

The Fall of Grand Juries

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Grand juries once played a preeminent role in American civic life. Today, they do little more than ratify indictments sought by prosecutors. How did this happen? This Article explores that question, primarily relying on period newspapers and constitutional convention transcripts. It looks at the pervasive role grand juries held and the anti-grand jury movement that arose in the mid-19th century. To understand the anti-grand jury fervor, this Article examines five explanations of why grand juries fell from grace: (1) they failed to protect the innocent or punish the guilty, (2) they facilitated anonymous character assassinations, (3) they were too expensive and cumbersome for a tax-conscious society, (4) as government professionalized, there was less need for citizen panels, and (5) urbanization meant that grand juries could not as easily represent their communities.

I. INTRODUCTION

For as long as the grand jury has existed, there have been calls for its abolition.¹ As far back as 1792, for example, a Pennsylvania judge warned of the dangers of unbridled grand juries.² Thomas Jefferson complained that the hated Federalists were turning grand juries into “inquisitors on the freedom of speech” and “from a legal to a political engine.”³ In the main, however, grand juries were held in much higher regard. They were guardians of individual liberties, mediators between the government and the governed, and a vital part of our political infrastructure.

But this prominence was not to last. As this article will show, around the middle of the 19th century, the country was swept by a national movement to abolish or weaken grand juries. This mindset extended to the courts. In 1870, the United States Supreme Court did nothing to stop a law that permitted government confiscation of private property without grand juries.⁴ The plaintiff’s attorney argued that the lack of grand juries, among other problems, did not comport with due process of law guaranteed by the Constitution.⁵ Without even bothering to analyze whether grand jury rights had

1 Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 314 (1995).

2 *Id.* at 314 n.244.

3 Letter from Thomas Jefferson to Peregrine Fitzhugh (June 4, 1797), in 29 THE PAPERS OF THOMAS JEFFERSON 415–19 (Barbara B. Oberg ed., 2002).

4 *Tyler v. Defrees*, 78 U.S. (11 Wall.) 331 (1870).

5 *Id.* at 344, 347.

been violated, the Court upheld the law.⁶ This came after a long line of cases holding that grand juries were not necessary in maritime law.⁷

The culmination of the grand jury abolition movement came in 1884, when the Supreme Court struck a grievous blow to grand juries. *Hurtado v. California* involved a defendant who argued that his death sentence—based on a prosecution without a grand jury—was a violation of the Fourteenth Amendment’s guarantee of “due process of law.”⁸ The Court concluded it was not. It said that because grand juries were explicitly mentioned in the Fifth Amendment, they could not fall into the nebulous term “due process of law.”⁹ By so doing, it relegated grand juries to second-class constitutional status.

The *Hurtado* decision concluded a debate that had been raging in the country throughout the prior decade: did states have the power to abolish grand juries, given that the Fifth Amendment guaranteed them? In the 1870s and before, many citizens argued that states lacked the power,¹⁰ or at least thought it an open question,¹¹ including some who believed that grand juries were foolish.¹² As the *Quad-City Times* explained: “If grand juries are to be abolished it is obvious that the constitution of the United States must first be amended. The whole tenor of that instrument hedges in the right of trial by jury and protects the rights of the individual.”¹³ Even *after*

6 *Id.* at 349.

7 *See id.* at 33 n.8 (citing cases in the syllabus).

8 110 U.S. 516, 519–20 (1884).

9 *Id.* at 534.

10 *See, e.g.,* REPORTS OF THE PROCEEDINGS AND DEBATE OF THE CONVENTION OF 1821 ASSEMBLED FOR THE PURPOSE OF AMENDING THE CONSTITUTION OF THE STATE OF NEW YORK 164 (Albany, E & E Hosford 1821) (statement of Mr. Dodge); *Grand Jury*, ST. IND. SENTINEL, Mar. 28, 1850, at 2, <https://www.newspapers.com/image/161541611/>; *Grand Jury Business*, ALBANY DEMOCRAT, Mar. 10, 1871, at 1, <https://www.newspapers.com/image/336153033/>; *No Imp Diment*, S.F. EXAMINER, Nov. 21, 1871, at 2, <https://www.newspapers.com/image/457829563/>; *The Grand Jury System*, WARRENTON BANNER, Aug. 1, 1871, at 2, <https://www.newspapers.com/image/126338009/>.

11 *Query*, MUSCATINE WKLY. J., Feb. 23, 1872, at 3, <https://www.newspapers.com/image/542001628/>.

12 *See, e.g.,* *Grand Jury Business*, *supra* note 10.

13 *Grand Juries: The Legislature Has No Power to Abolish Them*, QUAD-CITY TIMES, Jan. 31, 1880, at 2, <https://www.newspapers.com/image/301092526/>; *see Our Constitution*, NEB. ST. J., Jan. 17, 1879, at 1, <https://www.newspapers.com/image/309671868/>; *The Grand Jury System*, *supra* note 10; INTELLIGENCER, Apr. 24, 1879, at 2, <https://www.newspapers.com/image/73829033/>;

the Supreme Court proclaimed that state grand juries were optional, the *Arizona Champion* insisted that the federal constitution forbade states from eliminating them.¹⁴ It was not alone, as constitutional convention delegates made the same arguments.¹⁵ This was not a unanimous position,¹⁶ but it may well have been strong enough to make some legislators hesitant about doing away with grand juries altogether.

It is easy to quibble with the merits of the *Hurtado* decision. As the dissent points out, if the right to grand juries is not fundamental to due process of law because it is expressly mentioned in the Fifth Amendment, neither are the rights against double jeopardy, self-incrimination, or uncompensated eminent domain.¹⁷ It is more difficult to analyze *why* the Court ruled as it did. What about the state of society caused the Court to declare grand juries were not essential to ordered liberty?

This Article aims to understand why America soured on the grand jury. To do so, it focuses on period newspaper articles, state constitutional conventions, and other sources. It proceeds in three Parts. Part I sets the stage by recounting the history of grand juries in America, pre- and post-Revolution. This includes how they operated in England, which helps shed light on how the framers would have known them. Part II explores five primary reasons grand juries fell off the national pedestal. These are: (1) concerns that grand juries

STREATOR FREE PRESS, Aug. 7, 1880, at 4, <https://www.newspapers.com/image/542787047/>.

14 ARIZ. CHAMPION, Nov. 1, 1884, at 1, <https://www.newspapers.com/image/41073404/>.

15 1 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES IN THE CONVENTION ASSEMBLED AT FRANKFORT, ON THE EIGHTH DAY OF SEPTEMBER, 1890, TO ADOPT, AMEND, OR CHANGE THE CONSTITUTION OF THE STATE OF KENTUCKY 684 (Frankfurt, E. Polk Johnson 1890) [hereinafter KENTUCKY 1890 CONVENTION PROCEEDINGS] (Mr. Hopkins calling proposal to abolish grand juries in the state a “direct violation of the language of the fifth article of the amendments of the Constitution of the United States”); 1 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF IDAHO, 1889, at 260 (I.W. Hart ed., Caxton Printers, Ltd. 1912) [hereinafter IDAHO 1889 CONVENTION PROCEEDINGS] (Mr. Reid calling proposal to allow prosecution by information “a plain, open, direct violation of the constitution of the United States”).

16 See 1 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 129 (Offset Press 1935) (1850) [hereinafter 1850 INDIANA CONVENTION PROCEEDINGS] (statement of Mr. Pettit).

17 *Hurtado v. California*, 110 U.S. 516, 547–48 (1884) (Harlan, J., dissenting).

lacked procedural safeguards for defendants, and let guilty parties go free; (2) fears that the secrecy of grand jury proceedings would allow witnesses to anonymously lodge false accusations and destroy their neighbors' reputations; (3) allegations that grand juries were too expensive and inefficient when compared to judges; (4) government professionalization and laws becoming more complex, meaning that it was harder for grand jurors to understand the law without assistance from lawyers and accordingly easier for lawyers to replace grand juries; and (5) urbanization, meaning we have lost small, intimate communities that grand juries were made to thrive in.

Part III concludes by offering some reflections on the modern state of the grand juries. It summarizes the new attacks on grand juries in the 20th and 21st centuries. And it ends by arguing that whatever problems exist with grand juries today, they were caused by the limitations imposed on the institutions, not the people serving as jurors.

II. A HISTORY OF GRAND JURIES IN AMERICA

A. *The English Grand Jury Tradition*

We inherited many of our legal traditions from England; grand juries are no exception. In light of this fact, it is worth looking at how the grand jury operated in pre-Revolutionary England to understand how the framers would have understood the purpose of grand juries. The venerable Sir William Blackstone wrote “so tender is the law of England of the lives of the subjects, that no man can be convicted at the suit of the king of any capital offence, unless by the unanimous voice of twenty-four of his equals and neighbours.”¹⁸

The importance of Blackstone can hardly be overstated. Between 1687 and 1788, “not a single book that could be called a treatise intended for the use of professional lawyers was published in the British Colonies and the American States”¹⁹ according to Eldon James. Because of this dearth of literature, Harvard Law Dean Roscoe Pound “concluded that, at the time of the Revolution, ‘[f]or practical purposes Coke’s Second Institute and Blackstone are the repositories of the law.’”²⁰

18 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *306 (Philadelphia, J.B. Lippincott Co., 1893) (1753), <https://www.nationallibertyalliance.org/files/docs/Books/Blackstone%20vol%202.pdf>.

19 Richard A. Danner, *Oh, the Treatise!*, 111 MICH. L. REV. 821, 825 (2013).

20 *Id.* (quoting ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN

Then as now, an indictment by a grand jury was tantamount to a conviction.²¹ But English grand juries did far more than indict. At the dawn of the 18th century, English grand juries worked alongside justices of the peace, high-sheriffs, Knights of the Shire, and other county officials.²² Together, they pledged to the king that they would put their “Lives and Fortunes” on the line to “vindicate and maintain his undoubted Right and Title to these Nations.”²³ Another grand jury teamed up with judges, at the request of the mayor, to arrest nuns who were operating an illegal Nunnery.²⁴ They even certified the prices of wheat, rye, barley, malt, oats, white peas, grey ditto, and beans.²⁵

Sometimes, the grand jury went out of its way to laud public officials. One expressed its “entire approbation” at the conduct of its representative in Parliament.²⁶ A Dublin grand jury praised several legislators for their “manly and disinterested Conduct in Parliament.”²⁷ Such was commonplace. Presentments—charging decisions made without a prosecutor—were also commonplace. Take, for example, Francis Higgins, who was charged by a grand jury for being a “Common Disturber of her Majesty’s Peace, and a Sower of Sedition and groundless Jealousies amongst Her Majesty’s Protestant Subjects.”²⁸ Or Henry Wristle, who was accused of “keeping an un-

LAW 9 (1938)).

- 21 Niki Kuckes, *Retelling Grand Jury History*, in *GRAND JURY 2.0: MODERN PERSPECTIVES ON THE GRAND JURY* 125, 135 (Anthony Fairfax, Jr., ed., 2011).
- 22 *See Dublin*, *NEWCASTLE COURANT: WITH NEWS FOREIGN & DOMESTICK*, Oct. 10, 1711, at 3, <https://www.newspapers.com/image/404108020>; *see also* *POST MAN & HIST. ACCT.*, Oct. 11, 1701, at 2, <https://www.newspapers.com/image/35727397>.
- 23 *POST MAN & HIST. ACCT.*, Oct. 18, 1701, at 2, <https://www.newspapers.com/image/35727403> (spelling modernized).
- 24 *Dublin*, *Sept. 9*, *NEWCASTLE COURANT: WITH NEWS FOREIGN & DOMESTICK*, Sept. 29, 1712, at 10–11, <https://www.newspapers.com/image/404019841>.
- 25 *Newcastle*, *Jan. 13*, *NEWCASTLE WKLY. COURANT*, Jan. 13, 1770, at 2, <https://www.newspapers.com/image/404011176/>. *See also* *Leeds*, *January 19*, *LEEDS INTELLIGENCER & YORKSHIRE GEN. ADVERTISER*, Jan. 19, 1773, at 3, <https://www.newspapers.com/image/404017660/?terms=grand%2Bjury>.
- 26 *London*, *April 1*, *VA. GAZETTE*, June 7, 1770, at 2, <https://www.newspapers.com/image/40482187/>.
- 27 *Dublin*, *April 9*, *PA. GAZETTE*, June 27, 1771, at 2, <https://www.newspapers.com/image/39405389/>.
- 28 *Dublin*, *NEWCASTLE COURANT: WITH NEWS FOREIGN & DOMESTICK*, Oct. 17, 1711, at 1, <https://www.newspapers.com/image/404108199/> (spelling

lawful Seminary in his House for Instruction of Youth in Pernicious Tenents of Religion contrary to those of the Established Church.”²⁹

The structure of English grand juries was also different. In the tenth century, the king selected members of the grand jury.³⁰ The twelfth century had knights picking men for the grand jury from each county.³¹ By the time of Blackstone, sheriffs were the ones who selected grand jurors.³² Jurors were supposed to be property owners and were usually drawn from the upper crust.³³

B. Colonial Grand Juries

Pre-Revolutionary grand juries held the same vaunted role in American civic life as their counterparts across the pond. In 1630, Puritan refugees settled the Massachusetts Bay Colony.³⁴ By 1635, they instituted their first grand jury.³⁵ This makes grand juries far older than most other American institutions.

Grand juries were a political office in America, with grand jurors usually elected by their communities.³⁶ Colonial gentlemen who served on grand juries saw it as a sacrifice that their high station in life required, and some even served without a salary.³⁷ But much like many political offices, seats on grand juries were passed down from father to son, allowing family dynasties on grand juries.³⁸ Many in the patrician class believed that such hoarding of grand jury seats was essential because “the better sort” were “less liable to temptations, less fearful of the frowns of power, [and] may reasonably

modernized).

29 NEWCASTLE COURANT: WITH NEWS FOREIGN & DOMESTICK, Mar. 26, 1712, at 4, <https://www.newspapers.com/image/404008545>.

30 HARRY S. MARTIN, III, ZAVIER MEDINA & TWYLA TRANFAGLIA, *THE GRAND JURY: A SELECTED BIBLIOGRAPHY WITH EXHIBIT NOTES 1* (1975)

31 BLACKSTONE, *supra* note 18, at *302.

32 *Id.*

33 *Id.*

34 *Massachusetts Bay Colony*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/place/Massachusetts-Bay-Colony> (last visited May 11, 2019).

35 Mary Costello, *Grand Juries*, CQ RESEARCHER (Nov. 7, 1973), <https://library.cqpress.com/cqresearcher/document.php?id=cqresre1973110700>.

36 3 STATE OF NEW JERSEY CONSTITUTIONAL CONVENTION OF 1947, at 833 (1951) [hereinafter N.J. 1947 CONVENTION]; Barbara Clark Smith, *Beyond the Vote: Limits of Deference in Colonial Politics*, 3 EARLY AM. STUD. 341, 348 n.15 (2005).

37 GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 83–84 (1992).

38 *Id.* at 45, 84.

be supposed of more improved capacities than those of an inferior station.”³⁹

As one would expect from those holding political position, grand juries expressed a patriotic zeal. For example, a grand jury in the city and county of Philadelphia criticized the tax on tea and the use of the tax revenue to finance British domination of America.⁴⁰ It went on to lay out a laundry list of complaints about the Crown not unlike the Declaration of Independence, including the “unbounded and uncontrollable Powers” to collect tariffs, hauling men accused of treason off across the sea for trial, maintaining standing armies, and instituting admiralty courts in which judges were unencumbered by juries.⁴¹ It continued by pledging it would “promote a Union with the other Colonies” to ensure they received their constitutional rights and subvert the British revenue collection scheme.⁴² This missive was reprinted around the country,⁴³ and the “people’s panel enjoyed wide public support” throughout the colonies.⁴⁴

Colonial grand juries were also significant in the judgment of individual cases. Presentments were plentiful, and so too were acquittals.⁴⁵ Colonial grand juries not only refused to indict for violations of English law,⁴⁶ they often simply refused to indict. In the lead up to the Revolution, newspaper accounts provide scores of refusals to indict on ordinary crimes. These include political crimes,

39 *Id.* at 106.

40 John Gibson, PA. GAZETTE, Sept. 27, 1770, at 3, <https://www.newspapers.com/image/39402060/>.

41 *Id.*

42 *Id.*

43 John Gibson, HARTFORD COURANT, Oct. 16, 1770, at 1, <https://www.newspapers.com/image/233681107>; John Gibson, MD. GAZETTE, Oct. 11, 1770, at 2, <https://www.newspapers.com/image/41041133>.

44 Costello, *supra* note 35.

45 Today, the federal grand jury indictment rate hovers around 99 percent. Gordon Griller, *Modern Grand Jury (Part II)*, NAT’L CTR. OF ST. CTS., <https://www.ncsc.org/sitecore/content/microsites/trends/home/Monthly-Trends-Articles/2014/The-Modern-Grand-Jury-Part-II.aspx> (last visited May 1, 2019). Hopefully, this is because prosecutors are bringing stronger cases, but it more likely means that grand jurors are not properly empowered to disagree with prosecutors.

46 See AKHIL REED AMAR, AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 424 (2012); see also CHRISTOPHER WALDREP, JURY DISCRIMINATION: THE SUPREME COURT, PUBLIC OPINION, AND A GRASSROOTS FIGHT FOR RACIAL EQUALITY IN MISSISSIPPI 20 (2010).

like a printer criticizing government officials,⁴⁷ but also non-political ones like horse thievery, grand larceny, burglary, or murder.⁴⁸ This followed the tradition of English grand juries pushing back against government charges.⁴⁹

Because colonial grand juries refused to indict for English and political crimes, the British perceived them as a threat to their imperial power. But whenever the British attempted to weaken grand juries, the colonists responded by vilifying their efforts. John Adams criticized a British loyalist serving as a Superior Court judge for how he had “harrangued the Grand Juries in every County.”⁵⁰ He also fretted that the extension of admiralty courts was “the most grievous Innovation of all,” because in those courts, “one Judge presides alone!” A writer under the name Britannicus—a Roman emperor who conquered the English Isle—wrote that “[o]ur ancestors were indeed so justly jealous of their liberties, and so careful to arm against any unjust prosecution of the crown, that they fixed grand juries as an advanced guard.”⁵¹

Just because grand juries refused to indict for some political and English crimes does not mean that grand juries were afraid to punish. A Philadelphia grand jury presented an alderman and former mayor for not only refusing to punish “a Person guilty of profane Swearing,” but even worse, setting “an Evil Example by swearing himself.”⁵² A Mississippi grand jury presented a judge.⁵³

47 *St. Christophers, March 14, 1772*, MD. GAZETTE, Oct. 1, 1772, at 1, <https://www.newspapers.com/image/41042974/>.

48 PA. PACKET, July 6, 1772, at 3, <https://www.newspapers.com/image/39614889/>; *Williamsburg, April 22*, RIND'S VA. GAZETTE, Apr. 22, 1773, at 3, <https://www.newspapers.com/image/40482613/>; *Williamsburg, June 16*, VA. GAZETTE, June 16, 1774, at 2, <https://www.newspapers.com/image/40481847/>; *Williamsburg, October 22, 1772*, RIND'S VA. GAZETTE, Oct. 22, 1772, at 2, <https://www.newspapers.com/image/40482511/>.

49 Kevin K. Washburn, *Restoring the Grand Jury*, 76 FORDHAM L. REV. 2333, 2342–43 (2008).

50 John Adams, [*December 1765*], FOUNDERS ARCHIVES, <https://founders.archives.gov/documents/Adams/01-01-02-0009-0005> (last visited Feb. 20, 2020).

51 Britannicus, *To a Jurymen*, PA. GAZETTE, Mar. 8, 1770, at 5, <https://www.newspapers.com/image/39398536/>.

52 William Bell, *Presentment of the Philadelphia Grand Jury, 3 January 1745*, in 3 THE PAPERS OF BENJAMIN FRANKLIN 9–12 (Leonard W. Larabee, ed., 1961), <https://founders.archives.gov/?q=%22grand%20jury%22&s=1111311111&sa=&r=5&sr=#BNFN-01-03-02-0002-fn-0012-ptr>.

53 H.R. JOURNAL, 12th Cong., 1st Sess. 265 (1812), <http://memory.loc.gov/cgi-bin/ampage?collId=llhj&fileName=008/llhj008>.

In contrast, prosecutions by information—where charges are filed without a grand jury—were described as a “national grievance” and a “very great encroachment upon our laws and liberties.”⁵⁴ Several years later, after the burning of a British boat, authorities announced that an admiralty court would look into it. A Virginia paper said that this decision revealed that the British did not trust the people; if it did, it would have let a grand jury do it.⁵⁵

C. *Grand Juries in the Early American Government*

Despite the historical, cultural, and political significance of grand juries in the colonies, when the federal Constitution was passed, it contained no protections for grand juries. Like most rights, the founding fathers did not think it necessary to include it in the Constitution.⁵⁶ This caused an uproar throughout the young nation. At the Massachusetts convention debating whether to ratify the Constitution, one delegate bemoaned the lack of local trial juries and said this “horrid” situation was “still more dark and gloomy, as there is no provision made in the Constitution to prevent the attorney-general from filing information against any person, whether he is indicted by the grand jury or not.”⁵⁷ In response, another delegate argued that even if there were no constitutional protections for grand juries, prosecutors would still not resort to prosecution by information.⁵⁸ John Adams remarked that the grand jury’s role was so “evidently beneficial as to need no comment of mine.”⁵⁹

The Massachusetts convention ultimately recommended several amendments to the Constitution, including language that was substantially similar to the Fifth Amendment’s grand jury

db&recNum=263&itemLink=D?hlaw:11:/temp/~ammem_6Q05::%230080264&linkText.

54 Britannicus, *supra* note 51.

55 *Boston, December 17*, RIND’S VA. GAZETTE, Jan. 21, 1773, at 2, <https://www.newspapers.com/image/40482560/>.

56 James Madison, for instance, called rights provisions “parchment barriers” that would prove least effective “on those occasions when its control is most needed.” Sanford Levinson, *America’s Other Constitutions: The Importance of State Constitutions for Our Law and Politics*, 45 TULSA L. REV. 813, 818 (2013).

57 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 110 (Jonathan Elliot ed., n.p. 1787), http://oll-resources.s3.amazonaws.com/titles/1906/1314.02_Bk.pdf (statement of Mr. Holmes).

58 *Id.* at 113 (statement of Mr. Gore).

59 *Id.* at 132.

clause.⁶⁰ Other states followed suit.⁶¹ After Congress passed the Bill of Rights, it went to the states. Of the first ten legislatures that considered the matter, every single one of them adopted the grand jury amendment.⁶²

States did not simply ask the federal government to protect grand juries; the earliest state charters were a vote of confidence in grand juries. Of the founding 13 states, 11 contained guarantees for grand juries in their original constitutions or declarations of rights.⁶³ Of these, most of them ensured a grand jury in *all* cases, not only infamous crimes like the U.S. Constitution. In these early constitutions, they did not always explicitly mention grand juries, but guaranteed the right of defendants to “be informed of the accusation against him” or something to that effect. This amounts to the same thing as a grand jury indictment.⁶⁴

Of the of the two states that did not mention indictment rights—New Jersey and South Carolina—the latter’s was only meant as a transitory document to separate from Great Britain.⁶⁵ Within two years, the Palmetto State constitution guaranteed that no freeman could be imprisoned but by “the judgment of his peers or by the law of the land.”⁶⁶ The phrase “law of the land”—imported from

60 *Id.* at 177.

61 *See, e.g., id.* at 326, 328.

62 *Id.* at 339–40.

63 GA. CONST. of 1777, art. XLV; CONN. CONST. of 1818, art. I, § 9; *see* MD. DECLARATION OF RIGHTS of 1776, art. XIX; N.Y. CONST. of 1777, art. XIII. *See generally* DEL. DECLARATION OF RIGHTS of 1776, § 14; PA. CONST. of 1776, DECLARATION OF RIGHTS § 9; MASS. CONST. of 1780, pt. I, art. XII; N.H. CONST. of 1776, pt. I, art. XV, § 15; VA. DECLARATION OF RIGHTS of 1776, § 8; N.C. DECLARATION OF RIGHTS of 1776, arts. 7, 8; R.I. CONST. of 1843, art. I, §§ 7, 10. New York’s constitution referred to “law of the land” which readers of that era would have understood that phrase to include grand juries. *Jones v. Robbins*, 74 Mass. 329, 343 (1857).

64 *See Robbins*, 74 Mass. at 342. Technically it could also mean prosecution by information. *Id.* But information was rarely used in that era, so it probably referred to indictment. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1780 (Boston, Hilliard, Gray & Co. 1833); *cf.* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 57, at 113 (Mr. Gore noting that while Massachusetts did not explicitly mention indictments, it did not use information).

65 *South Carolina State Constitution, 1776 & 1778*, ROLLINS C. (Sept. 27, 2012), <https://web.archive.org/web/20190514171403/http://social.rollins.edu/wpsites/hist120/2012/09/27/south-carolina-state-constitution-1776-1778/>.

66 S.C. CONST. of 1778, art. XLI.

the Magna Carta—was well understood to include grand juries.⁶⁷ As for New Jersey, it still had grand juries, even if not constitutionally ordained,⁶⁸ and explicitly added grand jury protections in the state's second constitution.⁶⁹

Even after the original 13, grand juries continued to command respect. Of the next 14 states that joined the Union, from 1792 to 1844, 13 of them protected grand juries.⁷⁰ If anything, this batch of 13 was stronger than the last. They did not merely mention the right of the accused to know the nature of the accusation against them. They often forbade any means of prosecution other than indictment or explicitly forbade prosecution by information. Many states that revised their constitutions in this period also maintained or strengthened grand jury rights.⁷¹

At the federal level, when grand juries were discussed in the halls of Congress for the first few decades, it was most commonly not to disparage or weaken them—and not even to praise them. It was to listen to them. This is because, though the Fifth Amendment guaranteed grand juries in the context of criminal cases, 18th century grand juries did far more than indict. Before the modern bureaucratic state was created, grand juries performed many functions that we now expect professional government officials to handle.⁷²

67 *Robbins*, 74 Mass. at 343 (citing Lord Coke, Joseph Story, and James Kent). See also JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF VERMONT 398 (Montpelier, Freeman Steam Printing & Bindery 1880), [hereinafter VERMONT HOUSE JOURNAL] (governor vetoing bill limiting grand juries because it violated the state constitution's guarantee of due process "by the laws of the land," citing courts of New York, Massachusetts, Tennessee, Maine, North Carolina, Vermont, and the United States.).

68 New Jersey's first constitution did not mention any right to an indictment of any sort, but does reference indictments. N.J. CONST. of 1776, art. XV. Grand juries were present in the state's early days. See *Dare v. Ogden*, 1 N.J. L. 91, 108 (1791).

69 N.J. CONST. of 1844, art. I, § 9.

70 See ALA. CONST. of 1819, art. I, § 12; ARK. CONST. of 1836, art. II, § 11; FLA. CONST. of 1838, art. I, § 16; ILL. CONST. of 1818, art. VIII, § 10; IND. CONST. of 1816, art. I, § 12; KY. CONST. of 1792, art. XII, §§ 10–11; ME. CONST. art. I, § 7; MICH. CONST. of 1835, art. I, § 10; MISS. CONST. of 1817, art. I, § 12; OHIO CONST. of 1802, art. VIII, § 10; TENN. CONST. of 1796, art. XI, § 14; VT. CONST. ch. 1, art. X (amended 1924 and 1974).

71 See, e.g., DEL. CONST. of 1831, art. I, § 8; KY. CONST. of 1799, art. X, § 11; MISS. CONST. of 1832, art. I, § 12; N.J. CONST. of 1844, art. I, § 9; N.Y. CONST. of 1821, art. VII, § 7; PA. CONST. of 1838, art. IX, § 9; TENN. CONST. of 1835, art. I, § 14.

72 See RICHARD D. YOUNGER, *THE PEOPLE'S PANEL: THE GRAND JURY IN*

American territories had grand juries advocating for them before they earned full representatives in Congress. In the Louisiana Territory, a grand jury told Congress that inhabitants ought to have their own tax- and lawmaking powers, judges ought to reside in the territory, and more equitable provisions ought to be made concerning claims to lands.⁷³ An Indiana Territory grand jury put in a claim for the Island of Michilimackinac⁷⁴ (it lost out to Michigan). A territorial grand jury in Detroit, Michigan complained about the non-execution of a federal law in the Territory, the passage of bad laws in Congress, and misconduct by Augustus Woodward, judge of the territorial supreme court.⁷⁵

Grand juries across the country had something of a direct line to their federal legislatures. They would issue reports or resolutions on pressing questions of public policy of the day, and Congress would frequently hear them out and refer their complaints to committee for further deliberation. These sorts of complaints could result in changes in governmental policy.⁷⁶

Examples are legion. When Congress was deciding whether to provide more funding to poorhouses in the District of Columbia, it looked to proceedings from a grand jury session to determine that previous appropriations had been insufficient.⁷⁷ So too did Congress

THE UNITED STATES 2 (1963).

- 73 H.R. JOURNAL, 12th Cong., 1st Sess. 274 (1812), http://memory.loc.gov/cgi-bin/ampage?collId=llhj&fileName=008/llhj008.db&recNum=272&itemLink=D?hlaw:65:/temp/~ammem_PUHS:%230080274&linkText=1.
- 74 H.R. JOURNAL, 7th Cong., 1st Sess. 108 (1802), https://memory.loc.gov/cgi-bin/ampage?collId=llhj&fileName=004/llhj004.db&recNum=106&itemLink=D?hlaw:31:/temp/~ammem_UMCH:%230040108&linkText=1.
- 75 H.R. JOURNAL, 12th Cong., 1st Sess. 326–27 (1812), http://memory.loc.gov/cgi-bin/ampage?collId=llhj&fileName=008/llhj008.db&recNum=324&itemLink=D?hlaw:57:/temp/~ammem_PUHS:%230080326&linkText=1.
- 76 *E.g.*, Benjamin Franklin et al., *Order of the Mayor and Aldermen oncerning the Constabulary and Watch, 7 July 1752*, FOUNDERS ONLINE, [\(noting how a grand jury successfully petitioned the legislature to reform the city watch\)](https://founders.archives.gov/?q=%22grand%20jury%22&s=1111311111&sa=&r=10&sr=(last%20visited%20Mar.%2010%202020)); TUNKHANNOCK REPUBLICAN, Feb. 19, 1873, at 3, <https://www.newspapers.com/image/302596736/> (noting how the grand jury recommended the court should refuse of grant liquor licenses, and the judge complied with them).
- 77 H.R. JOURNAL, 27th Cong., 1st Sess. 7 (1841), <http://memory.loc.gov/cgi-bin/ampage?collId=llhb&fileName=027/llhb027.db&recNum=42>.

look to the capital's grand jury on the topic of establishing a penitentiary system, the juvenile justice system, and criminal courts.⁷⁸

Congress could count on grand juries to provide suggestions for infrastructure projects. Whether it was post offices, town halls, customhouses, or courthouses—especially courthouses—some inquest was nettling for it.⁷⁹ Improving courthouses was an ever-popular topic for grand juries to petition Congress about, perhaps because they held their meetings in them.⁸⁰

On broader questions of public policy, grand juries also sent

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- 78 S. JOURNAL, 11th Cong., 2d Sess. 433 (1810), [http://memory.loc.gov/cgi-bin/ampage?collId=llsj&fileName=004/llsj004.db&recNum=420&itemLink=r?ammem/hlaw:@field\(DOCID+@lit\(sj004496\)\):%230040422&linkText=1](http://memory.loc.gov/cgi-bin/ampage?collId=llsj&fileName=004/llsj004.db&recNum=420&itemLink=r?ammem/hlaw:@field(DOCID+@lit(sj004496)):%230040422&linkText=1); H.R. JOURNAL, 31st Cong., 1st Sess. 977 (1950), http://memory.loc.gov/cgi-bin/ampage?collId=llhj&fileName=045/llhj045.db&recNum=976&itemLink=D?hlaw:17:./temp/~ammem_6Q05::%230450977&linkText=1; H.R. JOURNAL, 25th Cong., 2d Sess. 264–65 (1838), http://memory.loc.gov/cgi-bin/ampage?collId=llhj&fileName=032/llhj032.db&recNum=263&itemLink=D?hlaw:24:./temp/~ammem_6Q05::%230320264&linkText=1 (using grand jury opinion to show “necessity for the erection of a new jail and a lunatic asylum in this city”).
- 79 S. JOURNAL, 33rd Cong., 1st Sess. 147 (1854), http://memory.loc.gov/cgi-bin/ampage?collId=llsj&fileName=045/llsj045.db&recNum=146&itemLink=D%3Fhlaw%3A49%3A.%2Ftemp%2F~ammem_PUhs%3A%3A%230450148&linkText=1 (customhouse, post office, and courthouse); S. JOURNAL, 24th Cong., 1st Sess. 171 (1836), http://memory.loc.gov/cgi-bin/ampage?collId=llsj&fileName=025/llsj025.db&recNum=170&itemLink=D?hlaw:32:./temp/~ammem_6Q05::%230250171&linkText=1 (courthouse); S. JOURNAL, 36th Cong., 1st Sess. 236 (1859), http://memory.loc.gov/cgi-bin/ampage?collId=llsj&fileName=051/llsj051.db&recNum=17&itemLink=D?hlaw:51:./temp/~ammem_PUhs::%230510019&linkText=1 (courthouse); S. JOURNAL, 24th Cong., 1st Sess. 236 (1836), http://memory.loc.gov/cgi-bin/ampage?collId=llsj&fileName=025/llsj025.db&recNum=235&itemLink=D?hlaw:46:./temp/~ammem_YAq8::%230250237&linkText=1 (courthouse); S. JOURNAL, 33rd Cong., 1st Sess. 393 (1854), http://memory.loc.gov/cgi-bin/ampage?collId=llsj&fileName=045/llsj045.db&recNum=392&itemLink=D?hlaw:59:./temp/~ammem_PUhs::%230450394&linkText=1 (town hall / courthouse).
- 80 Grand juries throughout America met in courthouses. LESLIE BERGER & AUSTIN SARAT, *THE GRAND JURY* 58–59, 79 (2000); See Richard D. Younger, *The People's Panel: The Grand Jury in the United States*, 46 J. CRIM. L. & CRIMINOLOGY 73 (1963).

their thoughts to Congress. When the Georgia legislature failed to support Congress's effort to lay a 5 percent tariff, a Chatham County grand jury chastised the state legislators for subverting an effort to shore up public credit and reduce the debt.⁸¹ A presentment of the grand jury of St. John's and Leigh Read Counties in the Florida territory expounded "the necessity of extending a sea-wall at St. Augustine."⁸² The Franklin County, Pennsylvania, grand jury prayed that the importation of spirits may be banned.⁸³ And the Babarras County, North Carolina, grand jury offered its thoughts on an embargo and asked permission to export their sur-plus produce if it could be done without undermining national independence.⁸⁴

Beyond the legislative branch, grand juries would also correspond with the president. After George Washington issued a proclamation of neutrality as to the war between Britain and France, a grand jury from Sussex County, Delaware, wrote him to praise his "wise and patriotic exertions for the public Welfare" and to pledge its support to him "at all times against the machinations of enemies of good Government."⁸⁵ Washington later told Delaware's governor that he felt "peculiar pleasure" from the "constant and steady support of the late Grand Jury of Sussex County."⁸⁶ Relatedly, the grand jury of Prince George's County, Maryland praised John Adams for his efforts to avoid a full-scale war with France during his administration.⁸⁷

81 Letter from William Samuel Johnson to Roger Sherman (Apr. 20, 1785), in 22 *LETTERS OF DELEGATES TO CONGRESS, 1774-1789*, 347-50 (Paul H. Smith ed., 1995).

82 *S. JOURNAL*, 27th Cong., 2d Sess. 342 (1842), http://memory.loc.gov/cgi-bin/ampage?collId=llsj&fileName=033/llsj033.db&recNum=341&itemLink=D?hlaw:18:/temp/~ammem_YAq8::%230330343&linkText=1.

83 *S. JOURNAL*, 19th Cong., 1st Sess. 121 (1826), http://memory.loc.gov/cgi-bin/ampage?collId=llsj&fileName=015/llsj015.db&recNum=120&itemLink=D?hlaw:27:/temp/~ammem_6Q05::%230150121&linkText=1.

84 *S. JOURNAL*, 10th Cong., 2d Sess. 313-14 (1808), http://memory.loc.gov/cgi-bin/ampage?collId=llsj&fileName=004/llsj004.db&recNum=303&itemLink=D?hlaw:29:/temp/~ammem_YAq8::%230040305&linkText=1.

85 Letter from the Grand Jurors of Sussex County, Delaware to George Washington, in 13 *THE PAPERS OF GEORGE WASHINGTON* 379-80 (Christine Sternberg Patrick ed., 2007), <https://founders.archives.gov/documents/Washington/05-13-02-0251>.

86 *Id.*

87 *H.R. JOURNAL*, 5th Cong., 2d Sess. 292 (1798), <http://memory>.

Learned treatises continued to exalt grand juries for years to come. James Kent praised the “genius and masculine vigour” of juries.⁸⁸ Joseph Story gushed that grand juries “perform most important public functions; and are a great security to the citizens against vindictive prosecutions, either by the government, or by political partisans, or by private enemies.”⁸⁹ Thomas Cooley wrote that trial procedures—including grand juries—were “[p]erhaps the most important of the protections to personal liberty.”⁹⁰

The reverence for grand juries during this time was also exemplified by the fact that Congress passed up opportunities to weaken grand juries. Representative James Bowlin introduced a far-reaching amendment that, among other things, would prevent grand juries from being summoned without a written application by the district attorney of that district.⁹¹ It was voted down.⁹² And when Congress passed a law for piracy on the high seas, it specifically stated they would be “tried and judged by grand and petit juries,” rather than trying to use admiralty law as an excuse to deny defendants these protections.⁹³

D. Storm Clouds Form Over Grand Juries

America’s love affair with grand juries would not last. Over time, anti-grand jury forces marshalled. Critics had a few choice words for grand juries. The venerable institution was decried as “Grand humbugs,”⁹⁴ “perfectly useless,”⁹⁵ and as a “cumbersome,

loc.gov/cgi-bin/ampage?collId=llhj&fileName=003/llhj003.db&recNum=289&itemLink=D?hlaw:40:./temp/~ammem_YAq8::%230030291&linkText=1.

88 JAMES KENT, COMMENTARIES ON AMERICAN LAW 352 (1826).

89 STORY, *supra* note 64, at 658.

90 THOMAS COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 308 (1871).

91 H.R. JOURNAL, 30th Cong., 1st Sess. 498–99 (1848), http://memory.loc.gov/cgi-bin/ampage?collId=llhj&fileName=043/llhj043.db&recNum=497&itemLink=D?hlaw:70:./temp/~ammem_PUHS::%230430498&linkText=1.

92 *Id.* at 504–05.

93 19 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 355 (1781).

94 *Grand and Petit Jury's*, OSHKOSH DEMOCRAT, Aug. 16, 1850, at 1, <https://www.newspapers.com/image/38648996/>.

95 *In Assembly*, COM. ADVERTISER & J., Jan. 21, 1842, at 3, <https://www.newspapers.com/image/264140427/>.

corrupt blotch upon the body politic.”⁹⁶ In their operation, they were “secret, sneaking, cowardly, inquisitorial, mean, vicious, thoroughly bad, in spirit and results.”⁹⁷ Its very existence was “pestilential and blighting”⁹⁸ and “the one dark spot upon our glorious judicial system.”⁹⁹

Sometimes lawyers were the driving force behind the grand jury abolition movement. “It has long been a favorable idea with lawyers to devise some means to get rid of a Grand Jury,” speculated *The Prompter*, since that would mean more cases would go to trial, and thus more legal fees for the lawyers who argued them.¹⁰⁰ At certain state conventions, lawyers were the ones leading the charge for abolition.¹⁰¹ One British judge, cited in American debates, said “I do not know one single argument in favor of the Grand Jury system.”¹⁰²

Sometimes lawyers were not advocating for abolition. To illustrate, at Oregon’s constitutional convention, one delegate claimed that lawyers and judges were the only ones defending grand juries.¹⁰³ The Minnesota Bar Association unanimously rejected a proposal to abolish the grand jury in 1884.¹⁰⁴ A survey of St. Louis lawyers in

96 William Welch, Letter to the Editor, *Letter from William Welch, Esq.—A Series of Reforms Suggested*, WIS. ST. J., Sept. 5, 1859, at 2, <https://www.newspapers.com/image/396578350/>.

97 ATCHISON DAILY, Feb. 2, 1883, at 2, <https://www.newspapers.com/image/109356156/>.

98 1850 INDIANA CONVENTION PROCEEDINGS, *supra* note 16, at 148.

99 *Proceedings in the Constitutional Convention*, CHI. TRIB., Apr. 23, 1870, at 1, <https://www.newspapers.com/image/349539766/>.

100 *The Prompter*, *Our Constitution*, NEB. ST. J., Jan. 17, 1879, at 1, <https://www.newspapers.com/image/309671868/>.

101 For example, at Pennsylvania’s 1872 constitution convention, there were several attempts to get rid of the grand jury. 1 DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA 95, 145, 202 (Harrisburg, Benjamin Singerly 1873). The delegates leading the charge were lawyers. ABRAM DOUGLAS HARLAN, PENNSYLVANIA CONSTITUTIONAL CONVENTION 1872 AND 1873: ITS MEMBERS AND OFFICERS AND THE RESULT OF THEIR LABORS 27, 79, 84 (Philadelphia, Inquirer Book & Job Print 1873). A group of 48 lawyers also petitioned that constitutional convention to abolish the grand jury. *Abolition of the Grand Jury*, DAILY NEWS, Apr. 24, 1873, at 1, <https://www.newspapers.com/image/514037442/>.

102 *Grand and Petit Jury’s*, *supra* note 94.

103 *The Constitutional Convention*, WKLY. OR. STATESMAN, Sept. 1, 1857, at 2, <https://www.newspapers.com/image/114362449/>.

104 NEW ULM REV., Oct. 22, 1884, at 2, <https://www.newspapers.com/image/201673166/>.

1879 found them evenly divided on whether to abolish.¹⁰⁵ Ultimately, the lawyers on the Supreme Court who wrote the *California v. Hurtado* decision did the most damage, casting hundreds of years of the American grand jury tradition as a mere ancillary right. The effect of this was quickly evident: by the time of World War I, legal circles were generally opposed.¹⁰⁶

John Decker has noted that the anti-grand jury movement gained steam after *Hurtado*.¹⁰⁷ But it may also be said that the anti-grand jury movement set the stage for *Hurtado*. Indeed, 15 years before the case was decided, the *Cadiz Sentinel* wrote that there were burgeoning grand jury abolition movements in New Hampshire, Massachusetts, Connecticut, New York, Pennsylvania, Virginia, Louisiana, Michigan, and Vermont—all of which had “every prospect of success.”¹⁰⁸ Other papers wrote about how the grand jury abolition movement had the wind at its back.¹⁰⁹ By 1871, Cooley observed that various states had substituted indictment with prosecutions by information.¹¹⁰

In the ten years prior to *Hurtado*, there were at least 35 proposals to abolish or weaken grand juries from legislatures, constitutional conventions, or governors in 18 states and Congress.¹¹¹ These

105 *Abolish the Grand Jury*, ST. LOUIS POST-DISPATCH, Feb. 20, 1879, at 3, <https://www.newspapers.com/image/137650672/>.

106 Costello, *supra* note 35.

107 John F. Decker, *Legislating New Federalism: The Call for Grand Jury Reform in the States*, 58 OKLA. L. REV. 341, 347 (2005).

108 CADIZ SENTINEL, Dec. 7, 1859, at 2, <https://www.newspapers.com/image/339530982/>.

109 *Abolish the Grand Jury*, *supra* note 105; *General News Condensations*, MORNING OREGONIAN, Jan. 25, 1872, at 1, <https://www.newspapers.com/image/9646006/> (citing “a growing sentiment throughout the country in favor of this change” to abolish the grand jury); *The Jury System*, PUBLIC LEDGER, Aug. 10, 1872, at 2, <https://www.newspapers.com/image/145328251/> (observing a grand jury abolition movement had sprung up in Pennsylvania).

110 COOLEY, *supra* note 90, at 309.

111 43 CONG. REC. 4,440 (1874); *The Ohio Legislature*, WHEELING DAILY REG., Jan. 28, 1876, at 1, <https://www.newspapers.com/image/466390947/>; *Opposed to Grand Juries*, DAILY NEWS, Mar. 28, 1877, at 1, <https://www.newspapers.com/image/515191254/>; *Lyceum Last Evening*, RENO GAZETTE-J., Feb. 6, 1878, at 3, <https://www.newspapers.com/image/147510172/>; *The Constitutional Convention*, SEATTLE POST-INTELLIGENCER, July 9, 1878, at 2, <https://www.newspapers.com/image/333586672/>; *Convention Notes*, PETALUMA WKLY. ARGUS, Oct. 18, 1878, at 2, <https://www.newspapers.com/image/283379025/>; ST. PAUL GLOBE, Jan. 12, 1879, at 4, <https://www.newspapers.com/image/85288975/>; *The Grand Jury System*, STAR TRIB.,

proposals came from California to Vermont, and, in many states, the effort to abolish grand juries became something of a biannual spectacle. In Iowa and Indiana, there were five separate attempts to do in grand juries during this period. Not every proposal was successful, but the direction of the public mood was clear. When Iowa put its

Jan. 23, 1879, at 1, <https://www.newspapers.com/image/178828564/>; *News in Brief*, INDEP.-REC., June 19, 1875, at 1, <https://www.newspapers.com/image/524704030/>; *Constitutional Amendment*, ST. JOSEPH WKLY. GAZETTE, Jan. 30, 1879, at 2, <https://www.newspapers.com/image/245017753/?>; *Affairs of State*, CHI. TRIB., Mar. 11, 1875, at 2, <https://www.newspapers.com/image/349271648/>; *The Legislature*, STREATOR FREE PRESS, Feb. 10, 1877, at 3, <https://www.newspapers.com/image/542803636/>; *Vacant Chairs*, INTER OCEAN, Feb. 12, 1879, at 3, <https://www.newspapers.com/image/32561755/>; *The State Capital*, INTER OCEAN, Mar. 14, 1879, at 2, <https://www.newspapers.com/image/35064011/>; *Illinois Legislature*, OTTAWA FREE TRADER, May 3, 1879, at 4, <https://www.newspapers.com/image/215010319/>; *Grand Juries*, ALTON EVENING TELEGRAPH, Jan. 25, 1881, at 3, <https://www.newspapers.com/image/16266402/>; *Brevities*, ROCK ISLAND ARGUS, Feb. 20, 1883, at 4, <https://www.newspapers.com/image/413377956/>; *Indiana in the Senate*, CHI. TRIB., Jan. 13, 1875, at 5, <https://www.newspapers.com/image/466286388/>; *REPUBLIC*, Mar. 18, 1879, at 2, <https://www.newspapers.com/image/128050477/>; *Indianapolis*, *REPUBLIC*, Feb. 25, 1881, at 1, <https://www.newspapers.com/image/128062018/>; *Legislative Notes*, INDIANAPOLIS NEWS, Jan. 23, 1885, at 4, <https://www.newspapers.com/image/35041652/>; *Misdemeanors, How the Legislature Revolutionized Criminal Proceedings*, TENNESSEAN, Apr. 19, 1879, at 1, <https://www.newspapers.com/image/118822456/>; *From the State Capital, Des Moines, Feb. 4, '74*, MUSCATINE WKLY. J., Feb. 6, 1874, at 2, <https://www.newspapers.com/image/541994011/>; *General and Personal*, LEAVENWORTH DAILY COM., Jan. 28, 1876, at 1, <https://www.newspapers.com/image/425155260/>; *Capital Punishment in Iowa*, INTER OCEAN, Mar. 2, 1878, at 5, <https://www.newspapers.com/image/32586400/>; *General Local Items*, CAIRO BULL. Jan. 30, 1880, at 4, <https://www.newspapers.com/image/145388610/>; *OMAHA DAILY BEE*, Nov. 20, 1884, at 5, <https://www.newspapers.com/image/466024803/>; *TIMES-PICAYUNE*, Feb. 17, 1880, at 2, <https://www.newspapers.com/image/27318585/>; *Legislature of Vermont*, DAILY J., Oct. 15, 1880, at 1, <https://www.newspapers.com/image/401519631/>; *Legislature*, STAR TRIB., Feb. 10, 1874, at 3, <https://www.newspapers.com/image/178703891/>; *The Legislature*, ST. PAUL GLOBE, Feb. 2, 1881, at 2, <https://www.newspapers.com/image/79763295/>; *The Governor's Message*, WKLY. ARIZ. MINER, Jan. 15, 1875, at 2, <https://www.newspapers.com/image/39780648/>; *Arizona: Legislative Proceedings*, RECORD-UNION, Feb. 9, 1881, at 3, <https://www.newspapers.com/image/42180679/>; *Telegraphic: The Twelfth Territorial Legislature*, WKLY. REPUBLICAN, Jan. 26, 1883, at 2, <https://www.newspapers.com/image/168520657/>; *The Grand Jury System*, NEB. ST. J., May 28, 1875, at 2, <https://www.newspapers.com/image/309629739/>; *RED CLOUD CHIEF*, Jan. 19, 1883, at 4, <https://www.newspapers.com/image/73685254/>; *DAILY HERALD*, Sept. 18, 1883, at 2, <https://www.newspapers.com/image/419557488/>.

proposal to the voters, it passed resoundingly by a vote of approximately 73,000 to 30,000.¹¹²

In 1884, the year of *Hurtado*, grand juries were long-maligned institutions. A search of 12,000 newspapers—including half a billion pages of content—from 1700 to 2019 for the phrase “abolish grand jury” reveals over 2,800 returns. In that database, the phrase first crops up in 1842, but does not pick up real steam until the 1870s. From there, the movement ran hot until the 1940s. The abolition movement saw a resurgence in the 1970s, but has largely petered out. Pennsylvania, by far, saw the most activity, followed by Illinois, Iowa, and New York. Every state had at least one documented instance of the phrase in the database except Maine, New Hampshire, Rhode Island, and Idaho.¹¹³

This wave of criticism went hand-in-hand with broader attacks on citizen participation in the courts as papers questioned the intelligence of juries, highlighted cases of gross injustice, spread tales of drunk or corrupt jurors, and opined that jury power was out of control.¹¹⁴ The *New York Herald* criticized the perceived sympathy by weak-minded juries for criminal defendants.¹¹⁵ Others started proposing reforms. The *Democratic Review* argued that jurors should be made up entirely of lawyers.¹¹⁶ The *New York Times* called for majority vote of juries, rather than unanimous verdicts.¹¹⁷ These stories prompted calls for juries to be reined in or eliminated altogether.¹¹⁸

It was more than just newspaper editors venting against

112 PERRY PILOT, Dec. 17, 1884, at 5, <https://www.newspapers.com/image/36920734/>.

113 Newspapers.com (follow “Search” hyperlink; then “Show Advanced”; enter “United States of America” in “Place” field; enter “1700-2019” in “Date” field; search for phrase “abolish grand juries”) (last search conducted Apr. 28, 2019). Professor Suja Thomas performed her own analysis of historical New York Times articles going back to 1851 and found criticism of the grand jury as well. Suja A. Thomas, *The Missing Branch of the Jury*, 77 OHIO ST. L.J. 1261, 1312-13 (2016).

114 STACY PRATT McDERMOTT, *THE JURY IN LINCOLN’S AMERICA* 15 (2012).

115 WALDREP, *supra* note 46, at 28.

116 Pratt McDermott, *supra* note 114, at 16.

117 *Id.* at 17.

118 *Id.* at 15. There were plenty of other attacks against trial juries—and the citizens who sat upon them—by the legal elite. In 1880, the Chief Editor of the American Law Review said juries were like an “untrained crew sailing a ship.” *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 191 (1964). In 1886, a different writer in the same journal said the jury was an “artificial feature” and “a foreign body” in the system. *Id.* at 190-91.

grand juries. State constitutions, examined in aggregate, show an unmistakable movement away from grand juries. As noted above, early state constitutions emphatically supported grand jury rights. But it was not to last. In the 1840s—the same time when calls for grand jury abolition started cropping up in newspapers across the country—there was a shift. Exceptions to grand juries were carved out more frequently. Indictments were not required “in cases cognizable by Justices of the peace,” or other situations involving minor crimes, a limited but noteworthy exception.¹¹⁹ The exception first appeared in Maine’s 1820 constitution, but took off in the 1840s and continued for the rest of the century.

Exceptions for minor crimes were the least of grand juries’ worries. States were also beginning to place prosecution by information on equal footing with indictment.¹²⁰ Once again, the first instances of allowing information occurred near the founding of the country, but did not become widespread until the middle of the 19th century.

Not only were old states redacting grand juries from their constitutions, new states were not even bothering to try them. After *Hurtado*, state after state entered the Union without grand juries.¹²¹ Of the twelve states that have joined since *Hurtado*, ten allowed prosecution by information in their constitutions, with Wyoming

119 ARK. CONST. of 1874, art. I, § 8; ARK. CONST. of 1868, art. I, § 9; FLA. CONST. of 1885, art. V, § 28; IDAHO CONST. of 1889 art. I, § 8; IOWA CONST. of 1857, art. I, § 11; IOWA CONST. of 1844, art. II, § 10; ME. CONST. of 1820, art. I, § 7; MINN. CONST. of 1857, art. I, § 7; N.J. CONST. of 1844, art. I, § 9; R.I. CONST. of 1843, art. I, § 7; S.C. CONST. of 1868, art. I, § 19; S.D. CONST. of 1889, art. I, § 10; W. VA. CONST. of 1872, art. III, § 4; W. VA. CONST. of 1863, art. II, § 1; WIS. CONST. of 1848, art. I, § 8.

120 See CAL. CONST. of 1879, art. I, § 8; COLO. CONST. art. II, § 8; CONN. CONST. art. I, § 9; LA. CONST. of 1898, art. IX.; LA. CONST. of 1879, art. V; LA. CONST. of 1868, art. I, § 6; LA. CONST. of 1864, tit. VII, art. CV; LA. CONST. of 1861, tit. VI, art. CIII; LA. CONST. of 1852, art. CIII; LA. CONST. of 1845, art. CVII; LA. CONST. of 1812, art. VI, § 18; NEB. CONST. of 1875, art. I, § 10; NEV. CONST. art. I, § 8 (amended 1912 and 1996); PA. CONST. of 1874, art. I, § 9; PA. CONST. of 1838, art. IX, § 9; PA. CONST. of 1790, art. IX, § 9; TEX. CONST. art. V, § 17 (amended 1985 and 2001); TEX. CONST. of 1869, art. I, § 8; TEX. CONST. of 1866, art. I, § 8; TEX. CONST. of 1845, art. I, § 8; W. VA. CONST. of 1872, art. VIII, § 10.

121 See ARIZ. CONST. of 1910, art. II, § 30; HAW. CONST. of 1959, art. I, § 10; IDAHO CONST. of 1889, art. I, § 8; MONT. CONST. of 1889, art. III, § 8; N.D. CONST. of 1889, art. I, § 8; N.M. CONST. of 1911, art. XX, § 20; OKLA. CONST. of 1907, art. I, § 17; S.D. CONST. of 1889, art. I, § 10; UTAH CONST. of 1895, art. I, § 13; WASH. CONST. of 1889, art. I, § 25.

and Alaska being the outliers.¹²² Even then, Wyoming authorized its legislature to abolish the grand jury¹²³—a decision many other states made¹²⁴—and Alaska allowed defendants to waive indictments.¹²⁵ By authorizing waiver, the state suggests the benefit of the grand jury is solely to protect the accused, rather than a check on the government that benefits the public at large.

Grand jury abolition became a *cause célèbre* among constitutional conventions. The drafters were plainly influencing each other. As more and more states ended grand juries without the sky falling in, constitutional conventions could credibly ask whether maintaining inquests was truly necessary.¹²⁶ By the end of it, even jury enthusiasts were willing to jettison grand juries so long as trial juries were preserved.¹²⁷

Anti-grand jury hysteria continued well into the 20th century, but the war was largely over by the end of the 19th. Only 26 states held constitutional conventions that produced new or revised constitutions in the 20th century.¹²⁸ Compare that to the 94 new or revised constitutions that were adopted in the 19th century,¹²⁹

122 WYO. CONST. of 1899, art. I, § 13; ALASKA CONST. of 1956, art. I, § 8 (allowing for prosecution by information only in case where defendant waived right to grand jury).

123 WYO. CONST. of 1899, art. I, § 9.

124 COLO. CONST. of 1876, art. II, § 23; IND. CONST. 1851, art. VII, § 17; NEB. CONST. of 1875, art. I, § 10; N.D. CONST. of 1889, art. I, § 8; ORE. CONST. of 1857, art. VII, § 18; S.D. CONST. of 1889, art. VI, § 10.

125 ALASKA CONST. of 1956, art. I, § 8.

126 KENTUCKY 1890 CONVENTION PROCEEDINGS, *supra* note 15, at 438; 1 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION ASSEMBLED AT SALT LAKE CITY ON THE FOURTH DAY OF MARCH 1895, TO ADOPT A CONSTITUTION FOR THE STATE OF UTAH 313 (1898) [hereinafter UTAH 1895 CONVENTION PROCEEDINGS] (statement of Mr. Wells); IDAHO 1889 CONVENTION PROCEEDINGS, *supra* note 15, at 262–63 (statement of Mr. Standrod); 1 THE DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF IOWA 124 (1857) (statement of Mr. Palmer); *The Grand Jury*, CHI. TRIB., Apr. 27, 1870, at 2, <https://www.newspapers.com/image/349540085>.

127 UTAH 1895 CONVENTION PROCEEDINGS, *supra* note 126, at 260–61 (statement of Mr. Varian).

128 The states are Pennsylvania, New Jersey, Georgia (three), Virginia (two), North Carolina, Rhode Island, Ohio, Louisiana (three), Illinois, Alabama, Missouri, Michigan (two), Florida, Montana, Oklahoma, New Mexico, Arizona, Alaska, and Hawaii. *See, e.g.*, N.J. 1947 CONVENTION, *supra* note 36; OHIO CONSTITUTIONAL CONVENTION OF 1912 (1912).

129 G. Alan Tarr, *The Montana Constitution: A National Perspective*, 64 MONT. L. REV. 1, 8 (2003).

plus 26 others that were adopted or revised in the 18th century.¹³⁰ That means that five-sixths of the states' constitutional drafting was already completed as the sun rose on the 20th century—preciously little room for pro-grand jury forces to settle the score even if they had been in the majority.

Today, about half of the states do not require a grand jury for criminal prosecutions. Among the states that still use grand juries, 15 require them only for felony indictments and six for capital cases alone—only four states require them for all indictments. Pennsylvania has grand juries, but they do not indict.¹³¹

Because the inflection point for the grand jury was the latter half of the 19th century, that is where this Article will focus. Part III considers the main arguments offered by grand jury opponents and the changing state of America that made grand juries lose their luster.

III. REASONS FOR THE DECLINE OF GRAND JURIES

This Part identifies five main reasons fueling the anti-grand jury movement. Some are arguments offered up by grand jury abolitionists; others are societal changes that explain the anti-grand jury fervor. They are (1) fears that the secrecy of grand jury proceedings allowed witnesses to anonymously lodge false accusations and destroy their neighbors' reputations; (2) concerns that grand juries were at once too hard on the innocent and too easy on the guilty; (3) allegations that grand juries were too expensive and inefficient when compared to judges; (4) government professionalization and laws becoming more complex, meaning that it is easier for lawyers to replace grand juries and harder for grand jurors to understand the law without assistance from lawyers; and (5) urbanization, meaning we have lost small, intimate communities that grand juries were designed to thrive in.

130 Delaware (two), Pennsylvania (two), New Jersey, Georgia (four), Massachusetts, Maryland, South Carolina (three), New Hampshire (two), Virginia, New York (two), North Carolina, Vermont (three), Kentucky (two), and Tennessee. See James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 811 (1992).

131 ARNOLD FLEISCHMANN & CAROL PIERANNUNZI, *GEORGIA'S CONSTITUTION AND GOVERNMENT* 32 (6th ed. 2006), <https://testing.kennesaw.edu/students/Georgia%20Constitution-US%20And%20GA%20Constitution.pdf>.

A. Reputation Concerns: An Anonymous Accusation Could Destroy a Man's Honor

The Bible teaches, "Thou shalt not bear false witness against thy neighbor."¹³² But for slow learners, western civilian has long prohibited attacks on reputation by law. The Lex Salica, a compilation of Frankish law in the Middle Ages, declared that calling a man "wolf" or "hare" entailed a fine of three shillings.¹³³ Falsely accusing a woman of being unchaste cost 45.¹³⁴ Early Icelandic law allowed a man accused of cowardice to slay his accuser.¹³⁵ Anglo-Saxon king Alfred the Great had tongues cut out to punish slander.¹³⁶ And in early British courts, money damages paid for dishonor were far higher than for physical injuries.¹³⁷ One British court ruled that merely transcribing or dictating a libelous statement ran afoul of the law, even if such a statement was never published.¹³⁸ Overall, "[t]he laws of England, provide[d] as effectually, as any human laws [could], for the protection of the subject in his reputation."¹³⁹

These ideas held sway in America too. State constitutional framers took these same principles to heart. Many early state charters included special rules for libel cases. They often constitutionally guaranteed that the truth could be offered as evidence and that the jury had control over fact *and* law.¹⁴⁰ Many states also outlawed calling someone a coward or insinuating that he refused to fight in a duel.¹⁴¹

In short, reputation was a thing of immense value to these proud people. It was so valuable, in fact, that attacks on a person's character could not be defended on First Amendment grounds. Indeed, freedom of speech was paramount, but false attacks on a person's character were an "abuse of that liberty" and punishable by

132 *Exodus* 20:16.

133 Van Vechten Veeder, *The History and Theory of the Law of Defamation* (pt. 1), 3 COLUM. L. REV. 546, 548 (1903).

134 *Id.*

135 *Id.* at 548 n.3.

136 *Id.* at 549.

137 *Id.*

138 *Rex v. Burdett* (1820) 106 Eng. Rep. 873 (K.B.) (quoting *King v. Payne*, 5 Mod. 167).

139 THE LETTERS OF JUNIUS LXXII (Paris, Malepeyre 1822), <https://babel.hathitrust.org/cgi/pt?id=njp.32101073822700&view=1up&seq=82>.

140 *E.g.*, ALA. CONST. of 1867, art. I, § 14; CONN. CONST. of 1818, art. I, § 7; GA. CONST. of 1868, art. I, § 19; OHIO CONST. of 1802, art. VIII, § 6.

141 Van Vechten Veeder, *The History and Theory of the Law of Defamation* (pt. 2), 4 COLUM. L. REV. 33, 43 n.2, 46 n.2 (1904).

law.¹⁴² The First Amendment used unqualified language, but the notion it empowered citizens to destroy their neighbor's reputation was "too wild to be indulged by any rational man."¹⁴³ For these reasons, libel used to be a criminal offense.¹⁴⁴

It is therefore little wonder why Americans were concerned about grand juries. The way they spoke about the dangers of the grand jury borders on terror. Core tenants of the grand jury informed these fears. Secrecy has always been part and parcel of the grand jury. At the 17th century grand jury proceedings for the Earl of Shaftesbury, the foreman got into a lengthy argument with the Chief Lord Justice of the court about the prerogative of the grand jury to examine witnesses in private, rather than in public.¹⁴⁵

Discretion was another essential ingredient. Sir Matthew Hale wrote that grand jurors could "as they see Cause . . . give the more or less Credit to [witness] Testimony."¹⁴⁶ If the grand jury had reason to doubt or credit a witness, they could rule against what the witness claimed or, alternatively, rule in favor of a single witness who gave a minority view.¹⁴⁷

These features served valid purposes. Through secrecy, the thinking goes, witnesses will feel at liberty to speak candidly, potential criminals do not know they are being investigated, grand jurors can deliberate in peace, and derogatory information will not come out unless there is an indictment. Through discretion, the grand jury can indict worthy cases and discard the others.

But taken together, it was a dangerous combination. Although the system may have been intended to prevent the escape of false rumors, what was to stop someone from wrongfully besmirching his neighbor's fine character and the grand jury from indicting on that evidence? Secrecy could embolden men to make frivolous accusations they would not dare make in public.¹⁴⁸ And discretion allowed "these arbitrary tribunals . . . to carry out the aims of mal-

142 *Press, Inc. v. Verran*, 569 S.W.2d 435, 442 (Tenn. 1978).

143 STORY, *supra* note 64, § 1874.

144 *Park v. State*, 4 Ga. 329, 330 (1848); *Reed v. State*, 11 Mo. 379, 380 (1848); *Thomas v. Thomas*, 20 N.J. Eq. 97, 98 (1869); *Moulton v. Beecher*, 52 How. Pr. 182, 183 (N.Y. 1876).

145 8 How. St. Tr. 759, 771–74 (1681).

146 SIR MATTHEW HALE, *HISTORY OF THE COMMON LAW OF ENGLAND* 255–56 (London, J. Walthoe & J. Walthoe, Jr., 1716).

147 *Id.* at 256.

148 *The Grand Jury System*, *supra* note 126, at 2.

ice, revenge, and dishonesty.”¹⁴⁹ In the modern era, there have been allegations that prosecutors leaked damning information about the accused, too.¹⁵⁰ Even if the charge fell apart at trial, the stink of the accusation would remain.

Worse still, the victim of malicious accusations would have few options in response. A person’s reputation could be ruined before he even knew he was under suspicion.¹⁵¹ And if a victim learned who lied about them, the law stood to thwart their recovery. Witnesses before a grand jury were generally protected from libel prosecutions.¹⁵² This protection extends to all relevant statements made in the course of a judicial proceeding, and applies whether they are made “maliciously and corruptly.”¹⁵³ Similarly, an ill-considered indictment by a grand jury was absolutely privileged.¹⁵⁴ Much like modern protections against liability for prosecutorial¹⁵⁵ or judicial¹⁵⁶ misconduct, it was deemed more important for grand jurors to operate freely than to punish them for potential misdeeds.

Thus, it is unsurprising that when word got out that grand juries were convening, supposedly, “the hurricane shutters [went] on the windows and some of the citizens [made] a speedy dive into the tornado cellar.”¹⁵⁷ In the eyes of critics, grand juries allowed “cowardly wretches an opportunity to vent their spite upon individuals.”¹⁵⁸ And the grand jury room was viewed as a “sort of sewer through which runs hate, malice, envy, villainy, cowardice and injustice.”¹⁵⁹ Through grand jury investigations, “[c]itizens are harassed and annoyed; private pique is gratified, and taxpayers may look on

149 *Shall We Abolish the Grand Jury?*, INTER OCEAN, Jan. 20, 1883, at 12, <https://www.newspapers.com/image/34191789/>.

150 Costello, *supra* note 35.

151 *The Grand Jury System*, READING TIMES, Sept. 16, 1868, at 2, <https://www.newspapers.com/image/45427012/>.

152 *Hollis v. Meux*, 11 P. 248, 249 (Cal. 1886); *Kidder v. Parkhurst*, 85 Mass. (3 Allen) 393, 396 (1862); *Commonwealth v. Blanding*, 20 Mass. (3 Pick.) 304, 320 (1825).

153 *Hayslip v. Wellford*, 263 S.W.2d 136, 137 (Tenn. 1953) (citing authorities).

154 *Nelson v. Robe*, 6 Blackf. 204, 205 n.1 (Ind. 1842); *Howard v. Thompson*, 21 Wend. 319, 326, (N.Y. Sup. Ct. 1839); *Hayslip*, 263 S.W.3d at 139.

155 *See generally Imbler v. Pachtman*, 424 U.S. 409 (1976).

156 *See Stump v. Sparkman*, 435 U.S. 349 (1978); *Pierson v. Ray*, 386 U.S. 547 (1967).

157 N.J. 1947 CONVENTION, *supra* note 36, at 618 (statement of Mr. Schlosser).

158 *Grand Jury Business*, *supra* note 10.

159 *Grand Jury System*, SEDALIA WKLY. BAZOO, Feb. 20, 1883, at 4, <https://www.newspapers.com/image/83461859/>.

and see thousands of dollars of county revenue thrown away.”¹⁶⁰

To give one example from the Illinois constitutional convention, Delegate Turner, a lawyer, recounted a tale a client had told him. It grew from a private feud between the client and a neighbor. The neighbor became a grand juror and gleefully explained to Mr. Turner that he planned to indict the client just to see him suffer. An hour later, the client—“a man of respectability, a man of family: a man with a wife and children”—came into the lawyer’s office shaking and exclaimed, “My God, Turner, I am indicted.” The poor man was later acquitted for the crime he did not commit, but the damage was done.¹⁶¹

In the view of critics, the process was insufficient in protecting one’s sacred reputation. According to them, witnesses did little else than lie before grand juries. “A man who knows he cannot make a case stand in open court, will bring it before a grand jury, so as to create suspicion against a man and blacken his character,” declared one delegate at Nebraska’s constitutional convention.¹⁶² “How often is [the grand jury] used as a means of venting spite—as in a case of charged embezzlement, to get money from the accused” asked a second.¹⁶³ “There is scarcely a gentleman on this floor” pronounced an Illinois constitutional drafter, “who cannot point to some victim of this secret inquisition in his own county.”¹⁶⁴

The danger of the grand jury was amplified by how respected it was, since many people, faults withstanding, believed it was a credible source. When the grand jury formally accused someone of a crime, “he is at once considered guilty by the community, and regarded as a criminal before he has had the benefit of a trial.”¹⁶⁵ One prosecutor, claiming to speak for all of them, said that he viewed an indictment as conclusive evidence of a person’s guilt.¹⁶⁶

Even defenders of the grand jury admitted that many people would make false accusations under the veil of secrecy the institution provided—though they argued that jurors would be able to

160 *The Grand Jury Humbug*, S.F. CHRON., Nov. 15, 1871, at 2, <https://www.newspapers.com/image/27623800/>.

161 *The Grand Jury*, *supra* note 126.

162 *The Grand Jury System*, NEB. ST. J., *supra* note 111.

163 *Id.*

164 1850 INDIANA CONVENTION PROCEEDINGS, *supra* note 16, at 148.

165 *The Grand Jury System*, EVANSVILLE DAILY J., Mar. 7, 1850, at 2, <https://www.newspapers.com/image/321423349/>.

166 KENTUCKY 1890 CONVENTION PROCEEDINGS, *supra* note 15, at 1861 (statement of Mr. Bullitt).

ferret out malicious charges. The *Prompter* wrote that grand jurors “quietly passed over” many of the “multitude of malicious charges which are made to them to get revenge on some person[.]”¹⁶⁷ One source claimed that two-thirds of accusations were bupkis.¹⁶⁸ If true, that would mean an alarming number of people were abusing the grand jury process.

B. Criminal Due Process Concerns: Too Hard on the Innocent, Too Easy on the Guilty

A frequent knock against grand juries was that they persecuted the innocent and denied basic due process rights to the accused. Critics likened it to the “Star Chamber,”¹⁶⁹ King Henry VIII’s secretive tribunal that acted more as a political cudgel than court of law.¹⁷⁰ The movement against grand juries may well have been the biggest movement *in favor* of criminal defendants in the adolescent country, as many grand jury abolitionists voiced concerns about how defendants were being given short shrift. Perhaps it was an extension of the same strong emphasis for criminal due process rights seen in the constitution and many state counterparts.

If grand juries hurt defendants, as abolition proponents claimed, this was a perversion of the historical role of the institution, for they were long seen as supreme obstacles to wrongful prosecutions. Non-indictments for the First Earl of Shaftesbury and publisher Peter Zenger are powerful examples of grand juries standing up to prosecutors and the Crown.¹⁷¹ They represent how common people with a strong sense of justice could thwart the most powerful empire in the world. Indeed, at one time, the *absence* of grand juries was likened to the Star Chamber.¹⁷² And the *real* Star Chamber was used to prosecute jurors who refused to convict defendants.¹⁷³

But it was not only sensational cases where grand juries acquitted. With few law enforcement officers, prosecutors, or estab-

167 The *Prompter*, *supra* note 100.

168 *Shall We Abolish the Grand Jury?*, *supra* note 149.

169 E.g. 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA 304 (Charleston, Denny & Perry 1868) (statement of Mr. C.C. Bowen); *Proceedings in the Constitutional Convention*, *supra* note 99; *Grand Jury System*, *supra* note 159.

170 *Trial by Jury: “Inherent and Invaluable”*, W. VA. ASS’N FOR JUST., <https://www.wvaj.org/index.cfm?pg=HistoryTrialbyJury> (last visited May 11, 2019).

171 Washburn, *supra* note 49, at 2342–43.

172 Britannicus, *supra* note 51.

173 VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 22–23 (1986).

lished law, grand juries at the time had very little information to go off of, and tended to resolve ties in favor of the defendant. These 18th century grand juries refused to indict so frequently that they earned the nickname “the hope of London thieves.”¹⁷⁴

Grand juries also refused to indict in the New World. Samuel Wharton complained to Ben Franklin a century earlier that a grand jury did not indict despite the fact that “the most plain and positive Proofs was adduced.”¹⁷⁵ Centuries later, grand juries rendered anti-gambling laws in New York “unenforcible.”¹⁷⁶

These sorts of cases meant that attacks kept coming based on the notion that grand juries let guilty men go free. Foes of the institution kept calling it the “thieves’ last chance” and “a loophole for the escape of crime” to justify doing away with it.¹⁷⁷ The *Mattoon Gazette* quipped: “The abolition of the grand jury system will hardly be serious[ly] regretted except by those who are interested in the protection of crime.”¹⁷⁸ The *Buffalo Morning Express* claimed that the stupidity of grand jurors ensured that criminals would get off scot free.¹⁷⁹ Delegate Moore of the 1890 Kentucky constitutional convention bemoaned that it would only take handful of maverick jurors to stymie an indictment.¹⁸⁰ A grand jury would acquit even if an “offense was committed in broad daylight, in one of the most populous streets of your cities; it does not matter how thoroughly he is steeped in crime.”¹⁸¹

Yet even in the mid-19th century, critics pointed out the way that grand juries hurt defendants. They warned that a “man may be held up to the community as guilty of a felony without the least par-

174 *Trial Procedures*, PROCEEDINGS OLD BAILEY, <https://www.oldbaileyonline.org/static/Trial-procedures.jsp#grandjury> (last updated Mar. 2018).

175 Letter from Samuel Wharton to Benjamin Franklin (May 27, 1765), in *THE PAPERS OF BENJAMIN FRANKLIN* 141–46 (Leonard W. Labaree ed., Yale Univ. Press 1967), <https://founders.archives.gov/documents/Franklin/01-12-02-0071>.

176 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 708 (Albany, J.B. Lyon Co. 1938).

177 *Grand Juries*, BROOKLYN DAILY EAGLE, July 19, 1861, at 2, <https://www.newspapers.com/image/50407510/>.

178 MATTOON GAZETTE, Mar. 21, 1879, at 4, <https://www.newspapers.com/image/73429129/>.

179 *The Jury System*, BUFFALO MORNING EXPRESS, Sept. 23, 1872, at 2, <https://www.newspapers.com/image/343955080/>.

180 KENTUCKY 1890 CONVENTION PROCEEDINGS, *supra* note 15, at 567.

181 *Id.*

ticle of evidence to sustain the charge.”¹⁸² A grand jury “prejudges the indicted party’s case”¹⁸³ and lacked due process protections.¹⁸⁴ Preliminary examinations, held before a judge with a defense attorney present, would be much fairer, they claimed.¹⁸⁵

One of the biggest problems in the critics’ eyes was that grand juries were one-sided.¹⁸⁶ Witnesses were examined without a defense attorney or judge present. This was doubly bad for defendants, since before the advent of public defenders it was said that “in criminal cases, judges were counsel for the prisoners.”¹⁸⁷ Summing up, one paper wrote: “There is not now, and there never has been, any right or justice in a system of investigation which hears only one side of a case.”¹⁸⁸

There was good reason to be skeptical of a one-sided case favoring the prosecution. Apart from the fact that *any* system that is tilted in favor of one side is open to abuse, there was even more reason for concern back in the day. District attorneys would be paid more if cases went to trial, and paid less if grand juries threw out cases.¹⁸⁹

Apart from the tough conditions for defendants *before* the grand jury, life was hard for defendants *waiting* to go before the grand jury. The setup in the 19th century forced defendants—who might later be pronounced innocent—to languish in jail. It was common practice for grand juries to only meet a few times a year to hold session. If a defendant was arrested while the grand jury was in session, they might be forced to wait in confinement until the inquest

182 *Grand Jury Business*, *supra* note 10.

183 *The Grand Jury*, *supra* note 126.

184 1850 INDIANA CONVENTION PROCEEDINGS, *supra* note 16, at 148 (statement of Mr. Pettit); *The Grand Jury System—How Its Abolition Works in Michigan*, WIS. ST. J., Apr. 25, 1867, at 2, <https://www.newspapers.com/image/396575792/>.

185 REPORT OF THE PROCEEDINGS AND DEBATES IN THE CONVENTION TO REVISE THE CONSTITUTION OF THE STATE OF MICHIGAN 54–55 (Lansing, R.W. Ingals 1850) (statement of Mr. Sullivan); *Opposed to Grand Juries*, *supra* note 111; *The Abolition of Grand Juries—An Important Bill*, DETROIT FREE PRESS, Jan. 13, 1859, at 1, <https://www.newspapers.com/image/118132466/>; *The Grand Jury System*, *supra* note 165.

186 *The Grand Jury Bill*, BURLINGTON DAILY, Oct. 29, 1859, at 2, <https://www.newspapers.com/image/355410084/>.

187 COOLEY, *supra* note 90, at 331–32 n.2.

188 *Town and County*, HOLT COUNTY SENTINEL, Feb. 14, 1879, at 3, <https://www.newspapers.com/image/78132433/>.

189 43 CONG. REC. 4,440 (1874) (statement of Mr. Hale).

assembled.¹⁹⁰ In Vermont, the grand jury only met once a year.¹⁹¹ Witnesses, too, could be forced to wait.¹⁹² These problems were not exclusive to grand juries—a person prosecuted by information could be “dragged from his home, his friends, his acquaintance[s], and confined in prison, until the next session of the court”¹⁹³—but grand juries were an easy target.

Citizens grew suspicious of grand juries. Sometimes, the concern was that personally corrupt grand jurors would sully the results of investigations.¹⁹⁴ Elsewhere, the threat was that prosecutors had subjugated grand juries. One paper said: “The Grand Jury system is reeking with corruption, and in the hands of venal and debased District Attorneys, has become a machinery of fraud by which the guilty are protected and the innocent persecuted.”¹⁹⁵ Even with good men on the grand jury, “with an ass, or a knave, or both, for an adviser, [the grand jury] may find fifty or even fifty-eight true bills, every one of which may be set aside or quashed.”¹⁹⁶ And still others believed that influential defendants or sheriffs could ply grand jurors into doing what they wanted.¹⁹⁷ The United States Supreme Court eventually admitted that: “The grand jury may not always serve its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor.”¹⁹⁸

This line of attack flipped the historical narrative on its head. There had once been a much greater concern that *judges* would be corrupt. John Adams wrote that judges, “being commonly rich and great, they might learn to despise the common people, and forget the feelings of humanity: and then the subjects liberty and securi-

190 *Court Reforms*, MUSCATINE J., Mar. 5, 1874, at 2 <https://www.newspapers.com/image/542058277/>.

191 *Legislature of Vermont*, *supra* note 111.

192 UTAH 1895 CONVENTION PROCEEDINGS, *supra* note 126, at 278–79 (1898) (statement of Mr. Varian).

193 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 57, at 110 (statement of Mr. Holmes).

194 CHI. TRIB., May 1, 1877, at 4, <https://www.newspapers.com/image/349746528/>; *see* DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA, *supra* note 101, at 215.

195 READING TIMES, Nov. 28, 1871, at 2, <https://www.newspapers.com/image/45343067/>.

196 *The Grand Jury Humbug*, *supra* note 160, at 2.

197 KENTUCKY 1890 CONVENTION PROCEEDINGS, *supra* note 15, at 568 (statement of Mr. Moore).

198 *United States v. Dionisio*, 410 U.S. 1, 17 (1973).

ty would be lost.”¹⁹⁹ Alexander Hamilton in the Federalist Papers claimed that the “strongest argument” in favor of juries was that they offered “security against corruption,” for it would be harder to influence a large group of transient citizens than a single, permanent government official like a judge.²⁰⁰ Grand juries could be counted on to root out corruption when government officials ignored it.²⁰¹

There was at least some evidence that grand juries were indiscriminately indicting. At the Illinois constitutional convention of 1873, Colonel Dement stated there were 4,682 indictments in the state last year, only 682 had been tried, and only 350 resulted in convictions.²⁰² By these numbers, only 7 percent of indictments led to convictions—meaning the other 93 percent sullied good names with little to show for it. Another detractor pointed out that one grand jury returned 123 indictments in a few hours,²⁰³ which probably meant it was cavalier about the presumption of innocence.

There were a few dissenting voices who still maintained that grand juries helped defendants. One such supporter said abolition would lead to favoritism by prosecutors, who “would [prosecute] the weak and fail to prosecute the strong.”²⁰⁴ Another, a delegate at Idaho’s constitutional convention, reported that grand juries declined to indict two-thirds of the time.²⁰⁵

For what it is worth, states that have grand juries allow defendants to waive that right, but they seldom do.²⁰⁶ And when it is

199 Letter from John Adams & The Earl of Clarendon to William Pym (Jan. 27, 1766), in 1 THE ADAMS PAPERS 161–64 (Robert J. Taylor ed., 1977), <https://founders.archives.gov/documents/Adams/06-01-02-0063-0003>.

200 THE FEDERALIST NO. 83 (Alexander Hamilton) (talking specifically about civil juries).

201 WILLIAM M. GOUGE, DEBATES OF THE DELAWARE CONVENTION, FOR REVISING THE CONSTITUTION OF THE STATE, OR ADOPTING A NEW ONE; HELD AT DOVER, NOVEMBER, 1831 40–41 (Wilmington, Samuel Harker 1831) (statement of Mr. Read).

202 *Proceedings in the Constitutional Convention*, *supra* note 99, at 1.

203 *The Grand Jury Humbug*, *supra* note 160.

204 INTELLIGENCER, *supra* note 13.

205 IDAHO 1889 CONVENTION PROCEEDINGS, *supra* note 15, at 267 (statement of Mr. Reid). Another delegate countered that nine-tenths of the true bills were quashed by the court. *Id.* at 268 (statement of Mr. Sweet). If both counts were accurate, that would mean only three percent of cases filed by prosecutors were valid—an alarmingly low number if true.

206 Greg Hurley, *The Modern Grand Jury*, NAT’L CTR. ST. CTS., <https://www.ncsc.org/sitecore/content/microsites/trends/home/Monthly-Trends-Articles/2014/The-Modern-Grand-Jury.aspx> (last visited May 1, 2019).

waived, it is usually as the result of a plea agreement.²⁰⁷ So faced with real-world consequences, defendants and their attorneys conclude they are at least potentially helpful.

To understand the value of grand juries, it is equally revealing to look at who was *denied* their protection. Southern states excluded slaves from the benefits of indictment. Kentucky's constitution provided: "In the prosecution of slaves for felony, no inquest by a grand jury shall be necessary, but the proceedings in such prosecutions shall be regulated by law."²⁰⁸ Arkansas made the intent even clearer, declaring that only free white men and Indians were entitled to grand juries.²⁰⁹ Cognizant of this history, in Florida's post-Civil War constitutional convention, one delegate recommended specifically guaranteeing "no colored person shall be put upon his trial for any crime involving his life, except upon presentment or indictment," though this did not make it into the final document.²¹⁰

By a similar token, Southern states removed the right to grand juries for small crimes such as vagrancy, drunkenness, and disorderly conduct.²¹¹ In theory, this would cut down on the need for a full-scale grand jury for minor cases. But given that "vagrancy" laws were used to subjugate black citizens and punish "them for any breach of Old South etiquette"—such as being "idle, disorderly, or using 'insulting' gestures"²¹²—this was yet another way to deny grand juries to black defendants.

Evidently, these states did not want to risk a grand jury acquitting slaves or freed blacks. If grand juries were seen as meaningless or rubber stamps, it would have made little sense to deny

207 *Id.*

208 KY. CONST. of 1799, art. VII, § 2. *See* MISS. CONST. of 1817, art. VI, pt. 2, § 2.

209 ARK. CONST. of 1861, art. I, § 14.

210 JOURNAL OF PROCEEDINGS OF THE CONVENTION OF FLORIDA: BEGUN AND HELD AT THE CAPITAL OF THE STATE, AT TALLAHASSEE, WEDNESDAY, OCTOBER 25TH, A.D. 1865 (statement of Mr. Wiggins).

211 MISS. CONST. of 1868, art. I, § 31. *See also* JOURNAL OF THE PROCEEDINGS OF THE CONVENTION OF DELEGATES ELECTED BY THE PEOPLE OF TENNESSEE, TO AMEND, REVISE, OR FORM AND MAKE A NEW CONSTITUTION, FOR THE STATE. ASSEMBLED IN THE CITY OF NASHVILLE, JANUARY 10, 1870, at 100–01 (1870) (proposing to get rid of grand juries in the cases of petit larceny, assault, battery, affray, riot, unlawful assembly, vagrancy, and "other misdemeanors of a like character").

212 Jason Phillips, *Reconstruction in Mississippi 1865-1876*, MISS. HIST. NOW (May 2006), <http://www.mshistorynow.mdah.ms.gov/articles/204/reconstruction-in-mississippi-1865-1876>.

black citizens the right to have them. By preserving them for white defendants, it places them on a level with voting and other rights that white Southern society thought too valuable to share.

C. *Too Cumbersome, Expensive, and Inefficient*

Perhaps the most common attack lodged against grand juries was that they were “cumbersome, expensive, and inefficient.”²¹³ This was a biting insult, for expenses were of paramount importance in a stridently tax-adverse society. Every hay penny shaved off the county budget was one less that taxmen had to collect.

To this end, public costs were cut down to the bone in many states. Michigan paid most of its statewide public officials \$1,000 or less a year all the way through the 19th century.²¹⁴ It got so bad that officials in Michigan tried to rig an election to authorize a pay bump (the dastardly plot was foiled by a grand jury).²¹⁵ Grand juries who audited county books in Nevada would decry an expense of \$2.50 it saw as wasteful—in a total budget that ran into the tens of thousands of dollars.²¹⁶

It is fitting that grand juries would be on the receiving end of this parsimonious streak. For years, the go-to criticism of grand juries was that they were a waste of taxpayer money. Throughout the country, newspapers and critics conveyed this criticism, calling grand juries: “expensive,”²¹⁷ “expensive and burdensome,”²¹⁸ “expensive and cumbersome,”²¹⁹ “expensive and worn-out,”²²⁰ “expensive and

213 Decker, *supra* note 107, at 346; *see infra* footnotes 217–26 and accompanying text.

214 *See Michigan’s Great Shame*, THE SUN, Feb. 25, 1894, at 20, <https://www.newspapers.com/image/207039722/>.

215 *See id.*; *see also* *The Indictments*, DETROIT FREE PRESS, Feb. 24, 1894, at 4, <https://www.newspapers.com/image/119515673/>.

216 *See Grand Jury Report of the January Term of the Second Judicial District Court*, RENO GAZETTE-J., Feb. 6, 1878, at 3, <https://www.newspapers.com/image/147502385>.

217 REPORT OF THE PROCEEDINGS AND DEBATES IN THE CONVENTION TO REVISE THE CONSTITUTION OF THE STATE OF MICHIGAN, *supra* note 185, at 89 (statement of Mr. S. Clark).

218 *The Grand Jury*, *supra* note 126, at 2.

219 PROSECUTING ATTORNEYS’ COUNCIL OF GEORGIA, GRAND JURY HANDBOOK 12 (15th ed. 2015), <https://www.hallcounty.org/DocumentCenter/View/2302/Grand-Jury-Handbook-PDF?bidId=>.

220 *Annual Message of Gov. Horace Austin*, STAR TRIB., Jan. 6, 1871, at 2, <https://www.newspapers.com/image/178876143/>.

useless,”²²¹ “useless and expensive,”²²² “cumbrous and fearfully expensive,”²²³ “awkward, cumbersome and expensive,”²²⁴ “cumbrous, expensive, and for the most part, unnecessary;”²²⁵ and an “expensive abomination.”²²⁶

In support of these claims, grand jury abolitionists occasionally provided numbers. An Iowa paper reported that the elimination of grand juries would save between \$50 to \$500.²²⁷ An Indiana constitutional convention delegate claimed grand juries cost at least \$20,000 per year in the state,²²⁸ while another delegate reckoned it was \$100,000.²²⁹ A Louisianan delegate calculated that cutting the size of grand juries would save \$15,000 out of an annual judicial budget of \$330,000 to \$600,000.²³⁰ One delegate in Utah estimated abolishing grand juries would save \$70,000.²³¹ Reformers in Michigan claimed that ending the grand jury saved money, but did not provide specifics.²³² Articles calling for the end of grand juries were printed across the country.²³³

221 *Albany*, N.Y. DAILY HERALD, Jan. 21, 1842, at 2, <https://www.newspapers.com/image/466563072/>.

222 *General Local Items*, *supra* note 111.

223 *Public Prosecutions*, NEB. ST. J., July 7, 1871, at 1, <https://www.newspapers.com/image/313793173/>.

224 Hubert J. Santos, *The Pros and Cons of Amending the Constitution, Question 1: Should We Abolish the Grand Jury? No*, HARTFORD COURANT, Oct. 30, 1982, at 13, <https://www.newspapers.com/image/368797782/>.

225 *The Power of Grand Juries*, BROOKLYN DAILY EAGLE, Dec. 15, 1855, at 2, <https://www.newspapers.com/image/50599972/>.

226 *The Moss-Covered Abomination*, CAIRO BULL., Mar. 9, 1879, at 2, <https://www.newspapers.com/image/221340582/>.

227 *Court Reforms*, *supra* note 190, at 2.

228 1850 INDIANA CONVENTION PROCEEDINGS, *supra* note 16, at 135 (statement of Mr. Anthony).

229 *Id.* at 142 (statement of Mr. Carter).

230 OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF LOUISIANA, HELD IN NEW ORLEANS, TUESDAY, FEBRUARY 8, 1898, at 382 (New Orleans, H.J. Hearsey 1898) [hereinafter LOUISIANA 1898 CONVENTION PROCEEDINGS] (statement of Mr. Kruttschnitt).

231 UTAH 1895 CONVENTION PROCEEDINGS, *supra* note 126, at 286 (statement of Mr. Evans).

232 *The Grand Jury System—How Its Abolition Works in Michigan*, WIS. ST. J., Apr. 25, 1867, at 2, <https://www.newspapers.com/image/396575792/>.

233 *See, e.g., The Grand Jury System—How its Abolition Works in Michigan*, IND. HERALD, July 24, 1867, at 1, <https://www.newspapers.com/image/40073902/?terms=%22abolish%2Bgrand%2Bjury%22>; *The Grand Jury System, How its Abolition Works in Michigan*, HOLT COUNTY SENTINEL, Nov. 8,

In Texas, juries of all stripes were said to contribute to “the vicious criminal system of Texas that is burdening the State and bankrupting the counties” and to which “the pruning knife should be vigorously applied.”²³⁴ And prune the states did. Instead of calling for the end of grand juries outright, many states proposed or implemented smaller ones.²³⁵

Though less commonly argued, some pointed out the expense not only to the taxpayer, but to the grand jurors themselves. Since grand jurors were not well paid for their services, grand juries could be “ruinous upon the people who are compelled to serve on” them.²³⁶ Without modern transportation systems, it was “costly in the loss of time of large numbers of valuable citizens, dragged from their homes to sit for weeks on grand juries.”²³⁷

The cost argument is easy to grasp: a grand jury was made up of as many as 23 people, and they seemingly did the same amount of work as a single judge. But does the argument hold up under scrutiny? Definitive comparisons between grand jurors are hard to come by. Today, federal grand jurors are paid \$50 per day, plus some incidental expenses.²³⁸ If there were 13 grand jurors, the total cost would be \$650 per day for salaries, and if there were 23 grand jurors, \$1,150 per day. Federal magistrates’ salaries are capped at 92 percent of federal district judges.²³⁹ District judges were paid an average annual salary of \$210,900 in 2019.²⁴⁰ 92 percent of this figure is \$194,028. Taking out weekends and ten federal holidays, there are 251 working days in a year (though many judges probably do work during off-duty hours). Using these figures, a magistrate is paid \$773 “per day,” plus health care, retirement, and the like. Based on this back of the envelope math, the difference between the cost of

1867, at 1, <https://www.newspapers.com/image/76171922/>.

234 DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875, at 426 (Seth Shepard McKay ed., The University of Texas Austin 1930), <https://tarltonapps.law.utexas.edu/constitutions/texas1876/debates>.

235 *General Local Items*, *supra* note 111, at 4; OHIO CONST. of 1851, art. I, § 10 (amended 1912); OR. CONST. of 1857, art. VII, § 18.

236 *The Grand Jury*, *supra* note 126.

237 *Id.*

238 *Juror Pay*, U.S. COURTS, <https://www.uscourts.gov/services-forms/jury-service/juror-pay> (last visited Apr. 30, 2019).

239 *Judicial Salaries: U.S. Magistrate Judges*, FED. JUDICIAL CTR., <https://www.fjc.gov/history/judges/judicial-salaries-u.s.-magistrate-judges> (last visited Apr. 30, 2019).

240 *Judicial Compensation*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-compensation> (last visited Apr. 30, 2019).

a magistrate and a grand jury is not too vast.

Whatever gap does exist between grand jurors and magistrates, at least on the federal level, judges will likely cost more in the long run. The rate of increase for juror pay is glacial. Grand jurors had to wait 28 years to see their pay increase to from \$40 to \$50 per day.²⁴¹ Back in 1970, they were making \$20 per day.²⁴² That works out to a 150 percent pay increase since 1970, and 25 percent pay raise since 1990.

District judges, and thus magistrate judges, had their pay rocket 427 and 118 percent in those same periods.²⁴³ Further, because federal judges have a constitutional right to annual cost of living increases from the Ethics Reform Act of 1989,²⁴⁴ judicial salaries will steadily rise for the foreseeable future.

Of course, those are modern numbers. It is harder to get 19th century data, but we can still make a few educated guesses. An 1885 report of the Department of Justice sheds some light onto the pay of federal judges. Supreme Court justices made about \$10,000, Court of Claims judges made \$4,500, most circuit and district judges were paid between \$6,000 and \$3,500, respectively, and territorial justices made \$3,000.²⁴⁵

Various states set judicial salaries by their constitutions. The Michigan Constitution of 1850 paid circuit court judges \$2,500.²⁴⁶ Oregon's original 1857 constitution paid supreme court judges \$2,000.²⁴⁷ Most Virginia trial judges were paid \$2,000 under the 1851 Virginia Constitution.²⁴⁸

Using these figures as a baseline, we can assume judges were paid somewhere in the neighborhood of \$2,000 to \$3,500. For convenience's sake, I will employ the same work schedule assumptions.

241 Spencer S. Hsu, *Federal Jurors Get Their First Raise in Nearly 30 Years*, WASH. POST (Mar. 27, 2018), https://www.washingtonpost.com/local/public-safety/federal-jurors-get-their-first-raise-in-nearly-30-years/2018/03/26/3ba6f646-311b-11e8-8bdd-cdb33a5eef83_story.html?utm_term=.9c1f25166e09.

242 1969 FALL TERM DADE COUNTY GRAND JURY, FINAL REPORT OF THE GRAND JURY 13 (1970).

243 See *Judicial Compensation*, *supra* note 240.

244 *Beer v. United States*, 696 F.3d 1174 (Fed. Cir. 2012).

245 U.S. DEPT OF JUSTICE, REGISTER OF THE DEPARTMENT OF JUSTICE AND THE JUDICIAL OFFICERS OF THE UNITED STATES 9–10, 20 (Washington D.C., Gov't Printing Office 1885), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015030792611&view=1up&seq=7>.

246 MICH. CONST. of 1850 art. 9, § 1.

247 OR. CONST. of 1857 art. 13, § 1.

248 VA. CONST. of 1851 art. 6, § 14.

This does not give us mathematical precision, but gives us a ballpark to operate inside of. If a judge worked 251 days a year, their daily pay would be about \$13.

And what of grand jurors? In Illinois at 1861, it cost \$1.50 per day for grand jurors, and grand juries had 23 members.²⁴⁹ Indiana grand juries of the same era had 16-18 members and paid them each \$1.25 per day.²⁵⁰ One Oregonian constitutional convention delegate estimated that it cost \$400 per county per year to fund grand juries of 15 members, assuming that grand jurors only put in a month of work, which was common enough at the time; this would work out to about a dollar a day. Unless the grand juries worked significantly more or less than normal, it would thus be right in line with Illinois. These figures would give a range of anywhere from \$20 to \$34.50 per day to run a grand jury, depending on how many grand jurors there were and how much each was paid. In some jurisdictions, it might have been even less. In Oregon's original 1857 constitution as adopted, grand juries with as few as seven members were permitted.²⁵¹ This could make grand juries as cheap as \$7 per day to operate, at least for staffing costs. That would be roughly half of the cost of a judge.

Grand juries, it was argued, also clogged up the court system. But despite rather low pay, grand juries could accomplish quite a lot. Before Iowa rolled back grand jury rights, "every offence known to [the] criminal code, [was] subject to indictment by Grand Juries."²⁵² This left courts "encumbered with the trial of numerous offenses of the most trivial character."²⁵³ At the North Dakota constitutional convention, one delegate recounted how even defendants who wanted to plead guilty could not until the grand jury convened, wasting months.²⁵⁴

It did not help that the estimation of the average citizen was perceived to dim with each passing year. An analysis of mid-19th

249 *Proposition to Abolish the Grand Juries*, ROCK ISLAND ARGUS, Dec. 31, 1861, at 2, <https://www.newspapers.com/image/354648751/>.

250 1850 INDIANA CONVENTION PROCEEDINGS, *supra* note 16, at 135 (statement of Mr. Anthony).

251 OR. CONST. of 1857, art. VII, §18.

252 THE DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF IOWA, *supra* note 126, at 125 (statement of Mr. Clarke).

253 *Id.* at 124 (statement of Mr. Palmer).

254 PROCEEDINGS AND DEBATES OF THE FIRST CONSTITUTIONAL CONVENTION OF NORTH DAKOTA 241 (Bismarck, Tribune, State Printers & Binders 1889) (statement of Mr. Rolfe).

century *New York Times* articles found distrust of blue collar workers' ability to serve on grand juries.²⁵⁵ In 1872, an Oregon paper called for the end of grand juries because "under the stupid understanding of the ignorant dozen who can be detailed to try a case only because of their ignorance, justice too often becomes a mockery and equity a sham."²⁵⁶ The process to find jurors was called "a fruitless endeavor to find twelve nincompoops who can't or don't read the papers, or if they do, have not perception enough to form an opinion upon subjects which are discussed in them."²⁵⁷ At Wyoming's constitutional convention, a delegate claimed, "I don't believe an ordinary grand jury is competent to examine the accounts of the treasurer."²⁵⁸ By the end of the century, one commentator sneered, "I cannot, however, say much for the intelligence of small shopkeepers and petty farmers, and whatever the fashion of the times may say to the contrary, I think that the great bulk of the working classes are altogether unfit to discharge judicial duties."²⁵⁹

Playing into these criticisms, the business community pushed for "reforms" of the jury system, saying that juries should be populated by businessmen because of their intelligence, experience, and responsibility.²⁶⁰ New York actually experimented with special grand juries that purported to select people based on their intelligence and good character. This experiment did not perfect grand juries, but it did result in criticism that they convicted more often.²⁶¹

At Illinois's 1870 constitutional convention, one delegate noted that there were 4,682 indictments in a year where the total cost of grand juries in the state was \$64,000.²⁶² That comes out to less than \$14 per indictment, or roughly a day's work for a grand jury. For comparison, the four days that the Indiana constitutional

255 Thomas, *supra* note 113, at 1313.

256 *Juries*, NEW NORTHWEST, Sept. 27, 1872, at 2, <https://www.newspapers.com/image/46361836/>.

257 *The Jury System*, *supra* note 179.

258 JOURNAL AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF WYOMING 472 (1893) [hereinafter WYOMING CONVENTION DEBATES] (statement of Mr. Fox) (emphasis added).

259 Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 CORNELL L. REV. 325, 344 (1995).

260 Thomas, *supra* note 113, at 1314–15.

261 *Id.* at 1315, 1315 n.294.

262 *Proceedings in the Constitutional Convention*, *supra* note 99 (Statement of Col. Dement).

convention spent debating grand juries cost taxpayers \$2,400.²⁶³ A single special session of the Michigan legislature in 1900—which, incidentally, accomplished nothing—cost \$17,000.²⁶⁴

These numbers cannot give us certainty about whether a grand jury or judge would be more expensive in a given jurisdiction. Two delegates at Oregon’s constitutional convention claimed that grand juries cost far less than judges.²⁶⁵ That may or may not be true. But it seems likely that abolishing grand juries would not render dramatic cost savings. Indeed, according to one Michigan delegate’s estimate, the total cost of grand juries to the state worked out to about one penny per person per year.²⁶⁶ And the estimates are close enough to tell us that grand juries would probably be less expensive than panels of judges, an idea occasionally floated as a replacement for citizen panels.²⁶⁷

Regardless of whether arguments about costs were empirically accurate, they clearly worked. Far more argued that grand juries were too expensive than those who claimed judges would cost more. John Langbein once said, “We cannot afford the Constitution and the Bill of Rights.”²⁶⁸ When it came to grand juries, people apparently believed him.

D. Government Has Become More Robust, Replacing the Need for Grand Juries

The cost argument may have become more persuasive to society as government professionalized, thus minimizing the tolerance people had for spending money on grand juries. In the mid-1800s, when grand juries were still fairly popular, government was a much smaller part of people’s lives. Unfunded and undermanned local governments “generally had neither the need nor the ability to maintain an established bureaucracy staffed by professionals.”²⁶⁹ To the extent any bureaucracy operated, it operated mostly on the local level.²⁷⁰ In the 1880s, Wisconsin’s governor had a staff of five—counting the

263 1850 INDIANA CONVENTION PROCEEDINGS, *supra* note 16, at 215 (Statement of Mr. Wolfe).

264 *Small Results*, LIVINGSTON COUNTY DAILY PRESS & ARGUS, Jan. 10, 1900, at 3, <https://www.newspapers.com/image/453263607/>.

265 *The Constitutional Convention*, *supra* note 103.

266 WALDREP, *supra* note 46, at 51.

267 *See, e.g., Opposed to Grand Juries*, *supra* note 111.

268 Thomas, *supra* note 113, at 1266.

269 *Filarsky v. Delia*, 566 U.S. 377, 384 (2012).

270 *Id.*

janitor and lieutenant governor.²⁷¹ Around that same time in Congress, the Senate Appropriation Committee had a staff of eight, and the Senate Foreign Relations Committee had three.²⁷²

Grand juries often filled the void left by this lack of a professional bureaucracy. Congress entrusted grand juries to assist in the administration of the first Census. While federal marshals throughout the country were responsible for submitting population returns to the president, grand juries were responsible for tracking down and punishing marshals who failed to file returns.²⁷³ Grand juries also scrutinized the materials submitted by the marshals to ensure they were good and proper.²⁷⁴ In the states, grand juries did everything from suggest routes for roads,²⁷⁵ approve election precincts,²⁷⁶ collect taxes, oversee road maintenance, grant licenses, probate wills, appoint guardians, and swear in public officials.²⁷⁷ Grand juries even contributed to drafting state constitutions by submitting reports to delegates.²⁷⁸

Because so few government officials were in the way, grand juries largely ran the show. And who better to do so? As will be discussed further below, local jurors were “more interested in seeing that the affairs of *their* counties are honestly administered than any state official could possibly be.”²⁷⁹ Collaborating with local grand juries, “the courts ruled the counties” in early America. When public officials were derelict in their duties, they could be fined by the grand jury, without any need to issue a formal indictment or presentment. Towns, counties, and private citizens, too, could be punished by the grand jury if they failed to provide good government.²⁸⁰

271 *Id.*

272 ROBERT CARO, *MASTER OF THE SENATE* 65, 66 (2002).

273 DEP'T OF COMMERCE & LABOR, *BUREAU CENSUS, HEADS OF FAMILIES AT THE FIRST CENSUS OF THE UNITED STATES TAKEN IN THE YEAR 1790, RHODE ISLAND 6* (1908).

274 *Id.* at 9.

275 *See, e.g.*, PROSECUTING ATTORNEYS' COUNCIL OF GEORGIA, *GRAND JURY HANDBOOK*, *supra* note 219, at 12.

276 43 CONG. REC. 2,408 (1874) (statement of Mr. Sloan).

277 N.J. 1947 CONVENTION, *supra* note 36, at 833.

278 OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF LOUISIANA, HELD IN NEW ORLEANS, MONDAY, APRIL, 21 1879, at 107, 117, 186 (New Orleans, Jas. H. Cosgrove, 1879).

279 WYOMING CONVENTION DEBATES, *supra* note 258, at 473 (statement of Mr. Jeffrey) (emphasis added).

280 3 STATE OF NEW JERSEY CONSTITUTIONAL CONVENTION OF 1947, *supra*

However, as time went on, Americans demanded more of their government, and the public sector grew. The first federal executive department created was State. It originally had nine employees, plus Secretary Thomas Jefferson.²⁸¹ The federal government had about “3,000 employees at the end of the Federalist period, . . . 95,000 by . . . 1881, and nearly half a million by 1925.”²⁸² Today, the Defense Department alone has nearly half a million employees *overseas*.²⁸³

Nowhere is the growth of government better illustrated than in the legal sphere. In the Washington Administration, Attorney General Edmund Randolph *was* the Justice Department. Even so, it was a part-time gig and Randolph maintained a private law practice. It was not until 1818 that Congress authorized a clerk for the attorney general.²⁸⁴ The first efforts to create a bona fide department stalled out, and it did not happen until 1870. It is now one of the largest departments.²⁸⁵

Not only did staff numbers swell, courts became more professionalized. In the early days of the Republic, there was a dearth of well-trained judges and law books.²⁸⁶ Many judges were not even schooled in the law.²⁸⁷ As one mid-19th century court put it: “In the judicial system of this Commonwealth, from the earliest period to the present time, the tribunals invested with criminal jurisdiction, with few exceptions, have been composed of a majority of judges not required to be learned in the law.”²⁸⁸ For example, between 1760 and 1774, six of the nine judges who served on the Superior Court of

note 36, at 833–34.

281 James Q. Wilson, *The Rise of the Bureaucratic State*, S. ILL. U. EDWARDSVILLE, <http://www.siue.edu/~dhostet/classes/501/assign/wilson.htm> (last visited May 4, 2019).

282 *Id.*

283 Kimberly Amadeo, *Department of Defense and Its Effect on the Economy*, BALANCE (Mar. 21, 2019), <https://www.thebalance.com/department-of-defense-what-it-does-and-its-impact-3305982>.

284 Jim Martin, *The Creation of the Department of Justice*, LIBR. CONG. (Dec. 4, 2017), <https://blogs.loc.gov/law/2017/12/the-creation-of-the-department-of-justice/>.

285 *Id.*

286 Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 904 (1994).

287 Mark DeWolfe Howe, *Juries As Judges of Criminal Law*, 52 HARV. L. REV. 582, 591 (1939).

288 *Kane v. Commonwealth*, 89 Pa. 522, 527 (1879).

Massachusetts had no legal training.²⁸⁹ Vermont, New Hampshire, and New Jersey were in a similar state.²⁹⁰ Well into the 1800s, Rhode Island's high court had a blacksmith serving on it and a farmer as its chief justice.²⁹¹ Many other government jobs were held by ordinary citizens with no specialized training or education.²⁹²

Our present justice system is now dominated by prosecutors, police officers, and lawyers—all of whom played a much lesser role during colonial times.²⁹³ Take lawyers. Massachusetts only had 15 practicing attorneys in 1740, and 71 by 1775.²⁹⁴ It is not surprising there were so few, since the first law school did not open until 1779.²⁹⁵ Even when lawyers made it onto the court, there were precious few recorded precedents.²⁹⁶ Georgia, for example, relied on “local courts with no formal system of review.”²⁹⁷ It is easy to see why so many legal jobs we consider strictly governmental were once done by private citizens.²⁹⁸

Though most governmental legal functions are now professionalized, grand juries endure. They are comprised of citizens from all walks of life and asked to perform a legal function that we would ordinarily trust to judges or lawyers: determine whether probable cause is present.

Predictably, however, as lawyers grew in numbers and importance within the government, the web of laws became more tangled. Chief Justice John Marshal memorably said that if the Constitution attempted to detail every power of government, it would “partake of the prolixity of a legal code, and could scarcely be embraced by the human mind.”²⁹⁹ 200 years later, the Constitution is more or less as simple as when Marshal knew it, but the same cannot be said for United States Code.

289 Alschuler & Deiss, *supra* note 286, at 905.

290 *See id.*

291 *Id.*

292 *Filarsky v. Delia*, 566 U.S. 377, 385 (2012).

293 Thomas, *supra* note 113, at 1270.

294 LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 69 (4th ed., 2019).

295 *Connecticut Loses Its Claim as Home of First Law School*, THE BRIDGEPORT POST, Sept. 15, 1996, <https://scholarship.law.wm.edu/lawschooldebate1966/6/>.

296 Alschuler & Deiss, *supra* note 286, at 905–06.

297 LaVerne W. Hill & Melvin B. Hill, *Georgia Constitution*, NEW GA. ENCYCLOPEDIA, <https://www.georgiaencyclopedia.org/articles/government-politics/georgia-constitution> (last edited Oct. 31, 2018).

298 *Filarsky v. Delia*, 566 U.S. 377, 385–86 (2012).

299 *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

Among the 50 titles of the U.S. Code—comprising millions of words and hundreds of thousands of provisions³⁰⁰—and 175,000 pages of the Code of Federal Regulations, there are so many crimes that no one actually knows how many exist. Educated guesses range from 4,000 to 300,000.³⁰¹ A federal judge admitted, “There are quite simply too many to count.”³⁰²

Laws are not only more numerous, but more complex. “At common law, there were nine major felonies[:] Murder, Robbery, Manslaughter, Rape, Sodomy, Larceny, Arson, Mayhem, and Burglary,” along with a smattering of misdemeanors.³⁰³ All of these have definitions that most anyone could comprehend. Today, the United States Supreme Court, for example, spent around 14,000 words arguing over whether a fish was covered in the phrase “any record, document, or tangible object,” in 8 U.S.C. § 1519 and split 4-1-4.³⁰⁴ And that is just the federal government. State criminal codes can be far more complicated.³⁰⁵ Professor Susan Brenner said that as laws became more complex, jurors were forced to rely more on prosecutors to understand them.³⁰⁶ She was onto something.

Legislators also picked away at the non-criminal functions of grand juries. At Louisiana’s 1898 constitutional convention, one delegate exclaimed: “We have also established for the first time in this State a board of control over all charitable and correctional institutions . . . Heretofore we have been compelled to rely solely upon the reports of grand juries.”³⁰⁷

With increasingly byzantine laws and supposedly dull jurors, more and more faith was invested in magistrates, making it easier to see how they could replace grand juries as gatekeepers to the criminal justice system. At the founding, the reasonableness of search

300 Daniel Martin Katz & Michael J. Bommarito II, *Measuring the Complexity of the Law: The United States Code*, 22 ARTIFICIAL INTELLIGENCE & L. 337, 340 (2014).

301 TED STEWART, SUPREME POWER: 7 PIVOTAL SUPREME COURT DECISIONS THAT HAD A MAJOR IMPACT ON AMERICA 123 (2017).

302 *Id.*

303 *Criminal Law*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/criminal_law (last visited May 8, 2019).

304 *Yates v. United States*, 574 U.S. 528 (2015).

305 *Criminal Law*, *supra* note 303.

306 Washburn, *supra* note 49, at 2371.

307 LOUISIANA 1898 CONVENTION PROCEEDINGS, *supra* note 230, at 378 (statement of Mr. Semmes).

warrants was litigated by juries; today it is done by magistrates.³⁰⁸ In 1879, magistrates had jurisdiction over certain thefts, embezzlement and receiving offenses; after 1925 they gained power over criminal damage, serious assaults, forgery, and attempted suicide.³⁰⁹ In 1962, burglary offenses were added to the list.³¹⁰ Critics had long called for magistrates to replace the work of grand juries,³¹¹ and at last succeeded.

E. Urbanization Transforms Society to the Detriment of Grand Juries

While government grew, community shrank. Gone are the days of small towns where everyone knew everyone. More and more people live in cities and suburbs. Four out of every five Americans live in urban areas.³¹² Metro life offers many benefits, but one drawback is how much looser the social bonds are among neighbors.

This, in turn, undercuts one of the key advantages of grand juries. At the dawn of the grand jury system nearly a millennium ago, King Henry II decreed that 12 “good and lawful” men would be drawn from every 104 men in each village to serve as grand jurors.³¹³ During the reign of Richard the First, four knights were selected from the county at large, and they would pick two men out of every hundred.³¹⁴ William Forsyth tells us it was once considered necessary that grand juries should be summoned by picking one man from every hundred in the community.³¹⁵

It was not simply that there were small towns. The structure of grand juries ensured they would be representative. In some ju-

308 AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 69 (1998).

309 J. KENDALL FEW, *IN DEFENSE OF THE TRIAL BY JURY* 478 (1993).

310 *Id.*

311 DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA, *supra* note 101, at 215; *The Constitutional Convention*, *supra* note 103.

312 Christopher Ingraham, *Americans Say There’s Not Much Appeal to Big-City Living. Why Do So Many of Us Live There?*, WASH. POST (Dec. 18, 2018), https://www.washingtonpost.com/business/2018/12/18/americans-say-theres-not-much-appeal-big-city-living-why-do-so-many-us-live-there/?utm_term=.3d5a9767cfa6.

313 Costello, *supra* note 35.

314 BLACKSTONE, *supra* note 18, at *302.

315 WILLIAM FORSYTH, *HISTORY OF TRIAL BY JURY* 182 (James Appleton Morgan ed., 1875), <https://babel.hathitrust.org/cgi/pt?id=mdp.49015000461195&view=1up&seq=200>.

risdictions, grand jurors were “elected from the various towns from which they came, so that the grand jury was virtually the representative body of the people of the county.”³¹⁶ They were referred to as “representatives of the people,”³¹⁷ the “popular branch” of government,³¹⁸ and “the organized agency of the people.”³¹⁹

Naturally, with such a small group, the grand jurors could be expected to be a fairly representative sample. They were probably somewhat familiar with the disputes they investigated. But in massive counties, this is not possible. By 1947, New York County had 1.8 million people, from which the grand jury pool was 60,000.³²⁰ A grand jury might still be more representative than a single judge, but with a grand jury of 23 New Yorkers—with each member speaking seven unique tongues—it would not even cover all of the languages spoken by students in the city’s public schools.³²¹

Critics seized on this point. For one of the most consistent insults hurled at the grand jury by opponents was that it was too old. It has been called a “relic of the past,”³²² “relic of a by-gone age,”³²³ “relic of another age,”³²⁴ “relic of the dark ages and the in-

316 3 STATE OF NEW JERSEY CONSTITUTIONAL CONVENTION OF 1947, *supra* note 36, at 833; *see also* The Massachusetts Government Act 1774, 14 Geo. III., c. 45 (Gr. Brit.), *reprinted in* SELECT CHARTERS AND OTHER DOCUMENTS ILLUSTRATIVE OF AMERICAN HISTORY 1660-1775, at 343–50 (1906) (“the method at present used in the province of Massachusetts Bay in America, of electing persons to serve on grand juries, and other juries, by the freeholders and inhabitants of the several towns”); Letter from Andrew Oliver to — (Feb. 13, 1769), *in* 20 THE PAPERS OF BENJAMIN FRANKLIN, JANUARY 1 THROUGH DECEMBER 31, 1773, at 557–61 (William B. Willcox ed., 1976), <https://founders.archives.gov/documents/Franklin/01-20-02-0282-0011> (“The method of appointing our Grand Juries lies open to management. Whoever pleases, nominates them at our town-meeting.”).

317 1850 INDIANA CONVENTION PROCEEDINGS, *supra* note 16, at 139 (statement of Mr. Rariden).

318 GOUGE, *supra* note 201, at 40 (statement of Mr. Read).

319 *The Grand Jury*, *supra* note 126.

320 *Fay v. New York*, 332 U.S. 261, 266 (1947).

321 Sam Roberts, *Listening to (and Saving) the World’s Languages*, N.Y. TIMES (Apr. 29, 2010), <https://www.nytimes.com/2010/04/29/nyregion/29lost.html>.

322 *Proceedings of the General Assembly Yesterday*, INTER OCEAN, Feb. 1, 1873, at 1, <https://www.newspapers.com/image/38399123/>.

323 *Grand Juries*, *supra* note 177.

324 *Grand and Petit Jury’s*, *supra* note 94.

quisition,”³²⁵ “relic of barbarous ages,”³²⁶ “relic of barbarism,”³²⁷ “a former condition of society,”³²⁸ “fossilized legal obstructions to justice,”³²⁹ “Moss-Covered Abomination,”³³⁰ “hoary with the moss of ages,”³³¹ the “old foggy system,”³³² and “an old stump [that must be] removed from a field, even though it has once supported a tree which bore golden fruit.”³³³ All of these japes get at the idea that grand juries were once valuable, but no longer were.

Indeed, many opponents flat out said that grand juries once had merit. The Citizen’s Municipal Reform Association said: “In the purer and simpler life of the country districts, the institution of the grand jury doubtless accomplishes the good purposes for which it was founded in past ages. In a city of three-quarters of a million souls it is simply an anachronism, powerless for good yet powerful for evil.”³³⁴ The *Reading Times* admitted that the grand jury was useful when first conceived, and even for many centuries later.³³⁵ The *Brooklyn Daily Eagle* said that whatever utility the grand jury once had, it was “long since inapplicable to the conditions of society succeeding that which gave it birth.”³³⁶ The *Cairo Bulletin* noted Blackstone and Kent had praised grand juries in their day, but the institution had since become unrecognizable.³³⁷

Supporters of the grand jury often extolled it in terms that implied it gave intimate treatment to defendants. One proponent said: “Let my case go first before a jury of my neighbors, who have known me for years, and know the accuser, and will properly weigh

325 *Abolish Grand Juries*, KAN. PIONEER, Dec. 26, 1878, at 2, <https://www.newspapers.com/image/478464142/>.

326 ATCHISON DAILY, *supra* note 97.

327 *Abolition of the Grand Jury*, S.F. CHRON., Jan. 6, 1872, at 2, <https://www.newspapers.com/image/27557729/>.

328 *Grand and Petit Jury’s*, *supra* note 94.

329 *Iowa and the Grand Jury System*, SIOUX CITY J., Jan. 9, 1885, at 1, <https://www.newspapers.com/image/416262541/>.

330 *The Moss-Covered Abomination*, *supra* note 226.

331 *Id.*

332 *The Grand Jury Abomination*, CAIRO BULL., Feb. 23, 1879, at 2, <https://www.newspapers.com/image/221339375/>.

333 *From the Capital*, MORNING OREGONIAN, Sept. 26, 1872, at 2, <https://www.newspapers.com/image/9648687/>.

334 DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA, *supra* note 101, at 215.

335 *The Grand Jury System*, *supra* note 151.

336 *Grand Juries*, *supra* note 177.

337 *The Grand Jury Abomination*, *supra* note 332.

the testimony.”³³⁸ Another noted that grand juries forced accusers to make a “charge against his neighbor, and give his neighbor a chance to explain before he is indicted and brought into the Court.”³³⁹ This may have been true enough once, but it is hard to argue that the modern system allows defendants to be judged by their “neighbors” in the same sense.

Though urban communities may not have the same sort of connectivity as a small town where everyone knows everyone else, that does not mean they cannot offer any sort of intimacy. It is a well-known tactic for plaintiffs’ lawyers suing a corporation to try to get into state court—and thus get a local jury—on the assumption that a local jury will favor the plaintiff.³⁴⁰ This tactic only makes sense if one believes that even in an urban society, local juries will better empathize with members of the community.

But it appears the perceived value of grand juries is closely tied up with how rural the community is, as shown by comparing the grand jury abolition movement with urbanization of the country. When the first Census was completed, 19 out of 20 citizens lived in rural areas. Half a century later, 18 out of 20 citizens still did. But after 1840, the rate of urbanization accelerated. Between 1840 and 1850, the number of urbanites grew by nearly half a million—more than the cumulative total of new urbanites over the preceding 50 years. As another way to express the cultural shift: more people lived in cities in 1850 than lived in the entire nation in 1800. For the rest of the 19th century, the percentage of those living in the city grew by about five percentage points per decade.³⁴¹

Remember: the phrase “abolish grand jury” in American newspapers did not first appear until the 1840s. The middle of the 19th century—when the anti-grand jury movement grew wings—is about the time when the Industrial Revolution had settled in.³⁴² It is also the point when England started to move away from grand juries.³⁴³ When it did so, it started by banning them in metropolitan

338 *The Grand Jury*, *supra* note 126.

339 KENTUCKY 1890 CONVENTION PROCEEDINGS, *supra* note 15, at 1221 (statement of Mr. Bronston).

340 *Forum Shopping*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/forum_shopping (last visited Dec. 4, 2019).

341 *U.S. Population, 1790-2000: Always Growing*, U.S. HIST., <https://www.u-s-history.com/pages/h980.html> (last visited May 7, 2019).

342 *Industrial Revolution*, HISTORY.COM (Jan. 10, 2019), <https://www.history.com/topics/industrial-revolution/industrial-revolution>.

343 Though not the driving force behind the domestic grand jury abolition

areas.³⁴⁴ The anti-grand jury movement continued surging in America until hitting a steady stride in the 1870s. The movement did not die down until the middle of the 20th century. By 1964, only five states still required grand juries for all crimes.³⁴⁵

* * * * *

There were a few other reasons offered in opposition to grand juries. Some Democrats made “strenuous efforts” to abolish grand juries because inquests had indicted so many Confederate sympathizers during the Civil War.³⁴⁶ Elitists shuddered at the idea that “twelve or more men selected from all classes of people” could sit in judgment of others, and would have preferred businessmen who were “responsible, prudent, upright, painstaking, well-known, and trusted.”³⁴⁷ Saloonkeepers thought grand juries interfered with their business of vice and agitated for a bill to abolish them.³⁴⁸ But those analyzed above are by far and away the most common complaints in newspapers and state constitutional conventions.

IV. CONCLUSION

In the midst of the grand jury abolition movement, the *Memphis Daily Appeal* wrote: “There is a growing opinion that the grand jury system is not the brilliant success it might be, and that justice would be as well served were it done away with.”³⁴⁹ Refusing to lose its optimism, the paper continued: “but we believe that in the end the States which have abolished grand juries will establish them again.”³⁵⁰

On this prediction, it was monumentally wrong. Grand jury protections tend to move in but one direction: downward. The ex-

movement, American reformers did occasionally cite the English example as yet another reason to move away from inquests. *Grand Juries*, NEW ENG. FARMER, July 31, 1852, at 2, <https://www.newspapers.com/image/404590663>; *Grand Juries*, *supra* note 177.

344 See, e.g., *id.* America did not follow this same trend.

345 William J. Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174, 174 (1973).

346 HARRISBURG TELEGRAPH, Jan. 21, 1867, at 2, <https://www.newspapers.com/image/44585807/>.

347 *Grand Jury System*, *supra* note 159.

348 *The News*, FREE DAILY PRESS, Mar. 1, 1881, at 1, <https://www.newspapers.com/image/542773254/>.

349 *Our Jury System*, MEMPHIS DAILY APPEAL, Apr. 24, 1879, at 2, <https://www.newspapers.com/image/167989488/>.

350 *Id.*

ceptions barely qualify as exceptions. Kentucky's original 1792 constitution had robust grand jury protections. It provided "in all criminal prosecutions" the accused has a right to "demand the nature and cause of the accusation against him," and that "no person shall, for any indictable offense, be proceeded against criminally by information" except for military and public officials.³⁵¹ Seven years later, the revised constitution took away grand jury protections for slaves accused of felonies.³⁵² This provision was removed in the 1891 revision, which is an increase in grand jury rights, but this is more because of the end of legalized slavery than a resurgence of grand juries.

Around the same time that the *Daily Appeal's* crystal ball had fogged up, a Vermont legislator was also prognosticating. Noting that grand juries had been gutted in the state but could still be summoned by a judge for special occasions, he predicted that this would almost never happen.³⁵³ This one hit the mark.

The bill he was talking about was ultimately vetoed by the governor as an unconstitutional abridgement of the grand jury right.³⁵⁴ But in other states where grand juries were placed under the thumb of judges, they were a rare sight to behold. After Michigan relegated its grand juries to obscurity in 1850, for example, Ingham County—home of the state legislature, and thus brimming with corruption cases to investigate—only called three special grand juries in the 19th century.³⁵⁵

Intent on flogging the long-dead horse, calls to eliminate grand juries did not end with the 19th century. From the 1940s through the 1970s, there were allegations that prosecutors abused grand juries, and thus should be abolished.³⁵⁶ The abolition renaiss-

351 KY. CONST. of 1792, art. XII, §§ 10, 11 (emphasis added).

352 KY. CONST. of 1799, art. IX, § 2; See also KY. CONST. of 1850, art. X, § 3.

353 *Legislature of Vermont*, *supra* note 111.

354 VERMONT HOUSE JOURNAL, *supra* note 67, at 398. Vermont would, however, ultimately do away with grand juries by statute. VT. STAT. ANN. §§ 5601-5606, 5967 (1973). According to one town, the office of grand juror "is mostly obsolete; the state's attorneys provide most of the criminal investigation, enforcement and prosecution services in the local communities." *Shaftsbury Grand Juror*, TOWN OF SHAFTSBURY, <https://shaftsburyvt.gov/town-officials/grand-juror/> (last visited May 11, 2019).

355 *For Lynching a Negro*, DETROIT FREE PRESS, Feb. 4, 1894, at 3, <https://www.newspapers.com/image/119510666/>; *Grand Jury in Ingham County*, DETROIT FREE PRESS, Nov. 14, 1899, at 7, <https://www.newspapers.com/image/119307595/>.

356 Thomas, *supra* note 113, at 1269.

sance in the 1970s was likely fueled by how grand juries were involved in hotbed political issues. The Nixon Administration used them to target political dissidents. Black Panthers, Catholic leftists, and antiwar militants were extensively investigated by inquests.³⁵⁷ Many felt that grand juries were being used so aggressively that they were chilling First Amendment speech rights. Senator Ted Kennedy said that under the Nixon Justice Department, “we have witnessed the birth of a new breed of political animal—the kangaroo grand jury.”³⁵⁸

For example, the FBI targeted two women who were staffers of the Episcopal Church’s National Commission on Hispanic Affairs in New York as part of an investigation into Puerto Rican domestic terrorism. The two women refused to testify before a grand jury and were jailed almost a year for it. Other times, grand juries were strategically used to summon witnesses who lived hundreds of miles away, causing great hardship to appear before them.³⁵⁹

At the federal level, the Advisory Committee on the Federal Rules of Criminal Procedure said “presentments as a method of instituting prosecutions are obsolete, at least as concerns the Federal courts.”³⁶⁰ It thus took away the grand jury’s presentment power because keeping it “might encourage the use of the ‘run-away’ grand jury as the grand jury could act from their own knowledge or observation and not only from charges made by the United States attorney.”³⁶¹ Courts were quick and willing to enforce this rule.³⁶² Government officials were in no hurry to stand up for the grand jury. After all, they were the most likely targets of citizen panels.³⁶³

357 Costello, *supra* note 35.

358 *Grand Jury Revision*, CQ ALMANAC (1977). The Nixon Administration would get its comeuppance when grand juries were later used to investigate Nixon and his cronies, resulting in indictments and resignations. Most dramatically, grand juries were involved in the fight over Nixon’s Oval Office tapes. Costello, *supra* note 35.

359 *Grand Jury Revision*, CQ ALMANAC (1977).

360 Michael F. Buchwald, *Of the People, by the People, for the People: The Role of Special Grand Juries in Investigating Wrongdoing by Public Officials*, 5 GEO. J.L. & PUB. POL’Y 79, 86 (2007) (citing FED. R. CRIM. P. 7(a) advisory committee’s note 4).

361 Roger Roots, *If It’s Not a Runaway, It’s Not a Real Grand Jury*, 33 CREIGHTON L. REV. 821, 837 (2000).

362 Buchwald, *supra* note 360, at 86.

363 Phillip E. Hassman, Annotation, *Authority of Federal Grand Jury to Issue Indictment or Report Charging Unindicted Person with Crime or Misconduct*, 28 A.L.R. Fed. 851 § 2a.

Nor could grand juries count on support from practitioners and academics.³⁶⁴ Both groups have been attacking the institution for decades.³⁶⁵ Critics say they should be eliminated altogether.³⁶⁶ They are hardly mentioned in law school.³⁶⁷ If they are, it is probably nothing more than to say they are an anachronism. The institution “has become the laughingstock of American criminal procedure.”³⁶⁸ To the extent that grand juries garnered more attention it was only for a fresh wave of criticism. Namely, they have bungled police-shooting cases.³⁶⁹ Faced with one such case, a prosecutor claimed that grand juries were not transparent or accountable enough, and he conducted an investigation without the body (ultimately concluding there was not enough evidence to charge the police officer).³⁷⁰

Professor Andrew Leipold takes one of the harshest views. He claims that ordinary people are “not qualified” to determine what “probable cause” means because they have “no experience in weighing evidence.”³⁷¹ He also doubts whether citizens are capable of understanding cases involving securities law, tax law, or RICO violations.³⁷² As a result, he believes that only lawyers should be allowed to serve on grand juries, as they have the “expertise to assess the sufficiency of the evidence.”³⁷³

He is not alone. Grand jurors are often criticized for their ignorance and lack of qualifications.³⁷⁴ Former federal judge William Campbell, for instance, has also said that normal people lack the

364 See Washburn, *supra* note 49, at 2335, 2335 n.3 (2008).

365 Note, *Restoring Legitimacy: The Grand Jury as The Prosecutor’s Administrative Agency*, 130 HARV. L. REV. 1205, 1205 (2017).

366 Washburn, *supra* note 49, at 2336 n.5.

367 *Id.* at 2336 n.4.

368 *Id.* at 2336.

369 See 2016 Democratic Party Platform, AM. PRESIDENCY PROJECT (July 21, 2016), <https://www.presidency.ucsb.edu/documents/2016-democratic-party-platform> (“We will require the Department of Justice to investigate all questionable or suspicious police-involved shootings, and we will support states and localities who help make those investigations and prosecutions more transparent, including through reforming the grand jury process.”); Allie Gross, *California Becomes First State to Ban Grand Juries in Police Shooting Cases*, MOTHER JONES (Aug. 13, 2015), <http://www.motherjones.com/politics/2015/08/california-becomes-first-state-ban-grand-juries-police-shooting-cases> [<https://perma.cc/U2XD-BN9K>].

370 *Restoring Legitimacy*, *supra* note 365, at 1214–15.

371 Leipold, *supra* note 1, at 294.

372 *Id.* at 302.

373 *Id.* at 322.

374 Thomas, *supra* note 113, at 1270.

skills and training to perform sophisticated investigations.³⁷⁵ Gordon Griller declared: “The problem with the grand jury system is the jury.”³⁷⁶

With hardly anyone to push back, it has become accepted truth that grand jurors are witless stooges of the prosecution. Replacing jurors with judges is held up as the answer.³⁷⁷ The legal handicaps—such as the removal of their ability to act independently, lack of due process for the accused, and so forth—imposed upon grand juries are seldom blamed. It is much easier to point the finger at lay people. There is nothing inherent about grand juries, however, that demands they defer to prosecutors. Trial juries show us that, in a fair setting, a panel of citizens is capable of putting the government to its proofs. If anything, trial juries have endured longstanding criticism that they make it *too* hard for the prosecutor.³⁷⁸

Though grand juries do almost uniformly indict today—at least at the federal level—this is more likely due to how heavily the deck is stacked in favor of indictment,³⁷⁹ rather than some intrinsic inability of grand jurors to weed out weak cases. Foreign Intelligence Surveillance Act (FISA) courts drive home the point. These courts approve Department of Justice “requests for surveillance warrants against foreign agents suspected of espionage or terrorism.”³⁸⁰ It hears only evidence from the government, hears it in private, and does not have to release information about the hearing.³⁸¹ The results speak for themselves: over 33 years, these courts have rejected

375 Decker, *supra* note 107, at 366.

376 Griller, *supra* note 45.

377 E.g., *Opposed to Grand Juries*, *supra* note 111. DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA, *supra* note 101, at 215 (stating that grand juries useful in vetting criminal cases but also that “the substitution of stipendiary magistrates for aldermen would promptly supercede its usefulness in this regard”); Editorial, *Four Amendments*, HARFORD COURANT, Oct. 17, 1982, at 52, <https://www.newspapers.com/image/368728618/>; *The Grand Jury System*, *supra* note 165.

378 See WALDREP, *supra* note 46, at 28.

379 Reasons for this include that grand juries are closed to the press and public, can be used by prosecutors as fishing expeditions, do not have a judge present, and do not allow witnesses to have attorneys present. Natasha Lennard, *Why 1 Anarchist Is Choosing Jail Over Grand-Jury Testimony*, THE NATION (Aug. 30, 2017), <https://www.thenation.com/article/why-one-anarchist-is-choosing-jail-over-grand-jury-testimony/>.

380 Erika Eichlberger, *FISA Court Has Rejected .03 Percent Of All Government Surveillance Requests*, MOTHER JONES (June 10, 2013), <https://www.motherjones.com/crime-justice/2013/06/fisa-court-nsa-spying-opinion-reject-request/>.

381 *Id.*

11 warrant applications out of 33,900 filed—an approval rate of 99 percent.³⁸² That is about the indictment rate of federal grand juries. So faced with a similarly one-sided process, judges behave no differently than grand jurors.

For all the grief they suffer, grand juries have been resilient. Despite nearly two centuries of attacks, they are still alive, albeit weakened. The Fifth Amendment endures. This is no small feat. The United States remains one of only two countries in the world—the other being Liberia—that still uses grand juries.³⁸³

Grand juries may no longer decline to indict with any regularity, but that does not mean they have no worth. It is easy to imagine changes to grand jury practice that would allow citizens to take a greater role. Beyond criminal process, a number of states to this day give grand juries additional powers, such as recommending disciplinary action for public officials³⁸⁴ or inspecting public buildings.³⁸⁵

Despite their wizened state, grand juries maintain a tender spot in our constitutional system. Court systems that have retained grand juries are almost universally praiseful of them, or least their juror handbooks are. Ohio calls them “an essential part of the legal system.”³⁸⁶ North Carolina writes: “Grand jurors are a fundamental part of the American judicial system.”³⁸⁷ New York raves that grand jurors perform “an important, essential public service.”³⁸⁸

Platitudes in grand juror handbooks are cheap. But many states have expressed their fondness in a more enduring manner. At Nevada’s constitutional convention, delegate Wilmot L. Warren

382 *Id.* But see Larry Abramson, *FISA Court: We Approve 99 Percent Of Wiretap Applications*, NPR (Oct. 15, 2013), <https://www.npr.org/sections/thetwo-way/2013/10/15/234840282/fisa-court-we-approve-99-percent-of-wiretap-applications> (noting that the courts claim they demanded changes in a quarter of applications before approving them).

383 Nick Gremillion, *What is a Grand Jury and How Does it Work?*, WAFB (Nov. 30, 2017), <https://www.wafb.com/story/36966860/what-is-a-grand-jury-and-how-does-it-work/>.

384 See, e.g., N.Y. CRIM. PROC. LAW § 190.85(1) (McKinney 2006).

385 See, e.g., OKLA. STAT. tit. 22, § 346 (2006).

386 SUP. CT. OHIO, GRAND JURY DUTY IN OHIO, <https://www.supremecourt.ohio.gov/Publications/SCO/grandJury.pdf>.

387 Mark Martin, *A Message from the Chief Justice of the Supreme Court of North Carolina*, in THE GRAND JUROR HANDBOOK (2017), https://www.nccourts.gov/assets/documents/publications/GrandJurorHandbook.pdf?Y_AqeB4WaVEZuLAhf0Vc1puqiV9SDIzt.

388 Janet DiFore, *Message from the Chief Judge*, in GRAND JUROR’S HANDBOOK (2017), https://www.nyjuror.gov/pdfs/hb_Grand.pdf.

read through the constitutions of the other states of the Union to better understand them. He determined that although state charters tended to be fluid, the least amended portion of constitutions was the bill of rights.³⁸⁹

Most of a constitution is used to erect the scaffolding of government. Powers of each office are laid out in detail. Prose is mostly bloodless and technical. But bills of rights are different. They tend to be at the front, shorter, and more eloquent. They set out the most important principles of the people who wrote it. And overwhelmingly, grand jury protections can be found here.³⁹⁰

389 *State Constitutions*, INTER OCEAN, Apr. 12, 1879, at 4, <https://www.newspapers.com/image/35069104/>.

390 *See, e.g.*, DEL. CONST. art. I, § 8; N.J. CONST. art. I, § 9; S.C. CONST. art. I, § 11; N.Y. CONST. art. I, § 6; N.C. CONST. art. I, § 22; KY. CONST. art. I, § 12; TENN. CONST. art. I, § 14; OHIO CONST. art. I, § 10; ARK. CONST. art. II, § 8; FLA. CONST. art. I, § 15(a); ALASKA CONST. art. I, § 8.