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Rectifying Wrongful Convictions through the Dormant Grand Jury Clause

Colin Miller
University of South Carolina - Columbia, mille933@law.sc.edu

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Abstract

In 1995, Lamar Johnson was convicted of a murder in St. Louis. Twenty-two years later, St. Louis Circuit Attorney Kimberly Gardner created a Conviction Integrity Unit ("CIU") to review possible wrongful convictions. After reviewing Johnson's case, the CIU concluded that Johnson was innocent. Then, consistent with her special responsibility as a prosecutor to seek to remedy wrongful convictions, Gardner filed a motion for a new trial. The court, however, denied the motion, holding that there was no enabling legislation in Missouri authorizing CIUs to seek relief for wrongful convictions. Gardner is not alone in her inability to rectify wrongful convictions. Although the number of CIUs has increased, most jurisdictions still do not have such a unit, and several CIUs exist in states that, like Missouri, lack enabling legislation.

Conversely, it has perhaps never been easier for prosecutors to commence criminal proceedings that culminate in wrongful convictions. The Fifth Amendment Grand Jury Clause provides that no person shall be subjected to a trial for felony charges unless there is a grand jury presentment or indictment. The grand jury's historical mission was "to clear the innocent, no less than to bring to trial those who may be guilty," and yet grand juries now return indictments in approximately ninety-nine percent of cases. Meanwhile, the use of presentments waned in the wake of the Civil War and was effectively declared dead in the criminal charging context in 1946. Historically, however, grand jury presentments were used not only to accuse wrongdoers of criminal behavior but also to call attention to issues of public concern. With the demise of presentments in the criminal charging context, this other historical function of the grand jury has largely fallen into disuse.

This Article advances the original thesis that there is a dormant Grand Jury Clause that prosecutors can use to revive the common law power of presentment and fulfill their responsibility to rectify wrongful convictions. Under this dormant Grand Jury Clause, a prosecutor who believes her office previously secured a wrongful conviction can take the case to a grand jury. If the grand jury agrees with the prosecutor, it can submit a wrongful conviction presentment to a judge, who can vacate the conviction under the inherent power of the court. By doing so, prosecutors can restore some of the glory of the common law grand jury and create a powerful new tool to right wrongs.

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* Associate Dean for Faculty Development and Professor of Law, University of South Carolina School of Law; Co-Host, Undisclosed Podcast, https://undisclosed-podcast.com/ [https://perma.cc/GZ9F-FHAZ]; Blog Editor, EvidenceProf Blog, https://lawprofessors.typepad.com/evidenceprof/ [https://perma.cc/YHX2-RQUU].

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INTRODUCTION

In 1995, Lamar Johnson was convicted of the murder of his former friend Marcus Boyd in St. Louis.[1] Twenty-two years later, Kimberly Gardner took office as the St. Louis Circuit Attorney and quickly created a Conviction Integrity Unit ("CIU") to review possible wrongful convictions.[2] After reviewing Johnson's case, the CIU concluded in a report that (1) Johnson was the victim of police and prosecutorial misconduct, and (2) "Johnson did not shoot Boyd and had nothing to do with Boyd's murder, and he should not be in prison for the crime."[3] Then, consistent with her special responsibility as a prosecutor to seek to remedy wrongful convictions under Model Rule of Professional Conduct 3.8(h),[4] Gardner filed a motion for a new trial.[5] The trial court, however, denied the motion, holding that (1) a prosecutor cannot file a motion for a new trial on behalf of a defendant; (2) a motion for a new trial must be filed within twenty-five days of the return of the verdict; and (3) there was no enabling legislation

1 *See* Emily Hoerner, *St. Louis Prosecutor: Fabricated and Hidden Evidence by Police, Prosecutor Led to Wrongful Conviction*, INJUSTICE WATCH (July 23, 2019), https://www.injusticewatch.org/news/2019/st-louis-prosecutor-calls-to-overturn-conviction-based-on-fabricated-police-evidence-undisclosed-witness-payments/ [https://perma.cc/7JA8-LR9E].

2 *See id.*

3 REPORT OF THE CONVICTION INTEGRITY UNIT: STATE V. LAMAR JOHNSON, CASE NO. 22941-03706A-01 45 (2019) [hereinafter JOHNSON REPORT], https://themip.org/wp-content/uploads/2019/07/Lamar-Johnson-CIU-Report.pdf [https://perma.cc/BFW8-8C2L].

4 MODEL RULES OF PRO. CONDUCT r. 3.8(h) (AM. BAR ASS'N 2020).

5 State's Motion for a New Trial Based on Newly Discovered Evidence of Innocence, Perjury, and False Testimony and Misconduct So Prejudicial That the Outcome of the Trial Is Unreliable, or in the Alternative, Motion for a Hearing on the Newly Discovered Evidence, State v. Johnson, No. 22941-03706A-01 (Mo. Cir. Ct. July 19, 2019), https://www.scribd.com/document/419521917/Motion-for-a-new-trial [https://perma.cc/3CAU-MDP7].

in Missouri authorizing CIUs to seek relief for wrongful convictions.[6] This decision was later affirmed by the state court of appeals[7] and state supreme court.[8]

Gardner is not alone in her inability to rectify wrongful convictions and fulfill her special responsibility as a prosecutor under Rule 3.8(h). Although the number of CIUs has increased over the past decade,[9] most jurisdictions still do not have such a unit, and several CIUs exist in states that, like Missouri, lack enabling legislation that allow prosecutors to rectify wrongful convictions.

Conversely, it has perhaps never been easier for prosecutors to commence criminal proceedings that culminate in wrongful convictions. The Fifth Amendment Grand Jury Clause and many state counterparts provide that no person shall be subjected to a trial for felony charges unless there is a grand jury presentment or indictment.[10] The grand jury is an ancient institution that predates even the trial jury and whose historical mission was "to clear the innocent, no less than to bring to trial those who may be guilty."[11] And yet, the grand jury has become little more than a rubber stamp for prosecutors. Grand juries now return indictments in approximately ninety-nine percent of cases,[12] validating Judge Sol Wachtler's classic statement that "a Grand Jury would indict a 'ham sandwich.'"[13] Meanwhile, the other document mentioned in the Grand Jury Clause—the presentment—in which the grand jury issues a report without a bill of indictment laid before it, has been neutered. The use of presentments waned in the wake of the Civil War and was effectively declared dead in the crimi-

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6 *See* Order at 14–15, State v. Johnson, No. 22941-03706A (Mo. Cir. Ct. Aug. 23, 2019), https://bloximages.newyork1.vip.townnews.com/stltoday.com/content/tncms/assets/v3/editorial/7/5c/75c4e19c-9220-5b21-acae-14d9aad821d0/5d6032524f933.pdf.pdf [https://perma.cc/5WHN-QC4P] (denying State's motion for a new trial).

7 *See* State v. Johnson, No. ED108193, 2019 WL 7157665, at *1 (Mo. Ct. App. Dec. 24, 2019).

8 *See* State v. Johnson, 617 S.W.3d 439, 445 (Mo. 2021).

9 *See infra* note 106 and accompanying text.

10 U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . .").

11 United States v. Dionisio, 410 U.S. 1, 16–17 (1973).

12 Thaddeus Hoffmeister, *The Grand Jury Legal Advisor: Resurrecting the Grand Jury's Shield*, 98 J. CRIM. L. & CRIMINOLOGY 1171, 1176 (2008); Nino C. Monea, *The Fall of Grand Juries*, 12 NE. U. L. REV. 411, 419 n.45 (2020) ("Today, the federal grand jury indictment rate hovers around 99 percent.").

13 *In re* Grand Jury Subpoena of Stewart, 545 N.Y.S.2d 974, 977 n.1 (Sup. Ct.), *modified*, 548 N.Y.S.2d 679 (App. Div. 1989).

nal charging context through the enactment of Federal Rule of Criminal Procedure 7(a)(1) and several state counterparts.[14]

Historically, however, grand jury presentments were used not only to accuse wrongdoers of criminal behavior but also to call attention to issues of public concern like failing infrastructure and unsanitary correctional facilities.[15] With the demise of presentments in the criminal charging context, this other historical function of the grand jury has largely fallen into disuse.[16]

This Article advances the original thesis that there is a dormant Grand Jury Clause that prosecutors can use to revive the common law power of presentment and fulfill their responsibility to rectify wrongful convictions. Under this dormant Grand Jury Clause, a prosecutor who believes her office previously secured a wrongful conviction can take the case to a grand jury. If the grand jury agrees with the prosecutor, it can submit a wrongful conviction presentment to a judge, who can vacate the conviction under the inherent power of the court. By doing so, prosecutors can restore some of the glory of the common law grand jury and create a powerful new tool to right wrongs.

In Part I, this Article traces the history of innocence claims in this country, culminating in the CIU roadblock faced by prosecutors such as Gardner. Part II then digs into the common law origins of the grand jury and the eventual decline of the presentment power to its current state of dormancy. Next, Part III reviews the Supreme Court's dormant Commerce Clause jurisprudence as a possible model for recognition of a dormant Grand Jury Clause. Part IV adds an assessment of two criminal clauses that the Supreme Court revived after centuries of dormancy. Finally, Part V sets forth the proposal that prosecutors in jurisdictions with or without CIUs should be able to take innocence claims to grand juries who can issue wrongful conviction presentments to judges with the power to right wrongs.

I. The Rise of Rectifying Wrongful Convictions and the CIU Roadblock

A. Introduction

Currently, wrongful convictions are seen as a significant problem due to a disproportionate impact on innocent African American men like Lamar Johnson, who, compared to their Caucasian counterparts,

14 *See infra* notes 230–35 and accompanying text.

15 *See infra* notes 195–205 and accompanying text.

16 *See infra* notes 236–66 and accompanying text.

are more likely to be wrongfully convicted and serve more time before being released.[17] But this was not always the case. This Section traces the history of innocence claims in this country through six eras: (1) innocence skepticism; (2) the DNA revolution; (3) the emergence of the Innocence Project and the Innocence Network; (4) the creation of the special responsibility of prosecutors to rectify wrongful convictions; (5) the emergence of CIUs; and (6) the CIU roadblock that this Article's proposal seeks to resolve.

B. Innocence Skepticism

There was little written about wrongful convictions in this country until 1932.[18] Indeed, in a 1923 opinion, the esteemed Judge Learned Hand wrote that:

> Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.[19]

These concerns became inverted in the public eye in the wake of the convictions of anarchists Nicola Sacco and Bartolomeo Vanzetti.[20] In 1921, Sacco and Vanzetti, Italian immigrants, were convicted of robbery and sentenced to die "during the height of the post-World War I Red Scare amidst much fervor and public outcry against both foreigners and anarchists."[21] The two men later appealed based upon "recanted testimony, conflicting ballistics evidence, a prejudicial pre-

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17 *See* Barbara O'Brien & Kristen Parker, *African-Americans More Likely to be Wrongfully Convicted*, MICH. STATE UNIV., https://research.msu.edu/innocent-african-americans-more-likely-to-be-wrongfully-convicted/ [https://perma.cc/A7B6-A2BJ] (noting that (1) African American defendants convicted of murder are fifty percent more likely to be innocent than their Caucasian counterparts, and (2) African American exonerees serve about three more years than their Caucasian counterparts before being released).

18 Richard A. Leo, *Rethinking the Study of Miscarriages of Justice: Developing a Criminology of Wrongful Conviction*, 21 J. CONTEMP. CRIM. JUST. 201, 203 (2005) ("The history of the study of wrongful conviction in America began with Yale law professor Edward Borchard's (1932) book, *Convicting the Innocent*.").

19 United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923).

20 Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Distinction*, 57 VAND. L. REV. 435, 470 n.141 (2004) ("Widespread interest in the problem of wrongful convictions in the 1930s appears to have been largely the result of the Sacco-Vanzetti case, together with the publication of Edwin Borchard's *Convicting the Innocent* in 1932.").

21 Meghan Levine, Note, *The Competing Roles of an Attorney in a High-Profile Case: Trying a Case Inside and Outside of the Courtroom*, 28 GEO. J. LEGAL ETHICS 683, 685–86 (2015).

trial statement by the jury foreman, and a confession by an alleged participant in the robbery."[22]

While the confession in particular led many to believe that Sacco and Vanzetti were wrongfully convicted,[23] the Supreme Judicial Court of Massachusetts denied their appeal in 1926.[24] One year later, "protests on their behalf were held in every major city in North America and Europe, as well as Tokyo, Sydney, S[ã]o Paulo, Rio de Janeiro, Buenos Aires, and Johannesburg."[25] The protests, however, were unsuccessful; later that year, Sacco and Vanzetti were executed via the electric chair.[26]

Although the appeals by Sacco and Vanzetti fell upon deaf ears, comments by the district attorney prosecuting them found an active audience. In 1932, Yale law professor Edwin Montefiore Borchard published his groundbreaking book *Convicting the Innocent*, in which he dissected sixty-five cases of wrongful convictions.[27] In the Preface to the book, Borchard wrote, "[a] district attorney in Worcester County, Massachusetts, a few years ago is reported to have said: 'Innocent men are never convicted. Don't worry about it, it never happens in the world. It is a physical impossibility.' The present collection of sixty-five cases, which were selected from a much larger number, is a refutation of this supposition."[28]

Although this Preface was cryptic, Borchard later wrote the following in a letter to *New Republic* Editor George Soule (after Congress passed legislation to compensate the wrongfully convicted):[29] "The effort [to pass compensation legislation] received a new lease of life through the statement made by the District Attorney in the Sacco-

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22 *FBI Files on Sacco and Vanzetti on Microfilm*, Cornell Univ. Libr. [hereinafter *FBI Files*], https://rmc.library.cornell.edu/EAD/htmldocs/KCL06082mf.html [https://perma.cc/2B2F-N2VR].

23 Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan. L. Rev. 21, 158 (1987).

24 Commonwealth v. Sacco, 151 N.E. 839, 864 (Mass. 1926).

25 *FBI Files*, *supra* note 22.

26 Kevin Francis O'Neill, *Muzzling Death Row Inmates: Applying the First Amendment to Regulations that Restrict a Condemned Prisoner's Last Words*, 33 Ariz. St. L.J. 1159, 1163 n.23, 1173 n.98 (2001). Sacco "used his last words to declare: 'Long live anarchy!'" *Id.* at 1163 n.23.

27 Edwin M. Borchard, Convicting the Innocent: Errors of Criminal Justice, at xiii (1932).

28 *Id.* at vii.

29 Jeffrey S. Gutman, *Are Federal Exonerees Paid?: Lessons for the Drafting and Interpretation of Wrongful Conviction Compensation Statutes*, 69 Clev. St. L. Rev. 219, 228 (2021) ("The only thing which appeared to put wrongful conviction compensation again on the legislative docket was the 1932 publication of Professor Borchard's *Convicting the Innocent: Sixty-Five Actual Errors of Criminal Justice*.").

Vanzetti case, who remarked that 'Innocence Men (sic) are never convicted. . . .'"[30]

In *Convicting the Innocent*, Professor Borchard identified several causes of the sixty-five wrongful convictions he studied, including "mistaken identifications, inadequate lawyering, police or prosecutorial misconduct, false or coerced confessions, and perjury."[31] The leading cause of wrongful conviction in these cases was eyewitness misidentification, which existed in twenty-nine of these cases, including eight in which Borchard concluded that "the wrongfully accused person bore not the slightest resemblance to the real culprit" and twelve in which he found that "the resemblance was not at all close."[32] Borchard advocated in the book "for improvements in the prosecution and police; eyewitness identifications, especially where victims of violent crimes make identifications; expert-witness testimony; and resources for poor defendants and defense attorneys."[33]

Although Borchard's wrongful conviction mosaic was compelling, the narratives in his book "failed to persuade others that wrongful convictions represented a systemic problem in the criminal justice system as opposed to a few anomalous, if deeply troubling, travesties of justice."[34] Over the next half century or so, "there was typically one big-picture book or major article published every decade or so on the subject of miscarriages of justice," which was often a retread of the territory covered by Borchard.[35] Meanwhile, over that same period of time, "the problem of wrongful conviction generated very little interest among criminal justice officials, policy-makers or the public."[36]

One prosecutor has said that "before DNA testing revealed otherwise, prosecutors believed wrongful convictions were so uncommon that there was little need to worry about them happening in their own office."[37] And, indeed, according to the National Registry of Exonera-

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30 Marvin Zalman, *Edwin Borchard's Innocence Project: The Origin and Legacy of His Wrongful Conviction Scholarship*, 1 WRONGFUL CONVICTION L. REV. 124, 142 (2020) (alteration in original).

31 Margaret Raymond, *The Problem with Innocence*, 49 CLEV. ST. L. REV. 449, 463 (2001).

32 State v. Raymond, 486 P.2d 93, 94 n.1 (Wash. 1971).

33 Tim Bakken, *Models of Justice to Protect Innocent Persons*, 56 N.Y.L. SCH. L. REV. 837, 841 (2011/12).

34 Richard A. Leo & Jon B. Gould, *Studying Wrongful Convictions: Learning from Social Science*, 7 OHIO ST. J. CRIM. L. 7, 12 (2009).

35 Leo, *supra* note 18, at 203.

36 Leo & Gould, *supra* note 34, at 12.

37 Daniel Kroepsch, Note, *Prosecutorial Best Practices Committees and Conviction Integrity Units: How Internal Programs Are Fulfilling the Prosecutor's Duty to Serve Justice*, 29 GEO. J. LEGAL ETHICS 1095, 1098 n.21 (2016).

tions, between the founding of this country in 1776 and 1988, there were only 438 exonerations, or just under two per year.[38]

C. The DNA Revolution

Deoxyribonucleic acid, or DNA, "is an extremely long, thread-like chain of molecules found in the nucleus of every cell of the body (except for certain cells, such as red blood cells, which do not have a nucleus)."[39] The DNA revolution began in 1984. In that year, English geneticist Sir Alec Jeffreys discovered that (1) "certain regions of DNA contained DNA sequences that were repeated over and over again next to each other,"[40] and (2) "the number of repeated sections present in a sample could differ from individual to individual."[41] These repeated sections came to be known as variable number tandem repeats ("VNTRs") or "DNA fingerprint[s]" that could be used to identify individuals "with probabilities greater than one-in-four billion."[42]

Dr. Jeffreys's DNA fingerprinting was first used in court in 1985 to prove that a Ghanaian boy who was denied entry to the United Kingdom was likely "the son of a Ghanaian woman who held rights of settlement in [the U.K.]"[43] The next year, DNA fingerprinting was first used in a criminal case in which two young girls were raped and murdered in Leicestershire, England and a suspect confessed to one of the crimes.[44] DNA testing of semen found on the two victims produced the "completely unexpected" result that another man, Colin Pitchfork, actually committed both crimes.[45] In 1988, Pitchfork became the first person convicted by DNA evidence.[46] That same year, there was the first DNA prosecution in the United States, with Florid-

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38 National Registry of Exonerations: Exonerations Before 1989, https://www.law.umich.edu/special/exoneration/Pages/ExonerationsBefore1989.aspx [https://perma.cc/VQ9R-T4CV].

39 William C. Thompson & Simon Ford, *DNA Typing: Acceptance and Weight of the New Genetic Identification Tests*, 75 Va. L. Rev. 45, 61 n.76 (1989).

40 John M. Butler, Forensic DNA Typing: Biology & Technology Behind STR Markers 2 (1st ed. 2001).

41 *Id.*

42 Louis J. Elsas II, *A Clinical Approach to Legal and Ethical Problems in Human Genetics*, 39 Emory L.J. 811, 812 (1990).

43 K.F. Kelly, J.J. Rankin & R.C. Wink, *Method and Applications of DNA Fingerprinting: A Guide for the Non-Scientist*, 1987 Crim. L. Rev. 105, 108–09.

44 Jessica Gabel Cino, *Tackling Technical Debt: Managing Advances in DNA Technology that Outpace the Evolution of Law*, 54 Am. Crim. L. Rev. 373, 378 (2017).

45 *Id.*

46 *Id.*

ian Tommie Lee Andrews also being convicted of a double rape/homicide.[47]

The following year—1989—saw the first exonerations based on DNA. In 1984, Carolyn Jean Hamm had been found raped and hanged in her home in Arlington, Virginia, with her hands bound behind her with a Venetian blind cord.[48] Detectives thereafter interrogated David Vasquez about the crime for hours.[49]

> Vasquez, who had a sub-70 IQ, eventually admitted to the crime, but he (1) initially said that he tied Hamm's hands behind her back with ropes, his belt, and a coat hanger before being told that they were bound with a Venetian blind; and (2) initially said that he stabbed Hamm before being told [by the police] that she was hanged.[50]

After unsuccessfully asserting that his confession was involuntary, "Vasquez pleaded guilty to second-degree murder and burglary to avoid the death penalty."[51] Subsequent DNA testing revealed that "Timothy Wilson Spencer was guilty of a series of similar crimes that led to him being dubbed the 'Southside Strangler.'"[52] "Based on the similar modus operandi of these crimes and the likelihood that it was Spencer who had killed Hamm, Virginia Governor Gerald L. Baliles pardoned Vasquez on January 4, 1989."[53]

Later that year, Gary Dotson became the second DNA exoneree after serving ten years for the 1977 aggravated kidnapping and rape of sixteen-year-old Cathleen Crowell.[54] DNA testing of semen on the victim's underpants excluded Dotson as a source and provided a match for Crowell's boyfriend.[55] It was then revealed that Crowell created the rape allegation to have a cover story in case her boyfriend had impregnated her.[56] Dotson was eventually exonerated on August 14, 1989.[57]

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47 *Id.*

48 Colin Miller, *Why States Must Consider Innocence Claims After Guilty Pleas*, 10 U.C. IRVINE L. REV. 671, 675 (2020).

49 *Id.*

50 *Id.*

51 *Id.*

52 *Id.*

53 *Id.*

54 *See* Dolores Kennedy, *Gary Dotson*, NAT'L REGISTRY EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3186 [https://perma.cc/4AQF-Y4K4].

55 *Id.*

56 *Id.*

57 *Id.*

Over the past few decades, DNA testing has become even more advanced, allowing an increasing number of defendants to prove their innocence.[58] Since 1989, there have been 375 DNA exonerations, including twenty-one DNA exonerations of people who had spent time on death row.[59]

D. The Innocence Project and the Innocence Network

In 1992, Barry Scheck and Peter Neufeld founded "the Innocence Project as a legal clinic at Benjamin N. Cardozo School of Law."[60] The Project was based on the principle that "[i]f DNA technology could prove people guilty of crimes, it could also prove that people who had been wrongfully convicted were innocent."[61] Scheck and Neufeld were impelled to create the Project based upon their work in the Marion Coakley case.[62]

In 1985, Marion Coakley, a man with an IQ in the midseventies, was convicted of the rape and robbery of Irma Lopez despite witnesses testifying that Coakley was at a bible study meeting at the time of the crime.[63] Attorneys at the Bronx Defenders represented Coakley at trial.[64] When those attorneys learned that Coakley might include a claim of ineffective assistance of counsel in his appeal, they referred the case to Barry Scheck and Peter Neufeld, who were both alumni of the Bronx Defenders.[65]

Scheck and Neufeld explored the possibility of using DNA evidence to try to exonerate Coakley, but "[t]he DNA tests were inconclusive, and the team was eventually able to prove Coakley innocent through other means."[66] Nonetheless, the Coakley case led Scheck

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58 *See* John Shaw, Comment, *Exoneration and the Road to Compensation: The Tim Cole Act and Comprehensive Compensation for Persons Wrongfully Imprisoned*, 17 TEX. WESLEYAN L. REV. 593, 617 (2011).

59 *Exonerate the Innocent*, INNOCENCE PROJECT, https://www.innocenceproject.org/exonerate/ [https://perma.cc/55A5-FX5V].

60 *Our Start*, INNOCENCE PROJECT, https://25years.innocenceproject.org/start/ [https://perma.cc/W32V-348X].

61 *Id.*

62 *Id.*

63 Rory O'Sullivan, *The Innocence Project: A Short History Since 1983*, BLACKPAST (Mar. 8, 2018), https://www.blackpast.org/african-american-history/perspectives-african-american-history/innocence-project-short-history-1983/ [https://perma.cc/82JU-GJX7]; Hyungjoo Han, *Marion Coakley*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetailpre1989.aspx?caseid=59 [https://perma.cc/J5AM-RXST].

64 O'Sullivan, *supra* note 63.

65 *Id.*

66 *DNA's Revolutionary Role in Freeing the Innocent*, INNOCENCE PROJECT (Apr. 18,

and Neufeld to realize "the potential of DNA technology to reverse wrongful convictions."[67]

After the formation of the Innocence Project in 1992, a number of other groups and schools began organizations that were "dedicated to proving claims of innocence that had been almost impossible to prove without DNA."[68] One of these schools was the Northwestern University School of Law, which "started the Center for Wrongful Convictions under their Bluhm Legal Clinic" in 1999.[69] The next year, the Innocence Project and the Center for Wrongful Convictions joined forces to form the Innocence Network,[70] which is currently a "coalition of organizations dedicated to providing pro bono legal and investigative services to individuals seeking to prove innocence of crimes for which they have been convicted, [and] working to redress the causes of wrongful convictions."[71] As of 2021, members of the Innocence Network have worked on over 190 DNA exonerations.[72]

Although the initial Innocence Project at Cardozo began with a mere four staff members, "it has grown into a substantial and well-funded non-profit organization with more than fifty employees."[73] Conversely, "many of the fifty-five U.S. innocence organizations that are Innocence Network members 'are underfunded, understaffed, and overworked.'"[74] As an example, in 2016, I and my colleagues from the wrongful conviction podcast *Undisclosed* began working with the Georgia Innocence Project ("GIP") on the case of Joey Watkins.[75] At the time, the GIP had one employee, was housed in a nail salon with no heat, internet, phone, or fax machine, and had one month's operating expenses in the bank.[76]

2018), https://innocenceproject.org/dna-revolutionary-role-freedom/ [https://perma.cc/38X4-WRL4].

67 *Id.*

68 *Who We Are*, INNOCENCE NETWORK [hereinafter INNOCENCE NETWORK], https://innocencenetwork.org/category/who-we-are [https://perma.cc/TD29-YBY3].

69 Mark A. Godsey & Thomas Pulley, *The Innocence Revolution and Our "Evolving Standards of Decency" in Death Penalty Jurisprudence*, 29 U. DAYTON L. REV. 265, 270 (2004).

70 *Id.* at 271.

71 INNOCENCE NETWORK, *supra* note 68.

72 *DNA Exonerations in the United States*, INNOCENCE PROJECT, https://innocenceproject.org/dna-exonerations-in-the-united-states/ [https://perma.cc/AM4T-6S5W].

73 Marvin Zalman & James Windell, *The Bite Mark Dentists and the Counterattack on Forensic Science Reform*, 83 ALB. L. REV. 749, 805 (2019/20).

74 *Id.* at 805–06.

75 *See The State v. Joey Watkins Episodes*, UNDISCLOSED, https://undisclosed-podcast.com/episodes/season-2/ [https://perma.cc/S283-9W99].

76 *See* E-mail from Clare Gilbert, Exec. Dir., Georgia Innocence Project, to author (Dec. 18, 2018, 12:12 PM) (on file with author). In March 2020, the Supreme Court of Georgia held

In the same year that the Innocence Project and the Center for Wrongful Convictions formed the Innocence Network, Scheck, Neufeld, and Jim Dwyer published *Actual Innocence: Five Days to Execution and Other Dispatches From the Wrongly Convicted*.[77] In the book, the authors analyzed sixty-two of the first sixty-seven DNA exonerations the Innocence Project had produced and found nine factors that led to wrongful convictions: (1) eyewitness misidentifications; (2) police and prosecutorial misconduct; (3) perjury; (4) jailhouse snitches; (5) false confessions; (6) junk science; (7) ineffective assistance of counsel; (8) public outrage over heinous crimes; and (9) racial bias.[78] In a commentary that preceded the book, Scheck and Neufeld wrote that "in many respects the reasons for the conviction of the innocent in the DNA cases do not seem strikingly different than those cited by Yale Professor Edwin Borchard in his seminal work, *Convicting the Innocent*."[79]

E. The Special Responsibilities of a Prosecutor

There was a significant increase in the number of DNA and non-DNA exonerations between 1989 and 2003 as well as a specific spike between 2000 and 2003, when there was an average of forty-four exonerations per year.[80] During this 2000 to 2003 range, there was a spate of high-profile exonerations, including the exoneration of Steven Avery, which was later covered in the Netflix docuseries *Making a Murderer*.[81]

Avery had been convicted of the 1985 rape of Penny Ann Beerntsen, who was assaulted while jogging on the Lake Michigan shoreline near Two Rivers, Wisconsin.[82] The jury found Avery guilty despite sixteen alibi witnesses placing Avery about forty miles away in Green

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that Watkins's jury misconduct and *Brady* claims in his successor habeas petition could move forward. *See* Watkins v. Ballinger, 840 S.E.2d 378 (Ga. 2020); *see also* Brady v. Maryland, 373 U.S. 83 (1963).

77 JIM DWYER, PETER NEUFELD & BARRY SCHECK, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000).

78 *Id.* at 246–59.

79 Peter Neufeld & Barry C. Scheck, Commentary, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL, at xxviii, xxx (1996).

80 Kelly J. Minor, Note, *Prohibiting the Death Penalty for the Rape of a Child While Overlooking Wrongful Execution:* Kennedy v. Louisiana, 54 S.D. L. REV. 300, 320 n.231 (2009).

81 *See* Michael C. Griesbach, *Why Avery Matters*, 84 WIS. LAW., Mar. 2011, at 6, 54.

82 *See* Maurice Possley, *Steven Avery*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3003 [https://perma.cc/4NKR-GP4T].

Bay at a time that would have made it highly unlikely that he could have committed the crime.[83] In 2002, attorneys for the Wisconsin Innocence Project secured a court order authorizing DNA testing of thirteen pubic hairs recovered from Beerntsen at the crime scene.[84] That testing revealed that those hairs were a "match" for Gregory Allen, who was serving sixty years for a sexual assault that occurred after the attack on Beerntsen.[85] On September 11, 2003, the Manitowoc District Attorney's Office and the Wisconsin Innocence Project filed a successful joint motion to dismiss the charges against Avery.[86]

In response to high profile exonerations such as the one in the Steven Avery case, the American Bar Association amended Model Rule of Professional Conduct 3.8, which covers the special responsibilities of a prosecutor.[87] Previously, Rule 3.8 was solely concerned with preventing wrongful convictions on the front end, stating that a prosecutor shall do things such as refraining from prosecuting charges not based on probable cause, making sure an accused is advised of the right to counsel, and timely turning over material exculpatory evidence.[88]

The effort to expand the focus of Rule 3.8 so that prosecutors were also obligated to remedy wrongful convictions on the back end began in 2006.[89] In that year, the Report of the Association of the Bar of the City of New York determined that

> [i]n light of the large number of cases in which convicted defendants have been exonerated, most often as a result of DNA testing but also as a result of other proof that they were wrongfully convicted, it is appropriate to obligate prosecutors' offices to give serious consideration and devote office resources to the consideration of credible post-conviction claims of innocence.[90]

The Report proposed that "prosecutors have ethical responsibilities upon learning of new and material evidence that shows that it is

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83 *Id.*

84 *Id.*

85 *Id.*

86 *Id.*

87 *See* Griesbach, *supra* note 81, at 54.

88 *See* MODEL RULES OF PRO. CONDUCT r. 3.8(a), (b), (d) (AM. BAR ASS'N 2008).

89 *See* Stephen J. Saltzburg, *ABA Model Rules of Professional Conduct Special Responsibilities of a Prosecutor: 3.8(g) & (h)*, 37 SW. U. L. REV. 935, 938 (2008).

90 NYC Bar Ass'n, Comm. on Pro. Resp., *Proposed Prosecutorial Ethics Rules*, 61 RECORD 69, 73 (2006), https://www2.nycbar.org/Publications/record/vol_61_no_1.pdf [https://perma.cc/Q4YP-7FXU].

likely that a convicted person was innocent."[91] Specifically, "[t]hese responsibilities include a duty to disclose the evidence [to the defense], to conduct an appropriate investigation, and, upon becoming convinced that a miscarriage of justice occurred, to take steps to remedy it."[92]

The New York State Bar Association and ultimately the American Bar Association adopted the Report's findings.[93] As a result, in 2008, the ABA added Model Rules of Professional Conduct 3.8(g) and 3.8(h).[94] They state that

> (g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
> (1) promptly disclose that evidence to an appropriate court or authority, and
> (2) if the conviction was obtained in the prosecutor's jurisdiction,
> (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
> (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.
> (h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.[95]

In a letter recommending that that the ABA adopt these Rules, Stephen J. Saltzburg, the Chair of the ABA Section of Criminal Justice, wrote that "[p]rosecutors' offices have institutional disincentives to comport with these obligations and, as courts have recognized, their failures are not self-correcting by the criminal justice process."[96] He

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91 Saltzburg, *supra* note 89, at 938.

92 *Id.*

93 *See id.* at 939.

94 John S. Dzienkowski, *Ethical Decisionmaking and the Design of Rules of Ethics*, 42 HOFSTRA L. REV. 55, 69 (2013). Only nineteen states have adopted versions of Model Rules 3.8(g) and (h), so these obligations are only advisory in most states. *See* Bruce A. Green & Ellen Yaroshefsky, *Should Criminal Justice Reformers Care About Prosecutorial Ethics Rules?*, 58 DUQ. L. REV. 249, 259 (2020).

95 MODEL RULES OF PRO. CONDUCT r. 3.8(g), (h) (AM. BAR ASS'N 2020).

96 Saltzburg, *supra* note 89, at 939.

then expressed hope that "[c]odification of these obligations, which are meant to express prosecutors' minimum responsibilities, will help counter these institutional disincentives."[97]

F. The Rise of the Conviction Review Unit

The addition of Rules 3.8(g) and (h) coincided with the dawn of the era of CIUs. A Conviction Review Unit ("CRU") or CIU "conducts extrajudicial, fact-based review of secured convictions to investigate plausible allegations of actual innocence. A CRU is typically contained within a local prosecutor's office."[98] Essentially, "[t]he creation of a CRU is a public commitment by the [district attorney] to ensure the accuracy, and therefore the legitimacy—that is, the integrity—of all criminal convictions secured by the Office."[99]

While the ABA was deciding whether to adopt Rules 3.8(g) and (h) in 2007, Dallas County District Attorney Craig Watkins created the first CIU.[100] Initially helmed by prosecutor Mike Ware and then by prosecutor Patricia Cummings,[101] the Dallas County CIU has produced thirty-seven exonerations,[102] second only to the 147 exonerations issued by the Harris County (Houston) CIU, which was started in 2009.[103] Progressive Prosecutor Larry Krasner later hired Cummings in 2018 to helm Philadelphia's reinvigorated CIU, which had

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97 *Id.*

98 JOHN HOLLWAY, CONVICTION REVIEW UNITS: A NATIONAL PERSPECTIVE 2 (Apr. 2016), https://www.law.upenn.edu/live/files/5522-cru-final [https://perma.cc/2U7X-PYE7].

99 *Id.* at 10.

100 Meghan J. Ryan & John Adams, *Cultivating Judgment on the Tools of Wrongful Conviction*, 68 SMU L. REV. 1073, 1116 (2015); *see also* Chris McGreal, *Dallas Chief Prosecutor Craig Watkins Fights Injustice and Racism*, GUARDIAN (Apr. 20, 2010, 2:54 PM), https://www.theguardian.com/world/2010/apr/20/dallas-prosecutor-craig-watkins-injustice [https://perma.cc/DCX2-25N3]. Previously, the San Diego County District Attorney's Office and the Santa Clara County District Attorney's Office started proto-CRUs in 2000 and 2004. *See* Justin Brooks & Zachary Brooks, *Wrongfully Convicted in California: Are There Connections Between Exonerations, Prosecutorial and Police Procedures, and Justice Reforms?*, 45 HOFSTRA L. REV., Winter 2016, at 373, 389–90.

101 Jessica Pishko, *No County for Innocent Men*, D MAG. (May 15, 2018, 11:30 AM), https://www.dmagazine.com/frontburner/2018/05/dallas-county-exonerations-innocent-conviction-integrity-unit/ [https://perma.cc/LFU6-L95M].

102 Dallas County CIU Exonerations, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View=%7bFAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7%7d&FilterField1=Group&FilterValue1=CIU&FilterField2=county_x0020_of_x0020_Crime&FilterValue2=Dallas [https://perma.cc/6NL9-N3ZW] (filter "County of Crime" by "Dallas"; then filter "Tags" by "CIU").

103 Harris County CIU Exonerations, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx [https://perma.cc/SQG2-V57M] (filter "County of Crime" by "Harris"; then filter "Tags" by "CIU").

only issued three exonerations in its four years of existence.[104] With Cummings in charge, Philadelphia's CIU has produced twenty-three exonerations in the last four years.[105]

There are currently ninety-one CRUs across the country, consisting of eighty-three countywide CRUs and eight statewide CRUs (six run by offices of six state Attorneys General, one run by a state Department of Justice, and one by the United States Attorney's Office for the District of Columbia).[106] The 2020 Annual Report by the National Registry of Exonerations refers to CRUs and Innocence Organizations ("IOs")—largely Innocence Network members—as "Professional Exonerators."[107] According to the Annual Report, there were 129 exonerations in 2020, with (1) sixty-one having CRU participation; (2) fifty-eight having IO participation; (3) eighty-four having either CRU or IO participation; and (4) thirty-five having CRU and IO cooperation.[108]

One of the benefits of many CRUs is that they can secure relief for defendants who may not be able to obtain relief on their own. Three real world cases are instructive. First is the case of Theophalis Wilson, also known as "Binky." In 1989, "three young men—22-year-old Otis Reynolds, 19-year-old Gavin Anderson, and his 17-year-old brother, Kevin Anderson—were found murdered in separate locations of Philadelphia, Pennsylvania."[109] The court convicted seventeen-year-old Theophalis Wilson and others for the murders, in large part based on the testimony of James White, an alleged accomplice.[110]

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104 *See* Philadelphia County CIU Exonerations, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx [https://perma.cc/SQG2-V57M] (filter "County of Crime" by "Philadelphia"; then filter "Tags" by "CIU"); Christopher Moraff, *New Philadelphia DA Larry Krasner Hits Reset on the Office's Troubled Conviction Review Unit*, APPEAL (Feb. 15, 2018), https://theappeal.org/new-philadelphia-da-larry-krasner-hits-reset-on-the-offices-troubled-conviction-review-unit-acc2c14412b4/ [https://perma.cc/Y9WQ-XC66].

105 Philadelphia County CIU Exonerations, *supra* note 104.

106 *Conviction Integrity Units*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/Conviction-Integrity-Units.aspx [https://perma.cc/H37Y-RR7L].

107 NAT'L REGISTRY EXONERATIONS, 2020 ANNUAL REPORT (2021), https://www.law.umich.edu/special/exoneration/Documents/2021AnnualReport.pdf [https://perma.cc/2Q4V-ZA7H].

108 *Id. See generally Bonus Episode—Theophalis Wilson*, UNDISCLOSED (Jan. 21, 2020, 12:12 PM), https://omny.fm/shows/undisclosed/theophalis-wilson [https://perma.cc/QD3U-96HQ] (describing the exoneration of Theophalis Wilson after Philadelphia's CIU began a comprehensive review of his case in 2018). Note that the 2020 Annual Report uses the term CIU, which is interchangeable with CRU.

109 Maurice Possley, *Theophalis Wilson*, NAT'L REGISTRY EXONERATIONS (Feb. 3, 2020), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5668 [https://perma.cc/46B9-7DFK].

110 *See id.*

White claimed that Wilson and the others shot two of the victims in a van and threw their bodies out of the van while it was in motion.[111] By 2018 Wilson had exhausted his appeals, but the Philadelphia CIU began reviewing new evidence in the case, including (1) White's recantation of his testimony, and (2) an expert's conclusion that, from the physical evidence such as the lack of tears in the victims' clothes and the victims' blood flow patterns, it was impossible that they were thrown from a moving vehicle.[112] In January 2020, Wilson and the CIU filed joint stipulations of fact under Pennsylvania law to vacate Wilson's convictions, Judge Tracy Brandeis-Roman granted it, and Wilson was released.[113]

Second, there is the case of Willie Veasy, also known as "Pee Wee." In 1993, Willie Veasy was convicted of murdering John Lewis, also known as the "Jamaican," in North Philadelphia based on his confession and Denise Mitchell's eyewitness identification.[114] By 2017, Veasy had filed two unsuccessful Post-Conviction Relief Act ("PCRA") petitions and sought to file a third Hail Mary PCRA petition that was likely procedurally barred.[115] Around the same time, he also filed an application with the CIU seeking an exoneration based on evidence gathered by the Pennsylvania Innocence Project and the aforementioned *Undisclosed* podcast. The new evidence included (1) a statement by Mitchell that she was legally blind;[116] (2) statements by Veasy's supervisors that he was working at a Houlihan's restaurant as a dishwasher at the time of the murder;[117] (3) an expert's conclusion that Veasy's confession was likely a false confession;[118] and (4) undis-

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111 *Id.*

112 *See Bonus Episode—Theophalis Wilson*, *supra* note 108.

113 *See id.* at 32:41, 33:20; *see also* Samantha Melamed, *A 'Perfect Storm' of Injustice: Philly Man Freed After 28 years as DA Condemns 'Decades' of Misconduct*, PHILA. INQUIRER (Jan. 21, 2020), https://www.inquirer.com/news/philadelphia-da-larry-krasner-conviction-integrity-unit-exoneration-theophalis-wilson-christopher-williams-20200121.html [https://perma.cc/B2VD-MSQG].

114 Ken Otterbourg, *Willie Veasy*, NAT'L REGISTRY EXONERATIONS (Aug. 13, 2021), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5624 [https://perma.cc/SF74-BM7E].

115 *See* Petition for Post-Conviction Relief Pursuant to 42 Pa. C.S. § 9541, *et seq.*, Commonwealth v. Veasy, No. CP-51-CR-641521-1992 (Pa. C.P. Phila. Cnty. June 23, 2017).

116 *See The State v. Willie Veasy: Episode 4—Recantation*, UNDISCLOSED, at 08:59 (Nov. 13, 2017), https://undisclosed-podcast.com/docs/willie-veasy/Veasy%20-%20Episode%204%20-%20Recantation.pdf [https://perma.cc/4Z8W-38AX].

117 *See The State v. Willie Veasy: Episode 3—The Alibi*, UNDISCLOSED, at 21:49 (Nov. 6, 2017), https://undisclosed-podcast.com/docs/willie-veasy/Veasy%20-%20Episode%203%20-%20The%20Alibi.pdf [https://perma.cc/YXD6-ZQFY].

118 *See The State v. Willie Veasy: Episode 2—The Confession*, UNDISCLOSED, at 16:49, 17:13

closed documents regarding an alternate suspect.[119] On October 1, 2019, the CIU filed an answer that effectively joined Veasy's third PCRA petition and asked that his conviction be vacated.[120] Eight days later, Judge Leon Tucker vacated Veasy's conviction.[121]

Third, there is the case of Joseph Webster. On November 22, 1998, someone killed Leroy Owens in Nashville, Tennessee by repeatedly striking him in the head with a cinder block.[122] A jury eventually found Webster, who wears a mouth full of gold teeth, guilty of Owens's murder, largely based on a female eyewitness's identification.[123] When attorney Daniel Horwitz started representing him, Webster had exhausted his appeals, including a claim of ineffective assistance of trial counsel.[124] Webster then brought a petition for writ of error coram nobis, claiming that the State failed to disclose (1) a woman's statement that her ex-boyfriend—Webster's stepbrother—had bragged about committing the murder, and (2) statements by two male eyewitnesses giving physical descriptions of the assailant that did not match Webster's characteristics.[125]

This petition likely would not have been successful because it turned out that this evidence had been disclosed to trial counsel, who simply failed to use it.[126] But before the court adjudicated the merits of the appeal, Horwitz filed a motion to put a pause on the petition while the Davidson County (Nashville) CRU considered the case.[127] Eventually, that CRU joined Horwitz's petition, recommending that the court vacate Webster's conviction based on evidence gathered by Horwitz, the Innocence Project, and the *Undisclosed* podcast, which demonstrated that (1) the stepbrother committed the murder; (2) Webster was not the source of DNA recovered from the cinder block; and (3) the female eyewitness likely misidentified Webster be-

(Oct. 30, 2017), https://undisclosed-podcast.com/docs/willie-veasy/Veasy%20-%20Episode%202%20-%20The%20Confession.pdf https://perma.cc/UY8R-CRX7.

119 *See id.* at 00:22.

120 Otterbourg, *supra* note 114.

121 *Id.*

122 Ken Otterbourg, *Joseph Webster*, NAT'L REGISTRY EXONERATIONS (Nov. 30, 2020), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5865 [https://perma.cc/QV3H-DFHL].

123 *Id.*

124 *See id.*

125 *Id.*

126 *Id.*

127 Appellant's Notice of Voluntary Dismissal, Webster v. Tennessee, No. M2016-02309-CCA-R3-PC (Tenn. Ct. App. Mar. 31, 2017), https://scotblog.org/wp-content/uploads/2018/07/Webster-Motion-to-Dismiss-Appeal.pdf [https://perma.cc/7KKN-9XVK] (offering a court-mandated update on the status of the case).

cause she spoke to the assailant at close range and never mentioned that he had gold teeth.[128] Ultimately, on November 10, 2020 a judge granted the petition and dismissed the charges against Webster.[129] Although many CRUs and CIUs are prolific in obtaining exonerations, over half of them—fifty-one out of ninety-one total—have not issued a single exoneration since their inception.[130] Critics often derisively refer to these units as "CRINOs," which stands for "Conviction Review In Name Only."[131] In other words, while one could conclude that these units simply found no wrongful convictions, there are concerns that they were simply created as publicity stunts to garner good press.[132] The Quattrone Center, which studies CRUs, once wrote that "[a] CRINO is arguably worse than no CRU at all, since it not only retards the progress of criminal justice accuracy and reform, it makes the operation of sincere CRUs more difficult in other jurisdictions."[133]

G. The CRU Roadblock

Although CRINOs are an issue, a potentially larger issue involves CRUs that investigate old convictions, conclude that they were wrongful, and yet lack the power to rectify them. One example can be seen in the Lamar Johnson case referenced in the introduction. As noted, in 1995, Johnson was convicted of murdering his former friend Marcus Boyd.[134] After a deep dive into the case, Kimberly Gardner's CIU issued a sixty-six-page report with eight key factual findings:

> (1) The State, through Assistant Circuit Attorney (ACA) Dwight Warren, failed to conduct a competent investigation into the death of Boyd and engaged in serious prosecutorial misconduct throughout the case;
> (2) The only eyewitness to the crime, [Greg] Elking, was paid to identify Johnson as one of the shooters. These payments, totaling more than $4,000, as well as [the] State's assistance

128 *See* Otterbourg, *supra* note 122. *See generally State v. Joseph Webster Episodes*, UNDISCLOSED, https://undisclosed-podcast.com/episodes/state-v-joseph-webster/ [https://perma.cc/8J8Y-Y5UB].

129 Otterbourg, *supra* note 122. Notably, although the CRU was able to join Horwitz's petition, it lacked the power to independently seek relief for Webster. In a subsequent case, after the CRU determined that Paul Shane Garrett had been wrongfully convicted of a murder, it could not file for his conviction to be tossed. Instead, the CRU had to get the Tennessee Innocence Project to represent Garrett so that it could file for relief on his behalf. *See* Telephone Interview with Sunny Eaton, Dir., Conviction Rev. Unit, Nashville Dist. Att'y's Off. (Aug. 5, 2021).

130 *Conviction Integrity Units*, *supra* note 106.

131 HOLLWAY, *supra* note 98, at 5.

132 *Id.*

133 *Id.* at 19.

134 *See supra* note 1 and accompanying text.

in the dismissal of numerous tickets were not disclosed to the defense;
(3) Elking told St. Louis Metropolitan Police Department (hereinafter "SLMPD"[)] officers repeatedly, and on multiple occasions, that Boyd was murdered at night by two African-American males wearing ski masks covering all facial features except their eyes, and that these facts prevented him from being able to make an identification. Elking was unable to identify the perpetrators from a lineup containing Johnson three times, and Elking was only able to make an identification after officers told him which number to choose. Nonetheless, the prosecution proceeded to trial. Elking's inability to identify the assailants was exculpatory and impeaching evidence and was not disclosed to the defense;
(4) SLMPD officers engaged in a widespread falsification of witness statements to create motive evidence that did not exist. A thorough investigation revealed that these reports are false and witnesses deny making statements attributed to them in the police reports;
(5) The State failed to disclose material impeachment evidence concerning jailhouse informant William Mock's (hereinafter "Mock") extensive criminal history, drug history, past history as an informant for the State, and the extensive assistance provided to Mock by the State, as well as Mock's racial animus toward African-Americans;
(6) The State failed to correct false and misleading testimony from State witnesses, misled the jury, and otherwise engaged in misconduct that violated Johnson's constitutional rights;
(7) The actual perpetrators, Johnson's co-defendant Campbell and another man James "BA" Howard (hereinafter "Howard"), credibly confessed to the shooting of Boyd in signed sworn affidavits, personal writings dating back to 1996, and in interviews with counsel for Johnson and the CIU. Letters from Campbell denying Johnson's involvement were confiscated by and in the possession of the State, however, no action was taken to correct the wrongful conviction of Johnson; and,
(8) Johnson was tried before his co-defendant, Campbell. After Johnson['s] trial, Campbell's counsel discovered the full extent of Mock's criminal history, which had not been disclosed to Johnson or his counsel. This evidence, along with Elking's refusal to assist with the prosecution of Campbell, forced the State to reduce the charges against Campbell. As a result, Campbell—one of the true perpetrators—was given a deal wherein he pled guilty to a voluntary manslaughter

> charge and received a sentence of seven years. As a result of errors outlined above, Johnson received a sentence of life without parole.[135]

These factual findings led to the CIU's ultimate conclusion that "Johnson did not shoot Boyd and had nothing to do with Boyd's murder, and he should not be in prison for the crime."[136] The CIU noted that it was filing the report pursuant to the prosecutor's duty to rectify wrongful convictions under Model Rules of Professional Responsibility 3.8(g) and (h).[137] Gardner subsequently filed a motion for a new trial on behalf of Johnson.[138]

The trial court, however, denied the motion, holding that (1) a prosecutor cannot file a motion for a new trial on behalf of a defendant; (2) a motion for a new trial must be filed within twenty-five days of the return of the verdict; and (3) there was no enabling legislation in Missouri authorizing CIUs to seek relief for wrongful convictions.[139] With regard to enabling legislation, the court contrasted Missouri with other states that allow for petitions for writs of actual innocence to be filed at any time, by any party.[140] The decision by the trial court was later affirmed by the state court of appeals[141] and state supreme court.[142]

Similarly, Kevin Strickland has served over forty-three years for his alleged involvement with three other men in a 1978 triple homicide in Jackson County, Missouri that also left Cynthia Douglas injured.[143] After a hung jury at his first trial, Strickland was convicted at a second

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135 JOHNSON REPORT, *supra* note 3, at 3–4.

136 *Id.* at 45.

137 *Id.* at 42–43.

138 *See supra* note 5 and accompanying text.

139 *See* Order, *supra* note 6, at 14–15.

140 *See id.*

141 *See* State v. Johnson, No. ED 108193, 2019 WL 7157665 (Mo. Ct. App. Dec. 24, 2019).

142 *See* State v. Johnson, 617 S.W.3d 439 (Mo. 2021). I worked with State Senator Jamilah Nasheed on enabling legislation that would allow Gardner to file for a new trial on behalf of Johnson. *See* Colin Miller (@EvidenceProf), TWITTER (Jan. 8, 2020, 10:26 AM), https://twitter.com/EvidenceProf/status/1214931496688963584 [https://perma.cc/96FK-APQV]. That legislation was put on pause during Johnson's appeal, but a similar bill recently passed that potentially could lead to relief for Johnson and Kevin Strickland, whose case is discussed *infra*. *See* Rebecca Rivas, *Pending Law to Correct Wrongful Convictions Could Depend on Missouri Attorney General*, MO. INDEP. (June 1, 2021, 7:59 AM), https://missouriindependent.com/2021/06/01/pending-law-to-correct-wrongful-convictions-could-depend-on-missouri-attorney-general/ [https://perma.cc/Y58V-MN3U].

143 *See* Angie Ricono, *Jailed Kansas City Man Innocent After 43 Years, Prosecutor and Legal Team Says*, KCTV5 (May 10, 2021), https://www.kctv5.com/news/investigations/jailed-kansas-city-man-innocent-after-43-years-prosecutor-and-legal-team-says/article_8fe1d582-b183-11eb-9f90-6b443970fb16.html [https://perma.cc/6P77-6UCU].

trial based largely on Douglas's eyewitness identification.[144] Douglas, however, has since recanted her identification, and Strickland's alleged accomplices have named a previously unidentified person as the fourth perpetrator of the crime.[145]

In November 2020, Strickland's legal team submitted the case to the Jackson County Prosecutor's CIU.[146] After reviewing the case, the CIU "concluded in a letter that '[r]eliable, corroborated evidence now proves that Mr. Strickland is factually innocence [sic] of the charges for which he was convicted in 1979. In the interests of justice, Mr. Strickland's conviction should be set aside, he should be promptly released, and he deserves public exoneration.'"[147] Like Gardner, Jackson County Prosecuting Attorney Jean Peters Baker could not file an appeal; Strickland's team filed a petition for a new trial, which Baker could not join.[148] On June 2, 2021, the Supreme Court of Missouri denied the petition without explanation.[149]

These types of issues are not limited to Missouri. On Wednesday, July 19, 1995, between 12:30 a.m. and 1:00 a.m., Jefferson County Deputy Sheriff William G. Hardy was fatally shot in the parking lot of a hotel in Birmingham, Alabama.[150] Ardragus Ford and Toforest Johnson were eventually prosecuted for the murder, with Ford's first trial ending in a hung jury and his second trial ending in an acquittal.[151] Johnson's first trial also ended with a hung jury, but he was convicted after a second trial.[152] The jurors convicted Johnson despite two alibi witnesses testifying that they saw Johnson at a night club on a Tuesday night or Wednesday morning in July 1995—probably July 18th and 19th—between 11:00 p.m. and 2:00 a.m.[153] Essentially, the only evi-

144 *See id.*

145 Press Release, Midwest Innocence Project, Jackson County Prosecutor States MIP & BCLP Client Kevin Strickland Is Actually Innocent (May 10, 2021), https://themip.org/clients/kevin-strickland/ [https://perma.cc/C636-TED2].

146 *Id.*

147 *Id.* (alteration in original).

148 *See id.*

149 *See* Luke X. Martin, *The Jackson County Prosecutor Says Kevin Strickland Is Innocent. Why Is He Still Behind Bars?*, KCUR 89.3 (June 2, 2021, 8:50 AM), https://www.kcur.org/news/2021-06-01/the-jackson-county-prosecutor-says-kevin-strickland-is-innocent-why-is-he-still-behind-bars [https://perma.cc/C5Y4-JEGW].

150 Johnson v. State, 823 So. 2d 1, 9–10 (Ala. Crim. App. 2001).

151 *See With Newly Discovered Evidence of Prosecutorial Misconduct, Alabama Death-Row Prisoner Hopeful to Win New Trial*, Death Penalty Info. Ctr. (Dec. 20, 2019), https://deathpenaltyinfo.org/news/with-newly-discovered-evidence-of-prosecutorial-misconduct-alabama-death-row-prisoner-hopeful-to-win-new-trial [https://perma.cc/866Y-E6VW].

152 *Id.*

153 *See Johnson*, 823 So. 2d at 13. Both alibi witnesses testified "that Johnson was wearing a

dence connecting Johnson to the crime was a witness named Violet Ellison, who testified "that she had eavesdropped on a phone call in which someone she believed to be Johnson admitted to the shooting."[154] Ellison's testimony, however, "didn't fit other evidence in the crime," and the State allegedly failed to disclose that Ellison came forward seeking reward money and was in fact paid $5,000 for her testimony.[155]

In 2019, attorneys for Johnson filed an appeal, claiming, inter alia, that the State had committed a violation under *Brady v. Maryland*[156] by failing to disclose information about Ellison seeking and receiving a reward for her testimony.[157] Subsequently, on March 16, 2020, Jefferson County Circuit Judge Teresa Pulliam denied that motion, finding that Johnson had failed to prove prosecutorial misconduct.[158] Johnson then appealed, and his appeal has been supported by Jefferson County District Attorney Danny Carr,[159] who recently launched a CRU.[160] Although Carr lacked the ability to join Johnson's appeal,[161] he filed an amicus curiae brief stating, "[i]t is the district attorney's position that in the interest of justice, Mr. Johnson, who has spent more than two decades on death row, be granted a new trial."[162] On

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navy blue 'Tommy Hilfiger' brand shirt with stripes on the collar" at the night club, and Johnson was wearing that shirt in a mugshot that was "taken when [Johnson] was arrested in the early morning hours of July 19, 1995." *Id.* That said, one of the alibi witnesses testified that she saw Johnson on the second Tuesday of July 1995, which would have been July 11 (into July 12), 1995. *Id.*

154 Kyle Whitmire, *Whitmire: Give Toforest Johnson a New Trial. Or Better, a Pardon. Now.*, AL.COM (Mar. 12, 2021, 9:22 AM), https://www.al.com/news/2021/03/whitmire-give-toforest-johnson-a-new-trial-or-better-a-pardon-now.html [https://perma.cc/6VJY-UVWE].

155 *Id.*

156 373 U.S. 83 (1963).

157 Beth Shelburne, *Hearing for Man on Alabama's Death Row Seeking New Trial Ends With No Decision*, 6 WBRC (June 7, 2019, 2:00 PM), https://www.wbrc.com/2019/06/07/hearing-man-alabamas-death-row-seeking-new-trial-ends-with-no-decision/ [https://perma.cc/W7ND-FZDY].

158 *See* Beth Shelburne, *Jefferson County Judge Denies New Trial in Possible Wrongful Death Row* Conviction, 6 WBRC (Mar. 17, 2020, 9:13 PM), https://www.wbrc.com/2020/03/18/jefferson-county-judge-denies-new-trial-possible-wrongful-death-row-conviction/. [https://perma.cc/NGK2-CA6Z]

159 Whitmire, *supra* note 154.

160 Carol Robinson, *'We Seek Justice': Jefferson County District Attorneys to Tackle Wrongful Convictions*, AL.COM (Nov. 30, 2020, 2:24 PM), https://www.al.com/news/birmingham/2020/11/we-seek-justice-jefferson-county-district-attorneys-to-tackle-wrongful-convictions.html [https://perma.cc/V4L3-TPL7].

161 Alabama law contains no provision that allows prosecutors to file or join motions for new trials based on evidence of innocence or wrongful convictions.

162 Kim Chandler, *Alabama County's DA Urges New Trial for Death Row Inmate*, AP

May 6th, 2022, the Alabama Court of Criminal Appeals ruled against Johnson.[163]

The Lamar Johnson, Kevin Strickland, and Toforest Johnson cases are thus all examples of the CRU roadblock. The prosecutor who determined that Theophalis Wilson was wrongfully convicted was able to bring a successful motion for a new trial on behalf of a defendant who might not have been able to bring one on his own.[164] Additionally, the prosecutors in the Willie Veasy and Joseph Webster cases were able to get their convictions vacated by joining the defendants' filings, which likely would not have succeeded on their own.[165]

Conversely, Kimberly Gardner was not able to move for a new trial on behalf of Lamar Johnson, and the prosecutors in the Kevin Strickland and Toforest Johnson cases were not able to join the defendants' appeals.[166] Thus, even though the prosecutors in all three cases believed that their office had secured a wrongful conviction, they have been unable to right these wrongs. Moreover, a majority of jurisdictions do not even have CIUs, so prosecutors in those jurisdictions have no way to investigate claims that people prosecuted by their office were wrongfully convicted. In the next Part, this Article delves into the history of the grand jury, the institution that can clear this CRU roadblock.

II. The Grand Jury and the Grand Jury Clause

A. Introduction

The grand jury might at first appear an odd choice as a tool for rectifying wrongful convictions given its current reputation as a rubber stamp for prosecutors pursuing criminal charges. This Part, however, traces the history of the grand jury, including its now largely dormant power to issue presentments on official misconduct and matters of public interest.

News (June 13, 2020), https://apnews.com/article/3ca98f9399f88188cc1542fabfb82082 [https://perma.cc/AF98-BCC5].

163 *See* Beth Shelburne, Alabama Appeals Court Rules Against High-Profile Death Row Prisoner, 6 WBRC (May 8, 2022, 10:45 PM), https://www.wbrc.com/2022/05/09/alabama-appeals-court-rules-against-high-profile-death-row-prisoner/ [https://perma.cc/R3QL-6Z9X].

164 *See supra* notes 109–13 and accompanying text.

165 *See supra* notes 115–17, 122–26 and accompanying text.

166 *See supra* notes 139–42, note 148, note 161 and accompanying text.

B. History of the Grand Jury

The grand jury is an ancient institution whose progenitor predates even the trial jury.[167] Its roots can be traced to the Norman Conquest[168] when William the Conqueror was dissatisfied with the practice of criminal accusations being "heard before 'moots,' a 'town meeting kind of body' which did not lend itself towards protecting the identity of the participants."[169] William the Conqueror replaced these moots with "the practice of sending barons into villages where they summoned 'important men from the neighborhood,' who were placed under oath and questioned primarily about financial affairs, but criminal matters as well."[170]

A century after the Norman Conquest, "King Henry II established a series of statutory enactments—known as assizes—that broadened William the Conqueror's use of neighborhood men into a criminal investigatory body."[171] Specifically, in 1166, King Henry II issued the Assize of Clarendon, which created what was known as the accusing jury by ordering that "in every county and in every hundred the twelve most lawful men of each hundred and the four most lawful men of each vill should be sworn to present any man who was suspected of serious crime either to the King's Justice or to the sheriff."[172]

The use of the word "present" in the Assize of Clarendon referred to one product of an accusing jury's deliberations: the presentment.[173] A presentment was an allegation by the accusing jury that someone had committed a crime based on "their own knowledge or observation, without any bill of indictment laid before them at the suit of the king."[174] In turn, this definition explains the second product of

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167 *See* Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1, 7–8 (2002) ("The trial jury itself is a direct descendant of the grand jury in both an ideological and an institutional sense, since the institution of the trial jury evolved out of the grand jury over six hundred years ago.").

168 *See* Richard H. Kuh, *The Grand Jury "Presentment": Foul Blow or Fair Play?*, 55 COLUM. L. REV. 1103, 1106 (1955) (noting that historians have found "institutions analogous to the indicting jury in various cultures antedating the Norman conquest, although no actual link has been established between any of these pre-Norman bodies and the grand jury").

169 Commonwealth v. Dupont, 9 Mass. L. Rptr. 1, 10 (Super. Ct. 1998).

170 *Id.*

171 Brian R. Gallini, *Bringing Down a Legend: How an "Independent" Grand Jury Ended Joe Paterno's Career*, 80 TENN. L. REV. 705, 737 (2013).

172 *Id.* (emphasis omitted) (quoting THEODORE FRANK THOMAS PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 88 (5th ed. 2011)).

173 *Id.*

174 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 298 (Robert Bell ed., 1772).

an accusing jury's deliberations: the indictment.[175] If the King believed that someone committed a crime, he would send a bill of indictment to the accusing jury, which would issue a "true bill" endorsing the indictment (or assert "not found" if rejecting it).[176]

If an accusing jury issued a presentment or a true bill/indictment, the accused could then defend himself by swearing to his denial and submitting to an "ordeal by water, wherein the accused was slowly lowered by rope into a body of water."[177] If the accused floated, he was found guilty, and his punishment was the loss of one of his feet and his right hand as well as banishment.[178] Meanwhile, if the accused sank, he was declared innocent, but, even if he could be resuscitated after being pulled out of the water, he was still banished.[179] Therefore, an accusing jury's accusation "was equivalent to banishment, at least."[180]

Finally, in 1215, King John abolished ordeal by water[181] and created the right to trial by jury in the Magna Carta.[182] In pertinent part, the Magna Carta provided that "[n]o freeman shall be hurt in either his person or property, unless by lawful judgment of his peers or equals, or by the laws of the land."[183] The number of trial jurors was twelve, the same as the number of jurors on the accusing jury, and "[m]embers of the accusing jury often were placed on the trial jury."[184]

If the King was angered by the accusing jury's failure to return a true bill, he could fine or imprison its members.[185] Based on the recognition that accusing jurors might be under the sway of the Crown, defendants were eventually allowed to prevent accusing jurors from

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175 *See* United States v. Cox, 342 F.2d 167, 187–88 (5th Cir. 1965) (Wisdom, J., concurring).

176 *Id.*

177 Kuh, *supra* note 168, at 1107 n.14.

178 *See id.*; *see also* Hurtado v. California, 110 U.S. 516, 529–30 (1884).

179 *Hurtado*, 110 U.S. at 529–30.

180 *Id.*

181 Theodore M. Kranitz, *The Grand Jury: Past-Present-No Future*, 24 Mo. L. Rev. 318, 320 (1959).

182 *See* State v. Ellis, 120 N.E. 218, 219 (Ohio 1918).

183 *Id.*

184 Stephen A. Lamb, *The Court-Martial Panel Selection Process: A Critical Analysis*, 137 Mil. L. Rev. 103, 108 n.48 (1992).

185 George Edward Dazzo, *Opening the Door to the Grand Jury: Abandoning Secrecy for Secrecy's Sake*, 3 D.C. L. Rev. 139, 143 n.28 (1995) ("Grand jurors who did not vote to find the accused guilty angered the King and could be fined, imprisoned, or both."); *see also* State v. Vinegra, 376 A.2d 150, 156–57 (N.J. 1977) (Hughes, C.J., dissenting) ("In 1667 a court held that grand jurors ought not be fined or imprisoned for failure to return a true bill desired by the King.").

serving as trial jurors upon objection.[186] Later, in 1352, under the reign of King Edward III, legislators enacted a per se prohibition on accusing jurors serving as trial jurors, "thus giving rise to two juries, the accusers and the triers."[187] Thereafter,

> when one of the king's traveling justices arrived to hear disputes, the local sheriff would choose twelve men from the immediate surrounding community to serve as jurors, and then would select an additional group of twenty-four men (usually knights) from a larger area to serve a[s] an accusing body for the entire county.[188]

This additional group, which was later reduced to twenty-three men,[189] came to be known as the "grand jury" because it was larger in number than the trial jury.[190]

During the first five hundred years of its existence, the accusing/grand jury "served exclusively as a sword for the Crown to consolidate power and to prosecute suspected lawbreakers."[191] Then, in 1681, the grand jury began to assume a new role "as the protector of an accused against an overzealous prosecutor."[192] In that year, two London grand juries refused to indict the Earl of Shaftesbury and his follower Stephen Colledge, supporters of the Protestant cause who were accused of treason by King Charles II.[193] These cases led to the concept of grand jury secrecy, which "insulated the jurors from the pressures of the Crown and permitted the grand jury to guard the people against the oppressive power of autocratic government."[194]

As grand juries gained independence from the Crown, they "began to act 'as a sort of "third estate" of the shire, or county "House of Commons," giving the opinion of the county on matters of public concern.'"[195] To achieve that purpose, "[t]he presentment, originally a

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186 *See* Kranitz, *supra* note 181, at 320.

187 Charles S. Potts, *Criminal Procedure from Arrest to Appeal: A Book Review*, 26 TEX. L. REV. 607, 621–22 (1948) (reviewing LESTER BERNHARDT ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL (1947)).

188 Commonwealth v. Dupont, No. CRIM. A. 85-981-987, 1998 WL 559694, at *16 (Mass. Super. Ct. Aug. 28, 1998).

189 *See* Kranitz, *supra* note 181, at 320.

190 *See Grand Jury*, BLACK'S LAW DICTIONARY 855 (6th ed. 1990).

191 Barry Jeffrey Stern, *Revealing Misconduct by Public Officials Through Grand Jury Reports*, 136 U. PA. L. REV. 73, 83 (1987).

192 Simmons, *supra* note 167, at 8.

193 Stern, *supra* note 191, at 83–84.

194 *In re* Russo, 53 F.R.D. 564, 568–69 (C.D. Cal. 1971); *see also* JoEllen Lotvedt, Note, *Availability of Civil Remedies Under the Grand Jury Secrecy Rule*, 47 CATH. U. L. REV. 237, 240 n.14 (1997).

195 Stern, *supra* note 191, at 84.

form of criminal accusation, was adapted by the grand jury to report publicly on a variety of noncriminal subjects."[196] Eventually, grand juries began issuing presentments on issues ranging from misconduct by public officials to the failure to properly maintain bridges and prisons.[197] Indeed, the use of the presentment was "so routine that parliament provided that no money was to be spent on the repair of bridges, jails, prisons, or houses of correction unless the need was first established by a grand jury presentment."[198]

The British subsequently exported this expanded version of the grand jury, "with the elements of secrecy and independence,"[199] to colonial America.[200] In the criminal realm, "[m]any state constitutions drafted in the first decades after the Revolution assumed the existence of grand juries, while a few explicitly mentioned or protected grand juries."[201] Thereafter, "[v]irtually every state admitted to the Union during its first three decades included a constitutional guarantee of grand jury indictment [or presentment] in serious criminal cases."[202] More generally, though, "[t]he state grand jury was defended . . . as a method of furthering popular control over government."[203] Specifically, in addition to investigating criminal behavior, "[g]rand juries acted in the nature of local assemblies: making known the wishes of the people, proposing new laws, protesting against abuses in government, performing administrative tasks, and looking after the welfare of their communities."[204] Colonial grand juries would investigate and issue presentments on misconduct by public officials, "ensuring that the official's conduct would come under public review."[205]

C. The Grand Jury Clause

The original draft of the United States Constitution did not reference the grand jury, presentments, or indictments.[206] The drafters of

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196 *Id.*

197 *Id.*

198 *Id.* at 84 n.31.

199 Lotvedt, *supra* note 194, at 240 n.14.

200 Stern, *supra* note 191, at 84.

201 Ronald F. Wright, *Why Not Administrative Grand Juries?*, 44 ADMIN. L. REV. 465, 475 (1992).

202 *Id.* at 476.

203 *Id.*

204 RICHARD D. YOUNGER, THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634–1941, at 2 (1963).

205 Stern, *supra* note 191, at 85.

206 *See* Thomas Y. Davies, *Correcting Search-and-Seizure History: Now-Forgotten Com-*

the Constitution, though, did include the Criminal Trial Jury Clause in Article III, Section 2 of the Constitution.[207] It states that

> [t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.[208]

James Madison proposed rights amendments to the Constitution, including amendments to this Clause that would have explicitly stated several rights, including the right of an accused not to be subjected to a jury trial "in all crimes punishable with loss of life or member" until after a "presentment or indictment by a grand jury."[209]

The House of Representatives, however, opposed the idea of altering the language of the Constitution "and instead decided to set out the rights amendments in a 'supplementary' format."[210] At the urging of the Anti-Federalists,[211] this supplementary format ultimately became the Bill of Rights, with the pertinent portion of Madison's proposal becoming the Grand Jury Clause of the Fifth Amendment.[212] That Clause states that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger."[213]

There was little discussion of the grand jury generally during ratification in 1791,[214] but the Supreme Court has since interpreted infamous crimes as felonies, i.e., crimes with a maximum punishment of more than one year incarceration.[215] Perhaps the reason that there was little discussion of the grand jury was the fact that there was little dis-

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mon-Law Warrantless Arrest Standards and the Original Meaning of "Due Process of Law", 77 MISS. L.J. 1, 139 (2007).

207 *See id.*

208 U.S. CONST. art. III, § 2.

209 Davies, *supra* note 206, at 139, 142 n.457.

210 *Id.* at 140.

211 Wright, *supra* note 201, at 476.

212 *See* Roger A. Fairfax, Jr., *The Jurisdictional Heritage of the Grand Jury Clause*, 91 MINN. L. REV. 398, 411–12 (2006).

213 U.S. CONST. amend. V.

214 Fairfax, *supra* note 212, at 412 ("There is little discussion in the ratification debates regarding the grand jury generally and virtually no discussion of the relationship of grand jury indictment to jurisdiction.").

215 *See Ex parte* Wilson, 114 U.S. 417, 429 (1885). The infamous crime is likely derived from the "infamia" under Roman Law. *See* United States v. Cox, 342 F.2d 167, 187 (5th Cir. 1965) (Wisdom, J., concurring).

pute about the scope of its powers.[216] Even though the Grand Jury Clause was an anti-Federalist initiative,[217] James Wilson, a Federalist, one of the most influential drafters of the Constitution and an Associate Justice of the Supreme Court, said the following about the grand jury in 1791:

> It has been alleged, that grand juries are confined, in their inquiries, to the bills offered to them, to the crimes given them in charge, and to the evidence brought before them by the prosecutor. But these conceptions are much too contracted: they present but a very imperfect and unsatisfactory view of the duty required from grand jurors, and of the trust reposed in them. They are not appointed for the prosecutor or for the court: they are appointed for the government and for the people: and of both the government and people it is surely the concernment, that, on one hand, all crimes, whether given or not given in charge, whether described or not described with professional skill, should receive the punishment, which the law denounces; and that, on the other hand, innocence, however strongly assailed by accusations drawn up in regular form, and by accusers marshalled in legal array, should, on full investigation, be secure in that protection, which the law engages that she shall enjoy inviolate.[]
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> The oath of a grand juryman—and his oath is the commission, under which he acts—assigns no limits, except those marked by diligence itself, to the course of his inquiries: why, then, should it be circumscribed by more contracted boundaries? Shall diligent inquiry be enjoined? And shall the means and opportunities of inquiry be prohibited or restrained? The grand jury are a great channel of communication, between those who make and administer the laws, and those for whom the laws are made and administered. All the operations of government, and of its ministers and officers, are within the compass of their view and research. They may suggest public improvements and the modes of removing public inconveniences: they may expose to public inspection, or to public punishment, public bad men, and public bad measures.[218]

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216 *See* Fairfax, *supra* note 212, at 412.

217 *See id.* at 411–12.

218 *In re* Phila. Cnty. Grand Jury, April 1943, 32 A.2d 199, 208–09 (Pa. 1943) (Maxey, C.J., dissenting) (citations omitted).

D. The Demise of the Grand Jury Presentment

In the early nineteenth century, the preliminary hearing developed as an alternate mechanism for determining whether there was sufficient evidence to take a criminal defendant to trial.[219] Unlike grand jury proceedings, which are private, prosecutorial proceedings held before lay jurors, preliminary hearings are "public, adversary proceedings" held before magistrate judges.[220] Many thus came to see grand jury proceedings "as 'costly, slow, amateur, and prone to error,' not to mention secretive and unfair, given the defendant's lack of representation at the proceedings."[221]

Beginning in the 1850s, these criticisms led some states to abandon the requirement of a presentment or indictment for felony prosecutions and instead allow for felony prosecutions by information, a charging document that does not require grand jury approval.[222] This led to the question of whether the Fifth Amendment requirement of a grand jury presentment or indictment for felony prosecutions applied to the states through the incorporation doctrine.

The United States Supreme Court ultimately resolved this issue in its 1884 opinion in *Hurtado v. California*.[223] In *Hurtado*, Joseph Hurtado was charged via information, not given a grand jury proceeding, convicted of first-degree murder, and sentenced to the death penalty.[224] After he was convicted, Hurtado appealed, challenging the constitutionality of Article 1, Section 8 of the California Constitution, which stated that:

> Offences heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment, as may be prescribed by law. A grand jury shall be drawn and summoned at least once a year in each county.[225]

According to Hurtado, this section violated the Fifth Amendment Grand Jury Clause, which he claimed was made applicable to the states through the incorporation doctrine under the Fourteenth Amendment.[226] The Supreme Court disagreed. It held that (1) the

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219 *See* State v. Christiansen, 2015 UT 74, ¶ 17, 365 P.3d 1189, 1192.

220 *Id.*

221 *Id.* ¶ 17, 365 P.3d at 1192–93.

222 *See id.* ¶ 18, 365 P.3d at 1193.

223 110 U.S. 516 (1884).

224 *Id.* at 518.

225 *Id.* at 517, 519.

226 *See id.* at 519–20.

Fifth Amendment's Grand Jury Clause and its Due Process Clause—"No person shall be . . . deprived of life, liberty, or property, without due process of law"—are distinct clauses; (2) the Fourteenth Amendment merely references due process—"[n]or shall any State deprive any person of life, liberty, or property, without due process of law"—but not grand jury presentments or indictments; and (3) "due process of law" in the Fourteenth Amendment thus "was not meant or intended to include, *ex vi termini*, the institution and procedure of a grand jury in any [state felony] case."[227]

Therefore, the Fifth Amendment to the United States Constitution does not require state prosecutors to procure grand jury approval before taking defendants to trial on felony charges. That said, under state constitutional or statutory provisions, every state still uses grand juries as a required or permissive procedure "for initiating a criminal prosecution or 'as an investigative tool.'[228] Specifically, in the wake of *Hurtado*: (1) twenty-three states require a grand jury indictment for serious crimes; (2) twenty-five states, including California, allow for either prosecution by indictment or information; and (3) two states allow prosecutors to "utilize the grand jury for investigative purposes only."[229]

Conversely, "in the overwhelming majority of jurisdictions presentments are no longer a part of the machinery in indicting one for a crime."[230] The current death of grand jury presentments in the criminal charging context can be traced back to the same general time period when *Hurtado* was decided. After the Civil War, commentators questioned the use of presentments to instigate felony prosecutions due to (1) increased skepticism "of the grand jury's knowledge of community affairs as populations grew," and (2) doubts about "whether the grand jury could independently understand increasingly complex laws and investigatory techniques."[231] These questions led to a sharp decline in the use of grand jury presentments, with the Supreme Court recognizing in 1906 in *Hale v. Henkel*[232] that "presentments have largely fallen into disuse in this country."[233]

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227 *Id.* at 520, 534–35.

228 Bennett L. Gershman, *The "Perjury Trap"*, 129 U. PA. L. REV. 624, 630 n.16 (1981).

229 Nicole Smith Futrell, *Visibly (Un)Just: The Optics of Grand Jury Secrecy and Police Violence*, 123 DICK. L. REV. 1, 5 n.8 (2018).

230 Stoots v. State, 325 S.W.2d 532, 536 (Tenn. 1959).

231 Gallini, *supra* note 171, at 742.

232 201 U.S. 43 (1906), *overruled on other grounds by* Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964).

233 *Id.* at 61.

The Federal Rules of Criminal Procedure finally declared the presentment a dead letter in the federal criminal charging context in 1946. Federal Rule of Criminal Procedure 7(a)(1) states that "[a]n offense (other than criminal contempt) must be prosecuted by an indictment if it is punishable: (A) by death; or (B) by imprisonment for more than one year."[234]

Meanwhile, the accompanying Advisory Committee's Note to the Rule pointed out that "[p]resentment is not included as an additional type of formal accusation, since presentments as a method of instituting prosecutions are obsolete, at least as concerns the Federal courts."[235]

The decline in the use of presentments to institute prosecutions roughly coincided with the decline in the use of presentments to report on official misconduct and matters of public concern. In 1903, a New York grand jury in Nassau County made a presentment to a court "in which the board of supervisors [of Nassau County] and two men who had acted as clerks of the board were censured for not performing the duties of their respective offices in a manner to meet the approval of the grand jury."[236] The individuals who were censured thereafter moved to quash the presentment.[237] In a majority opinion by Justice Almet F. Jenks denying the motion to quash in 1905, the court held that the presentment was a proper exercise of the grand jury's inquisitorial powers.[238] Justice Jenks then added, "I do not think that a presentment as a report upon the exercise of inquisitorial powers must be stricken out if it incidentally point[s] out that this or that public official is responsible for omissions or commissions, negligence or defects."[239]

The dissenting opinion of Justice John M. Woodward, however, was much more influential. According to Justice Woodward, "[t]here are two great purposes [of the grand jury]—one to bring to trial those who are properly charged with crime, the other to protect the citizen against unfounded accusation of crime."[240] Therefore, "[w]hen the grand jury goes beyond this, and attempts to set up its own standards, and to administer punishment in the way of public censure, it is de-

234 FED. R. CRIM. P. 7(a)(1).

235 FED. R. CRIM. P. 7(a)(1) advisory committee's note.

236 *In re* Jones, 92 N.Y.S. 275, 277 (Sup. Ct. 1905) (Woodward, J., dissenting), *appeal dismissed*.

237 *Id.*

238 *Id.* at 276 (majority opinion).

239 *Id.* at 277.

240 *Id.* at 279 (Woodward, J., dissenting).

feating the very purposes it was intended to conserve; and its action cannot, therefore, be lawful."[241]

Justice Woodward's dissent "was the first judicial pronouncement" that presentments alleging misconduct by public officials are quasi-criminal charges that lead to condemnation "without trial, the opportunity to be heard, or the right to assert [a] defense."[242] Over the next half century, courts across the country widely cited his dissent to quash grand jury presentments accusing specific public officials of misconduct.[243] As one court observed after declaring Justice Woodward's dissent "a convincing and sound argument,"

> A presentment is a foul blow. It wins the importance of a judicial document; yet it lacks its principal attributes—the right to answer and to appeal. It accuses, but furnishes no forum for a denial. No one knows upon what evidence the findings are based. An indictment may be challenged—even defeated. The presentment is immune. It is like the 'hit and run' motorist. Before application can be made to suppress it, it is the subject of public gossip. The damage is done. The injury it may unjustly inflict may never be healed.[244]

Therefore, "[p]resentments have become disfavored as a means of revealing official misconduct without initiating a prosecution" because they are seen as public, quasi-criminal allegations against individuals who cannot rebut them in court.[245]

In light of these issues, twenty-nine states have recognized a separate statutory or judicial authority for grand juries to issue reports of varying breadth on their observations.[246] In some of these twenty-nine states, grand juries have broad authority to issue reports "on matters affecting the 'public welfare' or 'public interest.'"[247] Conversely, in another subset of these twenty-nine states, grand juries are only author-

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241 *Id.*

242 J. Hadley Edgar, Jr., Comment, *The Propriety of the Grand Jury Report*, 34 TEX. L. REV. 746, 749 & n.21 (1956).

243 *See* Kuh, *supra* note 168, at 1110 ("Although the majority of the court affirmed the denial of a motion to set aside and quash a report, the dissent has been heavily relied upon by subsequent decisions in New York and elsewhere quashing reports."); Note, *The Grand Jury as an Investigatory Body*, 74 HARV. L. REV. 590, 594 n.29 (1961) ("The most widely cited opinion opposing reports is the dissent in *In the Matter of Jones*.").

244 People v. McCabe, 266 N.Y.S. 363, 366–67 (Sup. Ct. 1933).

245 *In re* Grand Jury Proceedings, 813 F. Supp. 1451, 1463 (D. Colo. 1992).

246 SARA SUN BEALE, WILLIAM C. BRYSON, TAYLOR H. CRABTREE, JAMES E. FELMAN, MICHAEL J. ELSTON & KATHERINE EARLE YANES, GRAND JURY LAW AND PRACTICE § 2:2 (2d ed. 1997 & Supp. 2011).

247 *Id.*

ized to report "on a few specific topics [that] are authorized by statute."[248] Meanwhile, "[i]n the remaining states, the grand jury has no clear statutory or judicial authority to issue reports."[249]

In some jurisdictions, courts have held that grand juries retain the historical power of presentment in addition to this new authority to report. For example, in *In re Presentment by Camden County Grand Jury*,[250] an attempted jail break led to a grand jury investigation and the issuance of a "report" to an assignment judge about "irregularities at the jail."[251] After the assignment judge denied a motion to expunge the report, the sheriff in charge of the jail appealed.[252] In denying that appeal, a New Jersey appellate court held that "[t]he document in question, although called a 'report' by the grand jury, is treated by the appellant as a presentment, and properly so."[253] According to the court, "although criminal presentments have vanished, the term, 'presentment by a grand jury,' has also been employed for centuries to designate the findings of a grand jury with respect to derelictions in matters of public concern, particularly of officials, which may fall short of being criminal offenses."[254]

Conversely, in some jurisdictions, courts have held that grand juries have no independent authority to issue presentments and that they can only issue reports under this new statutory or judicial authority. For example, the United States District Court for the District of Colorado has held that "[t]he grand jury document labelled as a 'presentment' can no longer be called, strictly speaking, a presentment. It is a *report*."[255] The court collapsed this dichotomy due to its assertion that "[t]he distinction between a presentment and a report is that only the latter is governed by standards which aim to soften foul blows, and grand juries may no longer issue documents failing those standards."[256]

Missouri, the home of the Lamar Johnson and Kevin Strickland cases, provides a pertinent example. Missouri's first and second state constitutions both contained provisions that required a grand jury presentment or indictment before a prosecutor could take a defendant to

248 *Id.*
249 *Id.*
250 89 A.2d 416 (N.J. 1952).
251 *Id.* at 417–18.
252 *Id.* at 422.
253 *Id.* at 423.
254 *Id.*
255 *In re* Grand Jury Proceedings, 813 F. Supp. 1451, 1463 (D. Colo. 1992).
256 *Id.*

trial on certain criminal charges.[257] Like California, Missouri subsequently amended its state constitution to allow for criminal prosecutions based on indictment or information, eliminating the presentment as part of the criminal charging context.[258]

Missouri has also enacted statutes detailing the grand jury's power to issue reports, creating the question of whether Missouri grand juries retain the common law power to issue presentments on public officials and matters of public concern. This question came to a head in *In re Interim Report of Grand Jury Convened for March Term of Seventh Judicial Circuit of Missouri 1976*.[259] In that case, the planning director and zoning enforcement officer of the Clay County Planning and Zoning Commission moved to expunge a grand jury's interim report censuring him.[260] The director argued that

> a grand jury should either indict or be quiet; that public policy and concepts of fair play require that it do one or the other, because a person accused by indictment is afforded an opportunity to refute the charge by answer and to present his defense at a trial, but where the accusation is by report he is denied that opportunity.[261]

The Supreme Court of Missouri assumed "that at common law a grand jury had the duty and the authority to report the results of its investigation of the official acts of officers having charge of public funds."[262] But the court then noted that Missouri statutory provisions currently only grant grand juries the power to (1) issue indictments, and (2) examine and report on the condition of public buildings.[263] The court then inferred "that the general assembly intended that the common law applicable to grand juries be superseded by these statutes."[264] This inference made the grand jury's interim report unlawful because "[t]here is simply no basis in the statute for assuming that the legislature intended to empower a grand jury to report the result of its investigation where that result disclosed that there was not sufficient grounds for indictment."[265] As such, the court held that "[t]he report

257 *See* Blair v. Ridgely, 41 Mo. 63, 81–82 (1867); State v. Ledford, 3 Mo. 102, 103–04 (1832).

258 *See* MO. CONST. art. I, § 17.

259 553 S.W.2d 479 (Mo. 1977).

260 *Id.* at 479.

261 *Id.* at 480.

262 *Id.* at 481.

263 *Id.* at 482.

264 *Id.* at 481.

265 *Id.* at 482.

filed in this case should be expunged from the record because it is not authorized by law, and because it is a quasi-official accusation of misconduct which movant is precluded from answering in an authoritative forum."[266]

E. Grand Jury as Rubber Stamp

With the presentment power largely falling into disuse, most grand juries now simply process indictments, serving as rubber stamps for prosecutors.[267] The indictment process typically plays out across one of two timelines: (1) a prosecutor brings a criminal complaint against a criminal defendant and then a bill of indictment before the grand jury, which has to confirm or dispel the prosecutor's claim of probable cause through a "true bill" or "no true bill"; or (2) a prosecutor thinking of charging a defendant beta tests her case before a grand jury with a bill of indictment that results in a "true bill" and then criminal charges or a "no true bill."[268]

For decades, there have been questions about whether the modern grand jury continues to carry out its core mission of clearing the innocent. As noted, in 1985, Court of Appeals of New York Chief Justice Sol Wachtler famously said that "a Grand Jury would indict a 'ham sandwich,'"[269] and that statement is now more true than ever. In the last year with complete data from the Bureau of Justice Statistics—2010—U.S. attorneys prosecuted more than 162,000 federal cases, and grand juries issued no true bills in only eleven of them.[270] Although there is no comprehensive data on state jury indictment rates, it is exceedingly rare for state grand juries to return no true bills.

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266 *Id.*

267 *See, e.g.*, *In re* April 1977 Grand Jury Subpoenas, 584 F.2d 1366, 1385 (6th Cir. 1978) ("They claim the grand jury no longer serves any protective function and that the minuscule percentage of 'no bills' reflects reality: that the grand jury is only a rubber stamp for the prosecution."); Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 248 (2006) ("In most jurisdictions, the screening mechanisms for the prosecutor's charging decision, such as the grand jury and the preliminary hearing, are relatively weak—ranging from being mere rubber stamps of the prosecutor's decision to dismissing only a small percentage of charges and criminal cases."); Robert L. Misner, *In Partial Praise of* Boyd*: The Grand Jury as Catalyst for Fourth Amendment Change*, 29 ARIZ. ST. L.J. 805, 828 (1997) ("In the federal system, the grand jury is seen as little more than a prosecutorial rubber stamp that follows the wishes of the prosecution in more than 99 percent of the matters before it.").

268 *See, e.g.*, United States v. Cox, 342 F.2d 167, 187–88 (5th Cir. 1965) (Wisdom, J., concurring) (stating the two options for the grand jury to take as true bill or no true bill).

269 *In re* Grand Jury Subpoena of Stewart, 545 N.Y.S.2d 974, 977 n.1 (Sup. Ct.).

270 *See* MARK MOTIVANS, U.S. DEP'T JUST., NCJ 239914, FEDERAL JUSTICE STATISTICS 2010—STATISTICAL TABLES 12 tbl.2.3 (2013).

For example, in Greenville County, South Carolina, "grand juries . . . returned true bills 99.9 percent of the time on more than 18,700 indictments" between 2011 and 2015.[271]

III. The Dormant Commerce Clause

A. Introduction

As noted in the prior Sections, despite being referenced in the Fifth Amendment to the U.S. Constitution as well as most state constitutions, the grand jury power of presentment has largely fallen dormant. Beyond the reasons given in Section II.D, this dormancy makes some sense given that there is no constitutional provision detailing the power of presentment. But could courts infer the scope of the power of presentment and revive it from its current dormant state? This Part reviews how the Supreme Court did just that with the dormant Commerce Clause.

B. The Development of the Dormant Commerce Clause

The Commerce Clause can be found in Article I, Section 8, Clause 3 of the United States Constitution.[272] It states that "[t]he Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[273] Some scholars have referred to the explicit text of this clause as the active Commerce Clause because it is an affirmative grant of authority to Congress to regulate certain types of commerce.[274] The Supreme Court has held that this active Commerce Clause authorizes Congress to regulate three broad categories of activity: (1) "the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "those activities

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271 *See* Romando Dixson, *Is Greenville Grand Jury System Fair to Defendants?*, Greenville News (Aug. 10, 2015, 8:32 AM), https://www.greenvilleonline.com/story/news/local/2015/08/07/greenville-grand-jury-system-fair-defendants/31300075/ [https://perma.cc/7FB8-ZH2J].

272 U.S. Const. art. I, § 8, cl. 3.

273 *Id.*

274 *See, e.g.*, Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 Duke L.J. 1127, 1149 (2000) (referring to the Commerce Clause as the "active" Commerce Clause); Michael A. Lawrence, *Toward a More Coherent Dormant Commerce Clause: A Proposed Unitary Framework*, 21 Harv. J.L. & Pub. Pol'y 395, 407–08 (1998) (discussing the "active" Commerce Clause in the context of the original Dormant Commerce Clause).

having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce."[275]

The Supreme Court, however, has also recognized that there is a negative, or dormant, Commerce Clause that concomitantly precludes states from discriminating against and/or burdening interstate commerce.[276] The history of this jurisprudence can be traced to the Court's 1824 opinion in *Gibbons v. Ogden*.[277] In 1798, before steamboats existed, "the New York legislature passed a law giving [Robert] Livingston the exclusive right to navigate 'all boats that might be propelled by steam on all waters within the territory, or jurisdiction of the state, for the term of twenty years.'"[278] With Livingston as his financier, Robert Fulton later invented the steamboat in 1807, and New York passed a subsequent law extending Livingston's monopoly, which included Fulton.[279] In response, New Jersey passed a law providing "that if any New Jersey citizen be restrained under the New York law from operating a steamboat between the two states, he could sue in New Jersey and win damages and triple costs."[280]

Subsequently, Aaron Ogden obtained a license from Livingston and Fulton to operate a steamboat between New York and New Jersey; thereafter, wealthy former plantation owner Thomas Gibbons had a feud with Ogden and set out to destroy Ogden's business by (1) obtaining "a permit under the Coastal Licensing Act, which Congress had passed in 1793, to regulate 'ships and vessels to be employed in the coastal trade and fisheries,'" and (2) commissioning a large steamboat—the *Bellona*—to be captained by twenty-four-year-old Cornelius Vanderbilt and ferry passengers between New York and New Jersey.[281] Litigation soon ensued, with the case eventually reaching the United States Supreme Court.[282]

In an opinion written by Chief Justice John Marshall, the Supreme Court concluded that New York's steamboat monopoly law conflicted with Congress's Coastal Licensing Act, rendering New

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275 United States v. Lopez, 514 U.S. 549, 558–59 (1995) (citations omitted).

276 *See, e.g.*, Gen. Motors Corp. v. Tracy, 519 U.S. 278, 287 (1997) ("The negative or dormant implication of the Commerce Clause prohibits state taxation or regulation that discriminates against or unduly burdens interstate commerce and thereby 'imped[es] free private trade in the national marketplace.'") (citations omitted) (quoting Reeves, Inc. v. Stake, 447 U.S. 429, 437 (1980)).

277 22 U.S. (9 Wheat.) 1, 209–12 (1824).

278 Michael R. Levinson, *Full Steam Ahead*, LITIGATION, Fall 2010, at 49, 49.

279 *See id.*

280 *Id.* at 50.

281 *Id.*

282 *Id.*

York's law unconstitutional under the Supremacy Clause.[283] In dicta, however, Justice Marshall addressed the question of whether the Commerce Clause also limits the states' power to regulate interstate commerce even in the absence of federal legislation.[284] Justice Marshall noted that "[i]t has been contended by the counsel for [Gibbons], that, as the word 'to regulate' implies in its nature, full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing."[285]

In response, Justice Marshall explained the Constitution's grant of authority to Congress under the Commerce Clause:

> The grant does not convey power which might be beneficial to the grantor, if retained by himself, or which can enure solely to the benefit of the grantee; but is an investment of power for the general advantage, in the hands of agents selected for that purpose; which power can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant.[286]

Justice Marshall seemed imply that Congress and only Congress could regulate certain types of interstate commerce, meaning that (1) Congress could exercise this power, or (2) Congress could choose not to exercise this power, meaning it would lay dormant rather than the states or the people being able to fill the void and exercise that power.

Five years later, Justice Marshall's reasoning became clearer in *Willson v. Black Bird Creek Marsh Co*.[287] In *Willson*, the Delaware legislature authorized the Black Bird Creek Marsh Company to erect a dam across a creek that opened into the Delaware Bay, obstructing the navigation of the creek by a vessel that was enrolled and licensed under federal navigation laws.[288] In the majority opinion authored by Justice Marshall, the Supreme Court rejected the argument that the Delaware legislature's authorization could "be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject."[289] In other words, as the Court would later reiterate in its 1851 opinion in *Cooley*

283 *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 239–40 (1824).

284 *See id.* at 189.

285 *Id.* at 209.

286 *Id.* at 189.

287 27 U.S. (2 Pet.) 245 (1829).

288 *Id.* at 248.

289 *Id.* at 252.

v. Board of Wardens,[290] (1) Congress has exclusive authority over certain types of interstate commerce, with Congressional dormancy not opening the door to state regulation; but (2) Congress does *not* have exclusive authority over other types of interstate commerce, meaning that states *can* regulate these types of commerce in the absence of Congressional regulation.[291] Starting with *Cooley*, the Court's dormant Commerce Clause jurisprudence has been a quagmire, with the Court applying no fewer than four different models to resolve cases.[292]

C. The Modern Dormant Commerce Clause

The Court's modern interpretation of the dormant Commerce Clause is that the Clause is driven by concerns about states engaging in economic protectionism, i.e., states passing laws to benefit in-state economic interests while burdening out-of-state competitors.[293] In its 1970 opinion in *Pike v. Bruce Church, Inc.*,[294] the Supreme Court set forth three types of state laws that violate this dormant Commerce Clause: (1) state laws that facially discriminate against interstate commerce, such as a law restricting out-of-state wineries but not in-state wineries from selling wine directly to consumers in a state;[295] (2) state laws that harbor a discriminatory purpose, such as a facially neutral North Carolina law prohibiting the display of state apple grades on closed containers based on evidence that the legislative intent was to discriminate against apples from Washington;[296] and (3) state laws with a discriminatory effect, such as a facially neutral law imposing an assessment on all milk sold in Massachusetts that was entirely offset by a subsidy provided solely to in-state dairy farmers.[297]

The Supreme Court has held that "[t]he bounds of these restraints appear nowhere in the words of the Commerce Clause, but have emerged gradually in the decisions of this Court giving effect to its basic purpose."[298] Instead, this dormant Commerce Clause is "a

290 53 U.S. (12 How.) 299 (1851).

291 *Id.* at 319–20.

292 *See* Daniel Francis, *The Decline of the Dormant Commerce Clause*, 94 DENV. L. REV. 255, 273–77 (2017).

293 *See* New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273–74 (1988); *see also* Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1087 (9th Cir. 2013).

294 397 U.S. 137, 142 (1970).

295 *See* Granholm v. Heald, 544 U.S. 460, 466 (2005).

296 *See* Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 352–53 (1977).

297 *See* W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 194 (1994).

298 City of Philadelphia v. New Jersey, 437 U.S. 617, 623 (1978).

self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce."[299]

IV. Dormant Criminal Clauses

A. Introduction

The Supreme Court has not only found that there is a dormant portion of the Commerce Clause. It has also found that there are dormant portions of certain criminal clauses. This Part explores two instances in which the Supreme Court has recognized implied portions of criminal clauses that had lain dormant for centuries.

B. The Right to Self-Representation

The Sixth Amendment to the United States Constitution provides that

> [i]n 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.[300]

Courts often refer to the final clause of the Sixth Amendment as the Assistance of Counsel Clause.[301] As with the Commerce Clause, there is an active portion of the Sixth Amendment, including an active portion of the Assistance of Counsel Clause: the requirement that the State provide counsel to indigent defendants charged with certain crimes.[302]

In its 1976 opinion in *Faretta v. California*,[303] however, the Court found that there was also a less obvious power contained in the Sixth Amendment, which this Article calls the dormant Assistance of Counsel Clause. This power, which had lain dormant for roughly two centuries, is the right to self-representation at trial.[304] In *Faretta*, Anthony

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299 S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 87 (1984).

300 U.S. Const. amend. VI.

301 *See, e.g.*, Flanagan v. United States, 465 U.S. 259, 266–67 (1984) (referring to the Assistance of Counsel Clause).

302 *See* Gideon v. Wainwright, 372 U.S. 335, 339–40 (1963). In *Gideon*, the Court found that the Assistance of Counsel Clause was applicable against the states pursuant to the incorporation doctrine under the Fourteenth Amendment. *See id.* at 344–45.

303 422 U.S. 806 (1975).

304 *See id.* at 807, 811–12.

Faretta was charged with grand theft.[305] When Faretta indicated that he wanted to represent himself rather than proceed with a public defender, the judge initially granted his request before reversing this ruling, finding "that Faretta had no constitutional right to conduct his own defense."[306] After Faretta was convicted, his appeal eventually reached the United States Supreme Court.[307]

The Supreme Court agreed with Faretta that he had the right to self-representation.[308] The Court began by noting that, under the Sixth Amendment generally, "[i]t is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor.'"[309] From this, the Court was able to deduce that, "[a]lthough not stated in the Amendment in so many words, the right to self-representation—to make one's own defense personally—is thus necessarily implied by the structure of the Amendment."[310]

The Court then added that the Assistance of Counsel Clause "supplements this design. It speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant."[311] Therefore, "[t]he language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally."[312]

Moreover, the Court concluded that its reading of the Sixth Amendment was "reinforced by the Amendment's roots in English legal history."[313] According to the Court, in the deeply rooted history of English criminal law, there was only one tribunal that forced counsel upon unwilling defendants: the odious Star Chamber, which the Tudors and Stuarts used to exorcise political and religious dissenters.[314] Accordingly, the English common law at the time of the found-

305 *Id.* at 807.

306 *Id.* at 808–10.

307 *Id.* at 812.

308 *See id.* at 818–36.

309 *Id.* at 819.

310 *Id.*

311 *Id.* at 820.

312 *Id.*

313 *Id.* at 821.

314 *See* Colin Miller, *Impeachable Offenses?: Why Civil Parties in Quasi-Criminal Cases Should Be Treated Like Criminal Defendants Under the Felony Impeachment Rule*, 36 PEPP. L. REV. 997, 1003 (2009).

ing of the United States was "that 'no person charged with a criminal offence can have counsel forced upon him against his will.'"[315] In the American colonies, this same "basic right of self-representation was never questioned," and the Court could find "no instance where a colonial court required a defendant in a criminal case to accept as his representative an unwanted lawyer."[316]

Although some state proposals for the Bill of Rights had language securing the right of an accused to be heard by himself, the final version of the Sixth Amendment only overtly spoke about the right to the assistance of counsel.[317] But the Court concluded that "[i]f anyone had thought that the Sixth Amendment, as drafted, failed to protect the long-respected right of self-representation, there would undoubtedly have been some debate or comment on the issue."[318] This was because "the colonists and the Framers, as well as their English ancestors, always conceived of the right to counsel as an 'assistance' for the accused, to be used at his option, in defending himself."[319] In other words, "[t]he Framers selected in the Sixth Amendment a form of words that necessarily implies the right of self-representation."[320]

C. The Right to Present a Defense

As noted in the previous Section, under the Sixth Amendment, a criminal defendant affirmatively has the right "to have compulsory process for obtaining witnesses in his favor."[321] Facially, this Compulsory Process Clause only "guarantee[s] that the accused shall have the power to subpoena witnesses."[322] Indeed, for nearly "two centuries, courts interpreted this Compulsory Process Clause as merely conferring on criminal defendants the procedural right of being able to subpoena or otherwise secure the presence of witnesses at trial."[323] Therefore, the "Compulsory Process Clause had become almost a dead letter after 170 years of desuetude."[324]

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315 *Faretta*, 422 U.S. at 826.

316 *Id.* at 827–28.

317 *See id.* at 831–32.

318 *Id*. at 832.

319 *Id.*

320 *Id.*

321 U.S. CONST. amend. VI.

322 Taylor v. Illinois, 484 U.S. 400, 406 (1988).

323 Colin Miller, *Dismissed with Prejudice: Why Application of the Anti-Jury Impeachment Rule to Allegations of Racial, Religious, or Other Bias Violates the Right to Present a Defense*, 61 BAYLOR L. REV. 872, 898–99 (2009).

324 United States v. Vietor, 10 M.J. 69, 75 (C.M.A. 1980).

Beginning with its 1967 opinion in *Washington v. Texas*,[325] however, the Supreme Court has found that there is what this Article calls the dormant Compulsory Process Clause. And this dormant portion of the Clause contains "the right to present a defense."[326] In *Washington*, eighteen-year-old Jackie Washington dated Jean Carter until her mother forbade the relationship.[327] Carter then started dating another young man.[328] Thereafter, a group of boys, including Washington and Charles Fuller, drove to Carter's house and threw bricks at the house during dinnertime.[329] As the new boyfriend exited the house, all of the boys except for Washington and Fuller ran back to the car, and either Washington or Fuller fatally shot the new boyfriend with a shotgun.[330]

Because Fuller held the shotgun when he and Washington regrouped with the other boys at the car, the Dallas District Attorney first charged Fuller with the murder.[331] Fuller's murder trial ended with a conviction after the jury rejected his defense that he fired the shotgun at the steps of the house and never saw the ex-boyfriend.[332]

After Fuller was convicted, the district attorney then turned around and charged Washington with murder with malice.[333] At trial, the judge precluded Washington from putting Fuller on the witness stand, despite indications that Fuller would have testified that Washington tried to persuade him to leave and actually left before Fuller fired the fatal shot.[334] The judge did so pursuant to two Texas statutes, which provided "that persons charged or convicted as coparticipants in the same crime could not testify for one another, although there was no bar to their testifying for the State."[335]

After Washington was convicted of murder, he appealed, with his appeal eventually reaching the United States Supreme Court.[336] In its opinion, the Court advanced its dormant Compulsory Process Clause theory, holding that

> [t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to

325 388 U.S. 14 (1967).
326 *Id.* at 19.
327 *Id.* at 15.
328 *Id.*
329 *See id.*
330 *See id.* at 15–16.
331 *See id.* at 16.
332 *Id.* at 16 & n.3 (citing Fuller v. State, 397 S.W.2d 434, 435 (Tex. Crim. App. 1966)).
333 *Id.* at 15.
334 *Id.* at 16.
335 *Id.* at 16–17; *see also Fuller*, 397 S.W.2d at 435.
336 *Washington*, 388 U.S. at 14.

> present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.[337]

As with the dormant Commerce Clause and the dormant Assistance of Counsel Clause, the Court was able to reach this conclusion by digging into the origin of the Clause.[338] The Court noted that Justice Joseph Story's *Commentaries on the Constitution of the United States* "observed that the right to compulsory process was included in the Bill of Rights in reaction to the notorious common-law rule that in cases of treason or felony the accused was not allowed to introduce witnesses in his defense at all."[339] Therefore, even though England had abolished this common law prohibition at the time of the founding, "the Framers of the Constitution felt it necessary specifically to provide that defendants in criminal cases should be provided the means of obtaining witnesses so that their own evidence, as well as the prosecution's, might be evaluated by the jury."[340]

Applying this logic to case at hand, the Court was able to hold that Washington

> was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense.[341]

In reaching this conclusion, the Court deduced that "[t]he Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use."[342]

V. The Dormant Grand Jury Clause and Rectifying Wrongful Convictions

A. Introduction

This Article advances the thesis that there is similarly a dormant Grand Jury Clause in the Federal Constitution and state counterparts that allows prosecutors to submit cases of wrongful convictions to

337 *Id.* at 19.
338 *Id.* at 19–23.
339 *Id.* at 19.
340 *Id.* at 20.
341 *Id.* at 23.
342 *Id.*

grand juries so that they can issue presentments to judges who can then vacate those convictions. This Part explains this thesis in four parts: (1) the Federal Grand Jury Clause and state counterparts contain a dormant Grand Jury Clause, which grants grand juries self-executing authority to exercise their common law powers, including the power to issue presentments; (2) the grand jury is a constitutional fixture not textually assigned to any branch of government, meaning that its power to present on issues of public concern has not been and cannot be circumscribed; (3) allowing a prosecutor to present a wrongful conviction case to a grand jury is consistent with the grand jury's core missions and common law history; and (4) after a grand jury makes a wrongful conviction presentment to a judge, the judge can vacate the conviction pursuant to the inherent power of the court.

1. The Dormant Grand Jury Clause

a. Introduction

The Fifth Amendment Grand Jury Clause to the U.S. Constitution and the original constitutions for most states, including the last two states admitted to the Union,[343] provide that felony prosecutions cannot proceed without a grand jury presentment or indictment.[344] Strictly speaking, these provisions merely provide a personal right: the right of a defendant not to be subjected to a felony trial without a grand jury presentment or indictment. And yet, given that grand juries immediately began issuing indictments or presentments without any separate constitutional or legislative grant of authority, this Article argues the logical conclusion is that these provisions contained an unspoken, self-executing, constitutional cede of authority for grand juries to continue exercising their common law powers. This self-executing power is what this Article dubs the dormant Grand Jury Clause.

Although this Article advances the novel thesis that there is a dormant Grand Jury Clause, the thesis is not unprecedented. Instead, over the last century, the Supreme Court has held in numerous cases that the Grand Jury Clause grants grand juries self-executing authority

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343 *See* ALASKA CONST. art. I, § 8 ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . . ."); HAW. CONST. art. I, § 10 ("No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . . .").

344 *See, e.g.*, U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . .").

to exercise their common law powers.[345] The following Sections explore several of those opinions.

b. Hale v. Henkel

Hale v. Henkel[346] is the previously mentioned 1906 case in which the Supreme Court declared that "presentments have largely fallen into disuse in this country."[347] Immediately after this declaration, however, the Court reaffirmed that grand juries do retain the power of presentment.[348] *Hale* involved a subpoenaed defendant in an antitrust case who refused to answer questions or produce documents despite being offered immunity.[349] The grand jury then made a presentment that the witness was in contempt, prompting an appeal.[350]

In rejecting that appeal, the Supreme Court began by tracing the grand jury power of presentment from the English common law to early American history.[351] Then, immediately after noting that presentments had largely fallen into disuse, the Court cited Constitution codrafter James Wilson's aforementioned statement that, inter alia, the commission under which grand jurors act "assigns no limits, except those marked by diligence itself."[352] Finally, after citing both state and federal precedent, the Court concluded that, although now rarely used, grand juries clearly retain the power of presentment.[353]

c. Blair v. United States

In *Blair v. United States*,[354] three defendants appealed orders finding them in contempt based on "their refusal to obey an order directing them to answer certain questions asked of them before a federal grand jury" that was investigating possible criminal conduct before any criminal charges had been brought.[355] In affirming these contempt orders in 1919, the Supreme Court held that

> [t]he Fifth Amendment and the statutes relative to the organization of grand juries recognize such a jury as being pos-

345 *See infra* Sections V.A.1.b–f.
346 201 U.S. 43 (1906).
347 *Id.* at 61.
348 *See id.*
349 *Id.* at 46.
350 *Id.*
351 *Id.* at 59–60.
352 *Id.* at 62.
353 *Id.* at 62–63.
354 250 U.S. 273 (1919).
355 *Id.* at 276.

> sessed of the same powers that pertained to its British prototype, and in our system examination of witnesses by a grand jury need not be preceded by a formal charge against a particular individual.[356]

According to the Court, the American grand jury, like its British prototype, is "a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime."[357]

d. United States v. Thompson

In *United States v. Thompson*,[358] a Pittsburgh grand jury issued a true bill on seventeen of forty-seven counts in a district attorney's indictment charging the president of a bank with violations of the National Bank Act.[359] Subsequently, the U.S. Attorney General appointed a special assistant to cooperate with the district attorney regarding the remaining charges.[360] Then, without asking for authorization by the court, the district attorney and the assistant presented an indictment with the remaining charges to a grand jury in Erie, Pennsylvania, which returned a true bill on all thirty charges.[361] The trial judge granted the bank president's motion to quash the second indictment on "the ground that the grand jury had considered the subject of that indictment, not of its own motion, but upon the suggestion of the district attorney without any previous authority given [to] him by the court."[362]

On appeal to the United States Supreme Court, the government advanced two propositions, including the proposition

> [t]hat the power and duty of the grand jury to investigate is original and complete, susceptible of being exercised upon its own motion and upon such knowledge as it may derive from any source which it may deem proper, and is not therefore dependent for its exertion upon the approval or disapproval of the court; that this power is continuous and is therefore not exhausted or limited by adverse action taken by a grand

356 *Id.* at 282.
357 *Id.*
358 251 U.S. 407 (1920).
359 *Id.* at 408–09.
360 *Id.* at 409.
361 *Id.*
362 *Id.* at 410.

> jury or by its failure to act, and hence may thereafter be exerted as to the same instances by the same or a subsequent grand jury.[363]

The Supreme Court reversed the decision to quash the second indictment in 1920, finding that it did not need to "cite the extensive array of authorities from which the Government deduces these propositions" because they were clearly established in *Hale* and *Blair*.[364]

e. Costello v. United States

In *Costello v. United States*,[365] Frank Costello appealed his conviction "for wilfully attempting to evade payment of income taxes," claiming that the grand jury improperly indicted him solely upon hearsay evidence.[366] In 1956, the Supreme Court disagreed, observing that "neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act."[367] The Court dug into the history of grand juries, finding that "[t]he grand jury is an English institution, brought to this country by the early colonists and incorporated in the Constitution by the Founders."[368] As such, the Court concluded "[t]here is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor."[369] Therefore, because the English grand jury acquired "independence in England free from control by the Crown or judges," the Court refused to exercise supervisory authority over the American grand jury.[370] According to the Court, doing so would have "run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules."[371]

f. United States v. Dionisio

In *United States v. Dionisio*,[372] a judge ruled Antonio Dionisio in contempt of court for refusing to furnish a voice exemplar in response

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363 *Id.* at 413.

364 *Id.* at 414.

365 350 U.S. 359 (1956).

366 *Id.* at 359–60.

367 *Id.* at 362.

368 *Id.*

369 *Id.*

370 *Id.*

371 *Id.* at 364.

372 410 U.S. 1 (1973).

to a grand jury subpoena in a gambling investigation.[373] The Seventh Circuit found that this contempt ruling was improper, holding "that the Fourth Amendment required a preliminary showing of reasonableness before a grand jury witness could be compelled to furnish a voice exemplar."[374] The Supreme Court disagreed in 1973, initially noting that "[t]he Fifth Amendment guarantees that no civilian may be brought to trial for an infamous crime 'unless on a presentment or indictment of a Grand Jury.'"[375] From this language, the Court was able to deduce that "[t]his constitutional guarantee presupposes an investigative body 'acting independently of either prosecuting attorney or judge,' whose mission is to clear the innocent, no less than to bring to trial those who may be guilty."[376] Therefore, "[a]ny holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws."[377]

g. Conclusion

By itself, the Federal Fifth Amendment Grand Jury Clause and state counterparts only grant a personal right for defendants to avoid felony trials without grand jury presentments or indictments. In isolation, this Clause makes no sense; instead, it implies that there must be a grand jury imbued with the constitutional power to issue both presentments and indictments. Or, as the Court put it in *Dionisio*, "[t]his constitutional guarantee presupposes an investigative body 'acting independently of either prosecuting attorney or judge,' whose mission is to clear the innocent, no less than to bring to trial those who may be guilty."[378] In this way, the Grand Jury Clause is similar to the clauses mentioned earlier in this Article: (1) the Commerce Clause's (semi-exclusive) grant of authority to Congress to regulate interstate com-

373 *Id.* at 2–4.

374 *Id.* at 8.

375 *Id.* at 16 (quoting U.S. CONST. amend. V).

376 *Id.* at 16–17 (citation omitted) (quoting Stirone v. United States, 361 U.S. 212, 218 (1960)).

377 *Id.* at 17. The Court closed by observing that

> The grand jury may not always serve its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor, but if it is even to approach the proper performance of its constitutional mission, it must be free to pursue its investigations unhindered by external influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it.

Id. at 17–18.

378 *Id.* at 16–17 (citation omitted) (quoting *Stirone*, 361 U.S. at 218).

merce presupposes the states' concomitant inability to burden or discriminate against interstate commerce;[379] (2) the Sixth Amendment right to the assistance of counsel presupposes a right to proceed without the assistance of counsel;[380] and (3) the Sixth Amendment right to compel witnesses to attend trial presupposes the defendant's right to have them testify to present evidence for their case.[381] Moreover, similar to the dormant Commerce Clause, the powers contained in this dormant Grand Jury Clause must be self-executing, or, as the Court held in *Thompson*, the "power and duty of the grand jury to investigate is original and complete, susceptible of being exercised upon its own motion."[382] Otherwise, grand juries would not have been able to issue presentments and indictments in the early days of this country without any constitutional or legislative provisions setting forth their powers.

Furthermore, it makes sense that there was no constitutional provision setting forth the powers of the grand jury for the same reason that there was no constitutional provision establishing the right to self-representation. In both cases, the power at issue was so well established in the common law and beyond reproach that there was no need to have a constitutional provision spelling it out.[383] Finally, as the Court made clear in several of the above opinions, the post-Constitution grand jury retains all of its common law powers, including the power to issue presentments on issues of public interest.[384]

2. The Non-Textual Assignment of the Grand Jury

a. Introduction

Even if federal and state grand juries originally had the power of presentment, that leaves the question of whether they still retain that power. There are two developments that theoretically could call that power into question. The first is the fact that both the federal government and most states have found that grand jury presentments are no longer sufficient to prosecute defendants on felony charges. These changes, however, merely expanded the personal right protecting defendants against felony prosecutions and did not limit the grand jury's power to issue presentments. Both federal and state courts have held

379 *See supra* Section III.B.

380 *See supra* Section IV.B.

381 *See supra* Section IV.C.

382 251 U.S. 407, 413 (1920).

383 *See supra* notes 216–18, 317–20 and accompanying text.

384 *See supra* notes 356–57, 368–71 and accompanying text.

that grand juries can still issue presentments accusing defendants of felony crimes;[385] such a presentment is simply insufficient to take a defendant to trial without an indictment signed by the prosecutor.[386] Such a reading would be consistent with *Costello* and *Dionisio*, which were both issued after Federal Rule of Criminal Procedure 7(a)(1) and which both held that the grand jury still has the same self-executing powers as its common law counterpart.[387] Moreover, even if these changes were seen as limiting the grand jury's power to issue presentments in the criminal charging context, they should have no impact on the grand jury power to issue presentments on matters of public concern. If, as argued in the prior Section, American grand juries initially had separate powers to issue presentments accusing defendants of crimes and reporting on matters of public concern, any limitation on the accusing power should not be seen as a limitation on the distinct reporting power.

This, however, takes us to the second change, which involves states passing laws creating a separate grand jury reporting power. Are courts, such as the Supreme Court of Missouri, correctly interpreting these grand jury reporting laws as limitations on the common law power of presentment? This Section argues that they are not and that these statutes cannot be seen as limitations because the grand jury is not textually assigned to any branch of the government, meaning its core powers cannot be circumscribed.

b. United States v. Williams *and the Grand Jury as Unassigned Constitutional Fixture*

In *United States v. Williams*,[388] John H. Williams, Jr. was indicted on federal charges based on allegedly overstating the value of his assets and interest income to secure a bank loan.[389] Upon learning during discovery that the prosecutor had failed to present evidence that he deemed exculpatory, Williams moved to dismiss the indictment.[390] After the district court granted the motion and the Tenth Circuit af-

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385 *See, e.g.*, *In re* Report and Recommendation of June 5, 1972 Grand Jury, 370 F. Supp. 1219, 1222 & n.12 (D.D.C. 1974) (collecting cases).

386 *See, e.g.*, Hoskins v. Maricle, 150 S.W.3d 1, 18 (Ky. 2004).

387 United States v. Dionisio, 410 U.S. 1, 16 (1973); Costello v. United States, 350 U.S. 359, 362–64 (1956).

388 504 U.S. 36 (1992).

389 *Id.* at 38.

390 *See id.* at 39.

firmed on appeal, the United States Supreme Court reversed in an opinion authored by Justice Scalia in 1992.[391]

According to Justice Scalia, the grand jury is "rooted in long centuries of Anglo-American history" even though it "is mentioned in the Bill of Rights, but not in the body of the Constitution."[392] As such, the grand jury "has not been textually assigned, therefore, to any of the branches described in the first three Articles."[393] Instead, it "is a constitutional fixture in its own right."[394] Justice Scalia then expounded that "[i]n fact the whole theory of its function is that it belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people."[395] Therefore, "[a]lthough the grand jury normally operates . . . in the courthouse and under judicial auspices, its institutional relationship with the Judicial Branch has traditionally been, so to speak, at arm's length," and "[t]he grand jury requires no authorization from its constituting court to initiate an investigation."[396] Justice Scalia then reviewed the Court's prior precedent to hold "that any power federal courts may have to fashion, on their own initiative, rules of grand jury procedure is a very limited one, not remotely comparable to the power they maintain over their own proceedings."[397] Applying this logic to reject the defendant's argument that a prosecutor has a duty to disclose exculpatory evidence to the grand jury, Justice Scalia concluded that any power the judiciary might have over the grand jury "certainly would not permit judicial reshaping of the grand jury institution, substantially altering the traditional relationships between the prosecutor, the constituting court, and the grand jury itself."[398]

c. Conclusion

Some courts, such as the Supreme Court of Missouri, have concluded that new laws granting reporting powers to the grand jury inferentially circumscribe the grand jury power of presentment.[399] But the Supreme Court in *Williams* found that the grand jury is a constitu-

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391 *See id.* at 39–40.

392 *Id.* at 47 (quoting Hannah v. Larche, 363 U.S. 420, 490 (1960) (Frankfurter, J., concurring in result)).

393 *Id.*

394 *Id.* (quoting United States v. Chanen, 549 F.2d 1306, 1312 (9th Cir. 1977)).

395 *Id.*

396 *Id.* at 47–48.

397 *Id.* at 50.

398 *Id.*

399 *See supra* notes 255–66 and accompanying text.

tional fixture that is not textually assigned to the judiciary, executive, or legislative branch.[400] As such, the power of any of these three branches over the grand jury is limited and does not permit reshaping the grand jury institution. Therefore, a state legislature merely creating a grand jury power to report would not and could not displace the deeply rooted power to present on issues of public concern, just as the Supreme Court could not require a prosecutor to disclose exculpatory evidence to a grand jury.

This then takes us to the heart of this Article, which is the inverse of the question presented in *Williams*: can the government require prosecutors not to disclose exculpatory evidence to a grand jury?

3. Wrongful Conviction Presentments and the Core Missions of the Grand Jury

As noted in Section II.D, the main reason for the decline in the use of grand jury presentments that censure public officials is that they are quasi-criminal charges without procedural protections or the ability of the official to contest the report in court.[401] In this sense, they fulfill neither the grand jury's function of clearing the innocent nor its function of bringing to trial those who may be guilty.

Conversely, wrongful conviction presentments would fulfill two of the grand jury's core purposes. First, they would facilitate the clearing of the innocent. The proposal in this Article would apply in two scenarios: (1) cases in which a CIU in a jurisdiction without enabling legislation concludes that a defendant was wrongfully convicted, and the prosecutor takes the CIU's report to a grand jury; and (2) cases in which a prosecutor in a jurisdiction without a CIU believes that a defendant may have been wrongfully convicted and presents evidence and witnesses to a grand jury. In either case, if the grand jury believes that the defendant was wrongfully convicted, it could issue a presentment to a judge, which, as explained in the next Section, would allow the judge to clear the innocent defendant.

Second, wrongful conviction presentments would allow for grand juries to continue vindicating the rights of incarcerated individuals. As noted, when grand juries first gained independence, one popular presentment subject was the failure to properly maintain correctional facilities.[402] Indeed, as discussed, the use of the presentment was "so routine that [P]arliament provided that no money was to be spent on

400 *Williams*, 504 U.S. at 47.

401 *See supra* Section II.D.

402 *See supra* note 197 and accompanying text.

the repair of bridges, jails, prisons, or houses of correction unless the need was first established by a grand jury presentment."[403] And, although some states have (or at least claim to have) limited the power of presentment through narrower grand jury reporting laws, many of these laws include the power to report on the condition of correctional facilities and the treatment of inmates.[404]

Moreover, historically, grand juries have been active in vindicating the rights of individual inmates. In one unsettling example, a grand jury in Darlington, South Carolina in 1852 issued a presentment to a judge "call[ing] attention to their discovery in the dungeon of the jail of a slave named Scipio, who had been sentenced . . . to two years imprisonment and five hundred lashes."[405] The presentment successfully petitioned the judge to lessen the sentence due to the grand jury's fear that the punishment "would probably endanger the slave's life."[406]

Thus, allowing wrongful conviction presentments would fulfill two of the grand jury's core missions. In some cases, these presentments would not implicate the concern about condemning public officials without procedural protections. For example, in the previously mentioned Joseph Webster case, the evidence pointing to his innocence had been turned over to the defense, meaning that he could be freed without a finding of official misconduct.[407] Similarly, there are plenty of wrongful conviction cases with issues such as recanting witnesses and postconviction DNA testing that can allow for exonerations without any finding of official misconduct.[408]

Finally, as in the Lamar Johnson case, there are plenty of wrongful conviction cases involving alleged misconduct by public officials. Grand jury presentments calling attention to this official misconduct

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403 Stern, *supra* note 191, at 84 n.31.

404 *See* Jonathan Witmer-Rich, *Restoring Independence to the Grand Jury: A Victim Advocate for Police Use of Force Cases*, 65 CLEV. ST. L. REV. 535, 547 nn.71–75 (2017) (citing statutes from Alabama, Alaska, Arkansas, California, Georgia, Nebraska, North Dakota, and Ohio).

405 H.M. HENRY, THE POLICE CONTROL OF THE SLAVE IN SOUTH CAROLINA 54 (1914).

406 *Id.* at 55.

407 *See supra* notes 122–29 and accompanying text; *see also* Otterbourg, *supra* note 122 ("But Gibson had received the information; he had just not acted on it at trial or provided it to Webster's attorneys in their initial appeals.").

408 *See, e.g.*, *supra* notes 22, 122, 145; *see also* Elizabeth Webster, *Postconviction Innocence Review in the Age of Progressive Prosecution*, 83 ALB. L. REV. 989, 1015 (2019/20) ("Nevertheless, recantation evidence has contributed to hundreds of exonerations, including several assisted by prosecutor interviewees in this study."); Sarah Lucy Cooper & Daniel Gough, *The Controversy of Clemency and Innocence in America*, 51 CAL. W. L. REV. 55, 109 (2014) (noting that over 320 exonerations "have been proven conclusively by post-conviction DNA evidence").

thus could be seen as implicating the same concerns that led to the decline of presentments censuring public officials. On the other hand, the CIU report criticizing public officials in the Lamar Johnson cases is publicly available and posted on the internet.[409] It is questionable whether a grand jury presentment would actually add insult to injury, and as will be explored in the next Section, a wrongful conviction presentment could actually provide a forum for accused officials to defend themselves.

4. Inherent Power of the Court

a. Introduction

A grand jury's ability to send a wrongful conviction presentment to a judge would be relatively meaningless without the judge's ability to act on it. On the other hand, if a judge could act on such a presentment, it could result in the release of innocent defendants who could not bring their own appeals based on statutes of limitations, restrictions on successor habeas petitions, and other roadblocks. This final Sections uses the Watergate presentment and a recent wrongful conviction case as, the model for wrongful conviction presentments and proof of concept, respectively.

b. The Watergate Presentment

In *In re Report and Recommendation of June 5, 1972 Grand Jury*,[410] a federal grand jury issued a sealed presentment on the Watergate break-in to a judge that "strongly recommend[ed] that accompanying materials be submitted to the Committee on the Judiciary of the House of Representatives for its consideration."[411] Seven people implicated in the presentment subsequently objected to its disclosure.[412]

Before resolving the issue, the United States District Court for the District of Columbia "invited all counsel who might conceivably have an interest in the matter, without regard to standing, to state their positions concerning disposition."[413] After that hearing, the court rejected the objection to disclosure, finding that federal grand jury reporting statutes did not cut back on the common law power of pre-

409 *See generally supra* note 3 and accompanying text.

410 370 F. Supp. 1219 (D.D.C. 1974).

411 *Id.* at 1221.

412 *Id.*

413 *Id.*

sentment.[414] Instead, the court cited to Constitution codrafter James Wilson's previously mentioned statement that, inter alia,

> The grand jury are a great channel of communication, between those who make and administer the laws, and those for whom the laws are made and administered. All the operations of government, and of its ministers and officers, are within the compass of their view and research. They may suggest public[] improvements, and the modes of removing public[] inconveniences: they may expose to public[] inspection, or to public[] punishment, public[] bad men, and public[] bad measures.[415]

Therefore, the grand jury was able to send a presentment with a recommendation to the judge—to send the presentment to the Judiciary Committee—that the judge was able to act upon.[416] The court did take note of cases allegedly per se prohibiting the presentment power but found that they instead "enumerate[d] the factors militating against approval of the specific reports at issue and refrain[ed] from a blanket denial of reporting powers."[417] And the court found that those factors did not apply in the case at hand because the court had given the implicated individuals their day in court by inviting them and their attorneys to the hearing about whether to send the presentment to the Judiciary Committee.[418]

This Article recommends a similar procedure for wrongful conviction presentments that would actually be preferable to the status quo for public officials in jurisdictions such as St. Louis. Currently, as noted, there is a publicly available CIU report implicating public officials in the wrongful conviction of Lamar Johnson, with no procedure for either Johnson or the public officials to clear their names.[419] Under this Article's wrongful conviction presentment proposal, however, after the grand jury sends a judge its presentment, the judge would invite all interested parties to a hearing where evidence, testimony, and arguments could be presented. Then, at the end of that hearing, there would likely be one of three outcomes:

(1) the judge could vindicate both the defendant and any public official involved if the judge found that the defen-

414 *See id.* at 1222–26.

415 *Id.* at 1223.

416 *Id.* at 1231.

417 *Id.* at 1224.

418 *Id.* at 1225–26.

419 *See supra* note 1 and accompanying text.

dant was wrongfully convicted in the absence of official misconduct;
(2) the judge could vindicate just the defendant by finding that she was wrongfully convicted at least in part based on official misconduct; or
(3) the judge could vindicate the public officials by finding that the defendant was rightfully convicted in the absence of misconduct.[420]

Through this procedure, both the defendant and the public officials would have a forum in which they could try to prove their innocence. But could courts in fact ignore roadblocks such as statutes of limitation and restrictions on successor habeas petitions to grant relief in response to wrongful conviction presentments?

c. The Terrance Lewis Exoneration and the Inherent Power of the Court

Courts maintain an inherent power to correct miscarriages of justice in certain circumstances.[421] In deciding whether to apply this power, courts consider factors such as "the clarity of the error, its gravity, its character . . . , the impact of the error on the defendant, the impact of correcting the error on the government, and the extent to which the defendant acquiesced in the result."[422] Courts have applied their inherent power to strike down wrongful convictions.[423] They used to apply this power somewhat broadly to forgive untimely actual innocence habeas petitions before Congress largely limited this power by enacting the one-year Antiterrorism and Effective Death Penalty Act ("AEDPA") statute of limitations.[424] This AEDPA statute of limitation had been an issue for Terrance Lewis, also known as "Stink," when I started working on his case for the *Undisclosed* podcast. Lewis was seventeen years old when he and two other men were convicted of the 1996 murder of Hulon Howard in his home in Philadelphia.[425] At a federal habeas hearing, an eyewitness testified that Lewis was not one of the three men she saw enter and leave Howard's home shortly before and after the shooting, and one of Lewis's alleged ac-

420 *See supra* note 1 and accompanying text.

421 *See, e.g.*, United States v. Teeter, 257 F.3d 14, 25–26 (1st Cir. 2001).

422 *Id.* at 26.

423 *See, e.g.*, United States v. Williams, 790 F.3d 1059, 1075–76 (10th Cir. 2015).

424 *Id.*

425 *See* Maurice Possley, *Terrance Lewis*, NAT'L REGISTRY EXONERATIONS (June 3, 2019), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5571 [https://perma.cc/4AK4-73VZ].

complices testified that Lewis was not involved in the crime.[426] In 2010, Magistrate Carol Sandra Moore Wells found that Lewis was actually innocent but that his habeas petition was untimely and thus procedurally barred under the AEDPA.[427]

While I worked on Lewis's case, he had a pending resentencing hearing under *Miller v. Alabama*[428] as a juvenile lifer and had filed a successor habeas petition as well as a petition with the Philadelphia CIU.[429] When reviewing the police file in Lewis's case for the podcast, we found previously undisclosed notes from a police interview with the State's key eyewitness in which she stated that the perpetrator she knew as "Stink" had the last name Muhammad.[430] This new information *might* have allowed Lewis's successor habeas petition to proceed or alternatively *might* have led to relief from the CIU.

But the State ordered that Lewis had to abandon his habeas claim to get his juvenile resentencing hearing scheduled, and the CIU had not completed its review of the case by the date of that hearing.[431] As Lewis entered the courtroom on May 21, 2019, he fully expected that he would simply be resentenced.[432] Instead, Common Pleas Judge Barbara McDermott began inquiring into the evidence of Lewis's innocence.[433] Even though the case was only before her for resentencing, Judge McDermott exercised the inherent power of the court to declare Lewis innocent and set him free.[434]

The Terrance Lewis case thus stands for the proposition that a judge can use the inherent power of the court to vacate a defendant's wrongful conviction as long as the case is properly before her on some actionable ground. A wrongful conviction presentment would do just that. As noted multiple times, Constitution codrafter James Wilson said, "[t]he grand jury are a great channel of communication, between those who make and administer the laws, and those for whom the laws are made and administered" and "[a]ll the operations of government, and of its ministers and officers, are within the compass of their view

426 *See id.*

427 *See id.*

428 567 U.S. 460 (2012).

429 *See* Possley, *supra* note 425.

430 *See Omar 60 & Walnut Notes*, UNDISCLOSED, https://undisclosed-podcast.com/docs/terrance-lewis/Omar%2060%20and%20Walnut%20Notes.pdf [https://perma.cc/2QFJ-3EK2].

431 *See* Possley, *supra* note 425.

432 *See id.*

433 *See id.*

434 *See id.*

and research."[435] The Supreme Court cited Wilson's statement to reaffirm the presentment power in *Hale v. Henkel*, and the judge in the Watergate case cited it to rule that he could act upon the grand jury's request to send its grand jury presentment to the Judiciary Committee.[436] Similarly, this great channel of communication should be able to send a wrongful conviction presentment to a judge with the actionable request that she set an innocent man free.

Conclusion

The scourge of wrongful convictions plagues this country and especially African American men like Lamar Johnson. With the modern grand jury acting as little more than a rubber stamp for criminal charges, it has perhaps never been easier for prosecutors to put in motion the machinery that manufactures these wrongful convictions. And yet, with the passage of Model Rules of Professional Responsibility 3.8(g) and (h) and the rise of the Conviction Integrity Unit, many prosecutors now have the obligation and the ability to rectify wrongful convictions. In jurisdictions with CIUs but no enabling legislation, however, prosecutors face a new roadblock in their efforts to right wrongs. Prosecutors in these jurisdictions, as well as prosecutors in jurisdictions without CIUs, should be able to use the same body that starts the ball rolling on these wrongful convictions to rectify them years later.

Although the grand jury power of presentment has largely fallen into disuse, it still exists under the dormant Grand Jury Clause. Under this dormant Grand Jury Clause, a prosecutor who believes her office might have produced a wrongful conviction can take the case before a grand jury. If that grand jury believes that the defendant in the case was wrongfully convicted, it can issue a presentment to a judge, who can vacate the conviction under the inherent power of the court. By doing so, prosecutors can revive the dormant power of presentment and rectify wrongful convictions.

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435 *In re* Report and Recommendation of June 5, 1972 Grand Jury, 370 F. Supp. 1219, 1223 (D.D.C. 1974).

436 *See supra* notes 407–14 and accompanying text.