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Reforming the Grand Jury to Protect Privacy in Third Party Records

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ARTICLES

REFORMING THE GRAND JURY TO PROTECT PRIVACY IN THIRD PARTY RECORDS

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* (1956–2014) At the time of his death in February 2014, Andrew Taslitz was a Professor of Law and the Director of the Criminal Justice Practice and Policy Institute at *American University Washington College of Law* (J.D., *University of Pennsylvania*, 1981; B.A., *Queens College*, 1978; former Assistant District Attorney, Philadelphia, PA). Professor Taslitz would surely express his deepest appreciation to Christiane Cannon and Rachael Curtis for their outstanding research assistance. In his own words—and we leave them in present tense because his brilliance, zest, unfailing good humor, and incredible compassion live on in all those he touched—"Professor Taslitz loves to teach, appreciates fine food, is a true science fiction and comic book fanatic, thrills to great movies, and owes much of the joy in his life to his heart-melting wife, Patty Sun, whose last name aptly captures her role in his life, and to his two beloved Norwegian Elkhounds, B'lanna (named after the half-Klingon engineer on *Star Trek Voyager*) and Odo (named after the shape-changer on *Star Trek: Deep Space Nine*)." *Andrew E. Taslitz*, HOW. U. SCH. L., http://www.law.howard.edu/445 (last visited Dec. 30, 2014).

** Professor of Law, the *University of Oklahoma College of Law*; B.S. in Electrical Engineering, *University of California at Davis*; J.D., *Yale Law School*. I am grateful to Jeffrey Vogt and Nathan Hall for outstanding research assistance, and for reminding me via stellar class performance and general good nature that it is a privilege to teach. I also appreciate Christopher Slobogin helping me think through this Article's unique co-authorship, and all that he has contributed not only to the ABA Standards but to Fourth Amendment and privacy scholarship more generally. And I am thankful to David H. Kaye for providing insights into existing subpoena law and to Lawrence Rosenthal for providing a typically honest critique that keeps *me* honest and (hopefully) responsive to other well-informed perspectives.

γ This Article requires a brief explanation, and please forgive me (Stephen) as I turn to the informal first person to appropriately explain. Andy originally intended to include this Article in an *Oklahoma Law Review* symposium reviewing the American Bar Association Standards for Criminal Justice on Law Enforcement Access to Third Party Records. *See* Stephen E. Henderson, *A Dedication to Andrew E. Taslitz: "It's All About the Egyptians," and Maybe Tinkerbell Too*, 66 OKLA. L. REV. 693 (2014). Before he died, Andy asked me to help him finish the Article. Thus, with the gracious support of his wife, Patty, I have now done so and am very pleased to publish it in Andy's "home" law review. One need only consult the *Oklahoma Law Review* dedication to

In late 2014, two grand juries returned controversial no bill decisions in police killings, one in Ferguson, Missouri, and one in New York City. These outcomes have renewed calls for grand jury reform, and whatever one thinks of these particular processes and outcomes, such reform is long overdue. One logical source of reform to better respect privacy in records, which would have incidental benefits beyond this privacy focus, would be the newly enacted American Bar Association Standards for Criminal Justice on Law Enforcement Access to Third Party Records (LEATPR). But LEATPR exempts from its requirements access to records via a grand jury subpoena, and, perhaps more surprisingly, potentially exempts access via a "functionally equivalent prosecutorial subpoena." The impetus for this exemption was a concern that applying LEATPR's requirements to the grand jury, or even to its functional equivalent, is unnecessary and might radically undermine longstanding systems of criminal investigation in perhaps unforeseeable ways. This Article addresses whether this exception can be justified by reviewing each of the four main regulatory mechanisms of LEATPR and examining whether grand jury procedures provide an adequate substitute. In finding that they do not, this Article indicates how to improve the grand jury process. These improvements would of course not resolve the very difficult and multifaceted social ills reflected in the controversy over recent grand jury decisions, but they could begin to restore the legitimacy of this once-revered but now-maligned institution.

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know my incredible high regard for Andy as a person and for Andy as a scholar. He was a giant. I am grateful to have known him as a friend, and I am humbled to have this role in what is likely his final publication. In short, I will be grateful if everything good in the Article is attributed to Andy, and anything amiss is attributed to me.

OVERVIEW

On August 9, 2014, a white police officer in Ferguson, Missouri, fatally shot a black teenager.[1] After an unusually extensive consideration, a grand jury decided not to indict the officer.[2] Less than a month prior to the Ferguson incident, on July 17, 2014, a white police officer in New York City used a chokehold in arresting a black man, likewise killing him.[3] A grand jury decided not to indict.[4] Both outcomes resulted in anger and protest, unfortunately including significant violence in Ferguson.[5] And together the outcomes have renewed calls for grand jury reform.[6]

The grand jury performs both shield and sword roles, the shield being its ability to refuse indictment as occurred in these cases, and the sword being its ability to obtain vast information in the investigation of crime. Many of the perceived problems in the exercise of its shield role, including prosecutorial dominance and lack of transparency and accountability, are also evident in its investigatory function. Thus, improving one will naturally improve the other. And while it is not implicated in these two recently prominent grand juries, given the massive and ever-increasing amounts of private information recorded and stored today,[7] grand jury access to private information is of significant concern.

A logical source of reform to better respect privacy in records would be the newly enacted ABA Standards for Criminal Justice on Law Enforcement Access to Third Party Records (LEATPR).[8] LEATPR is designed to fill a constitutional hole in federal privacy

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1. *See What Happened in Ferguson?*, N.Y. TIMES, http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html (last visited Dec. 30, 2014).

2. *See id.*

3. *See* Andy Newman, *The Death of Eric Garner, and the Events That Followed*, N.Y. TIMES (Dec. 3, 2014), http://www.nytimes.com/interactive/2014/12/04/nyregion/04garner-timeline.html#/#time356_10536.

4. *See id.*

5. *See* Monica Davey & Manny Fernandez, *Security in Ferguson Is Tightened After Night of Unrest*, N.Y. TIMES (Nov. 25, 2014), http://www.nytimes.com/2014/11/26/us/ferguson-missouri-violence.html.

6. *See* Patrik Jonsson, *In Wake of Eric Garner Case, Should Grand Jury System Be Reformed?*, CHRISTIAN SCI. MONITOR (Dec. 6, 2014), http://www.csmonitor.com/USA/Justice/2014/1206/In-wake-of-Eric-Garner-case-should-grand-jury-system-be-reformed; Marc Santora, *Mayor de Blasio Announces Retraining of New York Police*, N.Y. TIMES (Dec. 4, 2014), http://www.nytimes.com/2014/12/05/nyregion/mayor-bill-de-blasio-retraining-new-york-police-dept-eric-garner.html.

7. *See* Stephen E. Henderson, *Our Records Panopticon and the American Bar Association Standards for Criminal Justice*, 66 OKLA. L. REV. 699, 700–09 (2014) [hereinafter Henderson, *Our Records Panopticon*].

8. ABA STANDARDS FOR CRIMINAL JUSTICE: LAW ENFORCEMENT ACCESS TO THIRD PARTY RECORDS 2 (3d ed. 2013) [hereinafter LEATPR STANDARDS].

protection created by the third party doctrine.[9] Though that doctrine has some exceptions and inconsistencies,[10] its core idea is that what information a person has shared with even one other person or institution loses privacy protection under the Fourth Amendment to the United States Constitution as to law enforcement access from that person or institution.[11] The doctrine is based on the idea that privacy equates to secrecy and is an all-or-nothing concept.[12]

We and others have written about the illogic of this approach.[13] Sound philosophical ideas of privacy and social science studies of expectations lead to a very different idea of privacy as control over information about the self.[14] Privacy is thus not typically present or absent but most often exists in degrees and varies in quality. People should and do care about to whom they present information, for what purposes, and what happens to that shared information. They justifiably believe that information shared, for example, with a good friend about a highly personal matter should not result in the world

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9. *See* ANDREW E. TASLITZ, MARGARET L. PARIS & LENESE A. HERBERT, CONSTITUTIONAL CRIMINAL PROCEDURE 117 (4th ed. 2010) (offering a basic explanation of the third party doctrine); Stephen E. Henderson, *After* United States v. Jones*, After the Fourth Amendment Third Party Doctrine*, 14 N.C. J.L. & TECH. 431 (2013) [hereinafter Henderson, *After* United States v. Jones] (attacking the third party doctrine and predicting its gradual demise); Stephen E. Henderson, *The Timely Demise of the Fourth Amendment Third Party Doctrine*, 96 IOWA L. REV. BULL. 39 (2011) [hereinafter Henderson, *The Timely Demise*] (similar); Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561 (2009) (defending the third party doctrine); Orin S. Kerr, *Defending the Third-Party Doctrine: A Response to Epstein and Murphy*, 24 BERKELEY TECH. L.J. 1229 (2009) (similar).

Not all states follow the third party doctrine as a matter of state constitutional law, let alone as a matter of statutory law. *See generally* Stephen E. Henderson, *Beyond the (Current) Fourth Amendment: Protecting Third-Party Information, Third Parties, and the Rest of Us Too*, 34 PEPP. L. REV. 975 (2007); Stephen E. Henderson, *Learning from All Fifty States: How to Apply the Fourth Amendment and Its State Analogs to Protect Third Party Information from Unreasonable Search*, 55 CATH. U.L. REV. 373 (2006).

10. *See* Henderson, *After* United States v. Jones, *supra* note 9, at 434–47 (explaining both relevant changes in technology and the Supreme Court's conflicted jurisprudence over the last quarter century); Henderson, *The Timely Demise*, *supra* note 9, at 40–45 (similar).

11. *See* TASLITZ, PARIS & HERBERT, *supra* note 9, at 117.

12. *See id.*; LEATPR STANDARDS, *supra* note 8, Standard 25-4.1(a) cmt.

13. LEATPR STANDARDS, *supra* note 8, Standards 25-3.3 cmt., 25-4.1(a) cmt.; Stephen E. Henderson, *Expectations of Privacy in Social Media*, 31 MISS. C.L. REV. 227, 232–33 (2012) [hereinafter Henderson, *Expectations of Privacy*]; Andrew E. Taslitz, *Privacy as Struggle*, 44 SAN DIEGO L. REV. 501, 502 (2007); Daniel J. Solove, *Data Privacy and the Vanishing Fourth Amendment*, CHAMPION, May 2005, at 20, 20; Andrew E. Taslitz, *The Fourth Amendment in the Twenty-First Century: Technology, Privacy, and Human Emotions*, 65 LAW & CONTEMP. PROBS. 125, 131, 133–34, 151 (2002) [hereinafter Taslitz, *Human Emotions*]; Lewis R. Katz, *In Search of a Fourth Amendment for the Twenty-First Century*, 65 IND. L.J. 549, 564–69 (1990); Smith v. Maryland, 442 U.S. 735, 749 (1979) (Marshall, J., dissenting).

14. *See* LEATPR STANDARDS, *supra* note 8, Standard 25-3.3 cmt.; CHRISTOPHER SLOBOGIN, PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT 108–16, 183–85 (2007); Taslitz, *Human Emotions*, *supra* note 13, at 155–58.

at large being entitled to know that information. Nor does sharing information with one's bank mean, without more, that it is thereby fairly accessible to the police conducting criminal investigations.[15] Yet the result of the third party doctrine has been that, absent occasional and checkered statutory protection, simple law enforcement requests, or at most easy-to-obtain subpoenas, are all that law enforcement needs to access information about bank accounts, shopping preferences, viewing habits, communications, Internet usage, and a host of other matters.[16]

LEATPR adopts four methods for protecting against too-ready government access to information about individuals held in third party institutional records. First, LEATPR requires some level of justification for law enforcement access to such records in the investigatory stage of criminal cases.[17] This level of justification is not uniform. To the contrary, the level varies with the degree of privacy held in the information contained in the record.[18] Records can be highly private, moderately private, minimally private, or not private.[19] Highly private information requires a warrant based on probable cause, moderately private information a court order based on reasonable suspicion (or relevance), minimally private information a prosecutor determination of relevance, and not-private information merely a legitimate law enforcement purpose.[20] Legislatures are free to consider more demanding restraints for highly private information, such as additional administrative approval or greater

15. *Contra* United States v. Miller, 425 U.S. 435, 443–45 (1976) (holding that bank customers have no reasonable expectation of privacy in their own bank accounts under the Fourth Amendment).

16. *See* SLOBOGIN, *supra* note 14, at 179–80.

17. LEATPR STANDARDS, *supra* note 8, Standard 25-5.3.

18. *Id.* Standard 25-5.3(a).

19. *Id.* Standard 25-4.1. Factors determining the degree of privacy protection include the extent to which:

> (a) the initial transfer of such information to an institutional third party is reasonably necessary to participate meaningfully in society or in commerce, or is socially beneficial, including to freedom of speech and association;
>
> (b) such information is personal, including the extent to which it is intimate and likely to cause embarrassment or stigma if disclosed, and whether outside of the initial transfer to an institutional third party it is typically disclosed only within one's close social network, if at all;
>
> (c) such information is accessible to and accessed by non-government persons outside the institutional third party; and
>
> (d) existing law, including the law of privilege, restricts or allows access to and dissemination of such information or of comparable information.

Id. Standard 25-4.1.

20. *Id.* Standards 25-5.2, 25-5.3.

investigative need.[21] And legislatures may consider lowering a category's required justification if applying full protection would significantly interfere with solving and punishing a category of crime.[22] For example, a record otherwise entitled to probable cause protection might require only proof of reasonable suspicion. The justification-level protection is thus varied, is flexible, and accounts for the degree of privacy protection and the needs of law enforcement. Nevertheless, some level of justification is required, unlike the general situation under current law,[23] and for highly or moderately protected information LEATPR requires supervision by an independent magistrate.[24]

Second, for moderately and highly protected information, LEATPR requires providing notice—or, in some cases, delayed notice—to the focus of the record, meaning to the person whom the information concerns.[25] That notice recalibrates the perspective of the focus, provides some accountability, and enables the focus to raise whatever legal challenges might be available to limit or control the spread, use, and retention of the information.

Third, all records obtained must be protected against unauthorized access and distribution.[26] Such distribution is typically limited to those involved in the investigation for which the records were obtained and only to the extent necessary to further the investigation.[27] Moderately and highly protected records require audit logs noting access and must be destroyed according to an established schedule.[28] These requirements limit the dissemination of information to those with a need to know and create temporal limits on who may use the information and for what purposes. Disclosure is permitted (1) where required by discovery rules[29] or (2) where needed in another government investigation provided that, if the information is being transferred to a different government agency, that agency provides an official certification of relevance.[30]

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21. *Id.* Standard 25-5.3(b).
22. *Id.* Standard 25-4.2(b).
23. *See* 1 PETER J. HENNING ET AL., MASTERING CRIMINAL PROCEDURE: THE INVESTIGATORY STAGE 33–34 (2010) [hereinafter HENNING ET AL., THE INVESTIGATORY STAGE].
24. *See* LEATPR STANDARDS, *supra* note 8, Standards 25-5.2(a) cmt., 25-5.3(a) cmt.
25. *Id.* Standards 25-1.1(c), 25-5.7(b)–(d).
26. *Id.* Standard 25-6.1(a).
27. *Id.* Standards 25-6.1(a)(ii), 25-6.2.
28. *Id.* Standard 25-6.1(b).
29. *Id.* Standard 25-6.2(a).
30. *Id.* Standard 25-6.2(b). Provision is also made for inter-agency disclosure in exigent circumstances upon law enforcement officer or prosecutor request. *Id.*

Fourth, the legislature must create accountability mechanisms.[31] Although LEATPR merely provides a laundry list of such mechanisms rather than recounting details, these mechanisms include, as most relevant here, "appropriate periodic review and public reporting."[32] Rephrased, LEATPR requires some level of transparency and critical accountability reporting in order for the system of access to protected information to continue.[33]

LEATPR provides exceptions to many or all of its requirements. Among those exceptions is "access to records via a grand jury subpoena, or in jurisdictions where grand juries are typically not used, a functionally equivalent prosecutorial subpoena."[34] During drafting, one primary justification for this exception was that the grand jury historically played a unique role in our criminal justice system.[35] Although its shield (indictment) and sword (subpoena) roles might often be conflated in that history and in public consciousness, the latter role allegedly requires that a grand jury have few limits imposed on its investigatory authority.[36] To limit that role,

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31. *Id.* Standard 25-7.1.

32. *Id.*

33. *See* Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1154–65 (2000) (summarizing the virtues of transparency for improving governmental performance and democratic accountability).

34. LEATPR STANDARDS, *supra* note 8, Standard 25-2.1(c).

35. *See id.* Standard 25-2.1(c) cmt. *See generally* GEORGE J. EDWARDS, JR., THE GRAND JURY: CONSIDERED FROM AN HISTORICAL, POLITICAL AND LEGAL STANDPOINT, AND THE LAW AND PRACTICE RELATING THERETO 31–44 (1906) (offering a concise traditional history of the grand jury). But critics bemoan the long lost nature of this unique role. In the words of leading grand jury scholar Roger Fairfax:

> Many believe the grand jury—one of the oldest protections known to the American constitutional order—has strayed from its moorings and has eroded beyond recognition. A common criticism is that the grand jury's central purpose has morphed from the protection of individual rights to the facilitation of governmental investigative power. Others echo Jeremy Bentham's 19th century critique that the grand jury is unnecessary and redundant in a modernized criminal justice system. Although commentators differ as to the degree of the grand jury's atrophy, most scholars, lawyers, and judges paint a fairly bleak portrait of the grand jury's present utility as the bulwark of liberty it was designed to be.

Roger Anthony Fairfax, Jr., *Introduction*, *in* GRAND JURY 2.0: MODERN PERSPECTIVES ON THE GRAND JURY xv, xv (Roger Anthony Fairfax, Jr. ed., 2011) [hereinafter GRAND JURY 2.0]. Joshua Dressler and George Thomas similarly note that "the modern grand jury rarely serves as the shield that the Framers intended," and that "[n]o other country in the world uses grand juries." JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: PROSECUTING CRIME 848 (5th ed. 2013). Sometimes standing alone is admirable, but it should cause one to pause and consider.

36. In the words of the Supreme Court,

> [t]he grand jury occupies a unique role in our criminal justice system. It is an investigatory body charged with the responsibility of determining whether or not a crime has been committed. . . . [T]he grand jury can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. The function of the grand jury is to inquire

it was feared, might radically undermine longstanding systems of criminal investigation in perhaps unforeseeable ways.[37] Moreover, grand jury secrecy provisions and judicial supervision already provide some privacy protection.[38] Yet the exception is not limited to grand jury subpoenas but extends to "functionally equivalent prosecutorial subpoena[s]" in jurisdictions where grand juries are not used.[39] LEATPR makes little effort in its text or commentary to define what "functionally equivalent" means,[40] and prosecutorial subpoenas look very little like the traditional grand jury, obviously lacking—at the very least—lay participation and direction.[41] The exception therefore has the potential to dramatically limit LEATPR's scope, undermining many of the Standards' purposes.[42]

By reviewing each of LEATPR's four main regulatory mechanisms and examining whether grand jury procedures provide an adequate

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> into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred. As a necessary consequence of its investigatory function, the grand jury paints with a broad brush. A grand jury investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.

United States v. R. Enters., Inc., 498 U.S. 292, 297 (1991) (internal quotation marks and citations omitted). And again,

> [i]t is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime.

Blair v. United States, 250 U.S. 273, 282 (1919). In some jurisdictions, only this "sword" investigatory function remains. *See* 3 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 8.1(a) (3d ed. 2007).

37. *Cf.* SLOBOGIN, *supra* note 14, at 146 ("Without the ability readily to obtain the records of corporations, partnerships, and other entities, government agencies would be frustrated in their efforts to ensure that corporate tax laws, bank laws, securities laws, and a host of other regulatory statues were enforced."). Professor Taslitz was a member of the task force that began drafting LEATPR and of the ABA Criminal Justice Council that approved the near-final version of LEATPR. Professor Henderson was the Reporter. These arguments were made, most often by some prosecutors, as part of those debates.

38. *See* Branzburg v. Hayes, 408 U.S. 665, 688 (1972); CHARLES DOYLE, THE FEDERAL GRAND JURY 12–18 (2008).

39. LEATPR STANDARDS, *supra* note 8, Standard 25-2.1(c).

40. For an explanation of this omission (unsatisfying though it may be), see Henderson, *Our Records Panopticon*, *supra* note 7, at 716–18. The Commentary provides this limited guidance: "Legislatures, courts, and administrative agencies should be careful, however, to strictly cabin this exception to means for which (1) there is historical practice that has not been discredited and that remains relevantly applicable, and (2) that historical practice includes privacy safeguards equivalent to those of the federal grand jury." LEATPR STANDARDS, *supra* note 8, Standard 25-2.1(c) cmt.

41. *See* LAFAVE, *supra* note 36, § 8.1(c) (comparing and contrasting prosecutorial subpoenas with grand jury investigations).

42. For an argument hoping this will not happen, see Henderson, *Our Records Panopticon*, *supra* note 7, at 716–18.

substitute, this Article addresses whether LEATPR's grand jury exception can be justified. Part I addresses levels of justification, Part II notice provisions, Part III access limitations, and Part IV accountability mechanisms. In determining that the exception is not justified, the Article suggests some important improvements to the modern grand jury. Perhaps, given contemporary events, it will finally be possible to restore some luster to this once-revered but now maligned institution.

I. LEVELS OF JUSTIFICATION

Probable cause and reasonable suspicion, the traditional standards of justification used as prerequisites to police searches and seizures, serve several important purposes.[43] Notably, they require proof of individualized suspicion. Such proof prevents police from invading privacy on fishing expeditions that are based upon unsupported hunches, stereotypes, or simple biases.[44] Instead, police must have evidence that *this* individual engaged in criminal activity. This requirement is part and parcel of respect for persons.[45] Persons are judged based upon their individual behavior, not on their membership in a group, not on residence in a particular neighborhood, and not for generally being disliked by members of law enforcement.[46] Moreover, the proof may not be speculative but must, in the case of probable cause, hover around a preponderance of the evidence, thus setting a relatively familiar standard to guide police.[47]

Furthermore, the police do not themselves determine levels of justification, at least ultimately. Rather, an independent magistrate must make these determinations.[48] That separation reduces the

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43. *See* Illinois v. Gates, 462 U.S. 213 (1983) (formulating the modern standard of probable cause); Terry v. Ohio, 392 U.S. 1 (1968) (formulating the standard of reasonable suspicion).

44. *See generally* Andrew E. Taslitz, *Cybersurveillance Without Restraint? The Meaning and Social Value of the Probable Cause and Reasonable Suspicion Standards in Governmental Access to Third-Party Electronic Records*, 103 J. CRIM. L. & CRIMINOLOGY 839 (2013) [hereinafter Taslitz, *Cybersurveillance*]; Andrew E. Taslitz, *What Is Probable Cause, and Why Should We Care?: The Costs, Benefits, and Meaning of Individualized Suspicion*, 73 LAW & CONTEMP. PROBS. 145 (2010) [hereinafter Taslitz, *Individualized Suspicion*].

45. *See* Andrew E. Taslitz, *Respect and the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 15, 47–51 (2003).

46. *See* Taslitz, *Individualized Suspicion*, *supra* note 44, at 146.

47. *See* Taslitz, *Cybersurveillance*, *supra* note 44, at 883–89, 895–97. Professor Henderson would, at least as a descriptive matter and probably as a normative one, place probable cause at a slightly lower threshold. *See* Stephen E. Henderson, *Real-Time and Historic Location Surveillance After* United States v. Jones*: An Administrable, Mildly Mosaic Approach*, 103 J. CRIM. L. & CRIMINOLOGY 803, 822 n.104 (2013). Regardless of that precise quantification, the described benefit remains.

48. Even if it is one of the many police decisions that today does not require judicial preclearance, a magistrate will review the police determination if there is a

inevitable bias in favor of one's self-perceived wisdom. Moreover, because police must articulate specific reasons to justify their beliefs to an acceptable level of proof, police must account for their actions—that is, literally be answerable for them.[49] Social science research demonstrates that an awareness that one will need to justify her actions to a third party reduces the chance of error.[50] LEATPR's "relevance" standard for minimally protected information makes this justification easy to satisfy for that category, but some accountability is nevertheless required.[51] And LEATPR proceeds from the assumption that where less is at stake—that is, where privacy interests are less—a lower level of justification is acceptable to give law enforcement more leeway.[52]

Yet courts have rarely imposed any justification requirement upon grand jury records subpoenas, or at least not any meaningful one. Grandly proclaiming that "the public . . . has a right to every man's evidence,"[53] but never explaining how that alleged right comports with the Fourth Amendment's limited-government norm, the modern Supreme Court has failed to meaningfully regulate grand jury subpoenas.[54] Although that upshot is clear, the Court's jurisprudence in this area is frustratingly opaque.

As explained in LaFave's treatise,[55] in 1886, the Court took the very strong position in *Boyd v. United States*[56] that compelling the

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motion to suppress and will also decide whether there is probable cause warranting any sustained jailing and ultimate prosecution. This is not to say, of course, that an after-the-fact decision is necessarily equivalent to one *ex ante*. *See* HENNING ET AL., THE INVESTIGATORY STAGE, *supra* note 23, at 62 (discussing hindsight bias).

49. *See* Taslitz, *Individualized Suspicion*, *supra* note 44, at 189.

50. *See* Andrew E. Taslitz, *Police Are People Too: Cognitive Obstacles to, and Opportunities for, Police Getting the Individualized Suspicion Judgment Right*, 8 OHIO ST. J. CRIM. L. 7, 31–32, 64–66 (2010) [hereinafter Taslitz, *Police Are People Too*].

51. *See* LEATPR STANDARDS, *supra* note 8, Standard 25-5.3(a)(iii). The Federal Rules of Evidence define relevant evidence as evidence likely to change the probability of an element of a crime, claim, or defense's existence by any nonzero amount. FED. R. EVID. 401; STEVEN I. FRIEDLAND, PAUL BERGMAN & ANDREW E. TASLITZ, EVIDENCE LAW AND PRACTICE 46–50 (5th ed. 2012) (explaining this definition's meaning).

52. *See supra* text accompanying notes 17–24 (explaining the sliding scale of privacy protections under LEATPR).

53. Branzburg v. Hayes, 408 U.S. 665, 688 (1972) (quoting United States v. Bryan, 339 U.S. 323, 331 (1950)).

54. *See id.* at 701 (noting that the grand jury's inquiries "may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors"); United States v. Morton Salt Co., 338 U.S. 632, 642–43 (1950) (noting that a grand jury may "investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not"); DOYLE, *supra* note 38, at 2 ("The grand jury may begin its examination even in the absence of probable cause or any other level of suspicion that a crime has been committed within its reach."); SLOBOGIN, *supra* note 14, at 140–41 (describing the general lack of regulation).

55. LAFAVE ET AL., *supra* note 36, § 8.7(a).

56. 116 U.S. 616 (1886).

production of one's private papers was per se unreasonable under the Fourth Amendment.[57] Twenty years later, in *Hale v. Henkel*,[58] the Court did away with that absolute rule, but in an opinion that required continued Fourth Amendment scrutiny[59]—indeed a context-specific scrutiny that fits nicely within the modern jurisprudence of Fourth Amendment reasonableness. But forty years after *Hale*, in *Oklahoma Press Publishing Co. v. Walling*,[60] the Court stated that subpoenas "present no question of actual search and seizure."[61] Yet the *Oklahoma Press* Court nonetheless evaluated the subpoenas for overbreadth,[62] and on several occasions since the Court has recognized this protection against overbreadth as a requirement of the Fourth Amendment.[63]

So, perhaps ordinary subpoenas do not require Fourth Amendment justification.[64] Under this view, only overly broad or unduly burdensome subpoenas are Fourth Amendment searches, and given modern data duplication technology, those are extremely rare.[65] Or, perhaps the Fourth Amendment reasonableness criterion does regulate all subpoenas, especially because the Court's developmental cases all addressed subpoenas of business records as opposed to more private personal records.[66] Under this view, courts could impose a meaningful justification requirement when subpoenas seek private records. But to date they have only done so for subpoenas seeking a physical intrusion into the body.[67] Thus,

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57. *Id.* at 630; *see also* SLOBOGIN, *supra* note 14, at 145–48 (discussing *Boyd* and the jurisprudence that followed thereafter).

58. 201 U.S. 43 (1906).

59. *Id.* at 73, 76–77.

60. 327 U.S. 186 (1946).

61. *Id.* at 195.

62. *Id.* at 213.

63. *See* Donovan v. Lone Steer, Inc., 464 U.S. 408, 414–15 (1984); United States v. Dionisio, 410 U.S. 1, 11 (1973); See v. City of Seattle, 387 U.S. 541, 544 (1967).

64. TASLITZ, PARIS & HERBERT, *supra* note 9, at 146 ("A subpoena . . . is generally considered neither a search nor a seizure.").

65. *See* LAFAVE ET AL., *supra* note 36, § 8.7(a)–(c).

66. *See* SLOBOGIN, *supra* note 14, at 148; *cf. In re* Grand Jury Proceedings, 486 F.2d 85, 93 (3d Cir. 1973) (holding as a matter of supervisory power that grand jury subpoenas may only be enforced after "the Government . . . make[s] some preliminary showing by affidavit that each item is at least [i] relevant to an investigation being conducted by the grand jury and [ii] properly within its jurisdiction, and is [iii] not sought primarily for another purpose").

67. *See, e.g.*, United States v. Thomas, 736 F.3d 54, 61 (1st Cir. 2013) (holding, without citation support, that because "there was no determination by a grand jury or a judge of whether *any* particular level of Fourth Amendment justification had been met to justify the grand jury subpoena for the DNA sample . . . [defendant's] Fourth Amendment rights were then violated"); *In re* Grand Jury Proceedings Involving Vickers, 38 F. Supp. 2d 159, 165–68 (D.N.H. 1998) (regulating but permitting grand jury subpoena for saliva); Floralynn Einesman, *Vampires Among Us—Does a Grand Jury Subpoena for Blood Violate the Fourth Amendment?*, 22 AM. J. CRIM. L. 327, 363–71 (1995)

even courts requiring some Fourth Amendment justification for all records subpoenas might hold that reasonableness in this context has no more teeth than the Supreme Court's interpretation of the reasonableness requirement of Federal Rule of Criminal Procedure 17(c), which renders a subpoena unacceptable only when "there is no reasonable *possibility* that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation."[68]

A prosecutor using a grand jury subpoena can therefore currently be confident that she will prevail even if someone raises an objection; at worst she will narrow the request and thereby avoid meaningful review. Moreover, the institutional third party, for example Verizon, receives the subpoena. The account holder will likely never learn of its issuance.[69] Verizon may have little incentive on its own to combat, potentially at significant expense, a subpoena that leads to information incriminating an individual subscriber.

The Fifth Amendment's privilege against compelled self-incrimination similarly has little to no impact in the context of subpoenas for third party records. First, there is no privilege based upon privacy but rather only upon incrimination.[70] Nor is there Fifth Amendment protection for pre-existing records—those for which the government did not compel creation.[71] There can, of course, be Fifth Amendment protection for the act of producing pre-existing records.[72] When an individual responds to a subpoena by turning over requested records, he is admitting that the records exist, that they are in his possession, and that they are authentic—they are what they purport to be, namely, accurate originals or copies of the items

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(collecting and describing cases). There is no principled reason to restrict grand jury subpoenas for minimal physical intrusions (e.g., a DNA cheek swap or fingerprint) but not for major privacy intrusions (e.g., a diary, email records, or invasive questioning). Thus, while these cases relating to physical intrusion do not directly inform this Article's concern with access to third party records, they could provide a springboard for similarly restricting invasive records subpoenas.

68. United States v. R. Enters., Inc., 498 U.S. 292, 301 (1991) (emphasis added).

69. There can, of course, be applicable statutory restrictions. *See, e.g.*, 18 U.S.C. § 2703 (2012) (regulating government access to stored electronic communications).

70. *See* Fisher v. United States, 425 U.S. 391, 401 (1976) ("[T]he Fifth Amendment protects against compelled self-incrimination, not [the disclosure of] private information." (second alteration in original) (internal quotation marks omitted)).

71. *See id.* at 409–10; *see also* 2 PETER J. HENNING ET AL., MASTERING CRIMINAL PROCEDURE: THE ADJUDICATORY STAGE 34 (2012); LAFAVE ET AL., *supra* note 36, § 8.12(f). Most records, including most business records, were not compelled in their creation. *See* TASLITZ, PARIS & HERBERT, *supra* note 9, at 816–18; *see also* United States v. Doe (*Doe I*), 465 U.S. 605, 610 (1984) ("[w]here the preparation of business records is voluntary, no compulsion is present" and the Fifth Amendment privilege does not apply).

72. *Doe I*, 465 U.S. at 612; *Fisher*, 425 U.S. at 410.

the government requested.[73] Yet this limited protection is not available when these facts can be independently proven; when, in short, they are a "foregone conclusion."[74] Although it is *not* sufficient that a type of record is commonly kept,[75] the mere existence, location, and authenticity of records are often readily provable by other means.[76] Most important, the Fifth Amendment only applies when the person who is compelled (subpoenaed) is the person who will be incriminated.[77] With third party records, however, the institutional third party receives the subpoena but the subscriber or customer is typically incriminated, leaving no Fifth Amendment protection.

In theory, the grand jurors would themselves act as a screening device, refusing to issue subpoenas that unnecessarily infringe upon privacy rights.[78] In practice, however, grand juror power is limited. Grand jurors assemble at the direction of the prosecutor[79] and, once gathered, are told by the prosecutor whom to subpoena, or merely receive the results of the prosecutor-issued subpoena.[80] The

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73. *Fisher*, 425 U.S. at 410, 412.

74. *See id.* at 411 (explaining that compelling a taxpayer to produce tax documents is not incriminating because the documents' existence and the taxpayer's control of them is a "foregone conclusion"); *see also* Robert P. Mosteller, *Cowboy Prosecutors and Subpoenas for Incriminating Evidence: The Consequences and Correction of Excess*, 58 WASH. & LEE L. REV. 487, 508–10 (2001) (elaborating on the meaning of "foregone conclusion").

75. *See* United States v. Hubbell, 530 U.S. 27, 44–45 (2000) (rejecting "the overbroad argument that a businessman . . . will always possess general business and tax records").

76. *But see* Mosteller, *supra* note 74, at 518–19, 523–30 (arguing that it is becoming harder for prosecutors to prove that finding subpoenaed evidence is, independent from the subpoena, a foregone conclusion). Where the act-of-production facts are not a foregone conclusion, the government can compel production by granting act-of-production immunity that will not itself directly immunize the content of the records. *Doe I*, 465 U.S. at 617 n.17. But the grant might nonetheless have that practical effect. *See* LAFAVE ET AL., *supra* note 36, § 8.13(c).

77. *Fisher*, 425 U.S. at 398–99.

78. *See* DOYLE, *supra* note 38, at 1 ("But the exclusive power to accuse is also the power not to accuse and early on the grand jury became both the 'sword and the shield of justice.'" (quoting United States v. Cox, 342 F.2d 167, 186 n.1 (5th Cir. 1965) (Wisdom, J., concurring))).

79. *See* Susan W. Brenner, *The Voice of the Community: A Case for Grand Jury Independence*, 3 VA. J. SOC. POL'Y & L. 67, 81–82 (1995) [hereinafter Brenner, *Voice of the Community*].

80. *See* DOYLE, *supra* note 38, at 5 (noting that prosecutors generally decide whom to subpoena, the order in which to call witnesses, the questions to ask them, the law given to the grand jurors, and the language of the indictment); LAFAVE ET AL., *supra* note 36, § 8.2(c) (additionally noting that the prosecutor advises regarding any objections raised by witnesses, decides whether to prosecute for contempt, and decides whether to seek immunity). In a few states, grand jurors apparently have genuine input and perhaps even control. *See* 1 SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 6:2 (2d ed. 2013). On the other hand, some federal prosecutors

prosecutor tells the grand jurors the law and, given heavy case loads, presses the grand jurors to work quickly,[81] a pressure that makes deliberation over subpoenas difficult and unlikely. Nobody informs grand jurors of their full powers or independence.[82] Indeed, grand jurors who have spoken about their experience have expressed confusion regarding their role and frustration with their passivity in the face of enormous prosecutor power.[83] Grand jurors complained about prosecutor control over witness questioning, inability to hear exculpatory evidence, inability to independently interpret the law, lack of clarity as to the role of hearsay, sense of an inability to nullify prosecutor overreaching, and overwork that gave them little time to exercise prosecutorial oversight.[84]

The widespread use of hearsay certainly limits grand jury independence. Often, there is only a single grand jury witness: a detective.[85] The detective summarizes selected witness statements and police investigations.[86] Even if there were cross-examination—which there is not—it would be difficult to cross-examine a single witness merely reading from a report about the reliability or truthfulness of some other witness' statements.[87] As one commentator put it,

> using hearsay results in a dramatic decrease in the length, detail, and persuasive value of the presentation made by the prosecutor. When grand jurors are repeatedly subjected to such performances, they grow less likely to exercise their independent judgment in the

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pre-screen witnesses to determine whether they will even appear before the grand jury, all under the auspices of the grand jury subpoena authority. *Id.*

81. *See* Susan W. Brenner, *Grand Jurors Speak*, *in* GRAND JURY 2.0, *supra* note 35, at 25, 39–40 [hereinafter Brenner, *Grand Jurors Speak*] (sharing emails from a grand juror expressing frustration with the number of complex investigations occurring at once).

82. *See* Brenner, *Voice of the Community*, *supra* note 79, at 74–76; Michael Daly Hawkins, *Honoring the Voice of the Citizen: Breathing Life into the Grand Jury Requirement*, *in* GRAND JURY 2.0, *supra* note 35, at 115, 117–18. For a rather remarkable story of fighting for grand jury independence in Ohio as a foreperson, see Phyllis L. Crocker, Commentary, *Appointed but (Nearly) Prevented From Serving: My Experiences as a Grand Jury Foreperson*, 2 OHIO ST. J. CRIM. L. 289 (2004).

83. *See* Brenner, *Grand Jurors Speak*, *supra* note 81, at 27–40.

84. *Id.*

85. Ric Simmons, *The True Goals of the Modern Grand Jury—and How to Achieve Them*, *in* GRAND JURY 2.0, *supra* note 35, at 223, 225–26. A small minority of states are more restrictive in their approach to hearsay before the grand jury. *See* 4 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 15.2(d) (3d ed. 2007). For an argument that the lack of evidentiary restrictions is ahistoric, see Niki Kuckes, *Retelling Grand Jury History*, *in* GRAND JURY 2.0, *supra* note 35, at 125, 136–39.

86. *See* Simmons, *supra* note 85, at 225–26.

87. *See id.*

> cases brought before them, and more likely summarily to accept what they are given.[88]

There is, theoretically, judicial supervision of the grand jury. But once the grand jury is charged it will operate without a judge present,[89] and that—combined with the limited grounds for challenging subpoenas in the first place—makes judicial supervision of grand jury hearings generally, and of subpoenas specifically, minimal.[90] Only very few jurisdictions provide for judicial review of a grand jury transcript to ensure the correctness of a grand jury decision to indict.[91]

The lack of judicial review leads to the perception that grand jury proceedings are lesser lights of the justice system, entitled to less vigorous due process protections because judicial involvement at any subsequent trial will cure any grand jury hearing defects.[92] Yet only a tiny fraction of prosecutions ever reach trial, well over ninety percent resulting in guilty pleas.[93] For those prosecutions that do make it to trial, the grand jury decision to indict causes a frightening and uncertain experience that is enormously burdensome even for those ultimately acquitted, and to a prosecution that a vigilant representative of the people might have blocked on policy and

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88. *Id.* at 226. Explained Judge Weinstein:

> [G]rand jurors [on the federal level] do not hear cases with the rough edges that result from the often halting, inconsistent, and incomplete testimony of honest observers of events. Thus, they are unable to distinguish between prosecutions which are strong and those which are relatively weak. All cases are presented in an equally homogenized form. A grand jury so conditioned is unable to adequately serve its function as a screening agency.

United States v. Arcuri, 282 F. Supp. 347, 349 (E.D.N.Y. 1968).

89. DOYLE, *supra* note 38, at 5.

90. *Cf.* Sara Sun Beale & James E. Felman, *Enlisting and Deploying Federal Grand Juries in the War on Terrorism*, *in* GRAND JURY 2.0, *supra* note 35, at 3, 15 (recommending "return of the traditional role of the judiciary in supervising the disclosure of grand jury materials that relate to terrorism . . . and threats of attack"). The Supreme Court has generally restricted the federal courts' supervisory authority over grand juries. *See* United States v. Williams, 504 U.S. 36, 45–47, 55 (1992) (holding that federal courts lack the authority to regulate prosecutorial conduct before the grand jury independent of statute or rule of criminal procedure).

91. Simmons, *supra* note 85, at 227. For a review of the history regarding judicial review of grand jury evidence, see Kuckes, *supra* note 85, at 139–42.

92. *See* Costello v. United States, 350 U.S. 359, 363–64 (1956) (rejecting any evidentiary sufficiency challenge to an indictment because a trial will follow); Simmons, *supra* note 85, at 227 (concluding that courts place higher significance on the procedural safeguards associated with all other pre-trial proceedings).

93. *See* Matthew R. Durose & Patrick A. Langan, *Felony Sentences in State Courts, 2004*, BUREAU JUST. STAT. BULL., July 2007, at 1, *available at* http://www.bjs.gov/content/pub/pdf/fssc04.pdf (stating that "94% of felony convictions occurred in state courts," and of those, 95% were guilty pleas); Mark Motivans, *Federal Justice Statistics, 2010*, BUREAU JUST. STAT. BULL., Dec. 2013, at 1, *available at* http://www.bjs.gov/content/pub/pdf/fjs10.pdf (stating that 91% of federal felony convictions were guilty pleas).

fairness grounds.[94] Because no-bill decisions, rare as they are, permit a prosecutor to try again before another grand jury, the prosecutor does not worry about her ability to eventually indict.[95] This too contributes to the prosecutor viewing the grand jury as a mere procedural hurdle at best, or at worst a tool for obtaining information, rather than a restraint on her office.[96]

Witnesses are fairly powerless before the grand jury. Although a number of states have recently changed course, witnesses are traditionally not allowed to have attorneys with them in the grand jury room.[97] And while witnesses may leave to consult with counsel,[98] a prosecutor may, intentionally or not, intimidate a witness from frequently exercising that right.[99] Thus, witnesses provide little restraint to prosecutorial power.[100]

LEATPR's requirement that the prosecutor provide some evidence that an institutional third party has material in its possession implicating a particular individual in a crime offers at least a mild obstacle to willy-nilly invasions of privacy.[101] The justification

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94. *See* Roger A. Fairfax, Jr., *Does Grand Jury Discretion Have a Legitimate (and Useful) Role to Play in Criminal Justice?*, *in* GRAND JURY 2.0, *supra* note 35, at 57, 57–84 [hereinafter Fairfax, *Grand Jury Discretion*] (defending the grand jury's right to nullify even prosecutions supported by probable cause on numerous grounds, including sound public policy and democratic representation).

95. *See* Adriaan Lanni, *Implementing the Neighborhood Grand Jury*, *in* GRAND JURY 2.0, *supra* note 35, at 171, 180 (explaining the "no-bill" procedure); DOYLE, *supra* note 38, at 21 (discussing the prosecutor's power to resubmit for indictment to the same or a different grand jury).

96. Peter H. White, *Let's Make a Deal: Negotiating and Defending Immunity for "Targets and Subjects,"* LITIGATION, Fall 2002, at 44, 45 (2002) ("Notwithstanding the protective role the grand jury was initially intended to serve in our system, it has evolved into an investigative tool for the prosecution, a virtual extension of the U.S. Attorney's office.").

97. *See* DOYLE, *supra* note 38, at 5 ("The grand jury meets behind closed doors with only the jurors, attorney for the government, witnesses, someone to record testimony, and possibly an interpreter present."); BEALE ET AL., *supra* note 80, § 6:28; LAFAVE ET AL., *supra* note 36, §§ 8.3(d), 8.14(b).

98. BEALE ET AL., *supra* note 80, § 6:28.

99. *But see* Bennett L. Gershman, PROSECUTORIAL MISCONDUCT § 2:10 (2d ed. 2014) (recognizing that berating a witness for exercising the right to counsel constitutes prosecutorial misconduct).

100. Grand jurors are often ignorant of their right to call witnesses independently from those selected by the prosecutor, thus further limiting grand jury and witness power. *See* ANGELA DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 26 (2009). Moreover, while that grand juror right seemingly continues in the federal system despite abolishment of the presentment, *see* Hale v. Henkel, 201 U.S. 43, 60 (1906), it no longer exists in some states, *see* LAFAVE ET AL., *supra* note 36, § 8.4(b).

101. This "obstacle" is in sharp contrast to current law. As one expert put it,

> [r]esistance is ordinarily futile. Absent self-incrimination or some other privilege, the law expects citizens to cooperate with efforts to investigate crime. In the name of this expectation a witness may be arrested, held for bail, and under some circumstances incarcerated. Even when armed with an

requirement avoids fishing expeditions,[102] requires the state to justify its invasions of privacy,[103] and compels at least some deliberation about the factual and policy wisdom of seeking to obtain certain information.[104] Extending this requirement to grand juries would be a minimal hoop for law enforcement to jump through. Yet, like with a burning hoop in a circus, the hoop's mere existence would compel prosecutors to greater care and humility, better protecting privacy while still enabling the critical law enforcement investigative function.

This is not to say that the justification standard for a grand jury subpoena necessarily should match that for other methods of process, nor be consistent across all types of investigations. If, for example, law enforcement could present a compelling case that certain corporate or financial investigations absolutely require greater leeway—perhaps insider trading investigations that otherwise cannot get off the ground—it would be reasonable for a court or legislature to accommodate that, especially given that third party record subpoenas do not threaten physical confrontation and other harms present in other searches. Our argument is merely that there is no cause for entirely exempting the grand jury from LEATPR's justification requirements.

II. NOTICE

Notice is a fundamental requirement of due process[105] that serves several purposes. One is that notice reduces the impact of a frightening surprise. In *Zurcher v. Stanford Daily*,[106] police executed a

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> applicable privilege a witness' compliance with a grand jury subpoena is only likely to be excused with respect to matters protected by the privilege. A witness subpoenaed to testify rather than merely produce documents may be compelled to appear before the grand jury and claim the privilege with respect to any questions to which it applies. . . . [A]s a general rule, the grand jury is entitled to every individual's evidence even though testimony may prove burdensome, embarrassing, or socially or economically injurious for the witness.

DOYLE, *supra* note 38, at 6 (footnotes omitted).

102. Under LEATPR, law enforcement cannot "fish" without a license—that is, without a warrant, court reasonable suspicion order, or finding of relevance by a designated authority, depending on the level of privacy protection in the particular document. *See* LEATPR STANDARDS, *supra* note 8, Standard 25-5.3(a).

103. Justification and accountability are inherent in the concepts of probable cause and reasonable suspicion. *See supra* notes 43–46 and accompanying text.

104. Indeed, some commentators have argued that there is an "executive exclusionary rule": preemptive exclusion of evidence by prosecutors who, after internal deliberation, conclude that the evidence was unconstitutionally obtained and should not therefore even be offered. Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 138 (2008).

105. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546 (1985).

106. 436 U.S. 547 (1978).

search warrant at the offices of a student newspaper, seeking photographs of demonstrators who had allegedly assaulted police.[107] The newspaper challenged the search on the grounds that the police should have used a subpoena, given the newspaper's non-suspect status and given the First Amendment concerns inherent in the search of a newspaper office.[108] Implicit in that first argument were the dangers inherent in surprise.[109] Surprise is emotionally unsettling[110] and does not permit time to adjust to the State's invasion. While in *Zurcher* the alternative was a subpoena, the notice benefit does not necessarily require that process. In the context of modern electronic records, even when responding to a warrant, the non-suspect record holder will typically itself identify potentially responsive records.[111]

Notice also gives the searchee an opportunity to challenge the legal grounds of the search before it occurs. In *Zurcher*, a subpoena would have provided the newspaper time to challenge the search on First Amendment grounds.[112] Use of a warrant, however, meant that the search occurred and items were seized immediately, leaving only after-the-fact solutions.[113] The Court ultimately upheld the search in *Zurcher*,[114] but Congress was not pleased. It quickly passed a statute protecting the media from law enforcement use of search warrants in a wide array of circumstances, permitting only the use of subpoenas.[115]

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107. *Id.* at 551–52.

108. *See id.* at 553 (non-suspect status); *id.* at 563 (First Amendment).

109. *See* Brief for Respondents at 8–9, *Zurcher*, 436 U.S. 547 (Nos. 76-1484, 76-1600), 1977 WL 189744 (discussing lack of notice and implications thereof); *id.* at 18–19 (discussing interference and disruption); *id.* at 28–29 (noting only mode of resistance to search warrant is violence); *id.* at 46–47 (emphasizing value of challenge prior to execution).

110. *See generally* MATTHIAS GROSS, IGNORANCE AND SURPRISE: SCIENCE, SOCIETY, AND ECOLOGICAL DESIGN (2010) (surprise confronts us with our own ignorance); JONATHAN A. MORELL, EVALUATION IN THE FACE OF UNCERTAINTY: ANTICIPATING SURPRISE AND RESPONDING TO THE INEVITABLE (2010) (surprise sends evaluators into crisis mode).

111. *See* 18 U.S.C. § 2703(g) (2012) (permitting execution of search warrant without officer presence); Vindu Goel & James C. McKinley, Jr., *Facebook Bid to Shield Data From the Law Fails, So Far*, N.Y. TIMES, June 27, 2014, at B1 (describing Facebook's attempt to derail mass 381-warrant search); Google, *Way of a Warrant*, YOUTUBE (Mar. 27, 2014), https://www.youtube.com/watch?v=MeKKHxcJfh0 (explaining how Google responds to search warrants requesting customer data).

112. *See* Brief for Respondents, *supra* note 109, at 25–31.

113. Even if technically possible, traditionally warrants do not allow pre-seizure challenge. *See In re* Search Warrants Directed to Facebook, Inc. and Dated July 23, 2013 (N.Y. Sup. Ct. Sept. 17, 2013), *available at* http://www.nytimes.com/interactive/2014/06/26/technology/facebook-search-warrants-case-documents.html (rejecting Facebook's motion to quash a warrant for electronic communications). This traditional rule could of course be changed, including by statute.

114. *Zurcher*, 436 U.S. at 567–68.

115. Privacy Protection Act of 1980, 42 U.S.C. § 2000aa (2006).

When, upon notice, an individual challenges a state action, such challenge prompts initiation of adversary system procedures.[116] Those procedures, involving briefs, hearings, oral argument, and testimony, slow down the entire process to permit deliberation about its wisdom.[117] Deliberation, if it takes into account many points of view, often leads to better decisions.[118] Party input in deliberations also increases the perception that fair procedures are being followed, thus improving the legitimacy of the system.[119] Indeed, in some instances time and publicity alone are sufficient to demonstrate error, as when the mayor of Houston recently retracted broad subpoenas issued to area clergy.[120] Were search warrants used, the harm would already be complete.

Notice also demonstrates respect for the potential searchee as an individual. Unlike in Kafka's famous novel *The Trial*,[121] in which a man is arrested and convicted but never told the charges or evidence against him—thus dehumanizing him—notice treats the individual involved as someone who deserves an explanation. The State is answerable to him as a human being, even if he has done wrong.[122]

Sometimes the law "delays notice," eliminating some of notice's virtues.[123] Taking an action and only later telling its subject that it has occurred does not permit pre-action challenge or as effectively reduce surprise. Delayed notice should be permitted only in exceptional circumstances, such as when notice might lead to violence against witnesses or destruction of evidence.[124] Nevertheless, delayed notice still makes the State answerable to the individual, still

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116. For an understanding of the nature of those procedures, see, for example, STEPHEN LANDSMAN, THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE (1984), and *The Adversary System: Who Wins? Who Loses?*, *in* WEST'S ENCYCLOPEDIA OF AMERICAN LAW 136 (Jeffrey Lehman & Shirelle Phelps eds., 2d ed. 2005).

117. *See* Andrew E. Taslitz, *Temporal Adversarialism, Criminal Justice, and the Rehnquist Court: The Sluggish Life of Political Factfinding*, 94 GEO. L.J. 1589, 1591, 1610–18 (2006) [hereinafter Taslitz, *Temporal Adversarialism*].

118. *See id.* at 1596–98; Andrew E. Taslitz, *Eyewitness Identification, Democratic Deliberation, and the Politics of Science*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 271, 272 (2006) [hereinafter Taslitz, *Democratic Deliberation*].

119. *See* Taslitz, *Democratic Deliberation*, *supra* note 118, at 322, 324.

120. *See* Katherine Driessen & Mike Morris, *Mayor's Decision to Drop Subpoenas Fails to Quell Criticism*, HOUS. CHRON. (Oct. 29, 2014, 11:02 PM), http://www.chron.com/news/politics/houston/article/Mayor-set-to-make-announcement-on-sermon-subpoenas-5855458.php.

121. FRANZ KAFKA, THE TRIAL (Breon Mitchell trans., Schocken Books 1998) (1925).

122. On the general idea of respect for persons and its role in criminal procedure, see generally Taslitz, *Respect and the Fourth Amendment*, *supra* note 45, at 15–16.

123. *See, e.g.*, 12 U.S.C. § 3409 (2012) (relating to financial institutions); 15 U.S.C. § 57b-2a (same); 15 U.S.C. § 1681b(b)(4) (relating to consumer reports in national security investigations); 18 U.S.C. § 983(a)(1)(D) (relating to civil forfeiture proceedings); 18 U.S.C. § 2705 (relating to accessing stored communications).

124. *See, e.g.*, LEATPR STANDARDS, *supra* note 8, Standard 25-5.7(c).

recalibrates the individual regarding what personal information has been shared, and still permits at least post-action challenge and deliberation—a chance for second thoughts.[125] Even where such deliberation cannot or does not take place in the courtroom, notice allows it to take place in the public sphere through news reporting, petitioning, and public debate. Late notice is better than no notice.

So, subpoenas provide notice, and notice has many important benefits. But notice, advance or delayed, is best directed at the individual, group, or entity most affected by the government's action. The person potentially incriminated has the most incentive to challenge the acquisition, ex ante or ex post. Moreover, as a matter of simple fairness, it is *that* person, the data originator, who suffers a privacy harm at the government's hand.[126] To give your next door neighbors notice that the government plans to sell your house at auction does you no good when the auctioneers show up to your surprise. Such covert action cannot be viewed as an instance of fair procedure. Yet, that is what ordinarily happens with subpoenas directed to institutional third parties.[127]

An investigation into the affairs of a Verizon or AT&T subscriber ordinarily does not implicate the telecommunications provider in any crime. Perhaps Verizon has a business incentive to resist a government subpoena to please its customers, but there are also legal expenses involved in such resistance, and Verizon has every reason not to draw government fire in its direction. A subpoena directed solely to Verizon for records involving customer *X* may never reach customer *X*. Indeed, the law sometimes forbids such disclosure,[128] and federal and state prosecutors encourage recipients like Verizon not to disclose.[129] If Verizon decides not to challenge the subpoena,

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125. *See id.* Standard 25-5.7 cmt.

126. An analogous principle underlies the Fifth Amendment rule that the privilege against self-incrimination applies only to the person who is compelled to produce the information and only if he is thereby incriminated. Fisher v. United States, 425 U.S. 391, 397 (1976); *see* TASLITZ, PARIS & HERBERT, *supra* note 9, at 817–18.

127. *See* SEC v. Jerry T. O'Brien, Inc., 467 U.S. 735, 737, 751 (1984) (restricting the required notice to the third party in the case of an administrative investigation); Stephen Wm. Smith, *Gagged, Sealed & Delivered: Reforming ECPA's Secret Docket*, 6 HARV. L. & POL'Y REV. 313, 313–14 (2012) (describing effective lack of notice under the Electronic Communications Privacy Act).

128. *See, e.g.*, 18 U.S.C. § 1510(b) (criminalizing customer notice of a grand jury subpoena in the banking context).

129. *See* Joel Cohen & Danielle Alfonzo Walsman, *Can You Disclose Your Grand Jury Subpoena? It's a Balancing Test*, N.Y. L.J., Dec. 15, 2008, at 1, 1–2, *available at* https://www.stroock.com/SiteFiles/Pub690.pdf; Reed Albergotti, *Google, Microsoft, Apple to Notify Users About Subpoenas in Privacy Nod; Move Pits Tech Companies Against Federal Law-Enforcement*, WALL ST. J. (May 2, 2014, 7:40 PM), http://online.wsj.com/news/articles/SB10001424052702304677904579538320088504240. The general grand jury secrecy provisions do not bind a witness, *see infra* note 137, but a

Verizon will produce the information for the State, potentially with no notice to the person most affected.[130] LEATPR fixes this problem.

All of that said, LEATPR's is a gentle fix, making it that much less disruptive to the grand jury process. LEATPR requires notice for only certain types of records,[131] permits delayed notice for cause as described above,[132] and permits a court to prohibit the third party from itself providing customer notice during that delay period.[133] A court may also limit, or even eliminate, the notice requirement in a particular case in which it would be unduly burdensome, though of course the privacy intrusion must be considered in that calculus.[134] Most generously, and indeed perhaps too generously, LEATPR effectively *always* provides for delayed notice by requiring only that "notice should generally occur within thirty days after acquisition."[135] Nonetheless, such ultimate notice would still have important utility, and it would not be inimical to the beneficial aspects of grand jury secrecy.[136]

III. RETENTION AND DISCLOSURE

A. Grand Jury Secrecy

Whereas the traditional grand jury fails to provide the first two LEATPR methods in the third party records context (levels of justification and notice), it does provide the third: protection against unauthorized access and distribution. Indeed, from a privacy perspective, the strongest argument in favor of treating grand jury subpoenas as a special case is the longstanding rule of grand jury

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prosecutor can move for a protective order doing so in a particular case premised upon a court's inherent judicial power. *See In re* Grand Jury Proceedings, 417 F.3d 18, 26 (1st Cir. 2005).

130. Part of the fallout from leaks regarding the overzealous—and perhaps illegal—NSA surveillance has been a pushback from technology companies, including that they now plan to notify customers regarding subpoenas. Albergotti, *supra* note 129. Awareness of surveillance can be bad for business. *See* Mark Scott, *Irked by N.S.A., Germany Cancels Deal with Verizon*, N.Y. TIMES, June 27, 2014, at B2. While welcome, such a voluntary plan to notify could of course be retracted at any time.

131. LEATPR STANDARDS, *supra* note 8, Standard 25-5.7(a) (not requiring notice for minimally protected records); *id.* Standard 25-5.7(b) (requiring notice for highly or moderately protected records).

132. *Id.* Standard 25-5.7(c).

133. *Id.* Standard 25-5.7(d).

134. *Id.* Standard 25-5.7(f).

135. *Id.* Standard 25-5.7(b).

136. For example, grand jurors themselves cannot publicly communicate what they have received. *See infra* Part III.A.

secrecy.[137] Federal Rule of Criminal Procedure 6(e) prohibits, with appropriate—if somewhat complicated—exceptions, disclosure of matters occurring before the grand jury,[138] and almost all states have similar restrictions.[139]

To be precise, it is non-witness participants who, as a general matter, "must not disclose [any] matter occurring before the grand jury."[140] And disclosure by non-witnesses is permitted in several sets of circumstances, sometimes requiring a court order or at least court notification, and usually directed to other government attorneys or agencies for the purpose of enforcing federal criminal law or some other criminal, civil, and national security laws.[141] Additionally, a court may order disclosure upon finding "a strong showing of particularized need" for the information in connection with a judicial proceeding[142] or to a criminal defendant upon a showing "that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury."[143] Thus, grand jury secrecy is not absolute, but it is significant.

This commitment to secrecy, the Supreme Court has explained, serves these central functions:

> First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as inducements. There would also be the risk that those indicted would flee, or would try

137. For a history of grand jury secrecy, including in the American colonies, see Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. U. L. REV. 1, 12–34 (1996).

138. FED. R. CRIM. P. 6(e).

139. *See* BEALE ET AL., *supra* note 80, §§ 5:3–5:4; LAFAVE ET AL., *supra* note 36, § 8.5(b).

140. FED. R. CRIM. P. 6(e)(2)(B) (listing and therefore restricting all grand jury participants other than witnesses); *see* United States v. Sells Eng'g, Inc., 463 U.S. 418, 425 (1983) ("Witnesses are not under the prohibition unless they also happen to fit into one of the enumerated classes."). Some states do seek to restrict witness disclosure, but such restrictions raise First Amendment complications. *See* BEALE ET AL., *supra* note 80, § 5:5; LAFAVE ET AL., *supra* note 36, § 8.5(d).

141. FED. R. CRIM. P. 6(e)(3); *see, e.g.*, 18 U.S.C. § 3322 (2012) (allowing disclosure to government attorney for federal civil forfeiture and, upon court order, to federal and state financial regulating agencies). For full treatment of the secrecy limitations, see BEALE ET AL., *supra* note 80, §§ 5:1–5:36; LAFAVE ET AL., *supra* note 36, § 8.5.

142. *Sells Eng'g*, 463 U.S. at 443 (interpreting what is now FED. R. CRIM. P. 6(e)(3)(E)(i)); *see* BEALE ET AL., *supra* note 80, § 5:12; LAFAVE ET AL., *supra* note 36, § 8.5(h).

143. FED. R. CRIM. P. 6(e)(3)(E)(ii); *see* BEALE ET AL., *supra* note 80, § 5:13. A court may similarly order disclosure at the request of the government in order to enforce foreign criminal law, state or Indian tribal criminal law, or military criminal law. *See* FED. R. CRIM. P. 6(e)(3)(E)(iii)–(v).

> to influence individual grand jurors to vote against the indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.[144]

We know of no empirical data supporting concerns about witness safety and honesty in the usual case. Indeed, a number of authors have challenged the rules providing for limited discovery in criminal cases—which are based on similar concerns—as simply not rooted in reality.[145] Most states use preliminary hearings rather than grand juries in the run-of-the-mill case,[146] yet preliminary hearings are not protected by special secrecy rules.[147] These concerns are, however, surely valid in individual cases where threats or bribes have been made or seem likely for case-specific reasons. And grand jury secrecy rules have value in protecting innocent persons from public ridicule, even if the rules might not always function very well given the witnesses' freedom to disclose. Indeed, such public ridicule is not deserved even by the guilty, at least not before a trial has determined such guilt, especially as that ridicule or condemnation can influence the jury pool and thus the very guilt/innocence decision.[148] Secrecy is part of what privacy is all about.

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144. Douglas Oil Co. of Cal. v. Petrol Stops Nw., 441 U.S. 211, 219 (1979); *see also* United States v. Amazon Indus. Chem. Corp., 55 F.2d 254, 261 (D. Md. 1931) (articulating the list that would be adopted by the Supreme Court).

145. *See* STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY 1071–74 (10th ed. 2014) (addressing arguments for and against broad criminal discovery); Justice William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth*, 1963 WASH. U.L.Q. 279, 285–88 (arguing that trial judges can act to protect witnesses shown to be in danger of criminal discovery); Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 515 (2009) (arguing that the risks of broad disclosure are overstated because several states and the European continental justice system mandate broad disclosure); Peter J. Henning, *Defense Discovery in White Collar Criminal Prosecutions*, 15 GA. ST. U. L. REV. 601, 646–49 (1999) (arguing for greater discovery in white collar prosecutions); Wm. Bradford Middlekauff, *What Practitioners Say About Broad Criminal Discovery Practice: More Just—or Just More Dangerous?*, 9 CRIM. JUST. 14, 16 (1994) (noting that "[t]he vast majority of academic commentators and numerous judges . . . have endorsed broad criminal discovery" and that while many states have since 1970 expanded discovery, none have moved the other way). Middlekauff articulates prosecutor concerns regarding witness intimidation, but jurisdictions that have expanded discovery have found that expansion to be manageable and beneficial. *See id.* at 18–19, 55–58.

146. LAFAVE ET AL., *supra* note 85, §§ 14.2(c)–(d), 15.1(d)–(g); *see* Hurtado v. California, 110 U.S. 516, 520–21, 538 (1884) (holding that due process does not require that a grand jury initiate a state felony prosecution).

147. *See* FED. R. CRIM. P. 5.1. *See generally* LAFAVE ET AL., *supra* note 36, §§ 14.1–14.4.

148. *See* MODEL RULES OF PROF'L CONDUCT R. 3.8(f) (2013) (advising prosecutors to refrain from making "extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused"); Andrew E. Taslitz, *Information Overload, Multi-Tasking, and the Socially Networked Jury: Why Prosecutors Should Approach the Media Gingerly*, 37 J. LEGAL PROF. 89, 125–29 (2012) (explaining how the Internet and constant television news cycles can influence grand jurors); Andrew E. Taslitz,

But secrecy is not everything that privacy is about, nor of course is disclosing information to prosecutors and grand jurors preserving total secrecy. Privacy is fundamentally a right to control what information about us is available to others, and for what purposes.[149] As discussed earlier, there is an obvious difference between sharing information with your spouse, friend, or counselor and with the police or a prosecutor.[150] What third parties do with information matters to us, and it should so matter.

Controlling information about ourselves is key to creating intimate relationships. We share some things with some people *because they are close to us.*[151] Even when, as is typically the case, that information imposes no criminal or civil liability, the limitation of the information to a narrow chosen circle is precisely part of what marks them as close friends, lovers, or relatives. Even the most patriotic of individuals—perhaps Captain America excepted—do not love an amorphous and powerful government in the way that they love a spouse, best friend, or endearing colleague.

Control of information about ourselves also helps to define our very identities. Each of us has complex, multidimensional personalities. We wear different masks in different circumstances.[152] It is hard for any person to get to know another in all her complexity, especially if they meet rarely and under formal or contentious circumstances.[153] Yet each of us fears being misjudged—a piece of ourselves or our behavior being given too much weight in assessing our entirety.[154] We thus reveal only selected parts of ourselves. We have one mask at work, another at school, and another at home. These are not lies but ways to protect how others assess us, and humans hold other-assessment dear.[155] We want to be seen for whom we think we are, but we also know that esteem matters, because it is

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The Incautious Media, Free Speech, and the Unfair Trial: Why Prosecutors Need More Realistic Guidance in Dealing with the Press, 62 HASTINGS L.J. 1285, 1291–93 (2011) (arguing that modern society is less likely to question the media and is therefore more likely to be prejudiced against a defendant).

149. *See* LEATPR STANDARDS, *supra* note 8, Standard 25-3.3 cmt.; Henderson, *Expectations of Privacy*, *supra* note 13, at 232–33; Taslitz, *Human Emotions*, *supra* note 13, at 131, 153–57.

150. *See supra* notes 13–16 and accompanying text.

151. *See* JEFFREY ROSEN, THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA 8 (2000).

152. *See id.* at 209–18.

153. *Id.* at 8 ("True knowledge of another person is the culmination of a slow process of mutual revelation. It requires the gradual setting aside of social masks, the incremental building of trust, which leads to the exchange of personal disclosures. It cannot be rushed . . . ."); *see* Taslitz, *Human Emotions*, *supra* note 13, at 153–57.

154. *See* ROSEN, *supra* note 151, at 9.

155. *See id.* at 8, 210.

valuable in itself and can bring social resources and power.[156] Furthermore, how we believe others understand us affects how we understand ourselves.[157] We are not islands.

The secrecy of the grand jury unquestionably protects some privacy interests by limiting the circle of persons and groups who learn information about us. But, for the reasons noted above, it does not resolve all privacy concerns. Revelation to grand jurors, court reporters, and prosecutors, and the risk of later revelation to others via secrecy exceptions or breaches, matter because they represent a loss of control over the self, over the setting apart of intimate relationships, and over the masks that help to maintain social esteem. Such limited revelation may be necessary to serve the State's interests in public safety and retribution against criminal wrongdoers. But the State should have to justify believing there is a danger to safety or a need for retribution that merits damaging privacy. Again, LEATPR's flexible justification requirements serve just that purpose. Indeed, during drafting one person repeatedly insisted that secrecy sometimes *substitute* for levels of justification and notice. But LEATPR rejects such a model, instead always requiring all three.

B. Secrecy Versus Transparency

As explained above, grand jury secrecy serves multiple objectives, including providing some limited privacy protection. But because the grand jury is a government function, it is important to note that the secrecy of grand juries also has important social costs. Secrecy is the very absence of transparency,[158] and transparency promotes accountability.[159] With transparency, actors know that others will examine their errors. They fear punishment—even if only denial of a merit benefit, public reprimand, or harm to reputation. Social science demonstrates that actors believing they will be held accountable are more likely to work carefully and less likely to engage

156. *See* Andrew E. Taslitz, *Judging Jena's D.A.: The Prosecutor and Racial Esteem*, 44 HARV. C.R.-C.L. L. REV. 393, 398–403 (2009).

157. Taslitz, *Human Emotions*, *supra* note 13, at 156–57; *see* Andrew E. Taslitz, *A Feminist Fourth Amendment?: Consent, Care, Privacy, and Social Meaning in* Ferguson v. City of Charleston, 9 DUKE J. GENDER L. & POL'Y, 1, 12–25 (2002).

158. *See* Luna, *supra* note 33, at 1164 ("*[T]ransparency* is the ability of the citizenry to observe and scrutinize policy choices and to have a direct say in the formation and reformulation of these decisions.").

159. *Id.* at 1108–12. For an argument that traditional grand jury secrecy has been turned on its head to now shield prosecutorial abuse, see Roger Roots, *Grand Juries Gone Wrong*, 14 RICH. J.L. & PUB. INT. 331, 351–55 (2010).

in error, and thus are more likely to make sound decisions and less likely to make irrational or ill-informed ones.[160]

Transparency also permits commentary, critique, and conversation, again improving the likely quality of decisions. Moreover, transparency promotes democratic values. It allows citizens to watch what the government is doing, to feel a sense of participation just by being kept in the know, to act to change government action or advocate for new laws, or to make informed electoral decisions.[161]

In theory, however, secrecy can improve grand jury deliberation in a way that transparency would not. As one leading commentator on the grand jury explains,

> [s]ecrecy . . . shields the grand jury's exercise of discretion from public glare, thereby minimizing the possibility that grand jury members will feel compelled to base their decisions on concerns about immediate public backlash in a given case. Thus, secrecy can lead to greater reflection and richer, more sincere deliberation.[162]

This argument is similarly used to justify secret petit jury deliberation.[163] But there is a major difference between the two. Petit juries operate in an adversarial environment, and their fact-finding process, the trial, is closely regulated at every stage by a judge and is viewable by the public. The grand jury operates without a presiding judge, without defense counsel, and without outside observers, and then quickly makes decisions largely under prosecutorial control.[164] Secrecy thus does not encourage lengthier,

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160. *See* Taslitz, *Police Are People Too*, *supra* note 50, at 64–67. For this and other obvious reasons, the earliest judicial challenges to grand jury secrecy in America were by criminal defendants wanting to challenge their indictments. Kadish, *supra* note 137, at 16–17.

161. *See* Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 918–19 (2006); Andrew Taslitz, *Slaves No More!: The Implications of the Informed Citizen Ideal for Discovery Before Fourth Amendment Suppression Hearings*, 15 GA. ST. U. L. REV. 709, 756 (1999).

162. Fairfax, *Grand Jury Discretion*, *supra* note 94, at 74 (footnote omitted). For an early invocation of this type of argument, at least recognizing the potential for jury tampering, see United States v. Terry, 39 F. 355, 357 (N.D. Cal. 1889).

163. *See* United States v. Olano, 507 U.S. 725, 737–38 (1993) ("[T]he primary if not exclusive purpose of jury privacy and secrecy is to protect the jury's deliberations from improper influence."); Clark v. United States, 289 U.S. 1, 13 (1933) ("Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world."); Fairfax, *Grand Jury Discretion*, *supra* note 94, at 74–75 (analogizing grand jury secrecy to that of petit juries); Nancy S. Marder, *Deliberations and Disclosures: A Study of Post-Verdict Interviews of Jurors*, 82 IOWA L. REV. 465, 500–04 (1997) (exploring the potential negative impact of post-verdict juror interviews on candor during deliberations); Note, *Public Disclosures of Jury Deliberations*, 96 HARV. L. REV. 886, 888–92 (1983) (highlighting the negative effect that public disclosure has on jury deliberations).

164. DOYLE, *supra* note 38, at 12–14, 18, 20; Susan W. Brenner, *The Voice of the Community*, *supra* note 79, at 67 ("[T]he federal grand jury has become little more than a rubber stamp, indiscriminately authorizing prosecutorial decisions. At best,

richer deliberations but merely protects the prosecutor's degree of control over the proceedings. By exposing the inner workings of the grand jury, transparency could lead to corrective processes promoting more informed, independent grand jury decisions as a result of public criticism.[165]

Moreover, when subpoenas are directed at institutional third parties, there is less reason to be concerned that public pressure will affect such a grand jury decision. With such subpoenas, the grand jury—if it is the decision making body—is simply deciding whether to seek information from one witness and, if so, what information. And

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grand juries are passive entities whose existence burdens judicial efficiency and needlessly drains federal funds."); William J. Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174, 174 (1973) ("Today, the grand jury is the total captive of the prosecutor who, if he is candid, will concede that he can indict anybody, at any time, for almost anything, before any grand jury. I intend no criticism of prosecuting officials by this observation. I am a former prosecutor."); *supra* notes 78–84 and accompanying text.

165. *Cf.* Taslitz, *Democratic Deliberation*, *supra* note 118, at 318–20 (arguing that transparency in criminal justice coordinating councils will lead to open dialogue and better results). Other actors in the criminal justice system—most notably prosecutors—have relatively secret deliberations, exercising largely unreviewed discretion. *See* Wayte v. United States, 470 U.S. 598, 607 (1985) ("In our criminal justice system, the Government retains 'broad discretion' as to whom to prosecute . . . . This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review."); Peter Krug, *Prosecutorial Discretion and Its Limits*, 50 AM. J. COMP. L. 643, 645 (2002) (noting the "nearly unfettered independence" that prosecutors have in charging decisions); Luna, *supra* note 33, at 1139–41 (noting that prosecutors have "virtually unlimited discretion" on enforcement of laws); Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 728–59 (1996) (explaining the history of the local prosecutor and the vast discretion afforded to local police and prosecutors); Taslitz, *Democratic Deliberation*, *supra* note 118, at 296–315; James Vorenberg, *Decent Restraint of Prosecutorial Discretion*, 94 HARV. L. REV. 1521, 1524–37 (1981) (listing the host of decisions where prosecutors exercise discretion).

Much scholarship challenges whether this state of affairs is desirable. *See* 2 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE: ADJUDICATION 117–18 (4th ed. 2006) (articulating criticisms of prosecutorial discretion); Bibas, *supra* note 161, at 912, 916, 923, 933 (noting the criminal justice system is now the realm of professionals rather than ordinary citizens); Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 412–14, 462–64 (2001) (noting the potential for prosecutorial misconduct "behind closed doors" and advocating increased public disclosure and review of prosecutorial decisions); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 17–18, 25–38, 54–56 (1998) (suggesting that prosecutorial discretion is "a major cause of racial inequality" and arguing for the publication of racial impact studies); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 855–79 (1995) (arguing for financial incentives as a mechanism to limit prosecutorial discretion); Misner, *supra*, at 766–72 (advocating that prosecutorial discretion should be "linked directly to the availability of prison resources"); Vorenberg, *supra*, at 1554 (asserting that the "existence and exercise of prosecutorial discretion are inconsistent with the most fundamental principles of our system of justice").

And desirable or not, its existence alone cannot justify expansive, unreviewable, secret grand jury activities. The grand jury's structure must be justified on its own.

the witness is a third party witness rather than a principal player. It is an important decision, but not as likely to garner public backlash as the ultimate decision of whether to proceed against a person as an offender, meaning whether to indict.

If the desired closer supervision of subpoenas would be done by a judge, rather than the grand jurors, the grand jury is thereby freed from any outside political pressures. Judges are affected by politics, too, albeit in a more indirect, complex way.[166] But our system assumes that judges can resist overt public pressures of this sort and that it is not in the interest of society for judges to act in secret.[167] They are expected to explain the reasons for their decisions fully, defending them in written opinions.[168]

The grand jury system, if reformed in certain ways, could be an effective democratic deliberating body. Grand juries have the power to gain access to a wide array of information.[169] They are drawn locally and are relatively small in size.[170] Although ordinary citizens in everyday politics frequently act from ignorance,[171] the power to obtain information could theoretically be used to remove grand juror ignorance. If the proceedings were solemn and slow, they would impress grand jurors with their own power under these circumstances, motivating them to do the hard work of both obtaining information and processing it in order to understand it.[172]

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166. *See, e.g.*, Paul Brace & Brendt D. Boyea, *Judicial Selection Methods and Capital Punishment in the American States*, *in* RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS 186, 189 (Matthew J. Streb ed., 2007) (concluding that the prospect of elections affects judges' decisions in capital punishment cases); Matthew J. Streb, *How Judicial Elections Are Like Other Elections and What That Means for the Rule of Law*, *in* WHAT'S LAW GOT TO DO WITH IT?: WHAT JUDGES DO, WHY THEY DO IT, AND WHAT'S AT STAKE 195, 195–215 (Charles Gardner Geyh ed., 2011) (surveying many of the ways in which judicial elections are and are not like other political election contests); *see also* RICHARD A. POSNER, HOW JUDGES THINK (2008); *cf.* KEITH J. BYBEE, ALL JUDGES ARE POLITICAL—EXCEPT WHEN THEY ARE NOT: ACCEPTABLE HYPOCRISIES AND THE RULE OF LAW 1–4 (2010) (presenting data evidencing that citizens believe the judicial process to be both infused with politics and nonpolitical at the same time).

167. *See* Andrew E. Taslitz, *Hypocrisy, Corruption, and Illegitimacy: Why Judicial Integrity Justifies the Exclusionary Rule*, 10 OHIO ST. J. CRIM. L. 419, 440–42 (2013) (arguing that judicial legitimacy hinges on the perception of judges as impartial arbiters).

168. *See* Christopher Engel, *The Psychological Case for Obliging Judges to Write Reasons*, *in* THE IMPACT OF COURT PROCEDURE ON THE PSYCHOLOGY OF JUDICIAL DECISION MAKING 71, 75–78 (Christopher Engel & Fritz Strack eds., 2007) (highlighting many benefits of requiring judges to write legal opinions).

169. *See* Fairfax, *Grand Jury Discretion*, *supra* note 94, at 73.

170. *See* DOYLE, *supra* note 38, at 3–4 (noting that panels usually have between sixteen and twenty-three jurors).

171. *See* ILYA SOMIN, DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER 17–20 (2013).

172. *Cf.* Taslitz, *Temporal Adversarialism*, *supra* note 117, at 1602–19 (discussing the virtues of slow deliberation).

Grand jurors would feel their power to interpret the law independently and to nullify it when it does an injustice. They might view their deliberations as having weighty consequences. Indeed, petit jurors engaging in lengthy deliberations over complex and serious criminal charges often feel so empowered that they become politically active for the first time.[173] A powerful, diverse, independent grand jury might be trusted to decide when to issue subpoenas that breach privacy, and when not to do so.[174] But that is not the grand jury we have, however much it may be the grand jury that many reformers want.

The nation recently experienced a rare and poignant example of transparency in the grand jury process. The state of Missouri released, in only slightly redacted form, the grand jury materials relating to the no bill decision for Ferguson police officer Darren Wilson in the shooting death of Michael Brown.[175] Although this is not the place for an examination of their contents, which are highly unusual in their length and scope, and although obviously this transparency did not in this instance prevent another unfortunate round of violence,[176] the release has allowed, and will continue to allow, divergent commentators to make an *educated* assessment and critique not only of that grand jury process but also of the underlying police investigation.[177] And because the grand jurors were told

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173. *See* JOHN GASTIL ET AL., THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION 9–11 (2010) (showing through empirical study how jury service caused jurors to vote more, pay closer attention to the news, engage more with their neighbors about community issues, and participate more in charitable organizations); Andrew E. Taslitz, *The People's Peremptory Challenge and* Batson*: Aiding the People's Voice and Vision Through the "Representative" Jury*, 97 IOWA L. REV. 1675, 1678 (2012) [hereinafter Taslitz, *The People's Peremptory Challenge*].

174. *Cf.* Taslitz, *The People's Peremptory Challenge*, *supra* note 173, at 1692–1706 (discussing the virtues of petit jury diversity).

175. *See Evidence Released by McCulloch*, ST. LOUIS PUB. RADIO, http://apps.stlpublicradio.org/ferguson-project/evidence.html (last visited Dec. 30, 2014); *see also Documents Released in the Ferguson Case*, N.Y. TIMES, http://www.nytimes.com/interactive/2014/11/25/us/evidence-released-in-michael-brown-case.html (last updated Dec. 15, 2014); *Documents from the Ferguson Grand Jury*, CNN, http://www.cnn.com/interactive/2014/11/us/ferguson-grand-jury-docs/index.html (last updated Nov. 25, 2014). Witness names have been redacted from the transcripts of their interviews.

176. *See* Davey & Fernandez, *supra* note 5.

177. *See, e.g.*, Julie Bosman et al., *Amid Conflicting Accounts, Trusting Darren Wilson*, N.Y. TIMES (Nov. 25, 2014), http://www.nytimes.com/2014/11/26/us/ferguson-grand-jury-weighed-mass-of-evidence-much-of-it-conflicting.html; Paul Cassell, *The Michael Brown Grand Jury Process Was Fair*, WASH. POST (Nov. 25, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/25/the-michael-brown-grand-jury-process-was-fair; Jason Cherkis & Nick Wing, *Ferguson Grand Jury Evidence Reveals Mistakes, Holes In Investigation*, HUFFINGTON POST (Nov. 25, 2014, 7:59 PM), http://www.huffingtonpost.com/2014/11/25/ferguson-grand-jury-evidence-mistakes_n_6220814.html; Kaimipono Wenger, *We Need More Ferguson-style*

upfront that the release would be made, it may have solemnized their still-secret deliberations.[178] There is no doubt that there is a tension between, on the one hand, transparency and the norms it promotes (including accuracy and accountability), and, on the other hand, secrecy.

All that said, we are not making a brief for ending grand jury secrecy. That secrecy has important benefits. Our point is merely that it also has costs. And our argument is simply that, on balance, secrecy neither renders privacy protections unnecessary for the focus of subpoenas directed to institutional third parties, nor serves social goals so important as to outweigh privacy protection. To (1) embrace prior notice (absent particularized evidence of a safety or destruction of evidence danger) to the focus of a records subpoena (the person or group who is the original source or who may suffer as a result of the information's revelation to the government), (2) give the focus standing to challenge that subpoena, and (3) require the State to establish some level of justification for the subpoena, are small incursions on grand jury secrecy which serve a greater privacy good. In the routine case, and perhaps in many other cases, secrecy provides little reason to carve out a grand jury exception to LEATPR.[179]

IV. OTHER ACCOUNTABILITY MECHANISMS

LEATPR requires that a legislature provide means of accountability "via appropriate criminal, civil, and/or evidentiary sanctions, and appropriate periodic review and public reporting."[180] As already described above, and as with the other LEATPR methods, there is no reason to entirely exempt grand juries from such accountability

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Grand Juries, DAILY BEAST (Nov. 30, 2014), http://www.thedailybeast.com/articles/2014/11/30/we-need-more-ferguson-style-grand-juries.html. This is not to say that the release of materials is without its critics. *See* Benjamin Weiser, *Mixed Motives Seen in Prosecutor's Decision to Release Ferguson Grand Jury Materials*, N.Y. TIMES (Nov. 25, 2014), http://www.nytimes.com/2014/11/26/us/mixed-motives-seen-in-prosecutors-decision-to-release-ferguson-grand-jury-materials.html.

178. *See* 1 Transcript of Grand Jury Proceedings at 20–21, *available at* http://www.documentcloud.org/documents/1370490-grand-jury-volume-1.html.

179. While we hope to have made a persuasive case, given the social value of privacy, the "burden of proof" should lay with the supporters of the grand jury exception, not its opponents. Note, too, that any fears that the modest secrecy breach will harm an individual's reputation are partly addressed because the person facing potential harm—the focus of the record—chooses to go to court to challenge the subpoena. The focus thus voluntarily agrees to revelation—at least to the judge—for the purpose of protecting other privacy interests and other kinds of secrecy, namely the secrecy of the content of the records at issue. Any new rule of procedure might make the judicial proceedings closed ones at the request of the focus or, if the government shows safety danger, at the request of the prosecution, keeping in mind the secrecy-transparency tradeoff.

180. LEATPR STANDARDS, *supra* note 8, Standard 25-7.1.

mechanisms. Nor are they currently exempt. For example, the Federal Rules of Criminal Procedure provide that a knowing violation of grand jury rules may be punished as a contempt of court,[181] and there may be a private civil remedy as well.[182]

The easiest accountability mechanisms to justify are those requiring public reporting and periodic review. Unlike the more nuanced discussion above of whether to publicize, even in a limited manner, the particulars of a grand jury request—for example, that the grand jurors wish to examine the bank records of Andrew Taslitz—there is almost no risk and tremendous advantage in publishing composite statistics regarding the following: how often grand juries are convened and for what purposes (for example, what crimes are considered),[183] how often they return true bills, how often they return no bills, how often matters are otherwise declined, and how often and in what quantities they access given types of records. Much like the reporting concerning other methods of access required by existing legislation,[184] such aggregate data will permit informed and engaged debate regarding the proper role of the grand jury in our criminal justice system.[185]

It seems farfetched that access to such aggregate data would meaningfully inform lawbreakers in a manner that renders future prosecution more difficult, or at least any such effect should be offset by a potential increase in deterrence. Statistics are published even for the extremely secretive Foreign Intelligence Surveillance Court and have, in fact, been used to argue that the court does not provide a meaningful check on national security surveillance.[186] Informed debate cannot occur without such data, and there could be a mechanism for a prosecutor or department to urge the extremely rare circumstance in which disclosure would be substantially detrimental.

Some statistical evidence is currently published. The United States Attorneys' Annual Statistical Report includes the number of criminal

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181. FED. R. CRIM. P. 6(e)(7).

182. *See* LAFAVE ET AL., *supra* note 36, § 8.5(i) (discussing conflicting jurisprudence regarding a private civil remedy for violation of the secrecy requirements).

183. For these purposes, the relevant "convening" is of course how often a grand jury is considering a certain type of illegality or impropriety, not merely how many grand juries are currently empanelled and thus theoretically could be so engaged.

184. *E.g.*, 5 U.S.C. § 552a(s) (the Privacy Act) (2012); 18 U.S.C. § 2519 (the Wiretap Act).

185. *Cf.* Bibas, *supra* note 161, at 917, 955–59 (arguing for better published data regarding charge, conviction, and sentencing); Lawrence Rosenthal, *The Statement and Account Clause as a National Security Freedom of Information Act* (forthcoming) (arguing for better published data regarding national security expenditures).

186. *See* GLENN GREENWALD, NO PLACE TO HIDE: EDWARD SNOWDEN, THE NSA, AND THE U.S. SURVEILLANCE STATE 128–29 (2014).

matters in which grand jury proceedings were conducted and the number of work hours so dedicated.[187] And, from 1959 to 1991, these reports included the number of "no true bills," disclosing how often federal grand juries refused a prosecutorial offer to indict (Table One).[188] But when that number settled at astoundingly low levels around 1991 (a 99.9% indictment success rate), the number of no true bills ceased to be included.[189] However, data from the Bureau of Justice Statistics (BJS) indicate that the number of no bills has not increased since that time (Table Two).[190] Even taking into account the relatively low indictment threshold (as compared to the beyond a reasonable doubt standard required for conviction), achieving a 99.9% success rate is remarkable. This is especially so when one considers that some no true bills might be urged by a prosecutor who is either surprised by how the evidence turned out (though this is likely very rare, as the prosecutor controls the presentation and in any event could simply decline to present charges) or as a "solution" to a politically difficult matter, including to deflect pressure from victims or other interest groups.[191] That allegation is certainly being made in the recent no bill decisions in both Ferguson, Missouri and New York City.[192] But whatever the case in those instances, the bottom line is simply that were the grand jury an effective check on prosecutorial power, nobody could be *that* good.[193]

187. *E.g.*, U.S. DEP'T JUSTICE EXEC. OFFICE FOR U.S. ATT'YS, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT: FISCAL YEAR 2013 8, 80–82 (2013), *available at* http://www.justice.gov/usao/reading_room/reports/asr2013/13statrpt.pdf.

188. Copies of the annual statistical reports are available on the U.S. Department of Justice website for the years 1959 through 2013. *See generally Annual Statistical Reports*, U.S. DEP'T OF JUST., http://www.justice.gov/usao/resources/reports (last visited Dec. 30, 2014).

189. *See id.* (providing the statistical reports for the years 1959–2013).

190. *Publications & Product: Compendium of Federal Justice Statistics*, BUREAU JUST. STAT., http://www.bjs.gov/index.cfm?ty=pbse&sid=4 (last visited Dec. 30, 2014).

191. For an analysis of this prosecutorial success, see Andrew D. Leipold, *Prosecutorial Charging Practices and Grand Jury Screening: Some Empirical Observations*, *in* GRAND JURY 2.0, *supra* note 35, at 195; Andrew D. Leipold, *Why Grand Juries Do Not (And Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 274–75 (1995).

192. *See* Jonsson, *supra* note 6.

193. *Cf.* THE DEVIL'S ADVOCATE (Regency Enterprises 1997) ("It was a nice run, Kevin. Had to close out some day. Nobody wins them all.").

TABLE ONE

Data from U.S. Attorneys' Annual Statistical Report

Year	Total Grand Jury Proceedings	Indictments	No True Bills	U.S. Attorney Success Rate (%)
1959	15,397	14,673	724	95.30
1960	14,646	14,088	558	96.19
1961	15,100	14,565	535	96.46
1962	15,826	15,285	541	96.58
1963	16,121	15,591	530	96.71
1964	16,480	16,061	419	97.46
1965	17,511	16,950	561	96.80
1966	17,709	17,064	645	96.36
1967	19,197	18,663	534	97.22
1968	18,891	18,569	322	98.30
1969	22,565	22,209	356	98.42
1970	24,545	24,243	302	98.77
1971	29,299	29,079	220	99.25
1972	32,033	31,840	193	99.40
1973*	30,235	30,015	220	99.27
1974	25,786	25,595	191	99.26
1975	27,222	27,067	155	99.43
1976**	—	—	—	—
1977	21,531	21,412	119	99.45
1978	19,509	19,405	104	99.47
1979	16,446	16,356	90	99.45
1980	16,592	16,507	85	99.49
1981	16,794	16,699	95	99.43
1982	17,064	16,989	75	99.56
1983	17,765	17,702	63	99.65
1984	17,487	17,419	68	99.61
1985	17,094	17,051	43	99.75
1986	20,111	20,045	66	99.67
1987	19,263	19,224	39	99.80
1988	20,184	20,156	28	99.86
1989	23,203	23,172	31	99.87
1990	23,925	23,914	11	99.95
1991***	25,943	25,927	16	99.94

* The 1973 data is internally inconsistent, reporting 30,015 indictments and 220 no bills, but a total of 30,215 grand jury proceedings. For purposes of this table we have assumed the latter number is incorrect, but of course it could be any of the three.

** The Report for 1976 could not be located. All other reports from 1955 through 2013 are available at http://www.justice.gov/usao/resources/reports.
*** The Executive Office for U.S. Attorneys has not included the number of "no true bills" in its annual statistical reports since 1991.

TABLE TWO

Data from BJS Federal Justice Statistics

Year	Suspects Received by the U.S. Attorney	Total Suspects Declined	Total Suspects Declined due to No True Bill
1993	110, 286	33,678	50
1994	99,251	34,424	38
1995	102,220	35,896	39
1996	97,776	32,832	41
1997	110,034	29,069	15
1998	115,692	28,786	33
1999	117,994	31,004	35
2000	123,559	30,444	29
2001	121,818	32,250	21
2002	124,335	33,674	23
2003	130,078	33,602	50
2004	141,212	31,866	14
2005	137,590	29,755	11
2006	133,935	29,677	15
2007	138,410	29,232	23
2008	178,570	28,102	20
2009	188,341	29,780	20
2010	187,916	30,670	11

In the last few years, a number of private entities have begun publishing "transparency reports" to provide data on how often they release information to law enforcement.[194] The government should itself provide consistent and thorough aggregate data on the use of the grand jury's investigative and accusative functions.

194. *See, e.g.*, *Google Transparency Report*, GOOGLE, http://www.google.com/transparencyreport (last visited Dec. 30, 2014).

CONCLUSION

"The grand jury is a 'much maligned' organ of the criminal justice system,"[195] and recent events have renewed and intensified criticism. Perhaps at least some criticism is inevitable for any institution that seeks both to investigate in order to accuse and to protect from accusation. But the criticism is appropriate when the modern grand jury seems to have put all of its energies, and few meaningful checks, into its investigatory function, allowing its shield function to atrophy. Or at least that shield function has generally been subject to atrophy but, ironically, might remain strong in the unique circumstance of potential charges against police. It is telling that the grand jury right is the *only* criminal procedure provision in the Bill of Rights that has been held not to apply as against the states.[196]

This Article can certainly be read in that critical tradition. The modern grand jury simply does not live up to common and historic aspirations. But as with much of that critical literature, we aim at least in the first instance to improve the constitutionally-ensconced institution, not to eliminate or belittle it. There could come a day in which the people once again depend not only upon the grand jury's ultimate "shield" function for their liberty, but also upon its potential to limit harmful and inappropriate investigation while initiating its own investigation unpopular to those in power.[197] Perhaps we have seen a glimpse of that recently, and that chance might be reason enough to preserve it.

The ABA's Criminal Justice Standards on Law Enforcement Access to Third Party Records provides a helpful vehicle, in that its four protective mechanisms could be used not only to better respect the privacy of third party records obtained via grand jury subpoena but to improve the functioning of that institution more generally. It is thus unfortunate that the grand jury, both in its historic form and in the form of prosecutorial "equivalents," was exempted from LEATPR's provisions. Hopefully the legislation LEATPR inspires, as well as future iterations of those Standards, will instead thoughtfully apply to the grand jury.[198]

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195. Roger A. Fairfax, Jr., *Grand Jury Innovation: Toward a Functional Makeover of the Ancient Bulwark of Liberty*, 19 WM. & MARY BILL RTS. J. 339, 339 (2010) (citing Benjamin E. Rosenberg, *A Proposed Addition to the Federal Rules of Criminal Procedure Requiring the Disclosure of the Prosecutor's Legal Instructions to the Grand Jury*, 38 AM. CRIM. L. REV. 1443, 1462 (2001)). For a summary of some of those critiques, see *id.* at 341–45.

196. *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3034–35 nn.12–13 (2010).

197. *See* LAFAVE ET AL., *supra* note 36, § 8.2(b) (describing the grand jury of the early American experience as well as, very briefly, some of its demise).

198. *See* United States v. Williams, 504 U.S. 36, 55 (1992) (recognizing that legislatures, in this case Congress, can modify the grand jury function).