRENNER & SHAW, *supra* note 295, at 97. Any federal court interference with a grand jury’s exercise of its common law power must, however, respect the Supreme Court’s holding in *United States v. Williams*, which held that the grand jury is an entity distinct from the court. 504 U.S. 36, 46 (1992).

³⁹² Wayne R. LaFave et al., *Criminal Procedure* 439 (5th ed. 2009).

³⁹³ *Id.* at 776.

³⁹⁴ SARA SUN BEALE ET AL., *GRAND JURY LAW AND PRACTICE* § 1:8 (2d ed. 2011). The following states have presentments as active tools for either starting a formal criminal proceeding or ordering the start of a proceeding:

- Florida, *e.g.*, *Doe v. Presentment of Grand Jury Spring Term 2007*, 997 So. 2d 1250, 1250 (Fla. Dist. Ct. App. 2009); *Kirkland v. State*, 97 So. 502, 504 (Fla. 1923);
- Georgia, GA. CODE ANN. § 17-7-51 (2011);
- Mississippi, *Petition of Davis*, 257 So. 2d 884, 886 (Miss. 1972) (treating presentment as an instruction to start a proceeding);
- Nevada, *Barngrover v. Fourth Judicial Dist. Court of State ex rel. County of Elko*, 979 P.2d 216, 220 (Nev. 1999) (recognizing that presentments are an alternative to indictment or information);
- North Carolina, *State v. Cole*, 240 S.E.2d 355, 358 (N.C. 1978) (characterizing presentments as notice from the grand jury to the prosecutor to start proceedings);
- Tennessee, TENN. CODE ANN. § 40-3-102 (2012);

And what about state grand jury reports? Only half of the states expressly allow for grand jury reports,³⁹⁵ though within that number only about a fourth of the states recognize broad grand jury reporting that includes criticism of individuals.³⁹⁶ And, within that fourth, states typically limit that criticism to public officials “impose procedural safeguards designed to ensure the ‘fair treatment’ of persons criticized in such reports.”³⁹⁷ As discussed in more detail below, Pennsylvania is one of only two states in the

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- Virginia, VA. CODE ANN. § 19.2-216 (2012).

Two states, New York and New Jersey, have presentments, but they are reserved for public officials, and New Jersey requires that presentments be on non-criminal matters. *Matter of Nassau County Grand Jury*, 382 N.Y.S.2d 1013, 1017 (N.Y. Co. Ct. 1976); N.J. R. CRIM. P. 3:6-9 (2012). New York also provides specific procedural protections to any named public official. *Matter of Report of August-September 1983 Grand Jury III, Term XI, Suffolk County*, 479 N.Y.S.2d 226, 231 (1984). The following states have language recognizing presentments, but either have no developed case law from the past sixty years or explicitly acknowledge that presentments are obsolete:

- Arkansas, *Ex parte Faulkner*, 251 S.W.2d 822, 823 (Ark. 1952);
- Illinois, *In re Report of Grand Jury of Marshall County*, 438 N.E.2d 1316, 1317 (Ill. App. Ct. 1982);
- Louisiana, LA. CODE CRIM. PROC. ANN. art. 444 cmt. e (2012);
- Maine, *Gendron v. Burnham*, 82 A.2d 773, 781 (Me. 1951);
- Vermont, VT. STAT. ANN. tit. 13, § 5504 (2012) (referring to a “town grand juror”); *State v. Levy*, 34 A.2d 370, 371 (Vt. 1943) (discussing the “town grand juror,” a person who is more comparable to a district attorney than a grand juror).

Three states (Alaska, Oregon, Washington) have limited presentments, which are statements of facts with names omitted that are sent to the court for a determination of whether those facts amount to a crime. ALASKA R. CRIM. P. 6(o); OR. REV. STAT. § 132.370 (2012); *Paul W. DeLaney & Associates v. Superior Court for King County*, 418 P.2d 747, 752 (Wash. 1966). Finally, other states seem to disallow presentments or not recognize them as a concept distinct from indictments. *E.g.*, *In re Elkhart Grand Jury*, June 20, 1980, 433 N.E.2d 835, 837 (Ind. Ct. App. 1982); *In re Grand Jury of Wabasha County, Charged by Court January 19, 1976*, 244 N.W.2d 253, 255 (Minn. 1976).

³⁹⁵ BEALE ET AL., *supra* note 394, at § 2.2 (listing twenty-three states that have “no clear statutory or judicial authority to issue reports”).

³⁹⁶ Wayne R. LaFave et al., 4 *Criminal Procedure* § 8.3(h) (3d. ed. 2010).

³⁹⁷ *Id.*

nation that created an indicting grand jury only to thereafter repeal it,³⁹⁸ but leave the investigating grand jury intact.

C. *Pennsylvania grand jury practice and the utility of “presentments” and “reports.”*

In the post-Revolutionary period, Pennsylvania was one of only three states to expressly guarantee prosecution by indictment in its early constitution.³⁹⁹ That all changed in 1973 when Pennsylvania adopted an awkward constitutional provision that seemingly required all prosecutions to proceed by indictment.⁴⁰⁰ Yet that same provision allowed “[e]ach of the several courts of common pleas [to], with the approval of the Supreme Court, provide for the initiation of criminal proceedings therein by information[.]”⁴⁰¹ Because every common pleas court—the name of Pennsylvania’s felony criminal court⁴⁰²—has received Pennsylvania State Supreme Court approval, “no grand jury may be impanelled to consider an indictment in any common pleas court.”⁴⁰³ Investigating grand juries are therefore all that remain; formal criminal prosecutions commence via prosecutorial information.⁴⁰⁴

But the story of Pennsylvania’s somewhat awkward grand jury setup does not end there.⁴⁰⁵ In 1978, the Pennsylvania legislature promulgated the Investigating Grand Jury Act (“IGJA”).⁴⁰⁶ In general, the IGJA removed the strict standards previously required

³⁹⁸ *Id.* § 15.1(g) n.346 (3d. ed. 2010).

³⁹⁹ BEALE ET AL., *supra* note 394, at § 1:4.

⁴⁰⁰ PA. CONST. Art. I, § 10.

⁴⁰¹ *Id.*

⁴⁰² *Common Pleas Court*, PACOURTS.US, <http://www.pacourts.us/T/CommonPleas/> (last visited June 28, 2012).

⁴⁰³ BEALE ET AL., *supra* note 394, at 1:5.

⁴⁰⁴ PA. R. CRIM. P. 103 comment (“The definition of bill of indictment was deleted in 1993 as no longer necessary because all courts of common pleas have abolished the indicting grand jury and now provide for the initiation of criminal proceedings by information.”).

⁴⁰⁵ *See generally* Ashby Jones, *Case Puts Focus on Grand-Jury Quirk*, WALL STREET JOURNAL, Nov. 17, 2011, <http://online.wsj.com/article/SB10001424052970204517204577042491094936470.html> (explaining that the Sandusky investigation “is casting a spotlight on a distinctive part of [Pennsylvania’s] criminal-justice system”).

⁴⁰⁶ 42 PA. CONS. STAT. §§ 4541-4553 (1978). The Pennsylvania Supreme Court also promulgated a series of rules related to investigating grand juries. They are designated in the Pennsylvania Rules of Criminal Procedure at 220 through 244.

in Pennsylvania to commence a grand jury investigation.⁴⁰⁷ Indeed, the Act went so far as to allow the commencement of an investigation based on “rumors” or “mere possibilities.”⁴⁰⁸ Under the supervision of the court,⁴⁰⁹ each investigating grand jury sits for an eighteen-month period,⁴¹⁰ and is composed of twenty-three members and between seven to fifteen alternates.⁴¹¹ If, during the grand jury’s investigatory term, the work exceeds the body’s capacity, the prosecutor may seek permission from the court to impanel an additional investigative grand jury.⁴¹²

The Pennsylvania investigative grand jury operates in secret and enjoys significant powers in doing so,⁴¹³ including “the power of subpoena, the power to obtain the initiation of civil and criminal contempt proceedings, and every investigative power of any grand jury of the Commonwealth.”⁴¹⁴ But, most relevant to this Article, “[t]he investigating grand jury shall have the power to issue a presentment with regard to any person who appears to have committed . . . an offense against the criminal laws of the Commonwealth.”⁴¹⁵ In assessing the propriety of issuing a presentment, Pennsylvania grand juries can consider any evidence, including hearsay or unconstitutionally seized evidence.⁴¹⁶ If the grand jury determines that probable cause exists that an individual committed a crime,⁴¹⁷ then “the grand jury shall direct the attorney for the Commonwealth to prepare a presentment which shall be submitted to the investigating grand jury for a vote.”⁴¹⁸

⁴⁰⁷ DAVID N. SAVITT & BRIAN P. GOTTLIEB, PENNSYLVANIA GRAND JURY PRACTICE 19 (1983).

⁴⁰⁸ Hawthorne, Inc. v. County Investigating Grand Jury, 412 A.2d 556, 560 (Pa. 1980).

⁴⁰⁹ PA. R. CRIM. P. 229.

⁴¹⁰ 42 PA. CONS. STAT. § 4546(a) (2012).

⁴¹¹ *Id.* § 4545(a).

⁴¹² *Id.* § 4547.

⁴¹³ *Id.* § 4549(b); accord PA. R. CRIM. P. 231(c).

⁴¹⁴ 42 PA. CONS. STAT. § 4548(a).

⁴¹⁵ *Id.* § 4548(b).

⁴¹⁶ SAVITT & GOTTLIEB, *supra* note 407, at 214.

⁴¹⁷ *Id.* (noting that although the probable cause requirement is not in the statute’s text, legislative intent to impose that standard exists because “the act as original passed provided for a probable cause hearing before the supervising judge as a prerequisite for an investigating grand jury indictment”).

⁴¹⁸ 42 PA. CONS. STAT. § 4551(a).

Assuming the grand jury votes to issue a presentment, the supervising court is thereafter required to examine it.⁴¹⁹ If the presentment is “within the authority of the investigating grand jury and is otherwise in accordance with the provisions of this subchapter, the supervising judge shall issue an order accepting the presentment.”⁴²⁰ As part of doing so, the judge may, on his own motion or at the request of the Commonwealth’s attorney, “direct that the presentment be kept secret until the defendant is in custody or has been released pending trial.”⁴²¹ Once the presentment is issued, the prosecution files a complaint, the defendant is entitled to a preliminary hearing,⁴²² “and the prosecution proceeds in the same manner as other criminal proceedings.”⁴²³

In addition to the grand jury’s presentment power, the IGJA also confers a reporting power on the investigating grand jury.⁴²⁴ In Pennsylvania law, grand jury reports “answer questions of public concern and may offer an explanation where no criminal prosecution is recommended.”⁴²⁵ More specifically, a report “may be submitted by an investigating grand jury to the supervising judge regarding conditions relating to organized crime or public corruption or it may propose recommendations for legislative, executive, or administrative action in the public interest upon stated findings.”⁴²⁶ The supervising judge shall thereafter review the report and, if the facts within it are supported by a preponderance of the evidence and the report was issued during the course of an investigation, then the judge “shall issue an order accepting and filing such report as a public record.”⁴²⁷ Most relevant to this Article, however, is this provision:

If the supervising judge finds that the report is critical of an individual not indicted for a criminal offense the supervising judge may in his sole discretion allow the named individual to submit a response to the allegations contained in the report.

⁴¹⁹ *Id.*

⁴²⁰ *Id.*

⁴²¹ *Id.* § 4551(b).

⁴²² *Id.* § 4551(e).

⁴²³ SAVITT & GOTTLIEB, *supra* note 407, at 217-18.

⁴²⁴ 42 PA. CONS. STAT. § 4552(a).

⁴²⁵ SAVITT & GOTTLIEB, *supra* note 407, at 219.

⁴²⁶ *Id.*

⁴²⁷ 42 PA. CONS. STAT. § 4552(b).

The supervising judge may then in his discretion allow the response to be attached to the report as part of the report before the report is made part of the public record pursuant to subsection (b).^{428]}

With that brief overview of Pennsylvania grand jury law in mind, a few things bear summarizing. First, unlike federal grand jury practice, Pennsylvania investigative grand jury proceedings are secret only while the investigation is ongoing. Second, although reports ordinarily become part of the public record, the prosecutor has discretion to make presentments public. Third, although unindicted persons named in a *report* can respond to whatever that report might say, no similar procedure exists for uninvestigated or unindicted third parties named in *presentments*. Finally, despite the seemingly detailed nature of the statutes governing investigative grand juries in Pennsylvania, one basic question remains unanswered: could the grand jury name anyone in a presentment and/or report?

III.

With the totality of the foregoing background in mind, several questions arise with regard to Paterno's story. First, what precise kind of document *was* the Sandusky investigative grand jury's Findings of Fact? If a presentment, can a presentment freely name *anyone* in its wake for the purpose of recommending a criminal charge? Moreover, what relevance does that document have as to Paterno?

To the first question, the answer is not immediately clear. After all, the document as released contains neither a case caption, nor a basic title.⁴²⁹ Rather, the document includes headers labeled "Introduction" and "Findings of Fact" on the first page.⁴³⁰ But, to be clear, the Sandusky investigative grand jury's Findings of Fact is not a grand jury "report"—at least not as that document relates to Sandusky. Indeed, the Pennsylvania Attorney General has referred on multiple occasions to the investigative grand jury's document as "the presentment."⁴³¹ That conclusion is of course

⁴²⁸ *Id.* § 4552(e). The judge also has discretion to seal the report if "the filing of such report as a public record may prejudice fair consideration of a pending criminal matter[.]" *Id.* § 4552(c).

⁴²⁹ Sandusky Presentment, *supra* note 8, at 1.

⁴³⁰ *Id.*

⁴³¹ Press Release, *Attorney General Kelly Announces Additional Child Sex Charges Against Jerry Sandusky*, ATTORNEYGENERAL.COM, Dec. 7, 2011,

bolstered by the continuation of criminal proceedings against Sandusky based on that document.⁴³²

But why would the presentment name Paterno? Perhaps, some might contend, Paterno's testimony was necessary for the grand jury to find the requisite probable cause to believe that Sandusky sexually abused victim 2. But, as the presentment details, McQueary testified that he personally observed Sandusky engaging in criminal sexual activity with a minor.⁴³³ Eyewitness testimony is sufficient, by itself, to support both a criminal charge,⁴³⁴ and a criminal conviction.⁴³⁵ Moreover, the grand jury could have written that McQueary reported the incident immediately without saying to whom. Accordingly, Paterno's grand jury testimony that McQueary told him that he saw Sandusky showering "or doing something of a sexual to a young boy"⁴³⁶ was superfluous at best.

So the question persists: why name Paterno? Given that there is nothing in the IGJA to prevent the prosecution from naming

<http://www.attorneygeneral.gov/press.aspx?id=6343> ("According to the presentment, Sandusky told Victim 9 that he loved and cared for him and urged him to keep their activities secret." (emphasis added)); Press Release, *Attorney General Kelly and PA State Police Commissioner Noonan Issue Statements Regarding Jerry Sandusky Sex Crimes Investigation*, AttorneyGeneral.com, Nov. 7, 2011, <http://www.attorneygeneral.gov/press.aspx?id=6277> ("I suspect that most of you have now reviewed the grand jury presentment which details a disturbing pattern of sexual assaults on young boys, all of whom Sandusky met through his involvement in the charitable organization known as The Second Mile—an organization that Sandusky himself founded." (emphasis added)).

⁴³² E.g., Colleen Curry, *Penn State Ex-Coach Jerry Sandusky Loses Bid to Delay Next Week's Trial*, ABCNEWS.COM, May 30, 2012, <http://abcnews.go.com/US/penn-state-coach-jerry-sandusky-loses-bid-delay/story?id=16453504#.T8bBqI6dhCA>.

⁴³³ Sandusky Presentment, *supra* note 8, at 6-7.

⁴³⁴ See, e.g., *State v. McGhee*, No. L-98-1260, 1999 Ohio App. LEXIS 3583, **3-4 (Ohio Ct. App. Aug. 6, 1999) (noting eyewitness testimony sufficient to establish probable cause); *People v. Gaines*, No. 192386, 1997 Mich. App. LEXIS 1065, *4 (June 17, 1997); *Commonwealth v. Stokes*, 389 A.2d 74, 77 (Pa. 1978) ("[I]nformation provided by an eyewitness whose identity is known has also been deemed sufficient [to establish probable cause].").

⁴³⁵ See, e.g., *United States v. Redd*, 161 F.3d 793, 797 (4th Cir. 1998) (concluding "eyewitness testimony is sufficient to prove that a person used a firearm" in violation of federal law); *United States v. Hamblin*, 911 F.2d 551, 558-59 (11th Cir. 1990) (same); *Bush v. State*, 601 S.E.2d 511, 513 (Ga. Ct. App. 2004) (officer eyewitness testimony sufficient to support criminal conviction).

⁴³⁶ Sandusky Presentment, *supra* note 8, at 7.

Paterno, perhaps the better is question is why *not* name Paterno? After all, the cache associated with Paterno's name is the kind of stuff that builds careers. Let's be honest: who outside of Pennsylvania had heard of Sandusky before Paterno's name was mentioned? Perhaps the inclusion of Paterno's name in the Sandusky investigation explains why an army surrounded Pennsylvania Attorney General Linda Kelly at the news conference announcing the charges against Sandusky.⁴³⁷ Moreover, it's not simply *naming* Paterno in the presentment (drafted by the Commonwealth by the way);⁴³⁸ it's also *releasing* that document to the public—something the Attorney General's office was not required to do. At a minimum, that office could have redacted Paterno's name, which it likewise elected not to do. Admittedly, the judge overseeing the grand jury in Pennsylvania could have sealed the presentment,⁴³⁹ but it was the Attorney General's office that ultimately elected to inject the document into public debate.⁴⁴⁰

The problem with naming Paterno in a publicly released presentment investing someone else is not the possibly nefarious inferential motives to be gleaned from the Pennsylvania Attorney General's doing so. Instead, the problem is with the rules, or lack thereof, governing how that office should draft a presentment.⁴⁴¹

⁴³⁷ Christine Baker, *Attorney General, Police Discuss Jerry Sandusky Sex-Crimes Case*, THE PATRIOT NEWS, Nov. 7, 2011, http://photos.pennlive.com/patriot-news/2011/11/attorney_general_police_discus_7.html (providing a press conference picture of Linda Kelly who is surrounded by nine official-looking people).

⁴³⁸ 42 PA. CONS. STAT. § 4551(a).

⁴³⁹ *Id.* § 4551(b).

⁴⁴⁰ Pennsylvania Attorney General Press Release, *Child sex charges filed against Jerry Sandusky; two top Penn State University officials charged with perjury & failure to report suspected child abuse*, ATTORNEYGENERAL.GOV, Nov. 5, 2011, <http://www.attorneygeneral.gov/press.aspx?id=6270>.

⁴⁴¹ 42 PA. CONS. STAT. § 4551(a) (indicating that the Commonwealth should author the document for a grand jury vote, but providing no guidance on what the document should *include*). Although Pennsylvania has traditionally viewed itself as imposing more restrictions on the investigative grand jury when compared to other jurisdictions, *see* *In re County Investigating Grand Jury of April 24, 1981*, 459 A.2d 304, 306 (1983) (“Traditionally in Pennsylvania, we have been more restrictive in the interpretation of the powers vested in investigating grand juries than has been the practice in many other jurisdictions.”), it does not appear that Pennsylvania courts have offered any meaningful guidance on the required contents of a presentment, *cf.* *Commonwealth v. Bradfield*, 508 A.2d 568, 573 (Pa. Super. Ct. 1986) (noting that a prosecutor's inflammatory remarks during the grand jury's investigation could merit invalidation of the resulting presentment).

That leads to the second question posted at the outset of this Part: can the Attorney General properly name Paterno, a non-material uninvestigated and uncharged witness, in an investigatory document related to *someone else*? Apparently. To begin with, the IGJA provides no statutory guidance on how the Commonwealth should author a presentment and, moreover, it provides no recourse for an uninvestigated non-material witness named in that document.

There is of course the possibility that the *untitled* grand jury document was, as it related to Paterno, a grand jury “report.” Pennsylvania grand juries are statutorily entitled to author such documents,⁴⁴² and perhaps enjoy common law authority to report generically on matters of public concern.⁴⁴³ Surely what a celebrity-status coach like Paterno knew about Sandusky, and when he knew it, constitutes a matter of public concern throughout Pennsylvania—where the grand jury conducted its investigation.

But several reasons counsel against concluding that the untitled results of the Sandusky investigation were a “report” against Paterno: first, Pennsylvania surely knew, despite its statutory power to issue grand jury reports,⁴⁴⁴ that it could not issue a report as to Paterno—a private party. Both scholars and the judiciary almost uniformly agree that, historically speaking, grand jury reports were limited to appointed or elected public officials.⁴⁴⁵ The definition of “grand jury report” in Pennsylvania statutory law seemingly abides by that historical practice: “[a] report submitted by the investigating grand jury to the supervising judge regarding conditions relating to organized crime or public corruption or both; or proposing recommendations for legislative, executive, or administrative action in the public interest based upon stated findings.”⁴⁴⁶

Second, as noted above, the Attorney General’s office called it a “presentment” when discussing the charges against Sandusky. That office was wise to do so; the IGJA provides no procedural

⁴⁴² 42 PA. CONS. STAT. § 4552(a).

⁴⁴³ Note, *Grand Jury May Not Report on Misconduct of Public Official Without Indictment*, 43 MO. L. REV. 350, 353 (1978).

⁴⁴⁴ 42 PA. CONS. STAT. § 4552(a).

⁴⁴⁵ Stern, *supra* note 326, at 74 n.1 (collecting cases emphasizing that the grand jury’s reporting role was limited to public officials because those owe a fiduciary duty to the public).

⁴⁴⁶ 42 PA. CONS. STAT. § 4542.

recourse to a third party named in a presentment—though, as discussed earlier, it does for third parties named in a report.⁴⁴⁷ Finally, from a definitional standpoint, the IGJA does not appear to extend reporting power to naming private individuals,⁴⁴⁸ which comports with historical practices.⁴⁴⁹

Regardless of what the Sandusky investigative grand jury document is properly called as it relates to Paterno, prosecutors in Pennsylvania have consistently taken advantage of this muddy area. Indeed, the decision to make public a highly inflammatory document untested by the proof beyond a reasonable doubt standard, whether a report or presentment, is not an isolated instance in Pennsylvania. In September of 2003, a Philadelphia investigative grand jury issued an 800-page report wildly critical of archdiocesan officials' involvement in the sexual abuse of minors by clergy.⁴⁵⁰ It asserted, among other wide-ranging unproven allegations, that “the Archdiocese’s ‘handling’ of the abuse scandal was at least as immoral as the abuse itself.”⁴⁵¹ Then, in 2004, an eight-page grand jury report concluded that high school football coaches, who supervised a trip where three players were sexually assaulted by teammates, were “more concerned with being coaches of a football team than interested in the well-being of the players[.]”⁴⁵² The report included graphic details and criticized the school district, juvenile justice system, and even the judge who declined to try the accused players as adults.⁴⁵³

⁴⁴⁷ *Id.* § 4552(e).

⁴⁴⁸ *See id.* § 4542 (declining to include private persons within the definition of “investigating grand jury report”).

⁴⁴⁹ Some caselaw historically suggests that public officials are properly named in reports because, based on their office, they should be prepared to handle public scrutiny. *See In re Report of Grand Jury*, 11 So. 2d 316, 319 (Fla. 1943); *see also* Stern, *supra* note 326, at 74 nn.1-2.

⁴⁵⁰ *E.g.*, Report of the Grand Jury, *In re County Investigating Grand Jury*, COURT OF COM. PL., FIRST JUDICIAL DISTRICT OF PA, CRIM. TRIAL DIV., MISC. NO. 03-00-239, 2 (2003), http://www.bishop-accountability.org/reports/2005_09_21_Philly_GrandJury/Philly_00.pdf (concluding as “truth” that widespread abuse took place in the Catholic church involving “63 different priests” and “hundreds of child victims”).

⁴⁵¹ *Id.* at 4.

⁴⁵² Karla Schuster & Keiko Morris, “Appalled and Sickened”; Grand Jury Condemns Lack of Responsibility, Takes All Parties to Task for Handling of Attacks at Pa. Football Camp, *NEWSDAY* (New York), Mar. 11, 2004, at A02.

⁴⁵³ *Id.*

But, prior to the Sandusky presentment, perhaps the most well-known inflammatory grand jury document released to the public by Pennsylvania prosecutors—in this case also a report—involved a Philadelphia doctor by the name of Kermit Gosnell, his wife, and members of his staff.⁴⁵⁴ Drafted in 2008, but accepted by a judge and made public in 2011,⁴⁵⁵ the report called Gosnell’s clinic “a filthy fraud,”⁴⁵⁶ asserted that Gosnell “spread venereal disease among [the patients] with infected instruments, perforated their wombs and bowels,” and concluded that his horrific abortion practices killed at least two women.⁴⁵⁷ The 281-page report also included photos of some of Gosnell’s victims.⁴⁵⁸

Like the Pennsylvania Attorney General’s decision to release the Sandusky presentment, the Philadelphia district attorney’s decision to make public the Gosnell grand jury report makes doubtful the prospect that Gosnell will receive a fair trial. A simple Google search using “Kermit Gosnell” as the search terms reveals an overwhelming number of results that includes conclusory commentary about his guilt,⁴⁵⁹ stories from his alleged victims,⁴⁶⁰ and—of course—the grand jury’s report itself.⁴⁶¹ Apart from the

⁴⁵⁴ Report of the Grand Jury, *In re County Investigating Grand Jury XXIII*, MISC. No. 0009901-2008, C-17, <http://www.phila.gov/districtattorney/PDFs/GrandJuryWomensMedical.pdf>.

⁴⁵⁵ *Id.* (providing the date of adopting on the second page of the PDF; that page does not have a number).

⁴⁵⁶ *Id.* at 1.

⁴⁵⁷ *Id.*

⁴⁵⁸ Tara Murtha, *Neglect of West Philly Abortion Victims Was ‘By Design’*, PHILADELPHIAWEEKLY.COM, Feb. 2, 2011, <http://www.philadelphiaweekly.com/news-and-opinion/cover-story/Neglect-of-West-Philly-Abortion-Victims-Was-By-Design.html> (noting that the report “includes a graphic photo of the dead baby”).

⁴⁵⁹ *E.g.*, Steven Ertelt, *Kermit Gosnell Drugged, Tied Up Woman Before Forced Abortion*, LIFENEWS.COM, Jan. 24, 2011, <http://www.lifenews.com/2011/01/24/kermit-gosnell-drugged-tied-up-woman-before-forced-abortion/>.

⁴⁶⁰ Jessica Hopper, *Alleged Victim Calls Philadelphia Abortion Doc Kermit Gosnell a “Monster,”* ABCNEWS.COM, Jan. 25, 2011, <http://abcnews.go.com/US/alleged-victim-calls-philadelphia-abortion-doctor-kermit-gosnell/story?id=12731387#.T8bnzo6dhCA>.

⁴⁶¹ Report of the Grand Jury, *In re County Investigating Grand Jury XXIII*, MISC. No. 0009901-2008, C-17, <http://www.phila.gov/districtattorney/PDFs/GrandJuryWomensMedical.pdf>. A draft of a grand jury presentment against Gosnell is also publicly available online. *Presentment*, PHILA.GOV, <http://www.phila.gov/districtattorney/PDFs/PresentmentFinalWomensMedical.pdf>.

veracity of the horrific allegations against him, the idea that Gosnell can receive an impartial trial pursuant to the Sixth Amendment seems highly unlikely.⁴⁶²

The same can no doubt be said for the idea that Sandusky received a fair trial unencumbered by a media circus. The nation knew his name well long before his trial, thanks again to the inordinate media attention his case received⁴⁶³—media attention that would not exist had Pennsylvania declined to make public his grand jury presentment. Indeed, many presumed his guilt prior to his trial.⁴⁶⁴ Concededly, high-profile trials generate media attention all the time. But generating media attention through the release sensitive grand jury documents is a wholly different matter; doing so abuses the grand jury system by ignoring the hallmark of secrecy that historically surrounds a grand jury's actions.

But at least Sandusky had his day in court. Paterno will not. Paterno is a private third party who was not under investigation and is thus historically not properly included in either the presentment of *someone else*,⁴⁶⁵ or the subject of a separate grand

⁴⁶² The Supreme Court has acknowledged that, at some point, press coverage can corrupt trial atmospheres. *See, e.g.,* Sheppard v. Maxwell, 384 U.S. 333, 357-58 (1966); Estes v. Texas, 381 U.S. 532, 550-51 (1965); Rideau v. Louisiana, 373 U.S. 723, 725-26 (1963); Irvin v. Dowd, 366 U.S. 717, 725-26 (1961). That might be particularly important to note in Philadelphia where one former district attorney stated, while making a training tape, that winning is more important than trial fairness. L. Stuart Ditzen, Linda Loyd & Mark Fazlollah, *Philadelphia DA Candidate's Tips on Jury Selection: "To Win, Limit Black Jurors, McMahon Said,"* PHILADELPHIA INQUIRER, Apr. 1, 1997, <http://www.levelers.org/jrp/orig/jrp.philinfo.htm>.

⁴⁶³ *See* Leon Harner, *Bellefonte Readies for Return to Spotlight*, THE DAILY COLLEGIAN, June 12, 2012, http://www.collegian.psu.edu/archive/2012/06/12/bellefonte_readies_for_return_to_spotlight.aspx (discussing the media presence in Bellefonte, where Sandusky was tried, both during the pretrial hearings and leading up to his trial).

⁴⁶⁴ *See, e.g.,* Chris Papst, *Court of public opinion already has a verdict on Jerry Sandusky*, WHPTV.COM, June 12, 2012, <http://www.whptv.com/news/local/story/Court-of-public-opinion-already-has-a-verdict-on/J5Iq37x1h0CD0ORJJ8nx6w.cspix>; Jon Saraceno, *Scandal Shakes Sandusky's Hometown*, USATODAY.COM, Dec. 8, 2011, <http://www.usatoday.com/sports/college/football/bigten/story/2011-12-07/jerry-sandusky-penn-state-hometown-scandal/51722854/1>; Eliot Still, *Sandusky Already Guilty in the Court of Public Opinion*, THE DAILY ILLINI, Nov. 15, 2011, http://www.dailyillini.com/index.php/article/2011/11/sandusky_already_guilty_in_the_court_of_public_opinion.

⁴⁶⁵ *See generally* Part II(A) and accompanying discussion (discussing the use of the presentment as a tool to investigate criminal activity; Paterno was never investigated for his role in Sandusky's crimes).

jury report.⁴⁶⁶ The Pennsylvania Attorney General's decision to make the Sandusky presentment public ignores that history and, in doing so, denies to Paterno the opportunity to defend his name, his reputation, or what he did—or did not do—during Sandusky's tenure on his staff, leading up to Sandusky's retirement, and following Sandusky's retirement.⁴⁶⁷ Paterno's inability to do so has nothing to do with the fact that he is dead. Even assuming that Paterno had not died from lung cancer, there exists no meaningful legal proceeding in Pennsylvania that would allow him to distance himself from the grand jury's investigation into Sandusky. Even if such a proceeding existed, it's unlikely the public would forget about his inclusion in Sandusky's investigation.⁴⁶⁸ After all, the public reaction to Sandusky's acquittal on involuntary deviate

⁴⁶⁶ See, e.g., *Ex parte Burns*, 73 So. 2d 912, 915 (Ala. 1954); *Ex parte Faulkner*, 251 S.W.2d 822, 823 (Ark. 1952); *Thompson v. Macon-Bibb County Hospital Authority*, 273 S.E.2d 19, 21 (Ga. 1980); *In re Report of Grand Jury of Marshall County*, 438 N.E.2d 1316, 1318-19 (Ill. App. Ct. 1982); *Rector v. Smith*, 11 Iowa 302, 307 (Iowa 1860); *Bowling v. Sinnette*, 666 S.W.2d 743, 746 (Ky. 1984); *In re Report of Grand Jury of Carroll County*, 1976, 386 A.2d 1246, 1248-49 (Md. 1978); *Bennett v. Kalamazoo Circuit Judge*, 150 N.W. 141, 144 (Mich. 1914); *In re Grand Jury of Hennepin County Impaneled on November 24, 1975*, 271 N.W.2d 817, 820-21 (Minn. 1978); *Petition of Davis*, 257 So. 2d 884, 887 (Miss. 1972); *Matter of Interim Report of Grand Jury for March Term of Seventh Judicial Circuit of Missouri 1976*, 553 S.W.2d 479, 481-82 (Mo. 1977) (en banc); *Simington v. Shimp*, 398 N.E.2d 812, 817 (Ohio 1978); *Hayslip v. State*, 249 S.W.2d 882, 884 (Tenn. 1952); *State ex rel. Town of Caledonia, Racine County v. County Court of Racine County*, 254 N.W.2d 317, 320 (Wisc. 1977).

⁴⁶⁷ To be sure, federal indictments often name unindicted coconspirators and thus arguably could raise issues similar to those raised in this Article. *Accord Tex Lezar, Criminal Procedure Grand Juries-Federal Grand Juries May Not Name Unindicted Coconspirators*, 54 TEX. L. REV. 663, 667 n.32 (1976) (discussing judicial disapproval of grand juries naming unindicted coconspirators in indictments). Even assuming an analogy to unindicted coconspirators is appropriate for purposes of this footnote, which it may not be because Paterno was never characterized as such, federal indictments raise issues far different from those raised in this Article. In the federal scenario, a grand jury has agreed that sufficient evidence exists to charge the defendant named in the indictment. In contrast, the Sandusky presentment is an investigatory tool, not a charging instrument. That matters because, from a temporal standpoint, the investigation is ordinarily complete by the time of a federal indictment's issuance. Accordingly, superfluous investigatory evidence that is not relevant to securing a conviction—evidence like Paterno's testimony about what *he* did rather than what the *defendant* did—is unlikely to be included.

⁴⁶⁸ *Accord In re Grand Jury Sitting in Cedar Rapids, Iowa*, 734 F. Supp. 875, 877 (N.D. Iowa 1990); *In re Report of Grand Jury of Carroll County*, 1976, 386 A.2d 1246, 1249 (Md. Ct. Spec. App. 1978); *In re Presentment by Camden County Grand Jury*, 169 A.2d 465, 472 (N.J. 1961); *People v. McCabe*, 148 Misc. 330, 333-34 (N.Y. Sup. Ct. 1933).

sexual intercourse against victim two (the same victim who McQueary allegedly saw in the shower with Sandusky) has hardly cleared Paterno's name⁴⁶⁹—though it was Paterno's handling of the story related to victim two that led to his firing.

Part of the collective problem, of course, stems from the manner in which the Sandusky presentment was written. Emblazoned with Findings of Fact at the top of the page, the media at large took it as precisely as that—some members of the media even went so far as to assume the document constituted an indictment against Sandusky.⁴⁷⁰ Thus, the average reader of the media's subsequent stories about Sandusky, let alone the average lawyer, likely had no idea about the difference between a "presentment" and an "indictment." And why would they—the Sandusky presentment was not even labeled as such; the document omitted a title page and announced itself immediately with its "findings of fact" label. The public likely has no idea that those findings were not the product of an adversary proceeding.⁴⁷¹

⁴⁶⁹ Associated Press, *Breakdown of Sandusky Verdicts, By Victim*, MERCURYNEWS.COM, June 27, 2012, http://www.mercurynews.com/breaking-news/ci_20953262/sandusky-accusers-offer-glimpse-lives-now. Ironically, though, McQueary has, post-verdict, now also been viewed by at least one media outlet as a "victim" of the Sandusky investigation. Jim Sollisch, *The Other Victim in the Sandusky Verdict: Mike McQueary, the Good Soldier*, THE CHRISTIAN SCIENCE MONITOR, June 25, 2012, <http://www.csmonitor.com/Commentary/Opinion/2012/0625/The-other-victim-in-the-Sandusky-verdict-Mike-McQueary-the-Good-Soldier>.

⁴⁷⁰ See, e.g., Tony Santaella, *Read the Indictment Against Jerry Sandusky, Center of Penn State Scandal*, WLTX.com, Nov. 10, 2011, <http://www.wltx.com/news/article/158424/142/Read-the-Indictment-Against-Jerry-Sandusky-Center-of-Penn-State-Scandal>; Detroit Free Press Staff, *The Penn State indictment: What the grand jury alleges in sex-abuse case involving Jerry Sandusky*, FREEP.COM, Nov. 10, 2011, <http://www.freep.com/article/20111110/NEWS07/111100541/The-Penn-State-indictment-What-grand-jury-alleges-sex-abuse-case-involving-Jerry-Sandusky>; Cindy Boren, *Jerry Sandusky Indictment Prompts Questions About Future of Penn State's Joe Paterno*, WASHINGTONPOST.COM, Nov. 6, 2011, http://www.washingtonpost.com/blogs/early-lead/post/jerry-sandusky-indictment-prompts-questions-about-future-of-penn-states-joe-paterno/2011/11/06/gIQALFvhsM_blog.html.

⁴⁷¹ See, e.g., *Simpson v. Langston*, 664 S.W.2d 872, 873 (1984) (noting that a grand jury report carries "an aura of approval by the judge who accepted it"); *In re Grand Jury of Hennepin County Impaneled on November 24, 1975*, 271 N.W.2d 817, 819 (Minn. 1978) (observing that grand jury reports have "a ring of proven truth which they may not deserve"); *Petition of Davis*, 257 So. 2d 884, 888 (Miss. 1972) (concluding that grand jury allegations are "tantamount to fact in the eyes of the populace").

The totality of the Sandusky investigation perfectly illustrates why federal grand jury practice has, as discussed above, all but eliminated the grand jury’s presentment and reporting abilities. Its doing so “should not be mourned.”⁴⁷² Federal grand jury practice “properly reflect[s] an unwillingness to allow an ex parte, unaccountable body to inflict damage on reputations and careers.”⁴⁷³ Several states have followed suit by, for example, restricting the filing of grand jury reports that single out individuals,⁴⁷⁴ requiring that such reports follow procedural safeguards,⁴⁷⁵ or at least providing the named individual with the opportunity to challenge the report’s contents.⁴⁷⁶

But state practice is not constitutionally obligated to follow any particular procedural approach. Accordingly, the more central problem is the perhaps unintended consequence of the Supreme Court’s thematic emphasis on the grand jury being an “independent”⁴⁷⁷ body that is not “textually assigned”⁴⁷⁸ to any branch of government. The idea that the investigative grand jury in Pennsylvania is truly “independent” seems difficult to reconcile with the fact that it cannot operate without either the prosecutor,⁴⁷⁹ or a supervising judge.⁴⁸⁰

Paterno’s story so compellingly demonstrates these collective problems because of the consequences of the Sandusky investigation to him: (1) he believed he would die without football, and (2) the Sandusky investigative grand jury took

⁴⁷² Andrew D. Leipold, *Why Grand Juries Do Not (And Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 319 (1995).

⁴⁷³ *Id.*

⁴⁷⁴ *See, e.g.*, NEV. REV. STAT. § 172.267(2)(c) (2012); OKLA. STAT. tit. 22, § 346 (2012); WASH. REV. CODE § 10.27.160 (2012).

⁴⁷⁵ *E.g.*, N.Y. CRIM. PROC. LAW § 190.85(2)(a) (Consol. 2012).

⁴⁷⁶ *E.g.*, ALASKA R. CRIM. P 6.1(c)(1)-(4) (2012).

⁴⁷⁷ *Wood v. Georgia*, 370 U.S. 375, 390 (1962).

⁴⁷⁸ *Williams*, 504 U.S. at 66.

⁴⁷⁹ 42 PA. CONS. STAT. § 4543(b) (2012) (providing that the attorney for the Commonwealth applies to convene an investigatory grand jury); *id.* § 4551(a) (requiring the Commonwealth’s attorney to, at the request of the grand jury, “prepare a presentment which shall be submitted to the investigating grand jury for a vote”).

⁴⁸⁰ *In re Twenty-Fourth Statewide Investigating Grand Jury*, 907 A.2d 505, 512 (Pa. 2006) (“The safeguards against [grand jury] abuses are reflected in the statutory scheme of regulation, which recognizes the essential role of the judiciary in supervising grand jury functions.”).

football from him—whether intentionally or not. As to the first point, Paterno never had interest in retirement. In an interview for *The New York Times* in 1997, Paterno, then age seventy, said, “I don’t want to retire. Too many people quit their jobs too early and don’t know what to do with themselves.”⁴⁸¹ CBS sportscaster Brent Musburger said over a decade later in 2008 that his friend, Paterno, was haunted by Bear Bryant’s death.⁴⁸² Bryant, of course, was the legendary coach of the Alabama Crimson Tide football team from 1958-82,⁴⁸³ who retired in 1982 and died from a massive heart attack just twenty-nine days later.⁴⁸⁴ Musburger added the following: “[Paterno] is a man that doesn’t fish, doesn’t play golf . . . he has no other interest other than his family and football[.] And he’s just afraid what would happen with the rest of his life if he walks away from it.”⁴⁸⁵ Paterno was apparently even more direct with current Nittany Lion, Donovan Smith; Paterno told him “I’m afraid to stop coaching because I’ll die.”⁴⁸⁶

Although some contend that Paterno died from a broken heart,⁴⁸⁷ others suggest that medical evidence supports the idea that the grief he experienced as a result of the Sandusky investigation and his firing hastened Paterno’s passing.⁴⁸⁸ According to a recent study, grief experienced from loss—as in, for example, a job—can

⁴⁸¹ Frank Litsky, *Paterno a Dean at 70: Fewer ‘Dumb Mistakes,’* N.Y. TIMES, July 10, 1997, at B16.

⁴⁸² Will Bunch, *A Hero’s Life, a Mortal’s End: JoePa’s “Grand Experiment,”* PHILLY.COM, Jan. 23, 2012, http://articles.philly.com/2012-01-23/news/30655915_1_joe-paterno-plain-blue-and-white-uniforms-coach-in-major-college.

⁴⁸³ *Coach Paul “Bear” Bryant*, PAUL W. BRYANT MUSEUM, <http://www.bryantmuseum.com/page.asp?ID=21> (last visited May 20, 2012).

⁴⁸⁴ Will Bunch, *A Hero’s Life, a Mortal’s End: JoePa’s “Grand Experiment,”* PHILLY.COM, Jan. 23, 2012, http://articles.philly.com/2012-01-23/news/30655915_1_joe-paterno-plain-blue-and-white-uniforms-coach-in-major-college.

⁴⁸⁵ *Id.*

⁴⁸⁶ *Id.*

⁴⁸⁷ Bob Padecky, *Paterno ‘died of broken heart’*, THE PRESS DEMOCRAT, Jan. 24, 2012, http://www.pressdemocrat.com/article/20120124/NEWS/120129733/1042/opinion?Title=Paterno-died-of-broken-heart-; Reuven Fenton & Leonard Greene, Penn State Coach Paterno Dies of ‘Broken Heart,’ NYPOST.COM, Jan. 23, 2012, http://www.nypost.com/p/news/national/pride_of_the_lions_meets_sad_end_dLWSOGb8wP9bv4tG6RcChL.

⁴⁸⁸ Alice Park, *‘Broken Heart’? What Really Killed Joe Paterno*, TIME.COM, Jan. 25, 2012, <http://healthland.time.com/2012/01/25/did-joe-paterno-die-of-a-broken-heart/>.

increase the risk of a heart attack “21-fold.”⁴⁸⁹ One national expert on aging said that in Paterno’s case specifically, his firing could have accelerated his death: “[w]hen you feel that you’ve lost your place in this world, death is never far behind[.]”⁴⁹⁰ And, more basically, “coexisting conditions such as high psychological stress, depression and major changes in a life event are all associated with increased mortality.”⁴⁹¹

Regardless of the accuracy of the medical evidence, the point of this Article remains the same: all of this started with the Sandusky investigative grand jury presentment’s unnecessary naming of Paterno. Doing so was gratuitous, superfluous, and denied to Paterno the opportunity to explain what he did, or did not do, about Sandusky’s criminal behavior. Importantly, we might never have known about Paterno’s involvement, or lack thereof, had Sandusky been the subject of a federal investigation. But, Pennsylvania allows the investigative grand jury to issue a presentment, a document long ago described by a New York appellate court as follows:

A presentment is a foul blow. It wins the importance of a judicial document, yet it lacks its principal attributes—the right to answer and to appeal. It accuses but furnishes no forum for a denial. No one knows upon what evidence the findings are based. An indictment may be challenged—even defeated. The presentment is immune. It is like the “hit and run” motorist. Before application can be made to suppress it, it is the subject of public gossip. The damage is done. The injury it may unjustly inflict may never be healed.⁴⁹²

As the saying goes, the more things change, the more they remain the same.

⁴⁸⁹ Alice Park, *How Grief Can Break Your Heart*, TIME.COM, Jan. 10, 2012, <http://healthland.time.com/2012/01/10/how-grief-can-break-your-heart/>.

⁴⁹⁰ Michael Vitez, *Experts Say Joe Paterno’s Dismissal Could Have Hastened His Death*, PHILLY.COM, Jan. 23, 2012, http://articles.philly.com/2012-01-23/news/30655864_1_joe-paterno-football-coach-football-team.

⁴⁹¹ Emma Mustich, *Did Getting Fired Kill Joe Paterno?* SALON.COM, Jan. 23, http://www.salon.com/2012/01/23/did_getting_fired_kill_joe_paterno/.

⁴⁹² *People v. McCabe*, 148 Misc. 330, 333-34 (N.Y. 1933).

CONCLUSION

Long before the Penn State scandal, Paterno reflectively said this about his legacy:

I hope they're not going to judge me on how many games I won or lost . . . I hope they judge me on some other things, the impact we've had on people's lives. Some have been good and, obviously, some have not been so good. But I hope the overall picture is that we have done some good for people.⁴⁹³

At the time, of course, no one knew that Paterno would be abruptly and unceremoniously fired by the University he loved after its Board of Trustees concluded that Paterno exemplified a “failure of leadership” by failing to do more after being told that his former assistant coach anally raped a young boy.⁴⁹⁴ Commentators no doubt will continue to debate whether Paterno did, in fact, do “enough” when told about Sandusky. But, while that debate remains unresolved, what is clear is that a grand jury document, kept secret at the conclusion of a grand jury investigation in the federal system, should not have been the cause of Paterno’s termination.

When the Sandusky grand jury’s Findings of Fact became public, the court of public opinion took that document as precisely that: fact. Problematically, however, grand jury proceedings are not governed by a proof beyond a reasonable doubt standard and, moreover, Paterno was not under investigation. The possibility that an innocent third party could be ensnared by the grand jury investigation of *someone else* is precisely why grand jury proceedings at the federal level disfavor presentments and reports and, in any event, remain secret. The Sandusky presentment, by mentioning Paterno’s name, abused the grand jury system and raises this question: without the Sandusky presentment, what would *you* know about Paterno and when would *you* know it?

⁴⁹³ O’BRIEN, *supra* note 37, at 303.

⁴⁹⁴ *Penn State Trustees Reaffirm Firing Joe Paterno for ‘Failure of Leadership’*, ABCNEWS.COM, Mar. 12, 2012, <http://abcnews.go.com/blogs/headlines/2012/03/penn-state-trustees-reaffirm-firing-joe-paterno-for-failure-of-leadership/>.