



Grand Jury Background Study

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Introduction

In theory, the grand jury is a remarkable institution. Praised by some as the “protector of the citizenry against arbitrary prosecution,”¹ the grand jury involves ordinary citizens in the administration of criminal justice, and, in California, the civil grand jury gives ordinary citizens the power to investigate local political entities to root out corruption.²

Two recent events in California’s political history serve as reminders that well designed institutions may be subject to abuse. San Diego County’s 1998-1999 grand jury publicized its investigation of then Mayor Susan Golding in which it made a groundless accusation of misconduct in connection with efforts to pass a downtown ballpark measure.³ The grand jury failed to elicit evidence from Golding; despite that, the grand jury brought no charges against Golding. Nonetheless, Golding’s political career was destroyed.⁴

Critics also point to indictment of Assemblyman Scott Baugh as similar evidence of the excesses of the grand jury. In 1996, Assemblyman Scott Baugh was indicted by an Orange County Grand Jury on four felony and 18 misdemeanor counts of falsifying campaign records in 1995, during a special election.⁵ An Orange County Superior Court Judge dismissed most of the indictments because the District Attorney failed to present exculpatory evidence which would have impeached the credibility of a key witness.⁶ Later, the Orange County District Attorney’s Office was removed from prosecuting the case and state Attorney General Bill Lockyer forwarded the matter to the Fair Political

¹ Susan M. Schiappa, Note, *Preserving the Autonomy and Function of the Grand Jury: United States v. Williams*, 43 CATH. U. L. REV. 311, 327-328 (1993).

² In California, the grand jury serves two functions. The first is an indicting function. As part of that function, “[t]he grand jury may inquire into all public offenses committed or triable within the county and present them to the court by indictment.” CAL. PEN. CODE § 917 (West 2000). The district attorney or the grand jury itself may initiate these investigations. CAL. PEN. CODE § 918 (West 2000). The second and more expansive function of the grand jury is its power to investigate into “county matters of civil concern.” CAL. PEN. CODE § 888 (West 2000). Under this heading, the grand jury has been given authority to “inquire about prisoners not indicted;” to investigate county prisons; to investigate ownership, transfer or sale of real property; to investigate county officers, departments or functions; and to investigate cities or joint powers agencies. CAL. PEN. CODE §§ 923, 924, 925, 925(a) (West 2000). After such civil investigations, the grand jury may release its findings, in the form of a final report, to the public. CAL. PEN. CODE § 929 (West 2000).

³ Todd S. Purdum, *San Diego Grand Jury is Mouse With a Roar*, THE PRESS ENTERPRISE, July 5, 1999, at A01; *Grand Jury Accuses San Diego Mayor of Improper Conduct*, THE PRESS-ENTERPRISE, June 25, 1999, at A04.

⁴ *Conspiracy Theories: Grand Jury Report Full of Unsupported Claims*, SAN DIEGO UNION-TRIBUNE, June 8, 1999, at B6; Karen Brandon, *It’s Politics, But No Strange Bedfellows Allowed: San Diego Judge Mulls Mayor’s Fate*, CHICAGO TRIBUNE, July 8, 1999, at 4.

⁵ Michael Granberry, *Baugh Seeks Changes in Grand Jury System*, LOS ANGELES TIMES, January 10, 1997, at B1. *O.C. Grand Jury Indicts Baugh*, LOS ANGELES TIMES, Mar. 23, 1996, at A1.

⁶ *Id.*

Practices Commission “so they could determine if the campaign reporting problems merit[ed] civil fines.”⁷

These and similar examples of perceived abuse of power have resulted in a call for reform of, or abandonment of, the grand jury. In 1999, when Governor Gray Davis vetoed Assembly Bill 527,⁸ he noted that “[t]he current operation of the grand jury . . . has served us well for 150 years,” and “there [was] no indication that the Law Revision Commission was asked to perform a study to determine the efficacy of this legislation.”⁹ In light of the Governor’s veto, the University of the Pacific McGeorge School of Law’s Capital Center for Government Law and Policy (the “Capital Center”) decided to study potential reform of California’s grand jury system.

Founded in 1995, the Capital Center (formerly known as the Institute for Legislative Practice) promotes effective government by providing federal, state and local policymakers with nonpartisan information and analysis. Directed by one of the co-authors (Professor Clark Kelso), the Capital Center is one of California’s leading private sources of nonpartisan legal analysis of public policy issues.

In order to gain insight into need for reform, the Capital Center invited attendance from various District Attorneys Offices, defense attorneys, county grand juries, and public interest groups for two days of discussions where the authors of this report solicited views on the merits of the grand jury system. A number of individuals and organizations attended those discussions and offered important insight into the grand jury system.¹⁰

This report is divided into three chapters. The first deals with the civil oversight role of the grand jury. The second deals with issues relating to its role in the criminal justice system. Much of the second section focuses on Assemblyman Scott Baugh’s

⁷ Nancy Hill-Holtzman, *Grand Jury Reform Bill Expected to Be Approved Laws*, LOS ANGELES TIMES, July 12, 1999, at B1. See also Jean O. Pasco, *Elections Violations Cost Baugh \$47,900*, LOS ANGELES TIMES, July 28, 1999, at B1 (writing that in July of 1999, Scott Baugh agreed to pay a civil fine of \$47,900 for nine violations of the State Political Reform Act).

⁸ AB 527 provided that “any witness who is the subject of a grand jury investigation” may “have counsel present on his or her behalf while he or she is testifying.” The bill also forbade counsel from objecting to questions or even speaking to the grand jury, from revealing anything heard inside the grand jury room, and from representing more than one witness in the same proceeding. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 527, (July 13, 1999) at 2-4.

⁹ Governor’s Veto Message, Aug. 16, 1999.

¹⁰ Attendees included: Jack Zepp, Director California Grand Jurors Association; Dan Taranto, former President and Director California Grand Jurors Association; Sherry Chesny, Board of Directors California Grand Jurors Association; Clif Poole, Solano County Grand Jury; Gloria Gomez, Director of Jury Services, Superior Court of Los Angeles County; Bill Larsen, Special Assistant District Attorney, Grand Jury Advisor (also representing the California District Attorneys Association); Dave Harris, Stanislaus County District Attorneys Office; Roy Hubert, Stanislaus County District Attorneys Office; Ron Cheek, San Joaquin County Grand Jury; Jim Paige, San Joaquin County Grand Jury; Chris Wing, Criminal Defense Attorney, Clark Kelso, Director, Capital Center for Government Law and Policy; Michael Vitiello, Professor, University of the Pacific McGeorge School of Law.

proposed legislation.¹¹ The third chapter discusses concerns about the lack of diversity among members of the grand jury.

¹¹ In 1997 and again in 1999, State Assemblyman Scott Baugh proposed legislation which would alter the procedures of the criminal grand jury to allow for the presence of witnesses' counsel inside the grand jury room. Under the current system, witnesses must consult with their attorneys outside of the grand jury room. Hill-Holtzman, *supra* note 7; Pasco, *supra* note 7.

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Chapter 1: Civil Grand Jury

I. Early History

With roots in 12th Century England, the grand jury has always been controversial. Praised by some for its role in protecting citizens from oppressive government, the grand jury served the crown by helping it seize control of the administration of criminal justice from ecclesiastical and baronial courts.¹²

Popular perception of the grand jury as serving to protect citizens against oppression originated in the late 17th century with the refusal by two rogue grand juries to indict two prominent Protestant enemies of King Charles II.¹³ Indeed, that perception may account for the wide spread adoption of the grand jury system in the Colonies.

Like states today, colonies were divided on the utility of the grand jury. In some colonies, service on the grand jury was “the most important public service” rendered by members of the public.¹⁴ Elsewhere, absenteeism was common, forcing colonial legislatures to impose fines on jurors who failed to serve.¹⁵

By the time we framed our Bill of Rights, the grand jury had become rooted in our legal culture.¹⁶ While the right to grand jury indictment is one of the few guarantees in the Bill of Rights never made applicable to the states¹⁷, the Fifth Amendment requires federal prosecutions to commence with indictment.¹⁸ No doubt, its adoption in the Bill of Rights reflects its importance during the period leading to the American Revolution.¹⁹

¹² RICHARD D. YOUNGER, *THE PEOPLE’S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634-1941* (American History Research Center, Brown University Press, RI: 1963), at 1. *See also* Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. U. L. REV. 1, 6 (1996) (writing that the benefits of a grand jury’s accusation went to the crown); Stephanie A. Doria, Comment, *Adding Bite to the Watchdog’s Bark: Reforming the California Civil Grand Jury System*, 28 PAC. L. J. 1115, 1115-1118 (1997). The King also benefited, as all fines and forfeitures from an indictment and trial went to the royal coffers. Kadish, at 6; Doria, 1120.

¹³ Schiappa, *supra* note 1, at 327-328. Some scholars cite this first refusal of the King’s indictment edict as the beginning of a powerful citizens’ grand jury. *Id.* at 328.

¹⁴ Gwenda Morgan, *Law and Social Change in Colonial Virginia: The Role of the Grand Jury in Richmond County, 1692-1776*, VIRGINIA MAGAZINE OF HISTORY AND BIOGRAPHY 1987 95(4): 453-480, abstract pulled from AMERICAN HISTORY AND LIFE, part A, vol. 25 (article abstracts and citations) (1988).

¹⁵ YOUNGER, *supra* note 12, at 5 (writing that it was probably the great distances between colonial towns and poor road systems that made attendance so difficult for jurors). For example, some colonial grand jurors “supervised workmen clearing the commons, presented all idle persons, assisted the county justices in levying taxes, met with selectmen and constables to nominate tavern keepers, checked to see that Indian children were learning to read, and performed a host of other duties.” *Id.* at 9.

¹⁶ Testimony of Susan Sun Beale, Professor of Law, Duke University School of Law, Before the Subcommittee on the Constitution, Committee on the Judiciary, United States House of Representatives, “Constitutional Rights and the Grand Jury,” *hereinafter* Beale Testimony July 27, 2000, 2-3.

¹⁷ *Hurtado v. California*, 110 U.S. 516 (1884). *See also* Beale Testimony, *supra* note 16, 3-4.

¹⁸ U.S. CONST. amend. V.

¹⁹ YOUNGER, *supra* note 12, at 19-33.

Beginning in the 1730's, when colonials began to clash with royal authority, the grand jury "became the bulwark of [the colonists'] rights and privileges."²⁰ Colonists lacked a representative assembly; absent a representative government, colonists used the grand jury to challenge royal authority.²¹ In Georgia, the grand jury claimed power to inquire into any matter that it saw fit.²² Despite a court ruling to the contrary, grand juries continued to act as local representative assemblies.²³ For example, in addition to serving their function of determining whether to issue indictments, they protested abuses of power by royal governments, refused to enforce some laws, while proposing adoption of new laws.²⁴

A few examples demonstrate why the drafters of the Bill of Rights enshrined the institution in the Fifth Amendment. In 1765, a Boston grand jury refused to indict Stamp Act riot instigators.²⁵ In 1770, a Philadelphia grand jury proposed protests against the increase in taxes on tea.²⁶ In 1774, an Essex County, New Jersey grand jury refused to follow a court's charge to denounce colonial mob violence.²⁷

After the revolution, grand juries continued to perform civil oversight functions, as they had in Colonial America.²⁸ Frontier states especially relied on grand juries.²⁹ Similar to their role in the Colonial era, grand juries sometimes served as the only representative government to which citizens could bring grievances.³⁰ They used the indictment power to "bring order and decorum to boisterous frontier communities."³¹

Some states and territories expanded grand jury powers beyond the indictment.³² For example, they were to study conditions of the jails and treatment of prisoners and to examine toll roads and bridges.³³ On their own initiative, some grand juries audited accounts of county officials and denounced or indicted officials guilty of corruption.³⁴

As developed below, California's grand jury system was born out of this pre-Civil War tradition. Like grand juries in other states entering the Union before 1860, the grand jury was "an integral part of its legal and governmental machinery[.]"³⁵

²⁰ *Id.* at 21.

²¹ *Id.* at 22.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 26-35.

²⁵ *Id.* at 28 (writing that member of that grand jury included Paul Revere and Ebenezer Hancock).

²⁶ *Id.* at 30.

²⁷ *Id.* at 33.

²⁸ Beale Testimony, *supra* note 16, at 3 (writing that "When the federal and state governments were constituted, the grand jury was adopted in each jurisdiction").

²⁹ YOUNGER, *supra* note 12, at 72.

³⁰ *Id.* at 74, 81.

³¹ *Id.* at 79.

³² *Id.* at 77-79.

³³ *Id.* at 77.

³⁴ *Id.* at 80.

³⁵ *Id.* at 84.

II. The Grand Jury in California

California has recognized the civil functions of the grand jury since the state's inception. Like the Fifth Amendment to the United States Constitution, California's first constitution required that a criminal prosecution begin with an indictment.³⁶ The requirement was excised with the 1879 Constitution, and one contemporary result is that grand juries spend most of their time exercising their civil oversight function.³⁷

The California state constitution states only that "a grand jury shall be drawn and summoned at least once a year in each county."³⁸ But since 1851, legislation has specified its authority and responsibilities.³⁹ For example, one early statute gave the grand jury the authority to inquire into "the condition and management of public prisons."⁴⁰ They were also charged with auditing city books.⁴¹ In 1880, legislation added the specific power to investigate county government.⁴² Later legislation added similar authority to investigate city government and special districts.⁴³

Early legislation gave the superior court the responsibility for impaneling the grand jury each year.⁴⁴ Judges of the Superior Court made two lists.⁴⁵ One list contained the number of grand jurors required to complete court business.⁴⁶ The second list contained the names of prospective grand jurors as selected by the judges.⁴⁷ The list of names was given to the county

³⁶ CAL. CONST. art. I, § 8 (1849) (*repealed by* CAL. CONST. art. I, § 23 (West 2000)).

³⁷ The grand jury is charged with civil oversight functions, often called the grand jury's "watchdog" function. Doria, *supra* note 12, at 1124.

³⁸ CAL. CONST. art. I, § 23 (West 2000).

³⁹ 1851 Cal. Stat. ch. 29, sec. 214, at 235 (codified as CAL. PENAL CODE § 919(b)); *People v. Superior Court* (1973 Grand Jury for Santa Barbara County), 13 Cal. 3d 430, 436 n.5, 531 P.2d 761, n.5, 119 Cal. Rptr. 193, 197 n.5 (1975).

⁴⁰ 1851 Cal. Stat. ch. 29, sec. 214, at 235 (codified as CAL. PENAL CODE § 919(b)).

⁴¹ A. Wells Petersen, *The California Grand Jury System: A Review and Suggestions for Reform*, 5 PAC. L. J. 1, 4 (1974).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ CAL. CIV. PROC. §§ 210, 241 of 1872 (now encompassed within the penal codes) (providing that "every superior court, whenever in the interest of the court the public interest requires it, must proceed to impanel a grand jury," and "in all counties there shall be at least one grand jury drawn and impaneled each year").

⁴⁵ *Halsey v. Superior Court of City and County of San Francisco*, 152 Cal. 71, 73, 91 P. 987, 987-988 (1907). Today, jurors may be nominated or they may apply for the position, depending on the county. Candidates are then interviewed by the court to determine if they meet the requirements set out in California Penal Code § 893. If so, the candidate's name will be placed on a list of potential grand jurors. CAL. PENAL CODE § 896 (West 2000). The list is then given to the county clerk, who either places each name on a slip of paper or assigns each name a secret number, placing the numbers on slips of paper. CAL. PENAL CODE § 900 (West 2000). As before, the slips of paper are drawn from the "grand jury box." CAL. PENAL CODE § 902 (West 2000). The term of service for a grand jury has also been modified with time. "California grand juries in some counties lasted several years before being discharged." Bruce Olson, *The California Grand Jury: An Analysis and Evaluation of Its Watchdog Function* (1966), 75 (unpublished Master's Thesis, University of California, Berkeley) (using Solano County as an example, the grand jury was impaneled in 1934 and issued its final report in 1939). Today, the term of service for a grand juror is one year. CAL. PENAL CODE § 905.5 (West 2000).

⁴⁶ *Halsey*, *supra* note 45.

⁴⁷ *Id.*

clerk, who then wrote the names on identical slips of paper.⁴⁸ The paper slips were deposited in the grand jury box, and a number of names were drawn according to the number of grand jurors required.⁴⁹ Those names not drawn were rolled into the next year's juror selection.⁵⁰

One scholar, a proponent of civil grand juries, conducted an extensive study of the California grand jury system and documented numerous instances where grand juries performed effectively and suggests that grand juries took seriously their civil oversight function.⁵¹ That study found that California's grand juries from early statehood have examined conditions in jails, treatment of indigent patients, accounting matters, taxation issues, public works and law enforcement.⁵² During the early 20th Century, a number of states reformed their grand juries and ceded power to the district attorneys.⁵³ Similar reform efforts failed in California because grand juries had gained the reputation as "enemies of municipal corruption."⁵⁴

At least some grand juries earned their reputation. For example, in the late 19th Century, the grand jury took on the notorious political boss of San Francisco's municipal government. Chris "Blind Boss" Buckley⁵⁵ was considered the henchman of the Southern Pacific Railroad. San Francisco's grand jury's final report in 1890 denounced fraud in local government and highlighted city officials who had "reaped tremendous personal profits" at the expense of the city.⁵⁶ At various times, Buckley was able to get "machine men" on the grand jury to prevent serious investigation of corruption.⁵⁷ That strategy failed in 1891 when a judge dismissed nine panel members as obvious "plants" and then directed the jury to make a complete investigation of all charges of corruption against local officials.⁵⁸ As a result, Buckley took "an extended vacation" and other politicians "took to their heels."⁵⁹

The grand jury's final report in 1891 not only led to indictments of public officials for fraud and bribery, but also led to the mayor's appointment of a committee of citizens to draft a city charter to remedy conditions that led to corruption.⁶⁰

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Olson, *supra* note 45.

⁵² *Id.* at 71 nn.75.

⁵³ YOUNGER, *supra* note 12, at 152-53 (citing Oregon, Missouri, Minnesota, and Arizona as examples).

⁵⁴ *Id.* at 153.

⁵⁵ Chris Buckley was the Irish-Catholic machine boss in San Francisco until he was run out of town by Progressives interested in municipal reform in the late 1890s. He was dubbed "Blind Boss" because he lost his sight as an adult. YOUNGER, *supra* note 12, at 153.

⁵⁶ For example, San Francisco Grand Juries pointed to "graft in street widening projects, padding of payrolls for political reasons, and purchases of land at exorbitant prices for public buildings." YOUNGER, *supra* note 12, at 200.

⁵⁷ *Id.* (citing the SAN FRANCISCO BULLETIN, December 18, 1890).

⁵⁸ *Id.*

⁵⁹ *Id.* Buckley's demise co-exists with the rise of the Farmers' Alliance as a strong political party in California. The Alliance platform included the denouncement of railroad domination of city and state politics, not to mention a public takeover of the railroad industry. Joseph Pitti, "California Politics: Electoral Corruption," California History Notes & Outlines, CSU, Sacramento, 109.

⁶⁰ "Report on the Causes of Municipal Corruption in San Francisco, as Disclosed by the Investigations of the Oliver Grand Jury, and the Prosecution of Certain Persons for Bribery and Other Offenses Against the State," published by the Board of Supervisors, City and County of San Francisco, Jan. 5, 1910, at 8.

Almost twenty years later, the report remained the impetus for continued investigation of municipal corruption in San Francisco.⁶¹ The 1891 grand jury has been cited as the first attempt “at a comprehensive search under forms of law for the causes and persons ultimately responsible for the class of municipal dishonesty now known as ‘grafting.’”⁶²

Commentators point to other grand juries that have served well in rooting out corruption. Various grand juries in San Francisco rooted out corruption in the District Attorney’s office, uncovering bribery by machine bosses, and in the police department.⁶³ As one commentator observed, early grand juries proved that they could, “if necessary, unseat an entire municipal administration and using their power of indictment, take over a city and run it in the name of the people.”⁶⁴

Similar successes existed outside of San Francisco. A 1925 Yolo County Grand Jury made several specific recommendations relating to abuse of power.⁶⁵ For example, it recommended that the District Attorney refund money illegally paid to his stenographer and that he recover sums not collected by the Assessor, and that the Sheriff not use prisoners to work on his ranch.⁶⁶ The Solano County Grand Jury, in which the same panel sat from 1934 to 1939, investigated a county supervisor who subsequently resigned from office.⁶⁷ Its investigation also led to voluntary repayment for road work on privately owned property.⁶⁸ As summed up by one proponent of the grand jury system, reports like these were instrumental “in supporting legislation to improve accounting methods and other safeguards to minimize the early use of county road building material as political pork barrel.”⁶⁹

More recent examples exist. For example, one recent Santa Clara County grand jury included an attorney, financial consultant, several electronics engineers, a real estate agent, and a social worker.⁷⁰ As a result, it was able to study a number of complex budgetary issues, including an investigation that challenged whether the water district should construct a new \$40.5 million administrative building.⁷¹

⁶¹ *Id.*

⁶² *Id.* at 6.

⁶³ YOUNGER, *supra* note 12, at 202. See also “Report on the Causes of Municipal Corruption in San Francisco, as Disclosed by the Investigations of the Oliver Grand Jury, and the Prosecution of Certain Persons for Bribery and Other Offenses Against the State,” published by the Board of Supervisors, City and County of San Francisco, Jan. 5, 1910, at 8.

⁶⁴ *Id.* at 208.

⁶⁵ Olson, *supra* note 45, at 74 (citing the Yolo County Grand Jury Final Report, 1925, at 1).

⁶⁶ *Id.*

⁶⁷ Before jury service was limited to one year (CAL. PENAL CODE § 908.1 (West 2000)), grand jury terms continued until dismissed by the courts.

⁶⁸ *Id.* at 76 (using an interview with Mr. William Jones, the Solano County Road Commissioner in 1965).

⁶⁹ *Id.* at 108 (citing the Yolo County Grand Jury Final Report, 1925, at 1). From the 1950s through the 1970s, grand juries investigated issues such as county welfare needs and the efficacy of county assistance programs to children, corruption in the California State Legislature, and the accountability and economics of city school systems. *Id.* at 457-650. See also Harold W. Kennedy and James W. Briggs, *Historical and Legal Aspects of the California Grand Jury System*, 43 STAN. L. REV. 251, 263 (1954) (citing *Fresno County v. Roberson, Martin & Co.*, 124 Cal. App. 2d Supp. 888, 269 P.2d 252 (1954)).

⁷⁰ Vicki Haddock, *Grand Juries’ Future at Center of Debate*, SAN FRANCISCO EXAMINER, September 6, 1998, at C1.

Examples like these demonstrate the basis for faith in the grand jury system. When it works well, the system is a powerful example of democracy in action. The system empowers a group of concerned citizens to serve as a watchdog over public officials whose conduct may not otherwise be open to public scrutiny.⁷² Even if the grand jury does not uncover fraud or corruption, it may uncover incompetence or inefficiency.⁷³ Participation on the grand jury educates jurors about local government and in turn, the grand jury reports may educate the public at large.⁷⁴ As summarized in a 1962 law review article, “[a] grand jury is a short-lived, representative, non-political body of citizens functioning without hope of personal aggrandizement. It comes from the citizens at large and soon disappears into anonymity without individual recognition or personal reward and without ability to perpetuate itself in the public hierarchy.”⁷⁵

Despite the considerable support for the grand jury system in some quarters, the system has its detractors. In assessing whether to reform the civil grand jury, one must be mindful of the lack of recent systematic data on the functioning of the grand jury. No one has attempted to chronicle how often jury abuse takes place or how often grand jury reports lead to the stunning successes like those of cited above. But one cannot deny that the grand jury system has deep historical roots, including its role as watchdog, that in theory, the civil grand jury has potential for social good and that in many instances it has fulfilled that potential.⁷⁶

⁷¹ *Id.* Savings to cities and counties are often touted as one of the benefits to the public of an active grand jury. For example, one Solano County Grand Jury member cites “instances where there has been at least \$5,000 paid back to the City because of the rooting the Grand Jury did.” ROUNDTABLE DISCUSSION ON GRAND JURY REFORM, Capital Center for Government Law and Policy, University of the Pacific McGeorge School of Law, *hereinafter* ROUNDTABLE, June 1-2, 2000, at 6.

⁷² Complexity of modern government may keep ordinary citizens from close scrutinization of government. Grand jury proponents cite modern complexity of government as one of the reasons for maintaining civil oversight functions. “[Reports of grand juries] are much more essential now in these days when government at all levels has taken on a complexity of organization and of operation that defies the best intentions of the citizens to know and understand it.... What is not known and understood is likely to be distrusted. What cannot be investigated in a republic is likely to be feared. The maintenance of popular confidence in government requires that there be some body of laymen which may investigate any instances of public wrongdoing....” Justice Brennan and Judge Vanderbilt while on the Supreme Court of New Jersey, *State v. Fary*, 19 N.J. 431, 437, 117 A.2d 499, 502-03 (1955).

⁷³ Haddock, *supra* note 70.

⁷⁴ “In our system of government, a grand jury is the only agency free from possible political or official bias that has an opportunity to see the picture of crime and the operation of government relating thereto on any broad basis. It performs a valuable public purpose in presenting its conclusions drawn from that over-view. The public may, of course, ultimately conclude that the jury’s fears were exaggerated or that its proposed solutions were unwise. But the debate which reports . . . would provide could only lead to a better understanding of public governmental problems.” *Monroe v. Garrett*, 17 Cal. App. 3d 280, 284, 94 Cal. Rptr. 531, 533-534 (1971). While a report of official misconduct or violation of the public trust may not establish a crime, it may “lead to a variety of other consequences that range from public criticism to removal from office.” Barry Jeffery Stern, *Revealing Misconduct by Public Officials Through grand Jury Reports*, 136 U. PA. L. REV. 73, 75 (1987).

⁷⁵ William J. Shaw & Noah Weinstein, *Grand Jury Reports – A Safeguard of Democracy*, WASHINGTON U. LAW QUARTERLY 202, 191 (1962).

⁷⁶ Some examples of grand juries fulfilling their potential are the recent savings to city and county governments, both large and small, by Solano and Santa Clara County Grand Juries, and the long history of the San Francisco County and City grand Jury’s targeting graft and corruption in government.

III. The Statutory Powers of the Civil Grand Jury

While the constitution provides for the grand jury, its specific powers are governed by various statutes.⁷⁷ Hence, changes to the grand jury system (except for its abolition) do not require constitutional amendment.

Under current legislation, requirements of service on the grand jury are limited. A person needs to be at least 18 years old, a United States citizen, to meet the county residency requirement and to be “in possession of natural faculties, of ordinary intelligence, of sound judgment and fair character.”⁷⁸ Depending on the county, prospective grand jurors are either nominated or apply to serve, are interviewed by a superior court judge and then are selected at random to fill seats on the panel.⁷⁹ Compensation is set by the county, but must be at least \$10 a day for days on which grand jurors perform certain work for the grand jury.⁸⁰

In addition to authority to issue indictments, the grand jury is empowered to “investigate and report on” local government and to weigh allegations of misconduct by public officials.⁸¹ The grand jury operates in secret during its investigations and deliberations.⁸² The grand jury has subpoena power.⁸³ At the end of its term, the grand jury must issue a final report to the presiding judge of the superior court.⁸⁴ The judge may then submit the report “for comment to responsible

⁷⁷ The statutory powers given the grand jury were combined into the California Penal Code in 1959. Karl Kinaga & Robert F. Jordan, *Some Limitations and Controls of the California Grand Jury System*, 2 SANTA CLARA L.R. 78 (1962).

⁷⁸ CAL. PENAL CODE § 893(a)(1)-(a)(3) (West 2000).

⁷⁹ CAL. PENAL CODE § 896 (West 2000).

⁸⁰ CAL. PENAL CODE § 890 (West 2000).

⁸¹ Indeed, the grand jury *must* exercise its watchdog functions. For example, “The grand jury shall inquire into the willful or corrupt misconduct in office of public officers of every description within the county.” CAL. PENAL CODE § 919(c) (West 1985 & Supp. 1999). “The grand jury shall investigate and report on the operations, accounts, and records of the officers, departments, or functions of the county, including those operations, accounts, and records of any special legislative district or other district in the county....” CAL. PENAL CODE § 925 (West 2000). The California Supreme Court has said that the grand jury has three basic functions: “to weigh criminal charges and determine whether indictments should be returned [California Penal Code § 917]; to weigh allegations of misconduct against public officials and determine whether to present formal accusations requesting their removal from office [§ 922; *See* Gov. Code, § 3060 *et seq.*]; and to act as the public’s “watchdog” by investigating and reporting on the affairs of local government [*e.g.* §§ 919, 925 *et seq.*].” *McClatchy Newspapers v. The Superior Court of Fresno County*, 44 Cal. 3d 1162, 1170, 751 P.2d 1329, 1132, 245 Cal. Rptr. 774, 777 (1988).

⁸² CAL. PENAL CODE § 924.2 (West 2000).

⁸³ CAL. PENAL CODE § 939.2 (West 2000). The grand jury also has “free access, at all reasonable times, to the public prisons, and to the examination, without charge, of all public records within the county.” CAL. PENAL CODE § 921 (West 2000).

⁸⁴ CAL. PENAL CODE §§ 929, 933, 933.06, 939.9, 939.91 (West 2000). Jurors, with the permission of presiding judges, often issue interim reports before the end of the jury term. Interim reports are incorporated into the final report. *See e.g.*, *People v. 1973 Grand Jury for Santa Barbara County*, 13 Cal. 3d 430, 434, 119 Cal. Rptr. 193, 195 (1975). *Also* Telephone inquiry of the San Francisco Superior Court, 05.23.00.

CAL. PENAL CODE 933(a) (West 2000). All reports have statutory limitations. The report must be approved by the presiding Superior Court judge who may require redaction or masking of “any part of the evidentiary material, findings, or other information to be released to the public including, but not limited to, the identity of witnesses and any testimony or materials of a defamatory or libelous nature. CAL. PENAL CODE § 929 (West 2000). Final reports must have the concurrence of at least three-fourths of the grand jurors. CAL. PENAL CODE § 933.06 (West 2000). Jurors also must be available for 45 days after their term has expired to explain the report. CAL. PENAL CODE §

officers, agencies or departments, including the county board of supervisors” if the court finds that the report is in compliance with limitations imposed on the grand jury.⁸⁵ If the report concerns the operations of any public agency, the agency has 90 days to respond.⁸⁶ Every elected officer or agency head, however, must respond to grand jury reports “pertaining to matter under the control of that county officer or agency head” within 60 days.⁸⁷ The law does not require implementation of those recommendations, but only a response.⁸⁸

Until recently, the law did not prevent a response of “no comment” to a recommendation. Presently, however, a responding person or agency must comply with the requirements of California Penal Code § 933.05. The respondent must agree or disagree with each finding.⁸⁹ In the case of disagreement, the reason must be explained.⁹⁰

There are also specific requirements regarding implementation of recommendations.⁹¹ If a recommendation has not been implemented, there must be a time-frame for implementation, a description of a study to analyze the recommendation, or an explanation with regard to why the recommendation will not be implemented.⁹²

Typically, the grand jury submits its final report at the end of its one-year term.⁹³ As a result, the grand jury is no longer sitting when officials file their responses to the report, 60 or 90 days after its filing. Grand jurors have limited immunity for work performed as grand jurors,⁹⁴ but remain liable for defamation for statements made in their final report⁹⁵ and may be found guilty of a misdemeanor if they violate their oath of secrecy.⁹⁶

IV. The Contemporary Critique of the Civil Grand Jury

In preparing this report, the Capital Center invited persons interested in the grand jury

933(a) (West 2000). All final reports must be supported by documented evidence. CAL. PENAL CODE § 916 (West 2000). A person unindicted but investigated by the grand jury may require the grand jury to issue a report declaring that there was no evidence with which to find an indictment. CAL. PENAL CODE § 939.91(a) (West 2000). *See also* John M. Feser, *The California Civil Grand Jury: From Watchdogs to Watched Dogs*, 30 McGeorge L. Rev. 748 (1999) (a useful critique of CAL. PENAL CODE § 929 (enacted by Chapter 79)).

⁸⁵ CAL. PENAL CODE § 933(a) (West 2000). The affected agency receives a copy of the grand jury report prior to its public release. CAL. PENAL CODE § 933.05(4)(f) (West 2000).

⁸⁶ CAL. PENAL CODE § 933(c) (West 2000). However, there is no enforcement power or penalties for reports that go unanswered by agencies and officers.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ CAL. PENAL CODE § 933.05 (a)(1)-(a)(2) (West 2000).

⁹⁰ *Id.*

⁹¹ CAL. PENAL CODE § 933.05 (b)(1-4) (West 2000).

⁹² CAL. PENAL CODE § 933.05 (c) (West 2000).

⁹³ CAL. PENAL CODE § 933 (West 2000).

⁹⁴ *See* Gillett-Harris-Duranceau & Assoc., Inc. v. Kemple, 83 Cal. App. 3d. 214, 222-223, 147 Cal. Rptr. 616 (1978); Brooks v. Binderup, 39 Cal. App. 4th 1287, 46 Cal. Rptr. 2d 501 (1995). *See also* CAL. PENAL CODE § 930 (West 2000).

⁹⁵ *Id.*

⁹⁶ The oath is found at CAL. PENAL CODE § 911. The misdemeanor violation information may be found at CAL. PENAL CODE §§ 924-924.6.

process to attend two days of discussions about grand jury reform. No one who attended urged abandonment of the grand jury's watchdog function. Perhaps that is not surprising. Those closest to the process recognize its potential for social good. Nonetheless, elsewhere, often in response to perceived abuse by a specific grand jury, grand juries have been the subject of considerable criticism. What follows is a discussion of those criticisms.⁹⁷

According to critics of the grand jury system, the grand jury is a waste of public money because grand jury reports are as inept as their members; whether or not their reports are inept, they are ignored; and, often motivated by their own agenda, grand juries abuse their considerable power. Others, sometimes supporters of the grand jury system, suggest that the grand jury system would improve if grand jurors were provided with greater resources and better training.⁹⁸ A separate issue in this report is the concern about the lack of diversity on grand juries. Some of these criticisms overlap and will be considered together.

(a) Ineptitude

Because prosecutors are not required to begin criminal prosecution by indictment,⁹⁹ grand jurors spend most of their time investigating local government and preparing the grand jury's annual report. Despite the time invested in those reports, according to their critics, "the grand jury is widely belittled and almost totally ignored."¹⁰⁰ For example, some county supervisors admit that "they pay little attention to the grand jury reports."¹⁰¹ Estimates vary but some former grand jurors estimate that "less than 20 percent of ... recommendations were acted upon."¹⁰²

Lack of implementation of grand jury recommendations, according to the critics, is explained by a number of factors. First, once the grand jury files its final report, officials do not respond until two or three months after the grand jury has been dismissed.¹⁰³ The new grand jury, with its own work ahead of it, pays little attention to those responses.¹⁰⁴ Recommendations thus die a quiet death.

Second, grand jurors are inept. Standards for service are low. Issues facing local

⁹⁷ Doria, *supra* note 12, at 1132-33 (1997) (stating that after anti-grand jury sentiment swept the United States, "[o]nly California and Nevada mandate the annual impanelment of grand juries to initiate and conduct broad civil investigations").

⁹⁸ Critics also emphasize that grand juries lack diversity. That concern is discussed in chapter 3. Some of these criticisms overlap and will be considered together.

⁹⁹ California prosecutors always had the option of beginning criminal proceedings with an indictment or with an information (preliminary hearing). However, with the California Supreme Court decision in *Hawkins v. Superior Court*, all defendants who were indicted were also entitled to a preliminary hearing. As a result, prosecutors rarely used indictments, to avoid wasting time and governmental resources, as the indictment would have to be followed by an information. In 1990, California passed Proposition 115 which, among other things, amended the state constitution to provide that "a defendant is not entitled to a postindictment preliminary hearing." Doria, *supra* note 12, at 1124.

¹⁰⁰ David Hasemeyer & Anne Krueger, *The Grand Jury: Behind Closed Doors, Court body's opinions get lost in the cracks*, SAN DIEGO UNION TRIBUNE, June 12, 1986, at A1.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ ROUNDTABLE, *supra* note 71, at 14-16.

¹⁰⁴ *Id.*

government have become increasingly complex, beyond the competence of lay jurors.¹⁰⁵ As a result, grand jury recommendations are not simply ignored because they can be, but because they should be. Inept grand juries produce inept recommendations.

Moreover, in those cases when a grand jury recommendation is followed, it may turn out that the recommendation did not originate with the grand jury, but was identified by a local official. One news article claimed that the grand jury identified “a pattern of recommendations that simply restated problems brought to the attention of the grand jury by government officials.”¹⁰⁶ Thus, the argument goes, at best, the grand jury merely spends time “reinventing the wheel, treading in the footsteps of predecessors whose reports have been ignored.”¹⁰⁷

A related argument is that grand juries are especially inept because county government is now too sophisticated for a citizen’s panel. Resulting reports are “naive” and “simplistic.”¹⁰⁸ Here, competing demands may increase the problem of grand jury competence. As observed by one commentator, “[w]hen superior court judges were solely responsible for selecting potential grand jurors, the panel tended to mostly include people from the business sector.”¹⁰⁹ That resulted in grand juries criticized for “reflecting only the upper classes of society.”¹¹⁰

While some commentators list lack of time and lack of training as separate issues¹¹¹, those concerns relate to concerns about grand jury competence. Many grand jurors believe that one year of service is too short a time in which to become familiar with local government. By the time grand jurors are oriented, a good part of their term has passed. Knowledge of that fact may lead to stalling by local officials.

Historically, some grand jurors and their critics have questioned whether grand jurors receive adequate training.¹¹² Despite reform efforts to increase training for grand juries, grand jury advocates continue to question whether adequate training is available.¹¹³

¹⁰⁵ As one argument goes, in recent years there has been an “increased bureaucracy” that has made it near impossible for a panel of ordinary citizens to understand the inner-workings of local government and to make effective and workable recommendations to local agencies. Critics have also stated that local government “has become too complicated and too technical for a citizen without training in government to effectively assist people who are holding office.” Hasemeyer, *supra* note 100, at A1. Bruce Olson, formerly the executive director of the American Grand Jury Foundation, has stated that “people just don’t have the civic skills and knowledge they used to have.” Dave Thom, *Visions of Grandeur: California citizens are trying to restore the glory once held by civil grand juries*, THE RECORDER, Sept. 21, 1995, at 1.

¹⁰⁶ Hasemeyer, *supra* note 100, at A1.

¹⁰⁷ *Orange County Perspective; Putting Teeth in Grand Jury Reports*, LOS ANGELES TIMES, May 13, 1993, at B10.

¹⁰⁸ A former San Diego County grand juror has called the grand jury “a venue for the highly opinionated who’ve figured out a way to make taxpayers fund their pithy insights.” Marjorie Van Nuis, *Grand Juries are a joke, but no one laughs*, SAN DIEGO UNION-TRIBUNE, Jun. 25, 1999, at B9. The implication being that because grand jurors may investigate anything they want, many jurors spend their time investigating topics of interest to them, not necessarily topics of interest to the general public.

¹⁰⁹ Doria, *supra* note 12, at nn. 266-267.

¹¹⁰ *Id.*

¹¹¹ See e.g., Doria, *supra* note 12, at 1137-1142.

¹¹² Doria, *supra* note 12, at 1139-1142.

(b) Abuse of Power

Critics claim that grand juries may abuse their power. The grand jury does have broad powers, inviting abuse. In addition, specific grand juries have gone beyond their jurisdiction.¹¹⁴

According to the critics, grand jury secrecy contributes to the potential for abuse. While secrecy encourages witnesses to come forward, unsupervised grand jurors go astray, unchecked because of secrecy. Unchecked, grand juries “expose individuals to attack or allegations of misconduct, and those individuals may be unable to defend themselves due to the secretive nature of grand jury proceedings.”¹¹⁵ If charges are not brought, a person’s reputation may nonetheless be damaged by being investigated by the grand jury.¹¹⁶

A recent episode in San Diego gives fuel to grand jury critics. The 1998-99 San Diego County Grand Jury’s final report issued a “factually and legally groundless accusation, in violation of the standards of due process,” accusing Mayor Susan Golding of misconduct in connection with efforts to pass a downtown ballpark measure.¹¹⁷ According to the presiding judge, the grand jury abused its power by “ignoring the statutes, ignoring the case law, ignoring the constitution, ignoring counsel, ignoring the district attorney – indeed, ignoring common sense – and in so doing it has violated public trust.”¹¹⁸

V. A Response to the Critique

Neither proponents nor critics of the grand jury system can point to a recent systematic study of the California grand jury to substantiate claims made about its functioning or malfunctioning. Such a study is well beyond resources available to the author(s) of this report. Hence, the debate about abandoning the civil watchdog function of the grand jury is based on anecdotal evidence, rather than on any definitive study. Claims of abuse are based on specific examples, rather than on systematic measurement of abuse.¹¹⁹ Proponents of the grand jury system similarly rely on anecdotal evidence, often their own experience, in arguing in favor of the system.¹²⁰

¹¹³ The California Grand Jurors Association (CGJA), for example, believes that most jurors receive only an introduction to county officials and a few tips on interviewing techniques. They advocate a comprehensive training program that includes history and statutory authority of the grand jury, investigative and interviewing techniques, report writing, and the importance of continuity. “Grand Jury Training Guidelines,” CGJA, Jan. 15, 1983.

¹¹⁴ Doria, *supra* note 12, at nn. 199 *et seq.* A former grand juror has summed up the potential for abuse as follows: “You take 19 eager ‘civil watchdogs,’ equip them in lavish chambers in the tony Hall of Justice, repeatedly tell them how oh-so-important they’ve become, hand them subpoena power on a silver platter and turn them loose on local government for a year.” Van Nuis, *supra* note 108, at B9.

¹¹⁵ Doria, *supra* note 12, at n. 204.

¹¹⁶ *Id.*

¹¹⁷ *Abuse of Power: Civil grand jury needs reform*, San Diego Union-Tribune, Jul 28, 1999, at B8.

¹¹⁸ *Id.*

¹¹⁹ See *e.g.*, Purdum, *supra* note 3; See *e.g.*, Brandon, *supra* note 4. All use the example of San Diego’s former Mayor Susan Golding as an example of grand juries run amok.

¹²⁰ See *e.g.*, the answers of Dan Taranto and Jack Zepp when asked whether the civil oversight function is effective, ROUNDTABLE, June 1-2, 2000, at 11-12.

Absent definitive data, the burden of demonstrating the inadequacy of the civil watchdog grand jury should fall on the critics of the system. That is so for at least two reasons.

First, in theory, the civil watchdog function makes sense as a check on governmental abuse. Concerned citizens, who have limited tenure and do not serve for personal gain, have potential to check abuse of power by entrenched public officials whose work is not otherwise open to public scrutiny.¹²¹ Lay citizens bring common sense to the task and are not part of local political establishments.¹²² As one writer has stated, the grand jury is “the citizens’ personal entry into public service. As such, it has its justification, and because it is such, it should be retained.”¹²³

Second, the institution has a long historical pedigree. We should not perpetuate an ancient institution simply because of history. But history suggests that the grand jury has served well. For every publicized instance of grand jury abuse, far more numerous examples surface where the grand jury has served its intended purpose.¹²⁴ Recitation of examples of effective performance by a grand jury is anecdotal evidence, similar to anecdotal evidence cited by grand jury critics. But because of its long history, those who seek abandonment of the system ought to bear the burden of proof that the system does not work.¹²⁵

What follows is a response to some of the specific criticisms of the grand jury.

(a) Inept grand jurors

Proponents of the grand jury system recognize a need for additional training for grand jurors. They also express concern that, by the time that grand jurors begin to feel comfortable with their role, they are well into their limited tenure. In effect, proponents themselves admit that the grand jury system can be improved.¹²⁶

¹²¹ Noah Weinstein & William J. Shaw, *Grand Jury Reports – A Safeguard of Democracy*, 1962 WASH. U.L.Q. 191. “A grand jury is a short-lived, representative, non-political body of citizens functioning without hope of personal aggrandizement. It comes from the citizens at large and soon disappears into anonymity without individual recognition or personal reward and without ability to perpetuate itself in the public hierarchy. Grand juries are not remembered by the names of the individual members, but are recalled or forgotten by what they have accomplished or failed to accomplish.”

¹²² Vicki Haddock, *Grand Juries’ Future at Center of Debate*, SAN FRANCISCO EXAMINER, Sept. 6, 1998, at C-1.

¹²³ Irving R. Kaufman, *The Grand Jury: Sword and Shield*, THE ATLANTIC, Apr. 1962, at 54.

¹²⁴ See earlier discussion of the history of grand juries.

¹²⁵ One proponent of the grand jury civil oversight function characterizes the grand jury as “the flashlight shining on the problem.” Jack Zepp, ROUNDTABLE, *supra* note 71, at 12. Sherry Chesny, a three-time grand juror in Placer County and present Training Coordinator for the CGJA, says that to end the civil oversight function of the grand jury is to “take out the citizen element [from government].” *Id.* at 10. She also responds to the critics’ argument that government doesn’t listen to the grand jury: “Government doesn’t work quickly; it doesn’t turn on a dime ... and if you really look, some of those recommendations are going to be implemented two years from now, three years from now.” *Id.* at 13. And Clif Poole, a current member of the Solano County Grand Jury responds to critics: “[T]he credibility of the local citizen holds more weight with the public than does government inspecting government.” *Id.* at 13.

¹²⁶ Grand juries themselves are often the first to request additional training. See e.g., Rachel Gordon, *The S.F. Grand Jury Investigates Itself*, SAN FRANCISCO EXAMINER, July 12, 1995, at A25. See also Report of the 1994-1995

It does not follow that grand jurors are inept. Numerous examples exist of effective grand juries. While current composition of grand juries may not be sufficiently diverse, those able to serve are often retired professionals.¹²⁷ Indeed, as one superior court judge has observed, the grand jury in his county “welcomes the ‘average Joe’ who didn’t go to college and ha[s] a working class job,” but stated that “membership doesn’t reflect that.”¹²⁸ Even though requirements for grand jury service are minimal, evidence does not suggest that uneducated, unqualified people are volunteering to serve.¹²⁹

Even if not “inept,” grand jurors feel inadequate to do the job because of time constraints.¹³⁰ That is, by the time that they feel comfortable in their role as grand jurors, much of their tenure has elapsed. One obvious answer would be to extend the term of the grand jury. But that solution is of limited value. Some counties have difficulty in filling their grand jury ranks because of the length of service.¹³¹ Addressed in more detail below, another answer may be to improve the quality of training.¹³² Current training is limited and does not use simulation to train grand jurors how to conduct interviews or to write reports.¹³³ More on-hands training might improve the competence of those who serve.

Also as discussed below, in order to achieve greater diversity of membership, greater outreach is essential.¹³⁴ Community outreach should also invite participation by all members of the community. If those efforts are successful the quality of the prospective panel should improve.

(b) Inept reports

No doubt, improving the quality of the pool of prospective grand jurors and the training of those who serve should improve the quality of their reports. But evidence of incompetent reports is equivocal.

One serious criticism of grand jury reports, cited as evidence of incompetence of those reports, is that few recommendations are acted upon. Estimates vary, with one study suggesting

San Francisco Civil Grand Jury, *Restructuring and Funding the San Francisco Civil Grand Jury*, June 12, 1995, at 5. Clif Poole says that the new Penal Code requirement (CAL. PENAL CODE § 914 (b)) that provides training for all county grand juries “has made the difference of daylight and dark[.]” *ROUNDTABLE, supra* note 71, at 6.

¹²⁷ Sue Fagalde Lick, *Grand Jury Works Behind Closed Doors*, *LOS GATOS WEEKLY-TIMES*, May 08, 1996, at <<http://www.metroactive.com/papers/los.gatos.weekly-times/05.08.96/grand.jury.html>>.

¹²⁸ *Id.*

¹²⁹ See note 127, *supra*.

¹³⁰ Dawn Garcia, *Why Grand Juries Get No Satisfaction*, *San Francisco Chronicle*, August 17, 1987, at 2 (relating the feeling of some jurors that “one year is not long enough for a group of 19 strangers . . . to focus on what to so, investigate, and write a report”).

¹³¹ Robert W. Stewart, *Selection Process Seen as Haphazard; Grand Juries Crippled by Lack of Experience, Skill*, *LOS ANGELES TIMES*, August 6, 1986, A1.

¹³² See section six of this chapter.

¹³³ The training needs that remain unmet in most counties are researching skills, how to verify statements and find documentation, interviewing techniques, and how to synthesize a final report. Telephone interview with Sherry Chesny, Training Coordinator for the CGJA, 05.24.00.

¹³⁴ See chapter 3, section 4 of this report.

that fewer than 20% are acted upon¹³⁵, while another student of the grand jury found that about 30% of their recommendations are acted upon.¹³⁶ Even on the assumption that only about 20% of their recommendations are acted upon, that does not support a charge of incompetence. By comparison, elected representatives place far more bills in the hopper than are adopted.¹³⁷ As in sports, percentages are deceiving. If a quarterback completes 20-30% of passes attempted, he is incompetent while a batter achieving a 30% success rate may end up in the Hall of Fame.¹³⁸ Grand jury critics do not explain why a 20-30% success rate is a poor achievement. The rate may be a result of a number of factors, including intransigent public officials. But given the relatively low cost of grand juries, a 20-30% success rate seems like a good return on the investment.

Another reason why more recommendations may not be implemented is that grand jurors have been excused from service by the time that public officials must respond to their reports. One remedy, now in use by some grand juries, is to file interim final reports.¹³⁹ Those reports can become public during the early part of the grand jurors tenure, forcing a response within the term of the grand jury, allowing follow up by the grand jury.¹⁴⁰ Further study of whether such a procedure produces higher adoption of recommendations should be conducted in the future.

But, argue the critics, even when recommendations are adopted, the recommendations were based on suggestions of public officials, ideas that would have been implemented but for the grand jury report.¹⁴¹ Again, such charges are hard to document. Proponents of the grand jury system have a response to the criticism: even if some of their suggestions did not originate with the grand jury, often, the suggestions may have not been implemented because public officials were dragging their feet.¹⁴² The added pressure brought by the grand jury may have made the difference between an idea remaining bogged in red tape and being implemented.

Ironically, critics fault grand juries for “reinventing the wheel,” that is, by advancing

¹³⁵ Hasemeyer, *supra* note 100, at A1.

¹³⁶ See Olson, *supra* note 45.

¹³⁷ For example, in the 1997-1998 Legislative Session, the total of 2818 Assembly Bills were proposed. Of those, the total sent from the Assembly to the Senate was 1813 (64% of total). The total number of Assembly Bills enrolled and sent to the Governor was 1430 (51% of total). And, the total number of Assembly Bills approved by the Governor was 1102 (39% of total). Assembly Legislative History, 1997-1998. The myth of an incompetent grand jury based upon the number of proposals enacted by local governments may also be considered in another light. Legislatures are professional; grand juries are (for the most part) voluntary. Legislatures have a bevy of staff and in-house counsel to help them draft and analyze bills; grand juries have county counsel, possibly the DA, and a presiding judge to help.

¹³⁸ In the past 30 years, only one top career batting averages in the National Baseball Hall of Fame was about 34% (Tony Gwynn's .339). Mike Celizic, *Numbers are No Longer a Sign of greatness*, MSNBC (list visited 08.22.00) < <http://www.msnbc.com/news/404692.asp?cp1=1.html> >. The batter to have a batting average higher than 40% was Ted Williams in 1941. See Samuel Person, “Baseball: American and Unique,” (last visited 08.22.00) < <http://www.inditer.com/person/unique.html> >. The only QB in the NFL with a sub-50 percent completion rate in the red zone (the area inside the 20-yard line) for each of the last three years is Tony Banks.

¹³⁹ See *supra* note 84.

¹⁴⁰ See *supra* note 84.

¹⁴¹ Hasemeyer, *supra* note 100, at A1.

¹⁴² Jack Zepp, *ROUNDTABLE*, *supra* note 71, at 12 (estimating that probably half the time county governments say they've already fixed a problem contained in a grand jury final report, they didn't start to address the problem until the grand jury began investigating).

suggestions made by other grand juries or urging ideas suggested by public officials, and arguing that their recommendations are ignored. To some extent, their criticisms are contradictory. Absent greater power to command compliance (a questionable power to extend to the grand jury), grand juries persuade through public opinion. If the recommendations of one grand jury are not acted upon, but have merit, it is hard to see why a grand jury should be criticized for re-urging the same recommendation in a subsequent report.

(c) Abuse of Power

The specter of abuse of power by grand juries is overstated. No doubt, instances exist. But critics overstate their power and understate the constraints imposed on grand juries.

First, grand juries have no power to impose their recommendations on local government. At best, if public officials are not responsive to grand jury recommendations, the grand jury can influence policy only through public opinion. Given their limited tenure and the reality that jurors have usually disbanded by the time public officials must respond to their recommendations, grand jurors have limited power even to impose their ideas by appealing to public opinion. That is, some of the limitations on the effectiveness of the system serve as checks on potential for abuse.¹⁴³

Second, while specific examples demonstrate that the system is subject to abuse¹⁴⁴, if the system is otherwise worth retaining, the occasional abuse may be a cost that we ought to accept in light of other benefits.¹⁴⁵ Checks already exist to deter abuse. The most obvious limitation on irresponsible grand jury behavior is the threat of a defamation lawsuit.¹⁴⁶ Grand jurors are not immune from liability for defamation.¹⁴⁷ In addition, while a grand jury need not seek legal counsel, it may invite input from county counsel or the district attorney, either of whom may urge restraint by the grand jury. The grand jury also works with a presiding superior court judge who may exercise some degree of guidance to prevent a grand jury from irresponsible behavior. Finally, a grand jury report is not the product of a few people; a report requires a super-majority

¹⁴³ For example, limited term of service, training, oversight by the presiding judge, the use of legal counsel to answer questions about the scope of authority, the potential liability for defamation (the CA Supreme Court has said that this option provides an important balance in power), precedent (*Gillett-Harris-Duranceau v. Kemple*, 83 Cal. App. 3d 214, 147 Cal. Rptr. 616 (1978)), legislative provisions, and the need for a consensus (and the resulting deliberation among jurors).

¹⁴⁴ Again, the investigation of San Diego Mayor Susan Golding is often cited as an example.

¹⁴⁵ Doria, *supra* note 12, at 215 (*citing McClatchy Newspapers v. Superior Court*, 44 Cal. 3d 1162, 1175, 751 P.2d 1329, 1336, 245 Cal. Rptr. 774, 781 (1988)).

¹⁴⁶ CALIFORNIA PENAL CODE § 930 provides that information in grand jury reports regarding an unindicted person or official is not privileged. Thus, there is no protection to grand jurors from defamation actions that are the result of statements made concerning unindicted individuals in the final report. *See Brooks v. Binderup*, 39 Cal. App.4th 1287, 46 Cal. Rptr. 2d 501 (1995) (holding that even though statute requires juror secrecy, jurors were not prohibited from offering evidence available from sources outside grand jury proceedings.); *Gillett-Harris-Duranceau v. Kemple*, 83 Cal. App. 3d 214, 147 Cal. Rptr. 616 (1978).

¹⁴⁷ Doria, *supra* note 12, at n. 207. At least one writer has suggested that the threat of potential lawsuit may over-deter aggressive investigation by the grand jury. *See Doria, supra* note 12, at n. 220.

of its members.¹⁴⁸ Achieving the necessary majority may require building consensus among panel members, increasing the quality of the grand jury’s deliberations and reducing irresponsible behavior.

The available evidence simply does not support the case that California should abandon the civil watchdog function of the grand jury. Instead, at least anecdotal evidence suggests that it can work well; it remains a theoretically worthwhile instrument of participatory democracy. In subsequent discussions, this report considers other issues relating to the functioning of the grand jury. Specifically, below, it considers questions relating to budgets for grand juries and diversity of those who serve on grand juries and increasing the qualifications for those who serve on grand juries. Both discussions make specific recommendations affecting the civil grand jury. But none of those suggestions urges dramatic reform of the system.

VI. Training

This report’s discussion of the critique of the grand jury begs the question “how can California improve the civil grand jury?” Even the most ardent supporters and participants in the system recognize the need for greater competence on the part of grand juries.¹⁴⁹ This section discusses efforts to improve grand jury competence through legislation requiring training for grand jurors, some thoughts on the effectiveness of current training and specific recommendations for a pilot program aimed at creating better training for new members of county grand juries.

(a) Recent Legislation

Prior to 1997, a judge in charge of a grand jury was required to give new grand jurors “such information as it deems proper . . . as to their duties.”¹⁵⁰ In the minds of grand jurors, they lacked sufficient information or training to do their jobs adequately.¹⁵¹ Efforts to improve overall quality of grand juries culminated in a bill written and sponsored by the California State Association of Counties.¹⁵²

¹⁴⁸ Adoption of final reports may only happen when 12 of the 19 members of the grand jury concur. If the grand jury has 23 jurors, at least 14 jurors must concur. If the jury has 11 jurors, at least 8 members must concur. CAL. PENAL CODE §§ 916, 940. *See also* Unnamed Minority Members of the 1987-88 Kern County Grand Jury v. Superior Court, 208 Cal. App. 3d 1344, 256 Cal. Rptr. 727 (1989) (upholding the requirement of a super-majority to issue a grand jury report and denying minority members from issuing a minority report).

¹⁴⁹ ROUNDTABLE, *supra* note 71, at 11.

¹⁵⁰ SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 829, *hereinafter* AB 829 ANALYSIS, June 24, 1997, at 2.

¹⁵¹ Robert Presley, *County Grand Juries Also Need to Probe Their Own Techniques*, RIVERSIDE PRESS-ENTERPRISE, May 4, 1997, at A23. Telephone interview with Dan Taranto, Vice President of CGJA and two-time Humboldt County Grand Jury member, [*hereinafter* Taranto interview] 05.28.00. Report of the 1994-1995 San Francisco Civil Grand Jury, Restructuring and Funding the San Francisco Civil Grand Jury, June 12, 1995, at 8. The former American Grand Jury Foundation, run by Bruce Olson., recommended at least 80 hours of training for grand jurors. *Id.* In San Francisco, jurors asked that training include: 1. a review of the grand jury mandate; 2. an overview of local government (including the clients of County Counsel delineated); 3. availability of resources; 4. logistical and practical matters (*e.g.*, who in the Superior Court may be asked to type forms). Telephone interview with Hilda Bernstein, 1994-1995 San Francisco County Civil Grand Jury foreperson, 05.24.00.

¹⁵² AB 829 ANALYSIS, *supra* note 150, at 3. It may be important to note that Dan Taranto suspects the training part of AB 829 was added to encourage past and present grand jurors to give support to the bill. It was otherwise resisted

AB 829 added sections 914(b) and (c) to the California Penal Code.¹⁵³ Under those provisions, the superior court must ensure that new jurors receive, at the minimum, training in “report writing, interviews, and the scope of the grand jury’s responsibility and statutory authority.”¹⁵⁴ Counties must pay for the mandated training.¹⁵⁵

(b) Current Training Programs

The authors of this report are unaware of any successful efforts to create consistent statewide standards for grand jury training. Counties approach training quite differently. Some counties use a network of former grand jurors to provide training for incoming panels.¹⁵⁶ Other counties contract with the California Grand Jurors’ Association to provide training.¹⁵⁷ One participant in the two days of discussion at McGeorge Law School reported favorably that the new training requirement “has made the difference of daylight and dark.”¹⁵⁸ His county’s grand jurors manual discusses, but not extensively, inspections and tours of local facilities within the grand jury’s jurisdiction, and describes investigation and interview techniques.¹⁵⁹ The manual contains other information, like a checklist for improving objectivity in grand jury reports, and tips for improving findings and for preparing for interviews.¹⁶⁰ It also includes a copy of some of the statutes especially important to grand juries.¹⁶¹ Other counties provide grand jurors with similar manuals.¹⁶²

Another participant believes that enacting AB 829 has made supervising judges aware of their responsibility for training.¹⁶³ That awareness may increase what training is available.¹⁶⁴

But there are reasons to believe that training could be improved. One active member of the California Grand Jurors’ Association expressed concern that most current training is really an orientation, rather than true training.¹⁶⁵ He also stated that training, often taking only at most a day, is “usually just a parade of bureaucrats playing let’s get acquainted.”¹⁶⁶

by the California Grand Jury Association (CGJA), the California Judges Association, and the Judicial Council for requiring that jurors meet with the subject of their investigation. Taranto interview.

¹⁵³ CAL. PENAL CODE § 914 (b)-(c) (added with chapter 443, 1997).

¹⁵⁴ CAL. PENAL CODE § 914 (b) (West 2000).

¹⁵⁵ CAL. PENAL CODE § 914 (c) (West 2000).

¹⁵⁶ ROUNDTABLE, *supra* note 71, at 78.

¹⁵⁷ ROUNDTABLE, *supra* note 71, at 79.

¹⁵⁸ ROUNDTABLE, *supra* note 71, at 6.

¹⁵⁹ Solano County Grand Jury Manual, revised by the 1999-2000 Grand Jury, at pp. 8, 9, 11.

¹⁶⁰ Solano County Grand Jury Manual, revised by the 1999-2000 Grand Jury, at pp. 4-5.

¹⁶¹ For example, the manual contains Title 4 of the California Penal Code, dealing exclusively with Grand Jury Proceedings and some excerpts from the California Evidence Code. Solano County Grand Jury Manual, revised by the 1999-2000 Grand Jury, Part II, § A. The manual also contains copies of the 1974 Political Reform Act and the Ralph M. Brown Act. Solano County Grand Jury Manual, revised by the 1999-2000 Grand Jury.

¹⁶² For example, a review of the San Joaquin Grand Jury manual provides similar results.

¹⁶³ Telephone interview with Shelly Chesny, Training Committee Chair for the California Grand Juror’s Association (CGJA) and three-time Placer County Grand Jury member, 05.25.00

¹⁶⁴ *Id.*

¹⁶⁵ ROUNDTABLE, June 1-2, 2000, at 81.

¹⁶⁶ *Id.*

One obvious reason why training may be inadequate is cost. As discussed by one of the participants at the McGeorge's Roundtable Discussion, the California Grand Jurors' Association stepped into a financial breach and provides training for about \$75 a person because counties could not afford the heftier \$300 fee charged by a private organization.¹⁶⁷

The CGJA should be applauded for its efforts to provide affordable training to new grand jurors. But even members of the association recognize the limits of the kind of training that can be provided for such a nominal fee. At most, such training can give grand jurors an overview of the process and explain practical problems that they may face. It simply cannot provide grand jurors with the on-hands training that they need to become proficient in interviewing witnesses and local officials and in writing final reports.

Some counties, especially smaller counties, provide their grand juries such limited budgets that they can send few, if any, of their grand jurors to such programs.¹⁶⁸ Grand jurors report cases where new grand jurors pay their own way to such training events.¹⁶⁹

(c) Sound Education and Training for Grand Jurors

Educators understand that the best way to learn skills is through simulation or other on-hands experience. Law schools almost universally have created clinical legal education programs for that reason.¹⁷⁰ Most schools also provide a variety of simulation classes where students become active learners. Inspection of a typical law school catalogue shows offerings in courses like client counseling, negotiation, moot court, trial advocacy, settlement and the like. Such programs are labor intensive and, as a result, carry a heavy price tag.¹⁷¹ Their wide spread adoption demonstrates their significant educational benefits.

In preparation of this report, its primary drafter interviewed Glenn Fait, the Director for McGeorge's Institute for Administrative Justice (IAJ). For years, IAJ has run highly successful training programs for federal and state agencies. For example, IAJ runs training programs for the Special Education Hearing Office, which McGeorge runs under contract with the California Department of Education, and the Social Security Administration.

The key to IAJ's teaching methodology is the use of mock hearings and writing exercises.

¹⁶⁷ *Id.* at 80.

¹⁶⁸ *Id.* at 83.

¹⁶⁹ *Id.*

¹⁷⁰ See generally Steven F. Befort, *Musings on a Clinic Report: A Selective Agenda for Clinical Legal Education in the 1990s*, 75 Minn. L. Rev. 619 (1991); Mark Spiegel, *Clinical Education: Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 UCLA L. Rev. 577 (1987); and Douglas A. Blaze, *Deja Vu All Over Again: Reflections on Fifty Years of Clinical Education*, 64 Tenn. L. Rev. 939 (1997).

¹⁷¹ For some discussions of the costs of clinical education programs in the legal field see Mark V. Tushnet, *Perspectives on Critical Legal Studies: Scenes from the Metropolitan Underground: A Critical Perspective on the Status of Clinical Education*, 52 Geo. Wash. L. Rev. 272 (1984); and Gary S. Laser, *Legal Education I: Educating for Professional Competence in the Twenty-first Century: Educational Reform at Chicago-Kent College of Law*, 68 Chi.-Kent L. Rev. 243 (1992).

For example, in training disability hearing officers IAJ uses actual case files, “cleansed” for reasons of confidentiality.¹⁷² Trainees attend lectures on different aspects of their work.¹⁷³ But the special feature of their training involves simulation.¹⁷⁴ Participants are given a hearing packet, containing a file for the hearing officer and role-play sheets for those who play other roles in the hearing.¹⁷⁵ IAJ personnel tape record the hearings and take notes during the mock hearings put on by the trainees.¹⁷⁶ IAJ personnel provide feedback for the trainees by playing back portions of the tapes for the full group of trainees, allowing discussion of both substantive issues and techniques for conducting the hearings.¹⁷⁷

In addition to receiving training on conducting hearings, participants also receive instruction on writing decisions in the cases which they hear.¹⁷⁸ During a training session, disability hearing officers, for example, write three decisions.¹⁷⁹ One based on a case file and mini-record; a second is based on a videotaped hearing; the third is based on a full hearing that the trainee conducts.¹⁸⁰ IAJ personnel provide feedback on the trainees’ written work as well.¹⁸¹

In a discussion with Director Fait, he agreed with the authors of this report that similar training would be helpful for newly chosen grand jurors.¹⁸² Critics contend that grand jurors do not know how to conduct interviews to get at relevant information and do not know how to draft meaningful reports which sort out fact from opinion.¹⁸³ Grand jurors sometimes concur that they feel inept when they first begin their term, and that they spend six months trying to learn basic techniques like those necessary for conducting a meaningful interview and examination of a witness.¹⁸⁴ Those kinds of skills are routinely taught in programs like those run by IAJ.

Unlike current training available for grand jurors,¹⁸⁵ a well funded program would train grand jurors to conduct interviews, examine witnesses and write their reports through extensive simulation. Modeled on the successful formula of the IAJ,¹⁸⁶ a program could adapt existing investigations conducted by grand juries, build mock case files by “sanitizing” them to maintain privacy, and then have participants in training do mock interviews and write sections of grand jury reports, followed by detailed feedback from professional trainers.

¹⁷² Memo to Michael Vitiello, from Jeanne Benvenuti, IAJ, 08.28.00. See memo and accompanying training literature in Appendix A.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Conversation with primary drafter.

¹⁸³ See § (d) of this chapter, “The Contemporary Critique of the Civil Grand Jury.” See also, Hasemeyer, *supra* note 100, at A1.

¹⁸⁴ *Id.*

¹⁸⁵ ROUNDTABLE, *supra* note 71, at 78-82.

¹⁸⁶ See IAJ sample training seminar, “Training in Administrative Procedure and Technique for Social Security Disability Hearing Officers,” memo from Jeanne Benvenuti, IAJ, to Professor Michael Vitiello, Aug. 28, 2000.

Such a program would not be cheap to run. Providing training for every grand juror statewide would cost over a million dollars a year. That is based on the following calculations: with about 19 grand jurors in 58 counties, about 1100 people serve as grand jurors each year. IAJ training costs \$1500-2000 for a two week training session.¹⁸⁷ On the assumption that a one week training session would be adequate, and would cost about \$1000 a participant, the total cost would be about \$1.1 million. That sum would not include additional costs, like housing grand jurors if training sessions required travel away from home.

Many counties cannot afford to support such a program.¹⁸⁸ But a lot is at stake. This section of the report has argued that the civil oversight function of the grand jury is important and, if exercised wisely, provides significant public benefits at a remarkably low cost to the public.¹⁸⁹ It has also recognized some of the inadequacies the system, specifically relating to limited time that grand jurors serve, the learning curve that prevents grand jurors from maximizing the time that they do serve, and the lack of technical expertise in conducting interviews and drafting reports. In other words, a central finding of this report is that while California should retain civil grand juries, it has the opportunity to improve the system.

Rather than proposing that the legislature pick-up the tab for training grand jurors statewide, this report urges that the state pay for a pilot program. Specifically, it would fund a training program along the lines of the one described above. The training organization accepting the funding would also be responsible for creating and conducting a test to measure the success of the pilot program. For example, the program might involve training for grand jurors in several selected counties. The program might also identify similar counties (size, educational and income levels of its residents) for which training would not be provided. At the end of the year, the organization would set up objective testing procedures to determine whether the grand juries provided with training performed more effectively than did those without training. After completion of the pilot program, the legislature should revisit whether grand jurors have benefited by training, and whether expansion of the training program is justified by those added benefits.¹⁹⁰

¹⁸⁷ Conversation with primary drafter.

¹⁸⁸ Budget information was requested from representative counties throughout the state. Based upon the information that was received, the average budget information for three representative counties is as follows: for counties with populations under 10,000 people is approximately \$5,000; for counties with populations between 10,001 and 100,000 people is approximately \$30,000; and for counties with populations over 100,001 is approximately \$400,000. Thus, most counties cannot afford to spend several thousand dollars each year to train a new grand jury.

¹⁸⁹ For example, Fresno county allocates approximately 5 cents per capita to the grand jury. FRESNO COUNTY BUDGET, fiscal year 1999-2000. Humboldt county, which allocates the most money per capita to the grand jury, only allocates 31 cents per capita. HUMBOLDT COUNTY BUDGET, fiscal year 1999-2000.

¹⁹⁰ Some critics of the grand jury system have proposed an alternative, the creation of an agency along the lines of the Little Hoover Commission, which would investigate local government. By comparison even to fully funded training for all grand jurors, such an agency would cost far more than the proposal in this report. It would also lack one of the primary advantages of the grand jury system. The grand jury system is unique in its involvement of ordinary citizens who may come forward without being nominated or otherwise selected by those already involved in the political process. They provide fresh blood and because they are not beholden to anyone in the system, as would members of an agency, they may be freer from political influence.

Chapter Two: Criminal Grand Jury

I. Introduction

As noted above, Governor Gray Davis vetoed AB 527, a bill authored by Assemblyman Scott Baugh. In his October 9, 1999 veto message, Davis stated that in light of the long, “unchanged” operation of the grand jury, “any major departures from existing practice warrants thorough and thoughtful consideration and debate within the legal community and among legal scholars.”¹⁹¹ This study was conducted in response to the Governor’s veto message.

This section of the report concerns AB 527. It first discusses the events that gave rise to AB 527. It then discusses the changes that AB 527 would have made in current grand jury practice. It canvasses possible constitutional arguments relevant to representation before the grand jury. Concluding that the Constitution does not compel a right to counsel, it then reviews arguments in favor of adopting such a bill despite the absence of constitutional requirements that such a bill be adopted.¹⁹² It then reviews the law in other states. Thereafter, this section addresses the arguments made by opponents of creating a grand jury’s target’s right to have counsel during the target’s appearance before the grand jury. Finally, this report makes a recommendation with regard to AB 527.

II. People v. Scott Baugh

As widely reported in the media, AB 527 was a product of a political dispute between Orange County District Attorney Michael Capizzi and Assemblyman Scott Baugh. In 1996, the Orange County District Attorney notified Baugh that he was a target of the grand jury and invited him to appear before the grand jury.¹⁹³ On advice of counsel, Baugh declined the invitation. The grand jury indicted him for 18 misdemeanor counts of falsifying campaign records during a special election in 1995.¹⁹⁴

An Orange County superior court judge dismissed most of those initial charges because the prosecutor failed to introduce potentially exculpatory evidence.¹⁹⁵ Thereafter, Capizzi refiled charges against Baugh.¹⁹⁶ A judge eventually removed the Orange County District Attorney’s Office from the case, leaving the case in the hands of the Attorney General.¹⁹⁷ Attorney General

¹⁹¹ *Veto Attachment to AB 527*, October 12, 1999.

¹⁹² At a panel discussion held at McGeorge School of Law, a representative of the California District Attorney’s Association, argued that since there is no requirement that witnesses be accompanied by attorneys when testifying before the grand jury, the bill should not be adopted. *ROUNDTABLE*, *supra* note 71, at 23-26. This argument falls short, however, because there are many statutorily granted rights which expand upon the minimum required by the Constitution. For example, in California, there is a statute, CAL. PENAL CODE § 939.71 (2000), which requires prosecutors to present any exculpatory evidence to the grand jury, which is not constitutionally mandated. Hence, the question should be whether any proposed changes to the grand jury system are based on sound policy.

¹⁹³ *See* Granberry, *supra* note 5.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *See* Hill-Holtzman, *supra* note 7.

Bill Lockyer forwarded the matter to the Fair Political Practices Commission.¹⁹⁸ In July of 1999, Scott Baugh agreed to pay a civil fine of \$47,900 for nine violations of the State Political Reform Act.¹⁹⁹

Undoubtedly, Baugh's personal experience with the grand jury has led to his interest in reform.²⁰⁰ In 1997, Baugh introduced a bill, eventually enacted as California Penal Code Section 939.71, that requires prosecutors to inform grand jurors of any exculpatory evidence of which they are aware at the time of the grand jury proceedings. AB 527 goes further and would require, most importantly, that a target of a grand jury investigation be given a right to have counsel present when the target is called to testify.

California currently recognizes no such right. Consistent with historical practice and a majority of states and the federal system, California allows only witnesses, prosecutors, court reporters and, when necessary, translators, to appear before grand jurors.²⁰¹ AB 527 would have changed the law.

AB 527 contained a number of key provisions. Most importantly, it provided that, if a witness was "the subject of a grand jury investigation," "[t]he witness may have an attorney present during the grand jury examination."²⁰² In addition, expanding on California Penal Code Section 939.71²⁰³, AB 527 would have allowed the target of the grand jury to submit exculpatory evidence in writing for consideration by the grand jury.

The bill also included a number of exceptions to the rights created in section (1) of the bill. For example, amended § 939.2(b)(2)(C) provided that a witness who became a subject of the investigation only after that witness testified would not have a right to complain that she lacked a right to counsel during her appearance before the grand jury.²⁰⁴ Subsection 939.2(b)(2)(D) created a requirement that the prosecutor obtain a waiver of the notice of status as a target and right to counsel from the supervising judge in cases where notice created "undue risk or danger to

¹⁹⁸ *Id.*

¹⁹⁹ *See Pasco, Supra* note 7.

²⁰⁰ Orange County District Attorney Michael Capizzi has been quoted as saying that Baugh's motive for proposing this grand jury reform bill "is obvious without comment from me – and that's my comment." Though Baugh's experiences before the grand jury may have sparked his interest in reform, it may not be fair to characterize the bill as being personally motivated, and having no value to the citizens of California. It is hardly uncommon for legislators to champion issues with which they have had personal experience. State Senator John Burton is quoted as saying that "it takes somebody who's been bitten by a mad dog to understand the nature of rabies." Therefore, because of Baugh's unique experience, he may be the right person to champion this cause. Granberry, *supra* note 5, at B1.

²⁰¹ CAL. PENAL CODE §§ 935, 937, 938 (2000).

²⁰² AB 527, PROPOSED AMENDMENT TO CAL. PENAL CODE §§ 939.2(b)(1) and 939.2(b)(1)(B). The right to have counsel present while testifying before the grand jury shall not apply "if a corporation is the subject of the investigation and the witness is an employee or officer of the corporation and the witness is an employee or officer of the corporation and the witness is not the subject of the grand jury investigation." *Id.* at 939.2(b)(2)(B).

²⁰³ Section 939.71 requires the prosecutor to inform the grand jury of any exculpatory evidence of which he or she is aware. Once the prosecutor has informed the grand jury of the existence of such evidence, the grand jury has the option of hearing or not hearing the evidence.

²⁰⁴ AB 527, PROPOSED AMENDMENT TO CAL. PENAL CODE § 939.2(b)(2)(C).

other persons or reasonable possibility of destruction of evidence, or . . . strong suspicion of flight of the witness.”²⁰⁵

AB 527 limited the role of counsel who chose to appear along with the target witness. Specifically, counsel would not have been allowed to object to questions asked of the witness “or otherwise speak to the grand jury;” instead, counsel’s role was limited to advising “the witness during the course of the examination.”²⁰⁶ Among other limitations, counsel or counsel’s law firm would have been allowed to represent only one person appearing before that grand jury.²⁰⁷ Counsel violating any of the limitations in the bill would have been subject to sanctions.²⁰⁸

Subsection 939.22(e) stated that “Nothing in this section shall be construed to grant a witness a constitutional right to counsel under the United States or California Constitutions nor grant any right to discovery for the subpoenaed witness.”²⁰⁹ The intent of the first part of subsection (e) was, apparently, to prevent a court from concluding that the grand jury is a critical stage of a criminal proceeding, a stage at which the state might have to provide court appointed counsel consistent with the Sixth Amendment. As discussed below, such a provision would be unavailing on a court trying to decide whether such a right exists as a matter of constitutional law.

III. Constitutional Law

During the panel discussion held at McGeorge in June, 2000, a representative appearing for the California District Attorneys Association argued strenuously that AB 527 goes well beyond constitutional requirements.²¹⁰ That is obviously the case. Were the Supreme Court to decide that the Sixth Amendment or other constitutional guarantee requires a grand jury to allow counsel to assist the witness, this report would be rendered moot. Instead, the question is whether AB 527 reflects sound policy. This section reviews the Supreme Court’s constitutional case law relevant to the questions at issue. It concludes that the Constitution does not require proceedings afforded by AB 527. It also concludes that, were California to adopt protections like those found in AB 527, neither due process nor equal protection would require extending those requirements to indigent grand jury targets. That said, a later section argues why, if California does adopt protections for grand jury targets, those protections should be afforded to all, without regard to the ability to pay.

²⁰⁵ AB 527, PROPOSED AMENDMENT TO CAL. PENAL CODE § 939.2(b)(2)(D).

²⁰⁶ Presumably, the witness would have to indicate a need for advice, in light of the fact that counsel could not otherwise interrupt the questioning.

²⁰⁷ As stated by Assemblyman Scott Baugh, the author of AB527, the goal of the bill is to “correct” the problem of the grand jury being “the only arena in the criminal justice system where a person subjected to questioning does not have a right to have their attorney present during interrogation.” *AB527 Assembly Bill – Bill Analysis for Senate Committee on Public Safety, hereafter BILL ANALYSIS*, April 29, 1999, at 3. The means of correcting this problem is “allowing targets of a grand jury investigation to have their attorney present while testifying.” *Id.* An additional limitation on counsel is that he or she may not disclose what was heard there. AB 527, PROPOSED AMENDMENT TO CAL. PENAL CODE § 939.22(a)(2).

²⁰⁸ AB527, PROPOSED AMENDMENT TO CAL. PENAL CODE § 939.22(d).

²⁰⁹ AB527, PROPOSED AMENDMENT TO CAL. PENAL CODE § 939.22(e).

²¹⁰ ROUNDTABLE, *supra* note 71, at 23-24.

(a) *Right to Miranda-style warnings*

A witness before a grand jury retains the right to be free from self-incrimination.²¹¹ But nothing compels a prosecutor to warn a witness, not the target of the investigation, of the right to remain silent. By contrast, whether the prosecutor or grand jury must inform a target of that right remains an open question.

In *United States v. Mandujano*, the Court rejected a claim that the defendant had a right to have his perjury conviction overturned because he was not given full *Miranda*²¹² warnings when he testified before the grand jury.²¹³ While holding that the defendant could not defend against a perjury charge on that basis, it left open whether a target before the grand jury has a right to *Miranda* or similar warnings.²¹⁴

In dicta, four justices argued that *Miranda* was inapplicable because questioning before a grand jury did not amount to the kind of custodial interrogation involved in *Miranda*.²¹⁵ Hence, on that view, a target would not be entitled to a warning that he or she has a right to be free from self incrimination.²¹⁶ Elsewhere, a majority of the Court also in dicta has endorsed that view.²¹⁷

Lower courts have split over whether the prosecutor must warn the target of the privilege against self-incrimination.²¹⁸ The issue may not have been definitively resolved because federal prosecutors do give limited warnings to “known ‘targets’” as a matter of Justice Department

²¹¹ There is some difference of opinion whether the grand jury may subpoena targets to appear before the grand jury or if a target has a right to refuse to appear. WAYNE R. LAFAVE, ET AL., CRIMINAL PROCEDURE §8.10(c) (3d ed. 2000).

²¹² *Miranda v. Arizona*, 384 U.S. 436 (1966).

²¹³ *United States v. Mandujano*, 425 U.S. 564 (1976).

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ Justices Brennan and Marshall, concurred in the result, but disagreed with the reasoning. The concurrence, written by Brennan, emphasized that there is a “coextensive[ness] in certain circumstances of the right to counsel and the privilege against compulsory self-incrimination.” *Mandujano*, *supra* note 213, at 603. Thus, he felt that there was clearly a Fifth Amendment right to be free from “compulsory self-incrimination.” In hand with that right, may have been a right to the advice of counsel, to prevent the inadvertent or coerced waiver of that right. Because of the complex nature of asserting privilege and the ease with which it may be waived, Brennan asserted that “some guidance of counsel is required.” *Id.* at 604.

²¹⁷ *Minnesota v. Murphy*, 46 U.S. 420 (1984). While the Supreme Court recently reaffirmed its *Miranda* holding, *Dickerson v. United States*, 120 S.Ct. 2326 (2000), other post-*Miranda* decisions have narrowed its scope, underscoring the requirement of custodial interrogation. *See Beckwith v. United States*, 425 U.S. 341 (1976) (holding that interrogation in the suspect’s home is noncustodial and *Miranda* does not apply); *Oregon v. Mathiason*, 429 U.S. 492 (1977) (finding that *Miranda* does not apply if suspect was “invited” to the station and came there of his own will because suspect is not in “custody”); *Berkemer v. McCarty*, 468 U.S. 420 (1984) (holding *Miranda* inapplicable to roadside interrogation of motorist stopped for traffic violation, even when officer intended to arrest suspect); *Murphy*, *supra* (holding that *Miranda* does not apply because suspect was not in custody when ordered to his probation officer’s office).

²¹⁸ More recent rulings indicate a trend towards constitutionally requiring that *Miranda* warnings be given to grand jury targets. LAFAVE, ET AL., *supra* note 211, at §8.10(d). Several state courts have concluded that “the special status of a person viewed by the prosecutor as a target carries with it constitutional obligation[s] to inform that person of his right to refuse to answer on self-incrimination ground[s].” *Id.* at 452. Other states have not reached the issue because of statutory notification procedures which include a *Miranda*-type warning. *Id.*

policy.²¹⁹ In addition, some states require similar warnings as a matter of state law.²²⁰ Still other states do not require grand jury indictments to begin criminal proceedings, avoiding the issue entirely, or do not routinely call targets before the grand jury.²²¹

Even if the target has a right to a warning, it is a warning of a right to be free from self-incrimination, not a right to counsel. *Mandujano* implied that an accused had no right to have counsel present in the grand jury room.²²² Further, the cases have not held that an accused has the *Miranda* right to counsel to advise the accused during his or her testimony before the grand jury.²²³ Thus, it would appear that the *Miranda* line of cases (creating rules to protect a suspect's

²¹⁹ See *In re Kelly*, 350 F. Supp. 1198 (E.D. Ark. 1972).

²²⁰ See CONN. GEN. STAT. §54-47f (1999), IDAHO CODE §19-1121 (1999), UTAH CODE ANN. §77-10a-13 (1999), REV. CODE WASH. §10.27.120 (2000).

²²¹ See CAL. CONST. art. I, §14 (“[f]elonies shall be prosecuted as provided by law, either by indictment or, after examination and commitment by a magistrate, by information”). See also *ROUNDTABLE*, *supra* note 71, at 41-42 (stating that “targets” are infrequently called to testify before the grand jury).

²²² Though the disposition of *Mandujano* turned on the issue of the applicability of a *Miranda* warning, the Court did consider the issue of right to counsel for witnesses before the grand jury. As stated by Justice Scalia in a later opinion, the court has “twice suggested, though not held, that the Sixth Amendment right to counsel does not attach when an individual is summoned to appear before a grand jury, even if he is the subject of the investigation.” *United States v. Williams*, 504 U.S. 36, 49 (1992). This “suggestion” was made by a plurality of the Court, as two justices dissented from the proposition and two others felt that the issue should not have been explored, as the case turned on another issue. See *Mandujano*, *supra* note 213 (Brennan, J., concurring, & Stewart, J., concurring). The plurality opinion specifically says that the fact that counsel could not be present inside the grand jury room is a “plainly correct recital of the law.” *Id.* at 580. The plurality went on to say that because criminal proceedings had not been instituted against the defendant, “the Sixth Amendment right to counsel had not come into play.” *Id.* Brennan, in his concurrence, disagreed on the issue of whether or not criminal proceedings had been initiated and thus, on whether or not there was a Constitutional right to counsel. *Id.* at 584 (Brennan, J., concurring).

²²³ While the Supreme Court recently reaffirmed *Miranda*, *Dickerson*, *supra* note 217, has also limited *Miranda* by narrowly defining both interrogation, *Rhode Island v. Innis*, 446 U.S. 291 (1980), and custody, *Mathis v. United States*, 391 U.S. 1 (1968) and *Mathiason*, *supra* note 217, and by requiring a nexus between the custody and the interrogation. *Illinois v. Perkins*, 496 U.S. 292 (1990). The Court does not seem inclined to extend a *Miranda* right to counsel to the grand jury setting.

A *Miranda* right to counsel is distinct from a Sixth Amendment right to counsel. In the *Miranda* setting, counsel's role is to help the defendant protect his or her Fifth Amendment right to be free from self-incrimination. That right exists when the state seeks to interrogate the defendant in a custodial setting. *Miranda*, *supra* note 212. By contrast, a Sixth Amendment right to counsel arises only after the state has commenced formal proceedings; but once the Sixth Amendment right to counsel is triggered, the state must provide counsel in a variety of settings, including any situation in which the state seeks to elicit information from the defendant; *Massiah v. United States*, 377 U.S. 201 (1964), *Brewer v. Williams*, 430 U.S. 387 (1977); and at a variety of post indictment or post arraignment settings. See *Coleman v. Alabama*, 399 U.S. 1 (1970), *Wade v. United States*, 504 U.S. 218 (1967), and *Gilbert v. California*, 388 U.S. 263 (1967).

Even federal law leaves uncertain whether the federal public defender is required to represent targets. In the federal grand jury model, counsel for the witness under investigation is excluded from the grand jury room. Federal Rules allow only “attorneys for the government, the witness under examination, ... and a stenographer ... [to] be present while the jury is in session.” FED. R. CRIM. P. 6(d) (West 2000). Under 18 U.S.C.A. § 3006A, a court does not have to provide representation for financially eligible grand jury witnesses. The statute requires that “representation shall be provided for any financially eligible person who ... (H) is entitled to appointment of counsel under the [S]ixth [A]mendment to the Constitution.” 18 U.S.C.A. § 3006A(1)(H). But, “the fact that a person is the subject of a [grand jury] investigation is not enough to trigger his Sixth Amendment right to counsel.” *U.S. v. Soto*, 574 F. Supp. 986, 990 (1983). As the Court has found no such entitlement, section 3006A is not triggered when a witness must appear before a federal grand jury. However, most federal jurisdictions do allow consultation between the witness and her attorney outside the grand jury room. F. LEE BAILEY & HENRY ROTHBLATT, 1 DEFENDING BUSINESS AND

Fifth Amendment right to be free from self incrimination, including a subsidiary right to counsel to assist in protecting that right) does not create a right to counsel in the grand jury setting.

(b) Right to counsel in the grand jury room

In *Mandujano*, the Court implied that even a target of the grand jury does not have a right to have counsel present in the grand jury room. Insofar as the Court would rely on historical practice in interpreting grand jury practice, the Court is unlikely to find such a right to have counsel present.²²⁴

Current practice in the federal system demonstrates a strange tension. A target has a right to consult with counsel,²²⁵ necessary to protect the target's privilege to be free from self-incrimination. But the target does not have the right to have counsel present in the grand jury proceedings during questioning of the target.²²⁶ To assure that the target does not waive his or her Fifth Amendment right, counsel for a grand jury target who agrees to testify must wait in the hallway outside the grand jury room. Periodically, the target leaves the grand jury room to consult with counsel.²²⁷

In 1982, the American Bar Association published *Grand Jury Policy and Model Act*. After identifying some of the problems with the grand jury, it noted that during the several years that the subject of grand jury reform was before the ABA, numerous states adopted various reform measures.²²⁸ By the time of its 1982 report, 15 states allowed counsel in the grand jury room.²²⁹ Indeed, the first principle in its report was “[t]he hotly-contested question of allowing counsel in the grand jury room . . . [which] was approved by the House [of Delegates] by a two-to-one margin – 196 to 83 – despite substantial opposition voiced by the U.S. Department of Justice.”²³⁰

WHITE COLLAR CRIMES 50 (2nd ed., 1984). While court appointment of counsel of financially eligible witnesses is not required, some districts make routine appointments once an eligible witness has received a target letter. In other districts, witnesses generally interview with the Public Defender's Office to determine whether or not counsel should be appointed. The major factor in such a determination is whether or not the witness is in fact a target or whether it looks as if scope of the investigation will make the witness a target. Telephone interview with Mr. Jeff Staniels, Federal Public Defender's Office, 06.13.00.

²²⁴ See *Williams*, *supra* note 223 (finding that because the grand jury has historically been “functionally independent” from the judicial branch, “certain constitutional protections afforded defendants in criminal proceedings have no application before” the grand jury); *Hannah v. Larche*, 363 U.S. 420 (1960) (stating that procedural rights claimed by petitioners did not apply to grand jury hearings because of the “disruptive influence their injection would have” and because the grand jury's role is to investigate, not to try); and *United States v. Calandra*, 414 U.S. 338 (1974) (stating that a grand jury investigation is an *ex parte* investigation which should not be “saddled” with procedures that would frustrate that purpose).

²²⁵ See F. LEE BAILEY, *supra* note 223.

²²⁶ *Mandujano*, *supra* note 213.

²²⁷ In one federal case, “a witness was excused 1,203 times to consult with counsel.” Mary Emma Hixon, *Bringing Down the Curtain on the Absurd Drama of Entrances and Exits – Witness Representation in the Grand Jury Room*, 15 Am. Crim. L. Rev. 307, 334 (1978).

²²⁸ AMERICAN BAR ASSOCIATION GRAND JURY POLICY AND MODEL ACT, *hereafter* ABA REPORT, at 1-3 (1982).

²²⁹ *Id.* at 2.

²³⁰ *Id.* at 1.

The laws applicable in other states are reviewed below. Here, it is worth noting that although there is no constitutional right to have counsel present in the grand jury room, a number of states have extended that right as a matter of sound procedural reform to prevent perceived grand jury abuse.

(iii) Right to court appointed counsel

AB 527 included a provision, § 939.22(e), that provided that “Nothing in this section shall be construed to grant a witness a constitutional right to counsel under the United States or California Constitutions” While that provision is simply not binding on a court’s interpretation of the Constitution,²³¹ an indigent target almost certainly has no right to court appointed counsel under the Supreme Court’s current case law and would not have such a right even if AB 527 had become law.²³²

(i) Critical Stages and Court-appointed Counsel

In 1963, the Supreme Court, in *Gideon v. Wainwright*, held that the Sixth Amendment right to counsel requires a state to appoint counsel for an indigent defendant charged with a felony.²³³ In subsequent cases, the Court had to determine when that right began. The right to court appointed counsel applies only if the proceeding is a “critical stage” in the criminal prosecution.²³⁴

During the two-day session at McGeorge, one of the participants raised the question whether a grand jury proceeding might become a critical stage if counsel were allowed in the grand jury room, thereby requiring court appointed counsel.²³⁵ That does not appear to be the case.

The argument that the proceeding would be a critical stage finds support in part of the Court’s test to determine if counsel must be appointed. For example, the Court has required appointment of counsel at a preliminary hearing,²³⁶ at some pretrial identification procedures,²³⁷ and depending on state procedure, at the first appearance before a magistrate or at the arraignment.²³⁸ The Court required counsel in all of these settings because the defendant’s

²³¹ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (establishing the right to judicial review of legislation and that the Supreme Court is the final authority on the meaning of the Constitution).

²³² As argued in a separate section of this report, if California does extend the right to counsel to targets before the grand jury, it should also provide appointed counsel to indigent defendants.

²³³ *Gideon v. Wainwright*, 372 U.S. 335 (1963). See also *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (extending right to counsel in some misdemeanor cases).

²³⁴ See *Powell v. Alabama*, 287 U.S. 45 (1932).

²³⁵ ROUNDTABLE, *supra* note 71, at 41.

²³⁶ *Coleman v. Alabama*, 399 U.S. 1 (1970).

²³⁷ *Wade*, *supra* note 223.

²³⁸ *Hamilton v. Alabama*, 368 U.S. 52 (1961). In *Hamilton*, the Court found the arraignment to be a critical stage, necessitating appointed counsel because under Alabama law, defenses not raised at the arraignment were waived for trial. Because of this possible prejudice at trial to those defendants unable to afford attorneys at the arraignment, the Court found this to be a critical stage.

“substantial rights . . . may be affected” in the proceeding under consideration.²³⁹ Quite obviously, a target’s Fifth Amendment privilege against self incrimination may be affected if he or she lacks counsel to advise the target when to refuse to answer potentially incriminating questions.

But that ignores the second part of the Court’s test for determining whether a particular stage is a critical one. Counsel must be appointed only if the proceeding is part of a criminal prosecution.²⁴⁰ For example, the Court has made clear that the Sixth Amendment right to counsel is not triggered when police detain a suspect, even if the prosecutor intends to bring formal charges against the defendant.²⁴¹ In *Brewer v. Williams*, the Court stated that “the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him – ‘whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.’”²⁴² That is, until a suspect is indicted, the investigation has not demonstrated the state’s commitment to proceed against the defendant and remains an investigation, not a criminal proceeding.²⁴³

(ii) Other Possible Sources of a Right to Counsel

In some instances, when a state creates a right for those able to pay for the right, the Supreme Court has found a requirement to extend the right to indigent defendants, thereby compelling the state to pay for that right.²⁴⁴ This section reviews, whether passage of a bill like AB 527 would result in an obligation to provide similar assistance to indigent targets.

Apart from the Sixth Amendment, the Supreme Court has on occasion found that equal protection (possibly in conjunction with due process) requires appointment of counsel or provision of other resources to indigents. Indeed, prior to *Gideon*, the Supreme Court found due process may require appointment of counsel.²⁴⁵ The Court held that a state must appoint counsel for the subject of a probation or parole hearing depending on the circumstances of the case; that is, the Court refused to draw a bright line when counsel must be appointed.²⁴⁶ Instead, counsel must be appointed if necessary to assure that a hearing was effective.

²³⁹ *Jones v. Barnes*, 463 U.S. 745, 757 (1983), applying *Argersinger*, *supra* note 233.

²⁴⁰ *LFAVE*, *supra* note 211, at §11.2(b).

²⁴¹ *U.S. v. Gouveia*, 467 U.S. 180 (1984). By contrast, only if the suspect is subjected to custodial interrogation is the suspect entitled to counsel as required by *Miranda*. But here, the right to counsel is part of the protective or prophylactic rights developed in *Miranda* to protect the suspect’s Fifth Amendment right to be free from self-incrimination. *Dickerson*, *supra* note 217.

²⁴² *Supra* note 223.

²⁴³ At least one state court has rejected the argument that the Sixth Amendment right to counsel applies to the grand jury. The Nevada Supreme Court, analyzing a statute similar to AB 527, found the language regarding counsel inside the grand jury room to be permissive, which would not require the state to appoint counsel for indigent defendants. In other words, the right to have counsel was not constitutionally derived. *Sheriff v. Bright*, 108 Nev. 498, 835 P.2d 782 (1992).

²⁴⁴ *See Griffin v. Illinois*, 351 U.S. 12 (1956).

²⁴⁵ *See Powell*, *supra* note 234.

²⁴⁶ *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

In *Douglas v. California*, the Court recognized that a state does not have to create an appeal of right, but held nonetheless that, once a state does create an appeal of right, equal protection requires that the state afford indigent appellants court-appointed counsel.²⁴⁷

In *Evitts v. Lucey*, appellant's retained counsel failed to comply with state appellate rules of procedure, resulting in dismissal of his appeal.²⁴⁸ The Supreme Court held that due process includes a right to effective assistance of counsel on appeal. That is so, according to the Court, even if the state may dispense with the right to appeal entirely. Once it creates an appeal of right as "an integral part of the . . . system for adjudicating the guilt or innocence of a defendant,' . . ., the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution."²⁴⁹

Were California to recognize the right of a person able to afford counsel to have his or her attorney in the grand jury room, an indigent target might argue that the *Douglas-Evitts* line of cases requires court-appointed counsel. That conclusion is probably wrong.

Douglas has been limited in subsequent cases. Even in *Douglas*, the Court insisted that it was not requiring "absolute equality."²⁵⁰ It also insisted that without counsel, the appeal of right would amount to a "meaningless ritual."²⁵¹ Thereafter, the Court made clear that absolute equality was not required when it held that the state was under no obligation to appoint counsel for indigents seeking discretionary review.²⁵² The Court found that neither due process nor equal protection was offended. Due process would be violated "only if indigents were singled out . . . and denied meaningful access to the appellate system because of their poverty."²⁵³ Equal protection was not violated even though counsel's assistance may be helpful in the "somewhat arcane art of preparing petitions for discretionary review."²⁵⁴ That was so because the state has

²⁴⁷ *Douglas v. California*, 372 U.S. 353 (1963). In *Douglas*, the Court was reaffirming an earlier holding that once a State has decided to give a right to appeal to criminal defendants, that appeal must be administered in such a way that there is equal access to this right. *Griffin, supra* note 244. The Court stated that if a state "has a general policy of allowing criminal appeals, it cannot make lack of means an effective bar to the exercise of this opportunity." *Id.* at 24 (Frankfurter, J., concurring). Thus, the State has a constitutional obligation to provide counsel for indigents in appeals, even though there was no constitutional obligation to provide the appeal at all. *See also McKane v. Durston*, 153 U.S. 684 (1894) for the proposition that the state does not have to create a right to review.

²⁴⁸ *Evitts v. Lucey*, 469 U.S. 387 (1985). This case did not turn on equal protection grounds, as the defendant was represented by counsel. The *Douglas* line of cases involved indigent defendants entitled to treatment similar to those able to pay.

²⁴⁹ *Id.* at 393, citing *Griffin, supra* note 244, at 18. For some other examples, *see Eskridge v. Board of Prison Terms and Paroles*, 357 U.S. 214 (1958) (invalidating state rule giving free transcripts only to defendants who could convince judge that "justice will thereby be promoted"); *Burns v. Ohio*, 360 U.S. 252 (1959) (invalidating state requirement that indigent defendants pay fee before filing notice of appeal of conviction); *Lane v. Brown*, 372 U.S. 477 (1963) (invalidating procedure whereby meaningful appeal was possible only if public defender requested a transcript); and *Draper v. Washington*, 372 U.S. 487 (1963) (invalidating state procedure providing for free transcript only for a defendant who could satisfy the trial judge that his appeal was not frivolous).

²⁵⁰ *Douglas, supra* note 247, at 357.

²⁵¹ *Id.* at 358.

²⁵² *Ross v. Moffitt*, 417 U.S. 600 (1974).

²⁵³ *Id.* at 611.

²⁵⁴ *Id.* at 616.

no “duty to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the state appellate process.”²⁵⁵

Read together, *Evitts*, *Douglas* and *Ross* suggest that due process and equal protection require appointment of counsel only when lack of counsel renders the appeal (or presumably other procedures except those that are part of the criminal proceedings where Sixth Amendment rights exist) meaningless rituals. They also suggest that extending a right to have counsel present in the grand jury room does not create an obligation to appoint counsel for indigent targets. That is so because an appearance before the grand jury is unlike a hearing²⁵⁶ or appeal²⁵⁷ where the indigent cannot “go it alone.” For years, witnesses before the grand jury have “gone it alone,” without aid of counsel. At this late date, one cannot argue that the unrepresented witness is so outmatched to implicate notions of fundamental fairness. Further, unlike the appeal and trial, a grand jury determination is not an integral part of the system to determine guilt or innocence. It is merely a determination of probable cause that the defendant committed a crime; guilt or innocence will be determined at trial with a full panoply of rights, including the right to counsel.²⁵⁸

As developed below, however, even if the Constitution does not require appointment of counsel, sound policy dictates that the state makes counsel available if it does so for those who can afford counsel.

IV. The Arguments in Support of AB 527

According to Assemblyman Scott Baugh, “[t]he grand jury is the only arena in the criminal justice system where a person subjected to questioning does not have a right to have their attorney present during interrogation. AB 527 seeks to correct this situation by allowing targets of a grand jury investigation to have their attorney present while testifying.”²⁵⁹

Despite the suggestion that Baugh is attempting to change the law based only on his bad experience with the system²⁶⁰, AB 527 is neither novel nor radical.²⁶¹ Baugh’s experience may explain his interest in the subject matter, but concern over grand jury excess and lack of independence from prosecutors is long standing.

²⁵⁵

Id.

²⁵⁶

Gagnon, *supra* note 246.

²⁵⁷

See Douglas, *supra* note 247 and *Evitts*, *supra* note 248.

²⁵⁸

See Murray v. Giarratano, 492 U.S. 1 (1989) and *Pennsylvania v. Finley*, 481 U.S. 551 (1987).

²⁵⁹

BILL ANALYSIS, *supra* note 207, at 3.

²⁶⁰

See Granberry, *supra* note 5, at B1.

²⁶¹

See Hill-Holtzman, *supra* note 7, at B1, in which David LeBahn, deputy director of the California District Attorneys Association, and former Orange County prosecutor says that “Baugh’s experience hardly warrants such a fundamental change in how grand juries conduct inquiries.” Supporters of the bill would argue that the proposed change is hardly “fundamental.”

Over twenty years ago, the ABA began its study of the grand jury that led to its Model Act.²⁶² The ABA was interested in restoring the grand jury's "'protective' function."²⁶³

The ABA addressed several problems with the grand jury. The grand jury lacks sufficient procedural safeguards. A unique body in our judicial system, it possesses "awesome powers."²⁶⁴ Specifically, it works in secret, has "virtually unlimited subpoena powers"; "[i]t can question witnesses without their lawyer present."²⁶⁵ It works without judicial supervision.²⁶⁶ It can punish contempt by having a recalcitrant witness jailed without trial.²⁶⁷ Despite early faith in the grand jury as a shield, it is now viewed as a "tool" of the prosecution. The ABA report noted increasing concern among business leaders and the bar about the sweeping powers of the grand jury.²⁶⁸

After several years of studying the grand jury, the ABA recommended several reforms, many of them quite similar to those found in AB 527 and earlier California legislation. Those recommendations are summarized below.²⁶⁹ The ABA's first principle, adopted by a two to one margin, is broader than AB 527. It provides, in relevant part, that "a witness before the

²⁶² Criticisms of the grand jury go back further. *See, e.g.*, Wayne L. Morse, *A Survey of the Grand Jury System*, 10 OR. L. REV. 101, 101 (1931) (noting the criticism that the grand jury was a "rubber stamp for the district attorney").

²⁶³ ABA REPORT, *supra* note 228, at 1. Some scholars suggest the inception of the grand jury was for the purpose of protecting the citizens of England from an oppressive monarchical government. Helen E. Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 AM. CRIM. L. REV. 701, 703 (1972). Other scholars propose that the grand jury was essentially the King's tool for indicting his enemies. *Id. See also* Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. U. L. REV. 1, 5-9 (1996); Susan M. Schiappa, Note, *Preserving the Autonomy and Function of the Grand Jury: United States v. Williams*, 43 CATH. U. L. REV. 311, 326 (1993). Undoubtedly, at various times in our history, it has served as a shield against governmental overreaching.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.* Holding a recalcitrant witness in civil contempt is used to coerce such a witness to comply with a subpoena. "The witness is sentenced to imprisonment or to a fine (which may increase daily) but he may purge himself by complying with the subpoena...[if he] refuses to purge himself [he] will remain under sentence until the grand jury completes its term and is discharged. Moreover, if the information that the contemnor possesses is still needed, he may be subpoenaed by a successor grand jury and again held in contempt if he continues to refuse to supply that information." LAFAVE, *supra* note 211, at §8.3, fn. 1. In its report, the ABA attempted to lessen the blow to recalcitrant witnesses by recommending a "cap" on the length of time such witnesses may be confined. ABA REPORT, *supra* note 228, at 4.

²⁶⁸ In recent years, the grand jury has been used increasingly by prosecutors as an investigatory "tool." *Id.* at 1. In the past, charges of unfair use of the grand jury were made by "radical groups and the criminal defense community" but now, business leaders are making such charges. *Id.* Corporations such as General Motors and Braniff Airways, both the subject of federal grand jury investigations, "have criticized the uses to which the grand jury is put." *Id.* In addition, there have been "a series of congressional hearings over the past several Congresses" which have "exposed numerous abuses" and suggested numerous "potential reforms." *Id.*

²⁶⁹ In its report, the ABA recommended that witnesses before the grand jury "have the right to be accompanied by counsel" and that such counsel be "allowed to be present in the grand jury room." The ABA includes the recommendation that the role of counsel be limited to advising the witness and that counsel "not be permitted to address the grand jurors." *Id.* at 5. The ABA also recommends that targets of grand jury investigations be notified that they are "possible indictees." *Id.* at 5. The ABA provides for court-imposed sanctions against attorneys who fail to adhere to the procedural rules of the grand jury. *Id.* at 6.

grand jury shall have the right to be accompanied by counsel in his or her appearance before the grand jury.²⁷⁰ That is, it applies to any witness, not merely to a target. Like AB 527, principle 1 allowed counsel only to advise the target, and to play no other role in the process.

In its Commentary, the ABA observed that the limited role of counsel prevents the grand jury from becoming a mini-trial.²⁷¹ But providing counsel addresses concerns about unfairness of disallowing a person access to counsel. The common practice of allowing the witness to interrupt the proceedings to consult outside the grand jury room is, according to the ABA, “awkward and prejudicial”: “It unnecessarily prolongs the grand jury proceedings and places the witness in an unfavorable light before the grand jurors.”²⁷² The American Law Institute has called the grand jury system a “degrading and irrational” procedure.²⁷³

Even before the ABA recommended extending the right to have counsel present in the grand jury room, the A.L.I. made a similar recommendation. Among other arguments favoring the right to have counsel present in the grand jury room, it expressed concern that without counsel, a witness risked waiving the privilege against self-incrimination or refusing to answer, risking being held in contempt.²⁷⁴ It is difficult to imagine that prosecutors need to place citizens in such an untenable dilemma.

V. Grand Jury Reform in Other States

By 1982, according to the ABA, 15 states allowed counsel to be present in the grand jury room when the attorney’s client was testifying.²⁷⁵ There are now at least twenty states that recognize the right to have counsel present.²⁷⁶ This section compares AB 527 to those statutes. This section concludes that AB 527 would have made a modest change in the law and would have brought California within a significant minority of states that have recognized the right of a person to have counsel present during that witness’s testimony.

Statutes in the states that have reformed their grand jury practice vary considerably. But some common features allow comparison.

(a) Target or Any Witness

²⁷⁰ *Id.* at 5.

²⁷¹ *Id.* at 6.

²⁷² *Id.*

²⁷³ *Id.* The ABA Report also discusses the added problems with the current system of consulting with attorneys outside the grand jury room. In one case, a federal prosecutor was free to bring up at trial the fact that the defendant had left the grand jury room to consult with counsel as relevant to perjury charges. *United States v. Kopel*, 552 F.2d 1265 (7th Cir. 1977). Another court allowed a limit to be placed on the number of times that a witness could leave the grand jury room to consult with counsel. *In re Tierney*, 465 F.2d 806 (5th Cir. 1972). If counsel were allowed inside the grand jury room, these situations would disappear.

²⁷⁴ ABA REPORT, *supra* note 228, at 6.

²⁷⁵ *Id.* at 2.

²⁷⁶ The states are listed in Appendix A.

Unlike AB 527, 16 of the states that have reformed their grand jury practice allow counsel to be present when any witness testifies. The four states that limit representation to targets define that term differently.²⁷⁷ But a survey of reported case law in those jurisdictions found no case law in which the issue was litigated, suggesting that drawing a line between targets and witnesses who are not targets has not caused significant problems.²⁷⁸

Rather than calling for radical reform, AB 527 proposed a modest change in the law, limited to targets called before the grand jury. Further, rather than creating problems for prosecutors who realize after a witness has testified that the witness may be indicted, AB 527 protected prosecutors from second-guessing in such cases.²⁷⁹

(b) Counsel's Role in the Grand Jury Room

Critics of grand jury reform are legitimately concerned that grand jury investigations not become mini-trials. The essential investigatory function of the grand jury would be impaired, as would the need for grand jury secrecy. As a result, AB 527, like the overwhelming majority of states that have reformed grand jury practice, would have severely limited the role of counsel when counsel is before the grand jury.

Only one of the 20 states that allow counsel to be present does not limit counsel's role.²⁸⁰ The remaining 19 vary in terminology. For example, some statutes state simply that counsel "shall not participate" in the proceedings.²⁸¹ Others state that "counsel may not communicate with anyone other than his client."²⁸² Still others are more specific that counsel "shall not make objections, arguments or address the grand jury."²⁸³ The most explicit statute states that counsel

²⁷⁷ The definitions of those entitled to be accompanied by counsel range from simply "target," IND. CODE ANN. §35-34-2-5.5 (Michie 1999) and LA. CODE CRIM. PROC. ART 433(2) (2000); to "the person under investigation," Ariz. Rev. Stat. § 21-412 (2000); to "a person whose indictment the district attorney intends to seek or the grand jury on its own motion intends to return," NEV. REV. STAT. ANN. §172.239(1) (2000).

²⁷⁸ The annotated statutes regarding grand juries for each state and a lengthy search of each state's case law on the subject produced no results to indicate that those states which allow counsel inside the grand jury room have had problems.

A couple of states which do allow for counsel to be present inside the grand jury room impose a special limitation: counsel is only allowed inside the grand jury room if immunity has not been granted. See IDAHO CODE §19-1121 (1999), NY CLS CPL §190.52 (1999), and WASH. REV. CODE §10.27.120 (2000). The logic behind these provisions may be that if a witness has been granted immunity, the need to have counsel present to preserve rights and privileges is lessened. In those instances in which immunity has been granted and counsel is not allowed inside the grand jury room, the procedures revert to the old system where witnesses must consult with their attorneys outside the grand jury room.

²⁷⁹ See AB 527, PROPOSED AMENDMENT TO CAL. PENAL CODE §932.2(b)(2)(C), which provides that the section allowing for the presence of counsel shall not apply if "the prosecutor determines during the grand jury hearing that a previous witness has become the subject of the grand jury investigation." However, there may still be room for second-guessing whether the witness was entitled to representation in terms of when the prosecutor knew that the witness was a target or possible target. To eliminate this problem, it may be desirable to include that the determination of whether or not a witness was a target entitled to counsel be made using an objective standard, such as what the "reasonable prosecutor" would have thought.

²⁸⁰ See Kan. Stat. Ann. §22-3009(2) (1999).

²⁸¹ See 725 ILCS 5/112-4.1 (2000) and NY CLS CPL §190.52(2) (1999).

²⁸² See Ariz. Rev. Stat. §21-412 (2000).

²⁸³ See Colo. Rev. Stat. 16-5-204(4)(d) (1999) and FLA. STAT. §905.17(2) (1999).

shall not “speak in such a manner as to be heard by other members of the grand jury.”²⁸⁴ That is, most of the statutes limit the role of counsel consistent with the underlying justification for counsel’s presence: advising the client in order to protect the client’s rights.²⁸⁵ As with the line between target and witness, the role of counsel before the grand jury has produced no reported cases, again, suggesting that the statutes have not been difficult to administer.²⁸⁶

AB 527 was explicit in the limited role that counsel would have played in the grand jury room. Counsel could not object or otherwise speak to the grand jury. Counsel’s role was limited to advising the client.

(c) Sanctions

Unlike AB 527, most statutes fail to address sanctions if counsel violates the limited role defined in the statute. Those states that address the problem include provisions for removal of counsel that fail to comply with counsel’s statutory role.²⁸⁷ Some provide for an in camera hearing before the presiding judge to determine whether removal is proper.²⁸⁸

AB 527 provided that “[t]he prosecuting attorney may make a motion to the presiding judge for sanctions against counsel who is representing a witness pursuant to subdivision (a) for any violation of this section and refer the violation to the State Bar of California.” Although not elaborated on in analysis of the bill, § 939.22(d) apparently would have allowed a number of sanctions, including a finding of contempt or financial sanctions.²⁸⁹

(d) Multiple Representation

Concern has been expressed that allowing counsel before the grand jury poses a special problem in cases involving multiple targets that are represented by the same attorney.²⁹⁰ Multiple

²⁸⁴ See NEV. REV. STAT. ANN. §172.239(2) (2000).

²⁸⁵ One unique state provision allows the attorney to participate in the proceedings – making objections or arguments and questioning witnesses – only with the permission of the foreman of the grand jury and the prosecutor. IND. CODE ANN. §35-34-2-5.5(b)(2) (Michie 1999). Another state allows counsel to make objections on his or her client’s behalf, but does not allow counsel to question any witness. Kan. Stat. Ann. §22-3009(2) (1999). Additionally, there are two states that are silent on the issue of what sort of role the attorney for the witness is to take once inside the grand jury room. 22 OKLA. STAT. §340 (1999) and UTAH CODE ANN. §77-10a-13 (1999).

²⁸⁶ A significant amount of satellite litigation about the role of counsel would be one factor weighing against reform. That is so because extensive litigation would burden the process and frustrate legitimate law enforcement goals of timely indictments of criminal defendants and the public interest in efficient administration of justice. By contrast, the fact that there is an absence of significant cases where counsel has overstepped his or her bounds in the grand jury room suggests that fears of disruption of grand jury process are unfounded. Again, a search of the annotated statutes for each state and the case law failed to turn up any such cases.

²⁸⁷ See Ariz. Rev. Stat. §21-412 (2000), IND. CODE ANN. §35-34-2-5.5(c) (Michie 1999), LA. CODE CRIM. PROC. art 433(A)(2), NEV. REV. STAT. ANN. §172.239(3) (2000), NY CLS CPL §190.52(3) (1999) and 42 PA. CONS. STAT. §4549(C)(3) (1999).

²⁸⁸ See Colo. Rev. Stats. 16-5-204(4)(d) (1999) and R.R.S. NEB. §29-1411(2) (2000)

²⁸⁹ Only a few jurisdictions explicitly require the attorney appearing with the witness to take an oath of secrecy. Colo. Rev. Stats. 16-5-204(4)(d) (1999), IND. CODE ANN. §35-34-2-5.5(b)(1) (Michie 1999), R.R.S. Neb. §29-1411(2) (2000). AB 527 does not address the secrecy issue.

²⁹⁰ ROUNDTABLE, *supra* note 71, at 35-36.

representation may make the grand jury’s job of uncovering evidence more difficult because the target, in effect, will have an “ear” in the grand jury room when other witnesses are examined.²⁹¹ A related argument is that the attorney, able to listen to examination of multiple witnesses, will learn what the grand jury is investigating more fully than otherwise.²⁹²

To prevent obstruction of justice, some of the statutes provide that counsel may not represent multiple witnesses in the same investigation.²⁹³ Similarly, AB 527 made explicit the prohibition against multiple representation.²⁹⁴

Rather than creating fundamental change in grand jury procedure, AB 527 was a measured response to a serious problem. The proposed legislation was more cautious and drew brighter lines, favoring prosecutors, than similar legislation in other states. The perceived harm that gave rise to AB 527 was the fear that an uninformed target would inadvertently waive essential rights without advice of counsel or would refuse to testify entirely because of fear of appearing without guidance in the grand jury room. AB 527 would have granted a target a right to have counsel present, but carefully circumscribed counsel’s role in the grand jury room.

VI. Criticism of AB 527 and Response to that Criticism

A representative of the California District Attorneys Association attended the June 1-2, 2000 information gathering sessions at McGeorge School of Law. In addition, various organizations, including the Los Angeles District Attorney’s Office, stated their objections to AB 527 as it went through the legislature. Some additional objections were quoted in news stories about the proposed legislation. The criticisms are several, but none seems sufficient to reject the limited reform proposed in AB 527.

²⁹¹ *Id.*

²⁹² *Id.* at 29.

²⁹³ See C.R.S. 16-5-204(4)(d) (1999), FLA. STAT. §905.17(2) (1999), R.R.S. NEB. §29-1411(2) (2000), 42 PA. CONS. STAT. §4549(C)(4) (1999), and WIS. STAT. §968.45(1) (1999).

²⁹⁴ Most states are very vague on the issue of multiple representation, and do not say much more than, “no law firm shall represent more than one witness in the same proceeding.” There is very little guidance as to how the provisions are to be applied. Wisconsin has a very specific statute which provides that the prosecuting attorney, attorney for a witness or any grand juror may file a motion with the presiding judge to have an attorney removed because of a conflict of interest due to representation of multiple witnesses. After such a motion is made, a hearing will be held with “the burden on the moving party to establish the conflict.” WIS. STAT. §968.45(1) (1999). No such provision is included in AB 527, which will leave the determination of when counsel for a witness should be dismissed difficult to administer. A blanket rule against multiple representation may be unconstitutional. The Sixth Amendment guarantees a right to counsel, and the defendant’s choice of counsel should not be unnecessarily obstructed. *United States v. Seale*, 461 F.2d 345 (7th Cir. 1972); *United States v. Sheiner*, 410 F.2d 337 (2d Cir.), cert. denied, 396 U.S. 825, 90 S. Ct. 68, 24 L.Ed 2d 76 (1969). But, a defendant does not have the right to choose a particular attorney. *United States v. Poulack*, 556 F.2d 83 (1st Cir. 1977), cert. denied, 434 U.S. 968, 98 S. Ct. 613, 54 L.Ed. 2d 480 (1977). In 1978, the Colorado Supreme Court upheld a state statute prohibiting all multiple representation in grand jury proceedings. *People ex rel. Losavio v. J. L.*, 195 Colo. 494, 580 P.2d 23 (1978). See also *Wheat v. United States*, 486 U.S. 153 (1979), in which the Supreme Court held that there must be a “case-by-case evaluation” of the competing interests of the court, the defendant and the interests of justice when determining whether to deny a defendant counsel of his or her choice. In *Wheat*, the defendant indicated that he was willing to waive his right to “conflict-free” counsel, but the court still exercised its discretion to require the defendant to seek other counsel.

(a) *Mini-trials*

A number of organizations have objected that addition of counsel will make the grand jury proceeding into a mini-trial.²⁹⁵ For example, the Grand Jurors Association of Orange County stated in its opposition to AB 527 that “the proceedings of the Grand Jury would be virtually destroyed by allowing frequent interruptions with no judge present to control such discussions/interruptions.”²⁹⁶ The Los Angeles District Attorney’s Office voiced similar concern about restricting improper conduct by the defense attorney.²⁹⁷ A deputy director of the California District Attorneys Association was quoted in the Los Angeles Times as saying, “We do not think it’s appropriate to turn grand jury [proceedings] into trials.”²⁹⁸

Concern about converting grand jury proceedings into mini-trials was addressed by the ABA in its report: the limited role that counsel may play “will preclude the grand jury’s becoming a ‘mini-trial’ . . .”²⁹⁹ Under AB 527, similar to Principle 1 in the ABA report, counsel’s role was limited to giving advice to the client. Objections or otherwise addressing the grand jury were explicitly disallowed.

AB 527 and other similar legislation recognized that counsel might violate the limited role permitted under the statute. But AB 527 also provided for sanctions, presumably, including sanctions like being held in contempt of court or fined for violating the rules.³⁰⁰ In addition, the absence of reported cases in jurisdictions that have adopted similar measures suggests that the threat of attorney misconduct is overstated.³⁰¹

Opponents of grand jury reform may be concerned that counsel will advise the target not to answer questions and that the prosecutor will be forced to seek a court order to compel an answer. The same problem exists today. Counsel may be outside the grand jury room and the client may interrupt the questioning to seek counsel’s advice.³⁰² Thus under current practice, a prosecutor who wants to challenge counsel’s advice to a target or other witness must seek a court order compelling the witness to testify.³⁰³ Presence of counsel in the grand jury room will almost certainly lead to more objections.³⁰⁴ But whatever additional inefficiency occurs is justified in light of the purpose of having counsel present in the grand jury room: counsel is there to prevent unwarranted waiver of important constitutional rights. Where the grand jury or prosecution has

²⁹⁵ See BILL ANALYSIS, *supra* note 207, at 4.

²⁹⁶ *Id.* at 4.

²⁹⁷ *Id.*

²⁹⁸ Hill-Holtzman, *supra* note 7, at B1.

²⁹⁹ ABA REPORT, *supra* note 228, at 6.

³⁰⁰ AB 527, PROPOSED AMENDMENT TO CAL. PENAL CODE § 939.22(d).

³⁰¹ A search of the annotated statutes for each state allowing counsel inside the grand jury room and the case law for those states did not result in a finding of any reported cases where an attorney inside the grand jury room had caused a disruption requiring significant litigation.

³⁰² See Hixson, *supra* note 227, at 334.

³⁰³ See CAL. PENAL CODE § 1324 (2000).

³⁰⁴ That is not a foregone conclusion. Part of the problem with the current system is that counsel may not be able to advise the client adequately because counsel has not heard an entire line of questioning and cannot make a fully informed decision whether to advise the client not to testify. ABA REPORT, *supra* note 228, at 6. Presence in the grand jury room may lead to fewer uninformed objections.

attempted to ask improper questions, absence of counsel may lead the target to waive those rights. The state can make no serious claim that a procedure that increases the possibility of inadvertent waiver of constitutional rights is preferable to one that forces prosecutors, on occasion, to request a judge to make a determination whether a target's invocation of the Fifth Amendment is proper.

Thus, a bill like AB 527 does not convert grand jury proceedings into mini-trials. Further, even the marginal increase in the number of cases in which a target asserts a privilege that may be unfounded seems like a small cost to assure the protection of a target's constitutional rights.³⁰⁵

(b) Obstruction of Truth Telling

Related to the criticism discussed above is the claim that defense counsel will frustrate the grand jury's search for the truth. As stated in opposition to AB 527, the only benefit of allowing counsel in the grand jury room is "to provide additional methods of avoiding telling the truth."³⁰⁶

Counsel may provide benefits in addition to helping the target avoid telling the truth. Badly framed questions may lead to confusing answers, unfairly distorting the truth. But that aside, the idea that counsel's role is merely an obstruction of justice is worthy of serious consideration.

Presumably, the obstruction of justice comes about whenever a person invokes a privilege properly or improperly. If the invocation is improper, recourse is to seek a court order to compel an answer – that is true under the current system as well. As discussed above, had AB 527 been enacted, it may have led to some marginal increase in cases in which prosecutors would have to seek such court orders. That conclusion does not necessarily follow. Counsel may urge targets to refuse to answer more frequently than they may do so without aid of counsel. But having counsel present may lead to more proper and fewer improper refusals to testify than under the current system. Under the current system, counsel can consult with a target before and during the target's appearance before the grand jury.³⁰⁷ Presumably, the target tries to implement counsel's advice but may improperly invoke privilege, because the target lacks legal knowledge. In at least some cases, counsel's presence should eliminate some improper invocations of privilege.

³⁰⁵ This is further supported by the infrequency with which prosecutors apparently call targets. ROUNDTABLE, *supra* note 71, at 40.

In at least one news report, a representative of the California District Attorneys Association expressed concern that "having defense attorneys present could have a devastating impact on victims of child abuse or gang violence who, in the presence of defense attorneys, might feel squeamish about telling what happened." Granberry, *supra* note 5, at B1. This seems to be a more emphatic version of the mini-trial argument. But the argument overlooks the fact that victims of child abuse or gang violence who testify before the grand jury would not have done so in the presence of defense counsel had AB 527 been enacted. That is so because counsel's presence was limited to when the target was testifying.

³⁰⁶ See BILL ANALYSIS, *supra* note 207, at 4.

³⁰⁷ See *supra* note 227, for an example of abuse of the right to leave and consult with counsel.

What then of cases in which a target properly invokes a privilege – may such an invocation be construed as an obstruction of justice? In some non-technical sense, yes. Every privilege has a cost; it deprives a fact finder from hearing often the most probative evidence. When a psychiatrist or a priest may not testify about the confession of a patient or penitent who has committed a felony, the fact finder is deprived highly relevant evidence.³⁰⁸ Privileges exist, however, because of important countervailing policies.³⁰⁹ Hence, in some sense, proper invocation of a privilege not to testify obstructs the job of the fact finder to discover the truth. But opponents of grand jury reform should not complain about a target invoking his or her rights; if the opponents of reform have an argument it is with policy makers – either legislators or, in the case of the Fifth Amendment, with the drafters of the Bill of Rights.

Further, if more targets *properly* invoke their privileges because counsel is allowed in the grand jury room, it is hard to understand the criticism. The suggestion is that the targets who do not currently invoke their privileges fail to do so out of ignorance – AB 527 does not create new privileges, but simply assures that the target properly invokes any available privilege. Opponents to reform cannot seriously argue that a system that relies on uninformed targets waiving their rights is preferable to one in which the targets make informed decisions whether to testify.³¹⁰

(c) *Secrecy*

Concern has been raised that counsel’s presence impairs grand jury secrecy. That results, or so goes the argument, in a number of different ways. Each needs to be addressed.

(i) *Piecing together the evidence*

Under current practice, secrecy does not extend to a grand jury witnesses.³¹¹ Hence, a witness may discuss her own testimony with an attorney. Discussing the case with one’s client reveals a great deal about the subject of the investigation.³¹² Despite that, opponents of AB 527 and similar grand jury reform have argued that counsel’s presence will impair grand jury secrecy. During the discussions held at McGeorge, some participants urged that counsel will have a better understanding of the grand jury’s investigation than would an unaccompanied client.³¹³ In other words, despite the reality that under current practice, counsel may learn a good deal about the

³⁰⁸ See Evidence: Practice Under the Rules, 2d Ed., §5.1 (Aspen 2000).

³⁰⁹ *Id.*

³¹⁰ It is also unclear how many cases we are discussing, given that some prosecutors do not routinely call targets to testify. See ROUNDTABLE, *supra* note 71, at 40.

³¹¹ Under California law, witnesses testifying before a grand jury are given an oath of secrecy. 66 Op. Atty. Gen. Cal. 85, 88 (1983). However, that secrecy is not absolute, as witnesses are allowed to “consult with an attorney for the purpose of seeking legal advice.” *Id.* at 87. Thus, witnesses attorneys are able to hear from their client about what happened inside the grand jury room for the purposes of giving legal advice. Allowing counsel inside the grand jury room may not expand the information coming out to the grand jury room that counsel would have heard anyway.

³¹² That may explain why some prosecutors are hesitant to call targets. Bill Larsen, a representative of the California District Attorneys Association, stated that targets are not often called before the grand jury. ROUNDTABLE, *supra* note 71, at 40. Similar concerns may militate in favor of calling a target late in an investigation.

³¹³ ROUNDTABLE, *supra* note 71, at 29.

direction of an investigation by talking to the witness, counsel's presence in the grand jury increases that risk.³¹⁴

The increased risk of counsel learning about the direction of an investigation seems marginal at best. One must believe that the target is unable to recall useful information at all to suggest that current practice would differ significantly from the situation that would result if counsel were present during examination of the target.

That is especially true in light of statements made by the representative of the California District Attorneys Association during information gathering conducted at McGeorge. He acknowledged that at least some prosecutors seldom call grand jury targets. In light of that, and in light of current practice, which allows a target or other witness to communicate freely about their testimony, opponents arguments about serious impairment of grand jury secrecy seem grossly overstated at best.

Further, opponents ignore the provision in AB 527 that allows a prosecutor to petition the supervising judge to bypass rights created by § 939.2(b)(1)(presumably including the right to have counsel present, a right provided in § 939.2(b)(1)(B)).³¹⁵ Specifically, a prosecutor may obtain a waiver of rights created in subsection (b)(1) “upon proof that there are reasonable grounds to believe the notice would create an undue risk or danger to other persons or a reasonable possibility of destruction of evidence, or there is a strong suspicion of flight of the witness.”³¹⁶ Thus, in cases in which counsel's presence would create a serious risk of harm, AB 527 seems to allow the prosecutor to request an order circumventing the right to have counsel present.

(ii) Viewing the evidence

During the discussions held at McGeorge, some participants suggested another way in which grand jury secrecy may be violated if counsel is allowed in the grand jury room. One prosecutor offered the situation in which the prosecutor uses an exhibit of various gang members' photographs.³¹⁷ According to the prosecutor, a gang member may not be able to understand the legal significance of the various photos whereas counsel may be able to do so.³¹⁸

As in the previous discussion, under current practice, the witness is free to describe to counsel whatever exhibits he or she viewed in the grand jury room. While a lay witness may not

³¹⁴ A claim was made during the June 1 discussions at McGeorge that multiple representation of witnesses testifying in the same proceeding will increase such a risk of counsel learning too much about the direction of the grand jury investigation. ROUNDTABLE, *supra* note 71, at 35-40. However, AB 527 would not have allowed multiple representation, and given that counsel is required to maintain secrecy, some limitations are posed on counsel's ability to share information.

³¹⁵ AB 527, PROPOSED AMENDMENT TO CAL. PENAL CODE §§ 939.2(b)(1) and 939.2(b)(1)(B).

³¹⁶ AB 527, PROPOSED AMENDMENT TO CAL. PENAL CODE § 939.2(b)(2)(D).

³¹⁷ ROUNDTABLE, *supra* note 71, at 29.

³¹⁸ *Id.*

understand the legal significance of lines of questioning or perhaps of a photo array³¹⁹, it seems implausible that an attorney would better understand the facts under investigation than would the target, who presumably engaged in the criminal conduct. A target would almost certainly be better able to identify the people depicted than would counsel.

And as discussed above, the situation described seems infrequent at best. Where a real risk exists that counsel's presence or other rights in § 939.2(b)(1) would create specific harm, a prosecutor may petition the court to waive those rights.

(d) Statutory Ambiguity: Who is a Target?

The Los Angeles District Attorney's Office raised as a concern "the difficulty in some cases of determining who is the target and what would be required to comply with the new target notification requirements."³²⁰

Section 939.2(b)(2)(C) addressed the concern that a prosecutor may not realize until after a witness has testified that the witness should be indicted. It provided that the rights created in the statute (most importantly, the rights to submit exculpatory evidence in writing and to have counsel present during the target's testimony) "shall not apply if . . . (C) The prosecutor determines during the grand jury hearing that a previous witness has become the subject of the grand jury investigation."³²¹

That seems to address the concern of the Los Angeles District Attorney's Office. For example, the grand jury may call a person whom it believes has evidence of a target's criminal activity. After that person has testified, the grand jury gets additional evidence sufficient to indict the witness. The statute creates an exception from the right to counsel.

Perhaps the harder question is what a prosecutor should do when the grand jury or prosecutor realizes in the midst of that witness's testimony that the witness may be subject to indictment. If that is the Los Angeles District Attorney's concern, the solution should not have been opposition to the bill, but a suggested amendment that would have clarified the provision. The legislation could have been amended to make clear either that the prosecutor should stop the inquiry, and now warn the witness, allowing the witness time to secure counsel or that the prosecutor did not have to provide warnings and a right to counsel.³²²

³¹⁹ Presumably, the photo array may reveal organizational structure within a gang, leading to charges of aiding and abetting commission of a crime or conspiracy to commit a crime.

³²⁰ BILL ANALYSIS, *supra* note 207, at 4.

³²¹ AB 527, PROPOSED AMENDMENT TO CAL. PENAL CODE § 939.2(b)(2)(C).

³²² Arguably, even as written the bill would have allowed the prosecutor to argue the latter position. That is so because subsection (b)(2)(A) states that the right to counsel (and other rights created in the bill) do not apply if "The prosecutor is not able to notify the witness with reasonable diligence." One plausible application of that language to the example offered above is that, when in the midst of the witness's testimony, the prosecutor learns that the witness should be a target, it is too late to give notice now. As long as the prosecutor has not lacked due diligence in making that discovery, the exception would have applied.

While that is a plausible reading of subsection (b)(2)(A), that result may be undesirable. Fairness dictates that when an unrepresented witness stumbles into an incriminating area, the witness should be encouraged to consult with

In addition, as a general matter, the line between a target and a mere witness is not a particularly difficult one to draw. Prosecutors cannot claim that they do not know what they expect to hear from a witness when they call the witness, unless they are engaging in a fishing expedition, surely an abuse of prosecutorial power. That is, prosecutors must know whom they are targeting when they bring a case before a grand jury. If they are wrong and stumble on a target, AB 527 would have protected the prosecution.³²³ That the line between target and witness is not difficult to draw is supported by the absence of litigation on that issue in other jurisdictions that have drawn that line.³²⁴

(e) Scheduling Delays

During the discussions at McGeorge, some prosecutors raised concerns that allowing counsel to appear in the grand jury room would create unmanageable scheduling delays. In effect, they contend that the additional burden would make the smooth operation of the grand jury unreasonably difficult. That would be the case especially in cases involving multiple targets.

Even under current practice, a witness has the right to consult with counsel during that witness's testimony. As one prosecutor commented, prosecutors already accommodate counsel's schedules when they call represented witnesses.³²⁵ According to that prosecutor, current practice does not unduly impair the functioning of the grand jury.³²⁶ In addition, one prosecutor who raised the scheduling concerns also acknowledged that he infrequently calls targets before the grand jury.³²⁷ In light of both of those comments, it is hard to understand why AB 527 would create an intolerable scheduling problem.

Further, if AB 527 were extended to indigent defendants, as this report recommends below, public defenders offices routinely deal with similar problems by assigning an attorney to represent clients at a particular stage of the proceeding.³²⁸ Thus, a client may have a different attorney at the preliminary hearing, suppression motion hearing stage, and at trial. Such a scheme decreases scheduling difficulties.³²⁹

counsel to assure that the person does not inadvertently waive important constitutional rights. Typically our system requires that a waiver of important rights be knowingly and voluntarily made.

³²³ See AB 527, PROPOSED AMENDMENT TO CAL. PENAL CODE § 939.2(b)(2)(C).

³²⁴ A search of the annotated statutes and case law for every state allowing counsel inside the grand jury room revealed no significant cases on the subject.

³²⁵ ROUNDTABLE, *supra* note 71, at 33.

³²⁶ *Id.*

³²⁷ *Id.* at 40.

³²⁸ See Jeff Staniels interview, *supra* note 223.

³²⁹ In addition, even when a client has retained counsel, private counsel cannot frustrate the administration of justice by claiming unfounded scheduling conflicts. As the Supreme Court has held, the right to counsel of one's choice can be circumscribed when justified by sufficiently overriding interests of the judicial system. See *Wheat*, *supra* note 294 (holding that the trial court had discretion to evaluate on a case-by-case basis the interests at stake in granting or denying a defendant's choice of counsel).

The defendant's right to counsel of his choosing is not absolute and must be weighed against the interests of justice. LAFAVE, *supra* note 211, at § 11.4(c). The court is only required to accommodate defendant's choice of counsel

VII. Recommendations

As in the first section of this report, we conclude that grand juries are worth retaining, but that their performance can be improved with minor reforms. AB 527 represented such a reform.

Despite the claim that AB 527 would have amounted to “fundamental change”³³⁰ in grand jury procedure, that is simply not the case. It represented a measured response to a serious problem. AB 527 would not have expanded a target’s right to refuse to testify or to consult with an attorney to assure that the target does not inadvertently waive a right or privilege. It would have made a minor change by allowing counsel in the grand jury room during the target’s testimony, rather than forcing counsel to wait in the hallway outside the grand jury room. It would have created reasonable exceptions to its right to counsel. It would have prevented disruption by counsel by carefully circumscribing counsel’s role.³³¹ Meanwhile, AB 527 would have helped a target make important decisions about giving testimony more fully informed than is the case under current practice.

The California Supreme Court has called the grand jury a prosecutor’s “Eden” because it is “the total captive of the prosecutor.”³³² That is consistent with the frequent criticism that grand juries serve as a rubber stamp of the prosecutor who presents evidence to the grand jury. Statistical evidence suggests that grand juries seldom exercise independent judgment.³³³

The challenge is how to find a way to maintain grand jury secrecy and to allow it to conduct its investigations in conjunction with the prosecution while increasing its ability to exercise independent judgment.³³⁴ We gain little by having the grand jury serve merely as a rubber stamp for the prosecutor. In most cases, the prosecutor can begin criminal proceedings by filing an information, avoiding the need to use the grand jury.³³⁵ But in those cases, the accused has a right to a preliminary hearing where an independent magistrate must determine that the evidence is sufficient to justify further proceedings.³³⁶ Use of the grand jury allows the

when not doing so would result in a constitutional violation. *Id.* The Supreme Court has held that there is no set formula for determining when denying a continuance to substitute defendant’s choice of counsel is unconstitutional. *Ungar v. Sarafite*, 376 U.S. 575 (1964). Rather, “the answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.” *Id.*

The Supreme Court held in some instances, the state’s interest in orderly administration of justice may be sufficiently great to deny a defendant the choice of counsel entirely because of scheduling and other difficulties. *Id.* Presumably, a court may order that another member of retained counsel’s firm appear before the grand jury if counsel’s schedule presents too great a difficulty.

³³⁰ Granberry, *supra* note 5, at B1.

³³¹ See AB 527, PROPOSED AMENDMENT TO CAL. PENAL CODE §§ 939.22(a)(1), 939.22(a)(2), and 939.22(a)(3).

³³² *Hawkins v. Superior Court*, 22 Cal. 3d 584, 589-92 (1978).

³³³ For example, during the fiscal year ending in September of 1984, federal grand juries returned 17, 419 indictments and only 68 “no true bills.” STATISTICAL REPORT OF U.S. ATTORNEYS’ OFFICES, Fiscal Year 1984 (Report 1-21), introductory material, at 2. This works out to a non-indicting rate of .4%.

³³⁴ Elsewhere in this report, we recommend greater training for grand jurors and greater outreach, not only to assure broader representation, but also to involve more competent individuals in the process. Both of those suggestions may increase the independence of the grand jury.

³³⁵ CAL. CONST. art. I, §14.

³³⁶ *Id.*

prosecutor to avoid a preliminary hearing.³³⁷ Unless the grand jury exercises independent judgment, a person may be held without any neutral fact finder assessing the strength of the prosecution's case.

Assuring that the grand jury exercises independent judgment might call for reforms even greater than the minor reform proposed in AB 527.³³⁸ Major reform would also risk impairing the functioning of the grand jury.

A bill like AB 527, especially in conjunction with earlier legislation giving the grand jury the opportunity to hear exculpatory evidence, may improve the grand jury process. We have no way to measure how many targets refuse to testify because they lack the right to have counsel present. At least in those limited number of cases where a target would testify with counsel present, but not otherwise, the grand jury may hear a more complete version of the facts and be willing to reject the prosecutor's argument that an indictment is proper.

As discussed above, presence of counsel should also limit situations in which a prosecutor may overreach by asking improper questions that may result in the waiver of various privileges that a target might otherwise invoke. Preventing overreaching by the prosecutor is a worthwhile goal.

We recommend, therefore, that the legislature adopt AB 527.

We also recommend one significant change to AB 527. Subsection 939.22(e) specifically attempted to limit the right to counsel to targets who could afford counsel.³³⁹ We think that limitation is unwarranted. Instead, we recommend that if the legislature creates a right to counsel in the grand jury room, it should also be extended to indigent targets.

This report has argued that the Constitution does not compel appointment of counsel. The right to counsel created by AB 527 would have been entirely a statutorily created right; this report has also argued that creation of a right to counsel for those who could afford it would not create an equal protection or due process right to have the state appoint counsel for indigent targets. But that is not responsive to whether the state should provide the right.

This report has argued that sound policy justifies the creation of a limited right to counsel before the grand jury. Counsel has a role in assuring that a target is not cajoled, tricked or coerced into giving up constitutional rights or other privileges; counsel has a role in assuring that a target make proper invocation of such rights and privileges; counsel may also encourage some targets to testify, offering the grand jury a fuller understanding of the facts than it might otherwise have available, thereby increasing its ability to exercise independent judgment whether

³³⁷ *Id.*

³³⁸ See CAL. PENAL CODE § 939.71, a bill introduced by Assemblyman Scott Baugh which requires that the prosecutor, when presenting a case before the grand jury, inform the grand jury of the "nature and existence" of an exculpatory evidence of which he or she is "aware." This change in the law is a positive step to increase the grand jury's independence by putting exculpatory evidence before them.

³³⁹ See AB 527, PROPOSED AMENDMENT TO CAL. PENAL CODE § 939.22(e).

to indict. If these benefits justify creation of the right to counsel, it is hard to see how we can deny the right to counsel to indigent targets.

That is so because wealth should not determine whether a target receives a fair hearing before the grand jury.³⁴⁰ In addition, insofar as the creation of the right to counsel furthers independence of the grand jury and serves to assure that only proper objections are made before the grand jury, the right to counsel serves the public interest, not merely the interest of the target. The public interest does not vary depending on whether the target can afford counsel.

These two recommendations are reflected in the proposed bill. The proposed bill incorporates most of the provisions of AB 527, except for its attempt to limit the right to counsel to those who can afford counsel, and adds a provision to make clear that the state will provide counsel for indigent targets who want counsel and who choose to testify.

³⁴⁰ “In either case the evil is the same: discrimination against the indigent. For there can be no equal justice when the kind of appeal a man enjoys ‘depends upon the amount of money he has.’” *Douglas, supra* note 247, at 355, quoting *Griffin, supra* note 244.

Chapter Three: Diversity on Grand Juries

I. Introduction

California grand juries do not reflect the diverse nature of its population. While we could find no definitive study of the composition of California grand juries, significant anecdotal evidence suggests that grand juries lack diversity. In addition, to some degree, the lack of diversity results from demographics and the method for selection of grand jurors.

With or without a legal challenge to the composition of California's grand juries, the legislature should support efforts to increase diversity on our grand juries. Some commentators have urged that, given the difficulty that some counties experience in finding competent grand jurors, efforts to assure diversity may detract from efforts to improve the quality of grand juries. As argued below, that position is not sound as a matter of policy or as a matter of constitutional law.

This section discusses the lack of diversity on our grand juries and policies supporting full involvement by minority communities. It then considers statutory and constitutional requirements that militate in favor of greater diversity than we now have. It then discusses how the California legislature might assist county efforts to improve diverse membership on grand juries. Finally, it discusses whether outreach programs to increase minority participation on grand juries would violate Proposition 209.

II. The Lack of Diversity

Our research has not located any systematic information concerning composition of grand juries. At times, litigants have produced studies of the composition of grand juries in particular communities.³⁴¹ Elsewhere, news reports chronicle the lack of diversity on grand juries.³⁴² Despite the lack of systematic reporting on the ethnic composition of grand juries, the evidence is substantial that California grand juries do not represent its diverse population.

In litigation currently filed in Los Angeles County, a defendant has moved to dismiss the criminal indictment against him on the grounds of discrimination.³⁴³ Specifically, he has alleged he "has shown a violation of the Sixth Amendment guarantee of trial by an impartial jury in violation of the defendant's right to due process of law, due to the absence of a fair cross-section

³⁴¹ Most recently in California, *see* *People v. Mares*, Case No. BA-109979 (Los Angeles County Super. Court); *People v. Castro*, No. A-232902 (Cal. Super. Ct. 1968); *People v. Montez*, No. A-244906 (Cal. Super. Ct. 1969).

³⁴² Ann W. O'Neill, *2nd Grand Jury Backed as Way to Diffuse Bias Charges*, LOS ANGELES TIMES, May 9, 2000, B1; Ann W. O'Neill, *Choices for County Grand Jury Again Include Few Latino Demographics*, LOS ANGELES TIMES, April 25, 2000, B1; Ann W. O'Neill, *Special Report: Latinos Are Underrepresented on County Grand Jury*, LOS ANGELES TIMES, March 26, 2000, B1; Meg James, *Minorities Lacking On Grand Jury, Absence of Latinos and Asians Alarms Some*, LOS ANGELES TIMES, November 15, 1999, B1; *Minorities: Grand Jury Needs You*, LOS ANGELES TIMES, November 28, 1999, B26.

³⁴³ *People v. Mares*, Case No. BA109979 (Los Angeles County Superior Court).

of the community based on the systematic exclusion of a distinctive group in the community.”³⁴⁴ In addition, he has alleged that the county has intentionally discriminated “in violation of his constitutional right to equal protection of law.”³⁴⁵

In support of his motion to dismiss, the defendant has alleged facts supporting his claim: “With respect to the data for 1998, the Hispanic jury-eligible population was 22.67%. The percent of Hispanics in the grand jury pool was only 8.1%, indicating an absolute disparity of 15.2%. With respect to 1997, the Hispanic jury-eligible population was 22.7%, while the percentage of Hispanics on the grand jury was 11.6%, indicating an absolute disparity of 11.1%.”³⁴⁶ Those allegations were based on a study performed by Dr. John R. Weeks, a professor of geography and the Director of the International Population Center at San Diego State University.³⁴⁷ Apart from whether the study demonstrates grounds for relief in *People v. Mares*, his study demonstrates under-representation of racial minorities on Los Angeles County’s Grand Jury.³⁴⁸

Press reports suggest similar lack of diversity in other counties as well. For example, an Orange County Superior Court judge in charge of that county’s grand jury reportedly found “unconscionable” that Orange County, with a sizable Hispanic and Asian population, had no minorities on a recently impaneled grand jury.³⁴⁹ As reported in the Los Angeles Times, all 19 panelists on the 1999-2000 grand jury in Orange County, “as well as the 11 alternates, are white. Three-quarters are older than 60. Compare that with Orange County’s general population, which is 30% Latino, 13.2% Asian and has a median age of 33.”³⁵⁰ Similar reports are common.

Apart from the outcome of the Los Angeles litigation, lack of minority representation on California’s grand juries is a cause of concern, one worthy of attention by the legislature. That is so even when at least some counties experience difficulty in filling the ranks of grand jurors with any citizens.

During discussion conducted by McGeorge’s Institute for Legislative Practice, some participants raised concerns about achieving diversity. One participant summed up some of the concerns when she stated, “What I think is more important [than diversity][about] being a Grand Juror is someone who is very interested, and who is willing to dedicate the time and the effort it

³⁴⁴ *People v. Mares: Supplemental Declaration of John R. Weeks, Ph.D., In Support of Defendant’s Motion to Dismiss, Memo of Points and Authorities*, 3.

³⁴⁵ *Id.*

³⁴⁶ *Id.* at 2.

³⁴⁷ *Id.* See also attached Declaration and Statistical Data of Dr. John R. Weeks.

³⁴⁸ *Id.*

³⁴⁹ James, *supra* note 342, B1.

³⁵⁰ *Id.*, but note that the 2000-2001 Orange County Grand Jury has made significant improvements. See Richard Marosi, *Incoming Grand Jury Meets Diversity Goal*, LOS ANGELES TIMES, May 20, 2000, B1 (reporting that the incoming grand jury is 40% non-white, which reflects Orange County’s 30% Latino and 13% Asian population). [Vitiello: We’ve contacted the Orange County Grand Jury for information regarding their grand jury selection program, but as yet, there is no word. They have promised to send us something in care of you, or to have the jury commissioner call Amelia.]

takes to do a good job, and that has nothing to do with diversity.”³⁵¹ Participants seemed concerned primarily with increasing the pool of competent and willing individuals.³⁵²

Increasing the pool of competent grand jurors is not inconsistent with increasing the available pool of under-represented groups. As discussed below, increased representation may be constitutionally required and, even if not, is sound policy.

In the earlier discussion about the watchdog role of the grand jury, this report emphasized the historical justification for the grand jury. Concerned citizens use common sense to examine local governmental entities to determine whether local government is free from corruption. Despite its inadequacies, the system is worth saving because of its considerable potential for social good.

No group should be excluded from participation in such an institution. The grand jury benefits from full participation of members of the community who may bring different points of view of areas studied by the grand jury.³⁵³ Members of racial and ethnic communities benefit by sharing a full stake in self governance.

Boalt Hall Professor Ian Haney Lopez has reached a similar conclusion in a Yale Law Journal article.³⁵⁴ He argued that, even if “proportional presence of minorities on California’s grand juries would [not] significantly impact the way they function. . .” ideological and symbolic reasons support proportional diversity on grand juries.³⁵⁵ Ideologically, discrimination “contravenes” the representative nature of democracy and “popular self-governance.”³⁵⁶ Symbolically, participation sends an important social message: “Exclusion from organs of self-government communicates an inferior social position, while participation bespeaks full civic membership.”³⁵⁷

III. Constitutional and Statutory Concerns

Whether any particular county has violated the constitutional in its selection of members of its grand jury is beyond the scope of this report and is a question properly reserved for the

³⁵¹ ROUNDTABLE, *supra* note 71, at 47-48.

³⁵² *Id.* at 49-50.

³⁵³ *Developments in Orange, Riverside, San Bernadino and Ventura Counties: Grand Jury Criticizes Police Discipline, Training*, LOS ANGELES TIMES, May 10, 2000, B4. One remedy for the lack of minority members may be the use of county ethnic groups to publicize the need for grand jurors. *Supra* note 342, *Minorities: Grand Jury Needs You*. In some instances, a member of a minority community may bring a perspective quite distinct from members of the majority community. For example, an African American may be interested in having the grand jury investigate whether local police engage in racial profiling when they make traffic stops, or whether public officials respond similarly to complaints from minority and majority communities.

³⁵⁴ Ian Henry Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 Yale L.J. 1717 (2000).

³⁵⁵ *Id.* at 1746.

³⁵⁶ *Id.*

³⁵⁷ *Id.* at 1747. Professor Henry Lopez provides anecdotal evidence to support this proposition, quoting a Hispanic grand juror, Lydia Lopez: “[S]ince I am on the grand jury the people for my area feel they have a voice, they feel terrific about my position.”

courts. But this section discusses the constitutional and statutory requirements of assuring diversity on our grand juries. Not only is diversity sound policy; it is also legally required.

(a) Criminal Grand Juries

For many years, criminal defendants have made challenges to the grand jury selection process. While some questions await definitive resolution by the United States Supreme Court, both the Sixth and Fourteenth Amendments to the United States Constitution apply to the selection of state grand juries.

(i) Equal Protection

The Supreme Court has made explicit that a state violates a defendant's right to equal protection when "the procedure employed result[s] in substantial underrepresentation of [defendant's] race or identifiable group to which he belongs."³⁵⁸ The Court has long recognized that states may not intentionally discriminate by excluding minorities from juries.³⁵⁹ The Court's more recent case law has lessened a defendant's burden, making a showing of discrimination easier than in the past.³⁶⁰

Shortly after the adoption of the Fourteenth Amendment, the Supreme Court held that a state violated equal protection by excluding African Americans from service on juries.³⁶¹ In 1935, the Court held that a defendant might make a prima facie case of discrimination by showing existence of a substantial number of African Americans in the relevant community and their virtual exclusion from jury service.³⁶² Once that showing was made, the burden shifts to the state to show the lack of a discriminatory intent.³⁶³

³⁵⁸ *Casteneda v. Partida*, 430 U.S. 482, 494 (1977).

³⁵⁹ See *Alexander v. Louisiana*, 405 U.S. 625, 628 (1972); *Carter v. Jury Commission*, 396 U.S. 320, 330 (1970); *Whitus v. Georgia*, 385 U.S. 545, 552 (1967); *Swain v. Alabama*, 380 U.S. 202 (1965); *Cassel v. Texas*, 339 U.S. 282 (1950); *Hill v. Texas*, 316 U.S. 400 (1942); *Smith v. Texas*, 311 U.S. 128 (1940); *Pierre v. Louisiana*, 306 U.S. 354 (1939); *Rogers v. Alabama*, 192 U.S. 226 (1904); *Carter v. Texas*, 177 U.S. 442 (1900); *Bush v. Kentucky*, 107 U.S. 110 (1883).

³⁶⁰ *Casteneda*, *supra* note 358, at 494-495 (holding that discriminatory intent may be established by the use of statistics and a showing that the process of juror selection itself is susceptible to abuse or is not racially neutral). For arguments and statistics as to why certain common selection procedures are not racially neutral, see Hiroshi Fukari and Edgar W. Butler, *Sources of Racial Disenfranchisement in the Jury and Jury Selection System*, 13 Nat'l Black L.J. 238 (1994).

³⁶¹ *Strauder v. West Virginia*, 100 U.S. 303 (1880) (holding that a black defendant was denied equal protection (of the Fourteenth Amendment) when he was tried before a jury from which all members of his race were excluded); *Neal v. Delaware*, 103 U.S. 370 (1881) (the same principle was extended to what appeared to be fair jury selection systems that resulted in the exclusion of blacks from the jury). Under the *Strauder-Neal* equal protection approach, only a member of the same class of excluded jurors could make the constitutional challenge. In *Powers v. Ohio*, 499 U.S. 400 (1991), however, the Supreme Court held that a defendant in a criminal case has standing to raise equal protection challenges for excluded jurors. Later, *Campbell v. Louisiana*, 523 U.S. 392 (1998), extended the standing doctrine to grand juror selection.

³⁶² *Norris v. Alabama*, 294 U.S. 587 (1935).

³⁶³ *Avery v. Georgia*, 345 U.S. 559 (1953).

Castaneda v. Partida is representative of the Court's current approach to equal protection in the selection of grand juries. There, the Court recognized that a defendant establishes a prima facie case of intentional discrimination when a defendant's group is a "recognizable, distinct class;"³⁶⁴ and when the defendant demonstrates that under-representation has existed over a "significant period of time"³⁶⁵ and that under-representation is substantial, (i.e., that it is unlikely that the disparity is "due solely to chance or accident. . .").³⁶⁶ Further, if the state uses a selection procedure that is "susceptible of abuse or is not racially neutral . . ." that fact "supports the presumption of discrimination raised by the statistical showing."³⁶⁷

In *Castaneda*, the Court upheld a lower court's determination of discrimination based on a showing that during a ten year period, only 39% of those serving on the grand jury were Hispanic³⁶⁸, despite a general population of 79.1% Hispanic.³⁶⁹ The Court found that Texas's use of the "key-man" system,³⁷⁰ while facially constitutional, supported the finding of discrimination because it is "highly subjective."³⁷¹ A criminal defendant has ample incentive to challenge the composition of the grand jury that indicted him or her because, once discrimination is found, reversal is mandatory. In *Vasquez v. Hillery*, the defendant did not allege that he received an unfair trial. Nonetheless, a divided Court held that "even if a grand jury's determination of probable cause is confirmed in hindsight by a conviction on the indicted offense, that confirmation in no way suggests that the discrimination did not impermissibly infect the framing of the indictment and, consequently, the nature or very existence of the proceeding to come."³⁷²

The early cases all involved a defendant of the same race as the people who were excluded from service as grand or petit jurors. Later cases have made clear that the right is not just the right of the defendant. Instead, the person denied equal protection is the citizen denied

³⁶⁴ *Castaneda, supra* note 358, at 494. An equal protection claim can be brought despite a defendant's race. *See* Campbell v. Louisiana, 523 U.S. 392, 400 (1998) (holding that "a white defendant has standing to raise an equal protection challenge to discrimination against black persons in the selection of his grand jury"). Thus a defendant may bring the equal protection claim of another. While the Supreme Court has not yet determined that a state grand jury is bound by the fair cross-section requirement, scholars predict it will likely be applied. WAYNE R. LAFAVE ET. AL, CRIMINAL PROCEDURE (3rd ed.) (2000), 753.

³⁶⁵ *Castaneda, supra* note 358, at 494.

³⁶⁶ *Id.* at 495, nn.13.

³⁶⁷ *Id.* at 494.

³⁶⁸ *Id.* at 495.

³⁶⁹ *Id.*

³⁷⁰ The "key man" system is a statutory scheme for selecting grand jurors. The Texas system of the mid-1970s was under the Court's scrutiny in *Castaneda*. This particular "key man" system had the state district court judge appoint 3-5 jury commissioners who in turn had the responsibility of selecting citizens from counties in order to create a prospective juror pool for the grand jury. The district court judge then interviewed the prospective grand jurors and the court impaneled a grand jury. *Castaneda, supra* note 358, at 494. The "key man" system, however, may conflict with a constitutional cross section requirement. LAFAVE, *supra* note 364, at 753.

³⁷¹ *Castaneda, supra* note 358, at 497. Where discriminatory intent is shown without an inference from statistics, the percentage of underrepresentation need not be so obvious. For example, the Supreme Court found discriminatory intent and a violation of equal protection despite only a 4.7% underrepresentation. *Vasquez v. Hillery*, 474 U.S. 254, 268, nn. 2 (1986). The Court held that once a discriminatory selection process is found, mandatory reversal is required. *Id.* at 264.

³⁷² *Vasquez, supra* note 371, at 263.

participation on the jury.³⁷³ As a result, for example, a white defendant has been successfully challenged the exclusion of African-Americans from his jury.³⁷⁴

(ii) *Fair Cross Section*

The Supreme Court first discussed the requirement that a jury represent a fair cross section of the community in a case involving a federal petit jury.³⁷⁵ That is not surprising because the Sixth Amendment deals with petit juries.³⁷⁶ Whether a similar cross section requirement applies to grand juries is not entirely clear because the right to a grand jury is found in the Fifth Amendment, which does not include the Sixth Amendment language creating a fair cross section requirement.³⁷⁷

The Supreme Court has left open whether due process requires that a grand jury represent a fair cross section of the community. In 1972, a plurality of the Court asserted that such a right existed.³⁷⁸ A later opinion suggested that a majority of the Court then agreed that discrimination might violate “representational due process values. . . .”³⁷⁹ Subsequently, the Court indicated that the precise question is still an open one and lower federal courts have divided on whether “representational due process values” are equivalent to the protections afforded by the Sixth Amendment fair cross section requirement.³⁸⁰

In California, the issue is largely moot because of Penal Code section 904.6(e).³⁸¹ That section requires that at least criminal grand juries must be selected from a source or sources that are “reasonably representative of a cross section of the population eligible for jury service in the county.”³⁸²

³⁷³ Carter v. Jury Commissioner, 396 U.S. 320, 329 (1970).

³⁷⁴ Campbell v. Louisiana, 523 U.S. 392, 400 (1998).

³⁷⁵ Taylor v. Louisiana, 419 U.S. 522 (1975).

³⁷⁶ “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.” U.S. CONST. amend. VI.

³⁷⁷ “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .” U.S. CONST. amend V.

³⁷⁸ Peters v. Kiff, 407 U.S. 493 (1972).

³⁷⁹ Hobby v. United States, 468 U.S. 339, 346 (1984).

³⁸⁰ LAFAVE, *supra* note 364, 755.

³⁸¹ “It is the intent of the Legislature that all persons qualified for jury service shall have an equal opportunity to be considered for service as criminal grand jurors in the county in which they reside, and they have an obligation to serve, when summoned for that purpose. All persons selected for the additional criminal grand jury shall be selected at random from a source or sources reasonably representative of a cross section of the population which is eligible for jury service in the county.” CAL. PENAL CODE § 904.6(e) (West 2000).

³⁸² ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE REPORT FOR 1991 CALIFORNIA ASSEMBLY BILL NO. 607 (April 9, 1991), 2. “The purpose of this bill is to provide grand juries that are legally competent to return indictments. Because of the method used in selecting grand juries which investigate the operations of county and city governments, criminal indictments issued by them have been successfully challenged by defendants in court. This bill will correct this deficiency by insuring that grand juries used in criminal cases are impartial and representative of the community.” *Id.* at 1. “[G]rand juries are to be as representative as reasonably possible of the racial, gender and ethnic diversity of the jurisdiction in which they sit. To this end, the bill mandates that the 19 member grand jury be

On the assumption that the fair cross section requirement applies to California grand juries, the Supreme Court’s interpretation of that provision becomes relevant. As early as 1942, the Supreme Court held that “the proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a ‘body truly representative of the community’, and not the organ of any special group or class.”³⁸³ As a result, even the desire for competent jurors does not justify jury officials to make selections “which do not comport with the concept of the jury as a cross-section of the community.”³⁸⁴

Until 1968, when the Court held that the Sixth Amendment right to a jury trial applied to the states,³⁸⁵ the Court did not impose the requirement of a fair cross section on state juries. More recently, the Court has held that states must meet the fair cross section requirement.³⁸⁶

As summarized in *Duren v. Missouri*, a defendant makes out a prima facie case of a violation of the fair cross section requirement if the defendant shows “1) that the group alleged to be excluded is a ‘distinctive’ group in the community; 2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and 3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.”³⁸⁷

The primary difference between an equal protection and fair cross section challenge is that the litigant who makes a fair cross section challenge does not have to prove discriminatory intent.³⁸⁸ Instead, he or she must prove systematic exclusion.³⁸⁹ While that requires more than a showing that on a particular occasion, a distinct group has been excused, *Duren* found the requirement satisfied in a case in which women were under-represented in the weekly venires for almost a year.³⁹⁰

(iii) Assuring Fair Selection of Grand Juries

selected from 60 to 120 persons drawn at random from the list of those qualified to serve as superior court trial jurors.” *Id.* at 2.

³⁸³ *Glasser v. United States*, 315 U.S. 60 (1942).

³⁸⁴ *Id.* at 472.

³⁸⁵ *Duncan v. Louisiana*, 391 U.S. 145 (1968).

³⁸⁶ *Taylor v. Louisiana*, 419 U.S. 522 (1975).

³⁸⁷ *Duren v. Missouri*, 439 U.S. 357, 364 (1979). There is, however, some ambiguity about what constitutes a “distinctive group.” “[S]ome groups may be so small as to not come within Taylor and that some groups may be insufficiently “distinct” to fall within the cross section requirement.” LAFAVE, *supra* note 364, at 1034. Furthermore, the second element of the fair cross section requirement is shown by use of jury demographics and census statistics. Most courts use the absolute disparity test, which takes the percentage of the group in the total population minus the percentage of that same group on the master jury wheel or venires that appear for jury service. *U.S. v. Sanchez-Lopez*, 879 F.2d 541, 547 (9th Cir.) (1989). However, some courts employ the “comparative disparity” test, especially where a group’s population in the whole community is small. *United States v. Jackmun*, 46 F.3d 1240, 1246-47 (2nd Cir.) (1999). The comparative disparity test divides the absolute disparity by the percentage of the group in the community at large. *Sanchez-Lopez*, 879 F.2d at 547.

³⁸⁸ *Casteneda*, *supra* note 358, at 494 (requiring intent). Intent can be shown with statistics or a system susceptible to manipulation. *Id.* at 495.

³⁸⁹ *Duren*, *supra* note 387, at 364.

³⁹⁰ *Id.* at 366.

In 1991, California established statutory requirements on the composition of the criminal grand jury pool in light of concern about constitutional requirements of equal protection and fair cross section.³⁹¹ Historically, many counties impaneled grand juries by nomination.³⁹² Superior court judges nominated individuals for service; the nominees were then randomly selected.³⁹³ The process led to grand juries that were dominated by judges' acquaintances and by older professionals.

Under this system, for example, between 1959-69, Los Angeles Superior Court judges nominated 255 potential grand juries; of those, 82.7% were described as social acquaintances of the nominating judge.³⁹⁴ Given the racial and ethnic composition of the judiciary during that period, no one should be surprised that only 47 out of 1690 grand jurors were Mexican-American.³⁹⁵ At issue in the litigation in *People v. Mares* is whether the kind of gross disparity continues today, despite increased numbers of Latinos and Latinas on the bench.³⁹⁶

Since changes in California law allow counties to impanel separate criminal grand juries to indict³⁹⁷, many counties have used the same procedures that they use for selection of petit juries.³⁹⁸ Neutral methods of selection, probably immune from constitutional challenge³⁹⁹, include selection of jurors from motor vehicle and voter registration lists. It is unclear whether the change has resulted in significantly greater diversity.

Litigation in cases like *People v. Mares* will determine whether California is constitutionally compelled to improve diverse membership on its grand juries. The result will turn on whether sufficient disparity exists between minority population and representation on the grand jury to create a prima facie case of discrimination and, if so, whether the county has a sufficient explanation for the disparity that rebuts the inference of discrimination. But even if the county prevails, greater effort should be made in those counties where disparity exists. Below, this report discusses some specific proposals to increase minority representation.⁴⁰⁰

³⁹¹ CAL. PENAL CODE § 904.6(e) (West 2000).

³⁹² Lopez, *supra* note 354, at 1730-1732.

³⁹³ *Id.*

³⁹⁴ *Id.* at 1735-1736. For example, one judge who submitted a total of 10 nominees named 8 of them from his tennis club alone. *Id.* at 1733.

³⁹⁵ *Id.* at 1742-1743.

³⁹⁶ See *Mares*, *supra* note 341.

³⁹⁷ CAL. PENAL CODE § 904.6(e) (West 2000).

³⁹⁸ O'Neill, *supra* note 342. Telephone interview with Rex Warburton, May 25, 2000. See also www.sbgj.gov (last visited May 24, 2000).

³⁹⁹ While there do not appear to be any cases upholding this proposition, please see the Jury Selection and Service Act of 1968, which encourages the use of voter registration lists. Jury Selection and Service Act of 1968 § 1861. Some scholars assert, however, that the use of voter registration lists alone will not result in a representative cross section. Scholars cite differing registration rates by economic and racial groups. Fukari & Butler, *supra* note 360, at 244.

⁴⁰⁰ This report also discusses some legal issues that might arise with greater efforts to increase minority representation. Some jurisdictions have adopted procedures to ensure that the number of minorities in the jury selection pool mirrors the number of minorities in the general population. One scholar has suggested that such procedures may be vulnerable to equal protection challenges. Race-conscious methods of selection will be subject to strict scrutiny. *E.g.*, *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989) (applying strict scrutiny to a

(b) Civil Grand Jury

Most of the litigation dealing with equal protection has been in cases involving criminal defendants. The question arises, therefore, whether a grand jury that serves only the civil watchdog function must meet the same standards as does a criminal grand jury.⁴⁰¹ That is, does a significant lack of minority representation on a civil grand jury create a prima facie case of a violation of equal protection?

The answer is almost certainly yes, that it does create a prima facie case. Litigation developing equal protection has arisen in the criminal context because a criminal defendant has an incentive to litigate the claim. As discussed above, even when a defendant has been convicted, prevailing on a claim that the grand jury selection process violated equal protection voids the conviction without harmless error analysis.

Early case law focused on the race of the defendant. That is, the case law suggested that an African-American could challenge only the exclusion of African-Americans on the theory that it was the defendant's equal protection right that was being vindicated. Today, that view of the case law is simply incorrect.

For example, in *Carter v. Jury Commissioner of Greene County*,⁴⁰² the Court made clear that citizens excluded from jury service based on race were denied equal protection. There, the Court stated that, "People excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion. . . ."⁴⁰³ Whether service on the grand jury is considered a right, duty or privilege, the state may not extend it to some of its citizens and deny it to others on racial grounds than it may invidiously discriminate in the offering and withholding of the elective franchise."⁴⁰⁴

race-conscious method of awarding municipal construction contracts). LAFAVE et al., *supra* note 364, at 1032-34. Whether such efforts are unconstitutional are far from clear. *Croson* held that Richmond's set-aside for minority contractors violated equal protection. But it did so in a case in which the city council made no finding of past discrimination by the governmental entity that now sought to remedy past discrimination. If local communities adopt measures to increase diversity on their grand juries, they may avoid the equal protection problem if they adopt the measures to remedy past discrimination in that community. In addition, they may also avoid the equal protection problem if their efforts to increase diversity do not amount to rigid set-aside programs. For example, outreach efforts to under-represented communities do not pose the problem as Richmond's set-aside program. Even in *Croson*, the court recognized that, had the political entity demonstrated systematic exclusion of minorities, it could have taken remedial measures.

⁴⁰¹ The constitutional cases that address issue of grand jury composition have dealt with grand juries that return criminal indictments. The unique question for California counties that divide grand jury functions into separate civil and criminal grand juries, according to California Penal Code 904.6, is whether the same constitutional standards apply to a grand jury that serves only a civil function.

⁴⁰² *Carter v. Jury Commissioner of Greene County*, 396 U.S. 320, 329 (1970).

⁴⁰³ *Id.*

⁴⁰⁴ *Id.* at 329-330.

In most of the cases in which jurors' equal protection rights have been at stake litigants have raised those rights.⁴⁰⁵ In those cases, the Supreme Court has found that third party standing, allowing a person whose right has not been violated to raise rights of third parties not before the court, is appropriate.⁴⁰⁶ In 1998, the Court made explicit that third party standing applies in challenges to the composition of grand juries, as well as to petit juries.⁴⁰⁷

Litigants have obvious incentive to raise the equal protection rights of excluded prospective jurors. It is less clear who may have incentive to challenge the composition of the civil grand jury. A member of the minority community may merely put her own name forward and ask to participate. If she is selected, her selection reduces the chances that a plaintiff would emerge to challenge the lack of diversity on a civil grand jury. But the lack of obvious plaintiffs to challenge the system does not negate the reality that the Court's equal protection analysis applies with equal force to the civil grand jury system as it does to the criminal grand jury. As indicated above, discrimination is not proven simply by the absence of members of a racial or ethnic minority from a particular grand jury or even the venire from which the panel is selected. In addition, the party who raises the equal protection claim must demonstrate more than historic under-representation; she must prove intentional discrimination.⁴⁰⁸

Apart from whether a party can successfully demonstrate a denial of equal protection, as indicated above, participation by significant numbers of minorities is a desirable goal that should be supported. The next section discusses some ideas on how greater representation may be achieved.

IV. Increasing Diversity

Many counties suffer not only from under-representation of minorities on their grand juries, but also from lack of interest among members of the community at large. Counties can increase the competence of their grand juries generally if they have a larger pool from which to choose their grand juries. Counties should engage in strategies that will increase the size of the pool of potential grand juries to satisfy both the goal of increasing diversity and that of increasing the quality of the work done by the grand jury. What follows is a summary of various suggestions that have been made by grand juries themselves and others close to the grand jury process.

In its 1998-1999 Final Report, the San Diego County Grand Jury recommended increasing the "public interest in and awareness of the county grand jury, its history, sphere of

⁴⁰⁵ Powers v. Ohio, 499 U.S. 400 (1991) (holding that a criminal defendant has standing to raise equal protection rights of jurors). See also Edmunson v. Leesville Concrete Company, Inc, 500 U.S. 614 (1991) (holding that a civil litigant may not use peremptory challenges to exclude jurors on account of their race, as race-based exclusion violates equal protection of the challenged jurors); Batson v. Kentucky, 476 U.S. 79 (1986) (holding that prosecutors in a criminal case may not challenge potential jurors based solely on their race, as to do so is a violation of the Equal Protection Clause).

⁴⁰⁶ Powers, *supra* note 405, at 410-411.

⁴⁰⁷ Campbell v. Louisiana, 523 U.S. 392, 400 (1998).

⁴⁰⁸ Casteneda, *supra* note 358, at 494.

authority, composition, general activity and how it benefits county taxpayers.”⁴⁰⁹ It suggested that grand jury members “speak to service clubs, community area councils, special interest groups, religious groups, high school civics classes, [and] college courses on local government” about the activities of the grand jury and outlining how one becomes a grand juror.⁴¹⁰ The Final Report also suggested that a new “brochure” be produced each year, with a summary of the grand jury report along with an overview of the grand jury itself.⁴¹¹

The Humboldt County Grand Jury implemented a similar program. It distributed 30,000 copies of its report, which allowed the report to go countywide.⁴¹² Previously, the grand jury gave copies of the final report to the media, which would then pick and choose which stories to publish.⁴¹³ Wide-distribution of the reports makes the community “more enlightened” and creates a larger pool of people “that would like to serve on the grand jury now that they are aware of something that they can do as a part of their civic contribution to the community.”⁴¹⁴ Thus, greater awareness of the functions of the grand jury leads to a greater number and variety of people who want to participate by serving on the grand jury.

The presiding judge in charge of the grand jury for Orange County recognized that the ethnic make-up of the grand jury in his country was a problem. In an effort to increase minority representation on the grand jury, the judge “sent letters and fliers to dozens of minority leaders, asking for assistance in recruiting minorities to serve on the grand jury.”⁴¹⁵ In addition, the court plans to “place ads in Spanish- and Vietnamese-language newspapers, and judges will speak at city council meetings, business group functions and other community forums.”⁴¹⁶

A number of suggestions were proposed at the meeting held at McGeorge. Members of the Marin County Grand Jury spoke about their activities to various civic groups and schools.⁴¹⁷ One participant observed that most people have no knowledge about the civil functions of the grand jury and proposed that high schools be required to educate students about the grand jury.⁴¹⁸

We are unaware whether subsequent grand juries have followed the advice of San Diego County’s 1998-99 report and put in place greater outreach. Common sense suggests that outreach efforts like those suggested in the San Diego County report and broad distribution of a final report, along the lines done in Humboldt County, will produce greater interest among members of the community in serving on the grand jury. Those involved in the grand jury, including superior court judges who supervise grand juries and those involved in the California Grand Juror’s Association should encourage sitting and former grand jurors to spread the word about grand jury service. While such efforts may produce significant results, they are dependent

⁴⁰⁹ San Diego County Grand Jury 1998-1999 *Final Report*, June 30, 1999, at 53.

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

⁴¹² ROUNDTABLE, *supra* note 71, at 47.

⁴¹³ *Id.*

⁴¹⁴ *Id.*

⁴¹⁵ *See James, supra* note 342.

⁴¹⁶ *Id.*

⁴¹⁷ ROUNDTABLE, *supra* note 71, at 46.

⁴¹⁸ *Id.* For example, California might include education about the grand jury as part of its civics requirement.

on the energy of grand jurors who often feel overwhelmed by their current duties. Other efforts need to supplement efforts of individual grand jurors.

Orange County's outreach program has been successful in increasing minority representation on its grand juries. It provides a model for other counties. Mailing fliers and placing ads do not require the same amount of individual effort by already overworked grand juries. The problem is that not all counties have sufficient resources for meaningful outreach. Here is an area where the state has a role in improving the grand jury process. Counties should be available to apply to the state for funds necessary to solicit public participation in the grand jury. Those funds should be available to target not only minority communities to increase diversity, an important goal if the grand jury is to fulfill its promise, but also the community at large to increase the pool of available grand jurors.

V. Outreach and Proposition 209

This report has urged that counties engage in aggressive outreach programs, in part, to increase minority representation on their grand juries. This section addresses whether an outreach program targeted towards a minority community may violate Proposition 209.

Adopted in 1996, Proposition 209 or the California Civil Rights Initiative (CCRI) added section 31 to Article I of the California Constitution.⁴¹⁹ It provides that: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."⁴²⁰

Initially, the CCRI limits governmental action which obviously includes operation of the state's court system.⁴²¹ While it reaffirms existing prohibitions on certain types of discrimination, it prohibits preferences in three specific areas.⁴²² Grand juries are arguably an adjunct of the state court system or are themselves a public agency; thus, for purposes of this discussion, the first serious question is whether service on a grand jury amounts to "public employment," bringing the selection of its members within the CCRI. There is a strong argument that grand jurors, who receive fees but no compensation, are not public employees, and that targeted outreach programs to increase diversity on grand juries would therefore not be prohibited by the CCRI.

However, if service on a grand jury constitutes "public employment," then a second question arises: whether outreach efforts targeted to minority communities is a form of "preferential treatment" within the meaning of the CCRI. Proponents of the CCRI seem to agree that CCRI probably makes recruitment efforts targeted at minorities unconstitutional. Ward

⁴¹⁹ CAL CONST. art. I, § 31 (West 2000).

⁴²⁰ *Id.*

⁴²¹ *Id.* This is not spelled out within the language of the CCRI, but presumably "state" includes state agencies and instrumentalities.

⁴²² One scholar has pointed out that it is "important to remember that this ban is limited to a particular area—government action in public employment, education, and contracting." Eugene Volokh, *The California Civil Rights Initiative: An Interpretive Guide*, 44 UCLA 1335, 1338 (1997).

Connerly, one author of the CCRI, has advocated broad outreach efforts that reach *all* ethnicities in the community's population, thereby presumably avoiding preferential treatment.⁴²³ Eugene Volokh, another author of the CCRI, has stated that "learning about the existence of an opening is an important part of applying for that opening; if a person is discriminatorily denied this information, his chances of getting the spot are discriminatorily diminished."⁴²⁴ Volokh concluded by stating that ". . . recruitment campaigns intentionally targeted at a particular group are probably prohibited."⁴²⁵

Recently, the California Supreme Court agreed. *In High Voltage Wire Works, Inc. v. City of San Jose*,⁴²⁶ the City of San Jose argued that "Proposition 209 . . . would permit targeted efforts to draw under-represented groups into the applicant pool for public jobs, contracts, and education."⁴²⁷ San Jose's outreach efforts were focused on women and minority contractors.⁴²⁸ The City argued that targeted outreach programs are not prohibited by article I, section 31 of California's Constitution.⁴²⁹ California Attorney General Bill Lockyer argued in favor of San Jose's outreach efforts, arguing that "inclusive outreach should be distinguished from 'exclusive' programs that harm the majority."⁴³⁰ Against San Jose, the Pacific Legal Foundation argued that focused outreach to minorities and women "give[] women and minorities a 'competitive advantage' by narrowing the field of eligible white male bidders, and it coerces contractors to hire with an eye toward meeting quotas."⁴³¹

The California Supreme Court agreed with the Pacific Legal Foundation, holding that San Jose's outreach program violated the CCRI.⁴³² In striking down San Jose's program, the court noted that "outreach may assume many forms, not all of which would be unlawful."⁴³³ In particular, the court continued, "[p]lainly, the voters intended to preserve outreach efforts to

⁴²³ Telephone with Royce Van Tassell, American Civil Rights Institute, 10.09.00. See also John Welsh, *UC Boosts Minority Admissions*, THE PRESS-ENTERPRISE, Apr. 04, 2000, at A01.

⁴²⁴ Volokh, *supra* note 422, at 1350.

⁴²⁵ Volokh asserts that some outreach programs are clearly neutral:

- a public institution advertising in all local newspapers – including those that serve particular ethnic communities.
- A public institution makes clear in its ads that it doesn't discriminate and that it welcomes all races and ethnicities to apply.

But he also asserts that some outreach programs are clearly discriminatory:

- recruiters sent to particular schools because those schools have more of a particular group.
- A public employer puts ads in magazines with overwhelmingly male readership because it wants to get male applicants.

More importantly, Volokh asserts that the test for the in-between cases "as in equal protection jurisprudence generally, turns on the employer's intent." *Id.*, at 1352.

⁴²⁶ *Hi-Voltage Wire Works, Inc. v. City of San Jose*, WL 1129639 (Cal.Pet.Brief) (1999).

⁴²⁷ Clare Cooper, *State Justices Cool to Outreach Program*, Sept. 7, 2000, at A1-A15.

⁴²⁸ *Id.*

⁴²⁹ *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 72 Cal. App. 4th 600, 610 (1999), *aff'd*, 24 Cal.4th 537 (2000).

⁴³⁰ Cooper, *supra* note 427, at A15.

⁴³¹ *Id.*

⁴³² *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal.4th 537 (2000).

⁴³³ *Id.*, 24 Cal.4th at 565.

disseminate information about public employment, education, and contracting not predicated on an impermissible classification.”⁴³⁴

Assuming that the CCRI applies to court attempts to recruit grand jurors, an assumption that has not been tested, the holding in *Hi-Voltage Wire Works* creates a challenge for courts and jury commissioners who may need to increase minority representation on juries because the United States Constitution prohibits discrimination in the jury selection process, and the Supreme Court has held that under-representation is relevant to whether discrimination has taken place. For example, in *Casteneda v. Partida*, the Supreme Court held that discriminatory intent may be established by the use of statistics along with other evidence. Faced with statistical under-representation, a jury commissioner may feel compelled to increase minority participation through outreach programs. A reading of the CCRI which prohibits such programs places the local official in a difficult position.

At a minimum, even if the CCRI applies, counties would be advised to engage in “neutral” outreach programs.⁴³⁵ As discussed above, such programs have a benefit in addition to increasing minority participation in the grand jury system. Community wide outreach programs should increase the size and quality of the pool, allowing greater diversity and competence. Under the court’s interpretation in *Hi-Voltage Wire Works*, outreach clearly can include advertisements in media serving distinct ethnic and racial communities, as long as such ads are part of a community wide advertising program.

⁴³⁴ *Id.*

⁴³⁵ Volokh, *supra* note 422, at 1352.

Appendix A

Criminal Grand Juries States that Allow Counsel

	Target Witness Only	Counsel's Role Limited to Advising the Witness	Counsel May Be Removed	Counsel Appointed for Indigent Witnesses	Counsel must take oath of secrecy	No Multiple Representation in Same Investigation	Other Provisions
Arizona A.R.S. §21-412 (2000).	X	X	X				
Colorado C.R.S. 16-5-204 (1999).		X	X	X	X	X	
Connecticut Conn. Gen. Stat. §54-47f (1999).		X					
Florida Fla. Stat. §905.17 (1999).		X				X	
Idaho Idaho Code §19-1121 (1999).		X					No Attorney inside if Immunity has been granted
Illinois 725 ILCS 5/112-4.1 (2000).		X					
Indiana Burns Ind. Code Ann. §35-34-2-5.5 (1999).	X	X	X		X		Attorney may participate (object) w/permission
Kansas K.S.A. §22-3009 (1999).				X			Counsel may object, but may not ask questions
Louisiana La. C.Cr.P. Art. 433 (2000).	X	X	X				If witness becomes target, record not usable
Massachusetts Mass. Ann. Laws ch. 277, §14A (2000).		X					May not delay proceedings to get counsel of choice
Michigan MSA §28.959(5) (1999).		X					
Nebraska R.R.S. Neb. §29-1411 (2000).		X	X	X	X	X	
Nevada Nev. Rev. Stat. Ann. §172.239 (2000).	X	X	X				
New York NY CLS CPL §190.52 (1999).		X	X	X			Only have counsel if waived immunity
Oklahoma 22 Okl. St. §340 (1999).							
Pennsylvania 42 Pa.C.S. §4549 (1999).		X	X	X		X	May not delay proceedings to get counsel of choice
South Dakota S.D. Codified Laws §23A-5-11 (2000).		X					
Utah Utah Code Ann. §77-10a-13							

(1999).							
Washington Rev. Code Wash. §10.27.120 (2000).		X					May not have attorney present if have immunity
Wisconsin Wis. Stat. §968.45 (1999).		X				X	