

An Analysis of the U.S Grand Jury System

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Abstract:

The purpose of this honors thesis is to give an analysis of the grand jury system in the United States today. In order to do so it is necessary to begin with the inception and history of the grand jury system in England and how it subsequently came about in the United States. Then I will give a timeline of the progression of the grand jury system in the U.S and any reforms or changes that have been made. After that I will talk about four other countries, England, Canada, Ireland, and France, all of which once had a grand jury system but have since abolished it. I will then lay out the main arguments of both proponents of the grand jury system in the U.S. and critics of the grand jury system. Finally, I will analyze two recent grand jury proceedings that received national and international attention, the Michael Brown and Eric Garner cases.

History of the Grand Jury System:

The earliest inception of a grand jury system was in England in 1166 under the rule of King Henry II. The Assize of Clarendon, which transformed many aspects of the English legal system, called “for the preservation of the peace and the maintenance of justice enquiries be made throughout each county and hundred by twelve legal men of the hundred and four legal men from each township, under oath to tell the truth; if in their hundred or their township there be any man who is accused or generally suspected of being a robber or murderer or thief, or any man who is a receiver of robbers, murderers or thieves since our lord the king was

king.”¹ These “twelve lawful men” in each county were the very beginnings of the grand jury, also known as the jury of presentment. The purpose of this original grand jury was to “accuse criminals and extend the central government throughout England.”² Later, in the Assize of Northampton, the crimes covered in the Assize of Clarendon were expanded to include arson and forgery and eventually came to include all serious crimes. The Assize of Clarendon “provided the last link for the formation of an indictment jury empanelled for the purpose of formulating indictments and capable of collecting information as to supposed guilt.”³ When a person was accused of a crime they were able to come before the “twelve lawful men” in their county and plead their case. If the jury sided against the accused then he could choose how he would be tried. If the jury sided with the accused, or was evenly divided, then no trial was awarded and the accused was a free man. It was not until the year 1368, under the reign of King Edward III, that the more modern practice of selecting 24 men, who were to inquire into criminal offenses, was established and received the name grand jury.

Origins of the Grand Jury System in the U.S:

¹ "The Avalon Project : Assize of Clarendon, 1166." *The Avalon Project : Assize of Clarendon, 1166*. Yale Law School. Web. 03 Apr. 2016. <<http://avalon.law.yale.edu/medieval/assizecl.asp>>.

² Kadish, Mark J., "Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process" (1996). *Faculty Publications By Year*. Paper 229. http://readingroom.law.gsu.edu/faculty_pub/229

³ Hurnard, Naomi D. "The Jury of Presentment and the Assize of Clarendon 1 1." *Eng Hist Rev The English Historical Review* LVI.CCXXIII (1941): 374-410. Web.

The first grand jury held on U.S soil was in the English colony of Virginia in 1625 and was soon commonplace in the other colonies. After American Independence from England, the Founding Fathers, basing much of the U.S Constitution off the English system they were all familiar with, made multiple mentions of the grand jury system. The Fifth Amendment of the U.S Constitution states that, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."⁴ The Fifth Amendment also states explicit exceptions when the use of a grand jury is not mandatory, which includes "cases arising in the law or naval forces, or in the Militia, when in actual service in time of War or public danger."⁵

There are two different jurisdictions of grand juries; there are federal grand juries and state grand juries. Federal grand juries only review cases in which the accused has broken federal law and state grand juries review cases in which the accused have broken state laws. For example, the charge of first-degree murder would be investigated by a state grand jury, since first-degree murder is a state offense and not a federal one. However, if the defendant was being accused of murdering a government official in the line of duty the federal grand jury would review the case, since that is a federal crime.

In the U.S the grand jury, whether federal or state, has two distinct functions; the one most well known is bringing charges against citizens' accused of a crime.

⁴ "The Heritage Guide to The Constitution." *Guide to the Constitution*. The Heritage Foundation. Web. 03 Apr. 2016. <<http://www.heritage.org/constitution/#!/amendments/5/essays/146/grand-jury-requirement>>.

⁵ The Heritage Guide to The Constitution: *Guide to the Consitution*

The other function is as an investigative body. The use of a grand jury as an investigative body occurs to assess whether “organized crime is occurring in the community in which it sits.”⁶ If the grand jury investigates and finds that organized crimes are being committed they can then indict those responsible. At common law grand jury members were allowed to open their own investigations into crimes occurring in their community and then bring charges against individuals without getting the consent of the prosecutor. These charges were called “presentments”, as only charges brought by prosecutors were called indictments, however they had the same effect as an indictment. In the 1970s the Court of Appeals put an end to this practice by ruling that “charges cannot be brought except in an indictment signed by a prosecutor.”⁷ While grand juries still have the ability to launch their own investigations the vast majority of grand jury cases are investigated at the request of the prosecutor who presents the evidence.

Throughout the history of the United States there have been cases regarding the grand jury system that have been brought all the way up to the United States Supreme Court. One of the most important cases was *Hurtado v. California*, which was decided by the Supreme Court in 1885. In *Hurtado*, the defendant, Joseph Hurtado, fatally shot his wife’s lover but was not indicted by a grand jury. Nonetheless Hurtado was tried, convicted and sentenced to death in California. Hurtado then appealed his conviction claiming the 5th Amendment right to a grand jury also applied at the state level and that California’s failure to indict him by a

⁶ "What Does a Grand Jury Do." *What Does a Grand Jury Do*. The University of Daytona. Web. 03 Apr. 2016. <<http://campus.udayton.edu/~grandjur/faq/faq3.htm#Investigating>>.

⁷ “What Does a Grand Jury Do”: The University of Daytona

grand jury deprived him of his Due Process rights. The Supreme Court, in a 7-1 decision, ruled that the Fifth Amendment right to a grand jury did not apply to the state level because it was not specifically referenced in the Fourteenth Amendment. The Court ruled that Hurtado received a fair trial and his sentence stood. The lasting result of the *Hurtado* decision is that states are not required to use grand juries. However, as of today, 48 states and Washington D.C still do employ grand juries in some manner.

Another Supreme Court case that established important parameters for the workings of the grand jury system is *United States V. Williams*. In 1992 the United States Supreme Court, in *U.S v. Williams*, ruled that prosecutors were not obligated to present exculpatory evidence, or evidence that tended to favor the defense, to grand juries. This meant that prosecutors had the choice to present only incriminating evidence to the grand jury while omitting evidence that was in the defendants' favor. The fact that prosecutors are not required to show grand juries any evidence in favor of the defendant has long been one of the most controversial elements of grand jury proceedings, one which opponents of the system have continuously called for reforming or abolishing.

A third important Supreme Court case impacting the grand jury system is *Costello v. United States*. In that case Frank Costello was indicted for tax evasion based primarily on the hearsay testimony given by three IRS agents. Hearsay evidence is defined as "an out-of-court statement offered to prove the truth of

whatever it asserts”, which is often “inadmissible at trial.”⁸ Costello was ultimately convicted of tax evasion. When Costello found out he had been indicted based on hearsay evidence, which would not have been admissible at a criminal trial, he appealed his conviction. Costello argued that since hearsay evidence is not admissible as evidence at trial it should not be admissible during grand jury proceedings. The Supreme Court did not side with Costello. The Court ruled that hearsay evidence was admissible to obtain an indictment, as long as only non-hearsay evidence was presented at trial.

States and the Grand Jury System:

Since the *Hurtado V. California* ruling in 1885, states are not required to use grand juries in criminal cases, although only two states have taken the opportunity and abolished the grand jury system completely. All other states still use the grand jury in some format. At this time, 23 states require indictments by a grand jury for serious crimes. These states are: Alabama, Alaska, Delaware, Florida, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Rhode Island, South Carolina, Tennessee, Texas, Virginia, and West Virginia.

The other 25 states have the option of indictment by grand jury but it is not required. In those states “charges may be brought by a document called the information. In many states, an information is written by a prosecutor, similar to the initial criminal complaint, but it is reserved only for felony or serious charges.

⁸ "Hearsay." *LII / Legal Information Institute*. Cornell University Law School. Web. 03 Apr. 2016. <<https://www.law.cornell.edu/wex/hearsay>>.

Typically an information is filed after a preliminary hearing, including those charges which were found supported by probable cause.”⁹ This means that while a grand jury can still be empaneled to consider an indictment prosecutors’ can get around this by filing an information. Once the information document is filed a probable cause hearing takes place in which a judge looks over the evidence and determines if there is enough probable cause for an indictment.

There are only two states, along with the District of Columbia, which have abolished the indictment function of the grand jury completely: Pennsylvania and Connecticut. In Pennsylvania the “routine use of indicting grand juries was abolished in 1993, but indicting grand juries may still be convene in very limited situations where there is witness tampering.”¹⁰ Besides cases for witness tampering, which are extremely rare, Pennsylvania has not used grand juries for indictment purposes since 1993. Prior to November 1982 the state of Connecticut required a grand jury indictment for all crimes punishable by death or life imprisonment. While the accused were permitted to attend grand jury proceedings and to question witnesses they could not present their own witnesses or have assistance of counsel.

⁹ Taylor, Daniel. "Which States Use Criminal Grand Juries?" *FindLaw Blotter*. Web. 03 Apr. 2016. <<http://blogs.findlaw.com/blotter/2014/11/which-states-use-criminal-grand-juries.html>>.

¹⁰ "A Secret No More: Pennsylvania's Grand Juries." *The PLS Reporter*. Web. 03 Apr. 2016. <<http://www.plsreporter.com/Home/TabId/56/ArtMID/472/ArticleID/469/A-secret-no-more-Pennsylvania's-grand-juries.aspx>>.

The grand jury system in Connecticut “came to be widely criticized for its secret operation and its ex parte nature.”¹¹

In 1981 the Connecticut legislature passed a Constitutional Amendment, which abolished the indictment system of the grand jury and replaced it with “an open and adversarial probable cause hearing.” Under Connecticut Law all “crimes charged by the state on or after May 26th, 1983 are prosecuted by complaint or information, rather than grand jury indictment.”¹² This means that it is the prosecutor who brings an indictment against the accused. The accused then has the right to ask the court to dismiss the indictment for “lack of probable cause.”¹³ If the judge finds there is lack of probable cause the indictment is thrown out and if the judge finds there is enough probable cause the accused is then arraigned.

The only function the grand jury still has in Connecticut is as an investigative body. The Connecticut grand jury can only be empaneled for specific investigative functions, such as investigating “government corruption, Medicaid or vendor fraud, racketeering, election law violations, and felonies punishable by more than five years.”¹⁴ The investigative grand jury in Connecticut is not made up of common citizens like most other states; rather it is made up of a judge, a judge-referee, or a three-judge panel.

Since the question of grand juries’ composition and use is left up to each state there are many nuances and differences from state to state. Some examples include

¹¹ Matthews, Jason. “THE EVOLUTION OF CONNECTICUT’S GRAND JURY SYSTEM.” *THE EVOLUTION OF CONNECTICUT’S GRAND JURY SYSTEM*. OLR Research Report, 18 Jan. 2002. Web. 03 Apr. 2016. <<https://www.cga.ct.gov/2002/rpt/2002-R-0088.htm>>.

¹² Matthews, Jason. “THE EVOLUTION OF CONNECTICUT’S GRAND JURY SYSTEM.”

¹³ Matthews, Jason. “THE EVOLUTION OF CONNECTICUT’S GRAND JURY SYSTEM.”

¹⁴ Matthews, Jason. “THE EVOLUTION OF CONNECTICUT’S GRAND JURY SYSTEM.”

Wisconsin, which has not convened a grand jury in over 30 years, essentially making it obsolete, and Rhode Island, where grand juries are only required in capital and life imprisonment cases. States such as Connecticut and Pennsylvania demonstrate that it is possible for states to proceed with indictments and criminal trials with means and methods other than grand juries and still achieve a fair judicial process.

Grand Jury Criteria:

A grand jury consists of 23 citizens who have the task of deciding whether or not an accused person should be charged for the crime they are accused of committing. Grand jury meetings are not open to the public, the media or the accused and their counsel and jury members hear only evidence presented by the prosecution. At the commencement of the grand jury the prosecution usually “submits a statement of proposed charges known as an indictment.”¹⁵ After looking at the evidence presented by the prosecution the jury members must find probable cause that the accused committed the crime in order to indict. Once the grand jury hands down an indictment a subpoena is served for the arrest of the now charged person and an arraignment takes place in the near future. After the arraignment the proceedings can take two routes; the accused and the prosecution could agree to a plea-deal or a trial will take place.

Grand juries not only have indictment power but they also possess an investigative function. Grand juries “traditionally investigate both criminal activity

¹⁵ "Federal Grand Juries." *Federal Grand Juries*. The University of Daytona. Web. 03 Apr. 2016. <[http://campus.udayton.edu/~grandjur/fedj/fedj.htm#Size of the grand jury](http://campus.udayton.edu/~grandjur/fedj/fedj.htm#Size%20of%20the%20grand%20jury)>.

and the conduct of public affairs.”¹⁶ State grand juries may have these investigative functions although that decision is left up to each individual state and some states have not allowed their grand juries to possess both functions. At the federal level grand juries often investigate organized crime and are capable of giving prosecutors the “power to subpoena witnesses, who have to testify under oath, and to subpoena the production of evidence.”¹⁷

Countries that have abolished the Grand Jury System: England, Canada, Ireland, and France.

While most advanced countries have, at one time, employed the grand jury system, the number has been steadily shrinking as more and more nations choose to abolish the traditional grand jury system and pursue other avenues for indictment. Since the end of WWII many countries who have long held onto traditional court systems, including the grand jury, have been “reforming their systems in order to make them more democratic and fairer” by “eschewing secrecy, ensuring early and meaningful participation by defense attorneys, requiring proceedings to be oral and, most importantly, avoiding consolidating power in one individual.”¹⁸ Four major countries that have abolished or reformed their grand jury system are England, Canada, Ireland, and France.

England

¹⁶ “Federal Grand Juries.” The University of Daytona.

¹⁷ “Federal Grand Juries.” The University of Daytona.

¹⁸ Cleave, Rachel. “Viewpoint: Time to Abolish The “Inquisitional” Grand Jury System.” *Faculty Scholarship* (2014). *Digital Commons: The Legal Scholarship Repository at Golden Gate University School of Law*. Web.

<<http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1657&context=pubs>>.

In 1848 England established a set of rules for “holding an unbiased preliminary examination, in public, with both sides being represented and heard.”¹⁹ This was the beginning of grand juries becoming obsolete in England, although the grand jury system was not officially abolished until 1933. Discontent with the grand jury system began manifesting, however, as early as the 1920s. In 1923 a bill was introduced to the House of Lords, which called for the abolition of grand juries at quarter sessions, quarter sessions being the local courts that were usually held four times a year. At this time there was still strong support for the grand jury system, though, and a large belief that the system was “a great constitutional safeguard.”²⁰ The bill made it through the House of Lords and the Solicitor General but was stalled in a Standing Committee in the House of Commons. In 1924 a similar bill was introduced and, once again, died in the House of Commons. From 1924-1930 the grand jury system continued to be a staple in the English judicial system, until the legislation was reintroduced in 1931.

It was the beginning of the Great Depression that “was the most important factor in reviving the subject” of grand jury abolition in England.²¹ The extremely tough financial times during the Depression lead the Chairman of the London Sessions to suggest that “the grand juries be suspended during the financial emergency.”²² As a result, the Lord Chancellor of England, Viscount Sankey, appointed a committee to look into the entire court system, but particularly the

¹⁹ Elliff, Nathan T. "Notes on The Abolition of The English Grand Jury System." *Journal of Criminal Law and Criminology* 29.1 (1938). Web.

²⁰ Elliff, Nathan T. "Notes on The Abolition of The English Grand Jury System."

²¹ Elliff, Nathan T. "Notes on The Abolition of The English Grand Jury System."

²² Elliff, Nathan T. "Notes on The Abolition of The English Grand Jury System."

question of whether or not to abolish grand juries. The committee presented its report on February 24th, 1933 and highly recommended abolishment of the grand jury system. A few months after the committee delivered its report “The Times” released an article which stated that the “Grand Jury is an anachronism, a superfluity, a formality, a useless vestigial remnant, a third and paralyzed arm of the law, a fifth wheel on the legal coach, and we are about to be abolished in the man of efficiency.”²³ This article closely resembled the majority opinion of the grand jury system in England at the time.

The bill that put the final nail in the coffin for the grand jury system in England was introduced in 1933 and was known as The Administration of Justice Bill. The Bill passed the House of Lords, just as the two previous abolition bills did in the 1920s. However, unlike the previous two attempts, the Bill was not met with resistance in the House of Commons, with even those who previously opposed grand jury abolition stating that, “this archaic procedure has ceased to have any reality in modern days.”²⁴ The House of Commons passed the bill on July 18th, 1933 and the last English grand jury met on August 29th, 1993 and concluded on September 1st.

Canada

Grand juries in Canada were once extremely common. When the British colonized Canada they issued the Royal Proclamation of 1763. The Proclamation officially announced Great Britain’s claim on parts of North America, including large areas of Canada, after they won the Seven Years’ War against France. The

²³ Elliff, Nathan T. “Notes on The Abolition of The English Grand Jury System.”

²⁴ Elliff, Nathan T. “Notes on The Abolition of The English Grand Jury System.”

Proclamation also stated that the Laws of England would be applied to the British-held territory. This included implementing the British court system and its long-held tradition of using the grand jury. For decades the grand jury system stayed in place in Canada until the late 19th century when the case for abolishing the grand jury system became a much-debated topic. In the late 1890s an author named John Alexander Kains released a book titled “A Review for the Movement for Abolishing the Grand Jury System”. In his book, Kains makes the argument that the grand jury system, while once necessary as the “palladium and bulwark of English liberty” now no longer served this purpose.²⁵ Kains also included the writings and speeches of prominent Canadian senators and judges who also proposed abolishing the grand jury system as well as a chapter titled “Thirty-Four Objections to the Grand Jury System.” Among the 34 objections were; “It can be made the object of oppression”, “no right of challenge can be had”, and “it is exposed to outside influences.”²⁶The Nova Scotia courts, which were the country’s first independent courts, eventually abolished the grand jury system in 1984.

France

Grand juries were first introduced in France during the French Revolution. The Constituent Assembly, which was made up of French citizens, known as the Third Estate or the common-people, passed the Laws of 1791, among which established a grand jury system. The jury system was imposed in the wake of the

²⁵ Kains, John A. *How Say You? : A Review Movement for Abolishing The Grand Jury System in Canada.* Journal, St. Thomas, 1893. Print.

²⁶ Kains, John A. *How Say You? : A Review Movement for Abolishing The Grand Jury System in Canada.* Journal, St. Thomas, 1893. Print.

French Revolution because it was seen as a “symbol of democracy and the embodiment of popular sovereignty.”²⁷ The French citizens wanted to model their new democratic system around the system in England that had emerged out of the Magna Carta and other English reforms that had occurred since the early 13th century. The grand jury system stayed in place until 1808 when it was abolished under Emperor Napoleon when he released The Napoleonic Code of 1808.

Ireland

Grand juries were also common throughout Ireland during the Middle Ages in the parts of Ireland that were under British control. After the formation of the Irish Free States in 1922 grand juries were no longer required by law. Since the grand jury system had been in place for such an extended period of time and was the system most citizens were comfortable with they continued in place until 1969 when The Grand Jury (Abolition) Act was passed. The Grand Jury (Abolition) Act not only abolished the grand jury system in Ireland but also set up an alternative system for presenting indictments for crimes. The Act stated that instead of presenting charges to a grand jury charges were to be presented to a judge who, in addition to hearing all the evidence presented, had the power to pass a “No Bill” judgment, which amounts to the same as a ruling of no indictment from a grand jury.²⁸ This system remains in place today throughout Ireland.

²⁷ Hans, Valerie P., and Claire M. Germain. "The French Jury at A Crossroads." *University of Florida Levin College of Law* (2011). *UF Law Scholarship Repository*. Web. <<http://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1232&context=facultypub>>.

²⁸ "Grand Jury (Abolition) Act (Northern Ireland) 1969." *Grand Jury (Abolition) Act (Northern Ireland) 1969*. The National Archives. Web. 03 Apr. 2016.

Complaints Against The Grand Jury System: Prosecutors' Control

While the grand jury system in the U.S has been in effect since the inception of the nation and is clearly stated in the U.S Constitution, many people have become disillusioned and are beginning to question the necessity of grand juries for criminal prosecutions. One of the biggest criticisms of the grand jury is its lack of neutrality. A grand jury is "the total captive of the prosecutor who, if he is candid, will concede that he can indict anybody, at any time, for almost anything, before a grand jury."²⁹ In fact the Chief Judge of New York State, Judge Sol Wachtler, in a 1985 interview, stated that "by and large" a prosecutor could get a grand jury to "indict a ham sandwich." This is because all of the grand jury proceedings are conducted and controlled by the prosecutor. It is the prosecution that presents the evidence, calls witnesses, informs the jurors of the charges and the level of proof required to indict. The defendant and their counsel are not permitted to be present at the proceedings and even witnesses are not entitled to counsel.

Professor Wayne Morse, who taught at the University of Oregon School of Law, and later was elected to the U.S Senate, conducted a survey regarding the grand jury in 21 states. In that study he found that "of the thousands of cases presented to the grand juries sitting in those states only about 5% were initiated by the jurors", with the rest being initiated by state prosecutors.³⁰ Morse also found that "in cases where the grand jury refused to indict, the prosecution concurred with

²⁹ Campbell, William J. "Eliminate the Grand Jury." *The Journal of Criminal Law and Criminology* 64 (1973). *Northwestern University School of Law*. Web.

³⁰ Campbell, William J. "Eliminate the Grand Jury." *The Journal of Criminal Law and Criminology* 64 (1973). *Northwestern University School of Law*. Web.

this decision 95% of the time.”³¹ Critics use staggering statistics such as these to affirm their stance that the grand jury has become nothing more than “a sounding board for the predetermined conclusions of the prosecution officials.”³²

Grand Jury Reform:

While there are those who advocate nothing less than a complete abolishment of the grand jury and those who advocate the grand jury as a safeguard of citizen liberty there is a middle ground, known as grand jury reform. The theme of grand jury reform is that the grand jury system is broken, but is a system that can be fixed instead of eliminated. An organization called The National Association of Criminal Defense Lawyers (NACDL) has established “The Commission to Reform the Federal Grand Jury”, which consists of “a bi-partisan, blue-ribbon, panel that included current and former prosecutors, as well as academics and defense attorneys.”³³ Together the members of the NACDL released a publication titled “Federal Grand Jury Reform Report and Bill of Rights.” This report detailed many reform options; among the most important were “the right to counsel for grand jury witnesses who are not receiving immunity, an obligation to present evidence which may exonerate the target or subject of the offense, and the right for targets to testify.”³⁴ The goal of NACDL reforms is to produce a new, fairer, more efficient grand jury process that

³¹ Campbell, William J. “Eliminate the Grand Jury.”

³² Campbell, William J. “Eliminate the Grand Jury,”

³³ “Grand Jury Resistance Project.” *Grand Jury Reform Links*. Web. 03 Apr. 2016. <<http://grandjuryresistance.org/reformlinks.html>>.

³⁴ “Federal Grand Jury Reform Report and Bill of Rights.” *National Association of Criminal Defense Lawyers*. Web. <<http://www.nacdl.org/reports/federalgrandjury/>>.

will prevent unwarranted trials from taking place while also keeping the essential function of the grand jury system intact.

Reform legislation very similar to that proposed by the NACDL was introduced by the American Bar Association over two decades ago but Congress failed to adopt it. It is the hope of the NACDL that due to the recent high visibility of cases of grand jury failure that Congress will be more willing to pass grand jury reform. Among these recent developments are the number of recent cases of African-American males killed by police officers who have largely gone uncharged. Two cases, which made major headlines and sparked worldwide riots when the officers were not indicted by grand juries, were the case of the shooting of Michael Brown and the death of Eric Garner.

The Michael Brown Shooting

On August 9th, 2014 in Ferguson Missouri police officer Darren Wilson fatally shot Michael Brown, an 18 -year old African-American. Officer Wilson was informed of a robbery that had taken place in a convenience store and a description of the two robbers. On the way to the convenience store Wilson came across Brown and a friend, Dorian Johnson, who were illegally walking down the middle of the street. Wilson quickly realized that the two young men matched the description of the robbers and stopped them. At some point during the conversation between Brown and Wilson an altercation took place which lead to a struggle for Officer Wilson's gun. After Officer Wilson regained control of his firearm Brown and Johnson began to flee, however Brown suddenly turned back around and charged at Wilson. In

response to Brown's sudden aggression Wilson fired at Brown repeatedly until Brown was incapacitated. Brown was pronounced dead around 12:20p.m.

In the immediate aftermath of the Brown shooting there was chaos and confusion around the circumstances of Brown's death. Brown was unarmed when he was shot and witnesses claimed he had his hands up in surrender and was telling Wilson not to shoot. However, the witnesses who made those claims were later found not to be credible. Even as more concrete evidence surfaced proving that Officer Wilson was acting in self defense there continued to be chaotic, violent protests in Ferguson and around the world.

Due in part by the outrage in the African-American community in Ferguson and by some of the still murky details surrounding aspects of Brown's death charges against Officer Wilson were brought before a grand jury. The charges that the prosecutor asked the grand jury to consider were: first-degree murder, second-degree murder, voluntary manslaughter or involuntary manslaughter. The grand jury was composed of six white-men, three white-women, one black man and two black women. On January 7th the jury declined to indict Wilson on any of the charges. The refusal of the grand jury to indict Wilson sparked even more massive protests and vigorous debate as to the way the grand jury proceedings were conducted.

Among the complaints about the grand jury was the perceived impartiality of the prosecutor, Robert McCulloch. McCulloch's own father was a policeman who, in 1964, was shot and killed by an African-American man. Many critics point to McCulloch's family history as a reason why he was not truly committed to trying to

prosecute Wilson. Cohn, a former president of the National Lawyer's Guild, stated, "It was clear the prosecutor was partisan in this case, and not partisan in the way prosecutors usually are, which is to get people indicted."³⁵ These critics point to the atypical manner in which McCulloch conducted the grand jury proceedings as evidence of his bias. While the prosecutor in grand jury proceedings typically only presents jurors with evidence that supports an indictment in this case McCulloch "allowed Wilson to testify for hours before the grand jury and presented them with every scarp of exculpatory evidence available."³⁶ The grand jury proceedings conducted in this pro-defense fashion was seen as quite astonishing since, in the vast majority of grand jury proceedings, prosecutors never allow defendants to testify nor do they present any exculpatory evidence even when they may possess it. Many people who were not convinced of Wilson's claim of self-defense were extremely agitated that McCulloch allowed Wilson to testify in front of the grand jury.

However, there are others who applauded McCulloch for taking a different approach with the Wilson grand jury. Professor Andre Leipold, director of the Criminal Law and Procedure program at the University of Illinois College of Law stated that McCulloch was "just trying to make it clear why [McCulloch's] treating this as an unusual case because of the intense media attention and because of the fact that there were a lot of wild rumors going on". Later stating that he didn't "fault

³⁵ "Justice Scalia Explains What Was Wrong With The Ferguson Grand Jury." *ThinkProgress* RSS. 26 Nov. 2014. Web. 03 Apr. 2016. <<http://thinkprogress.org/justice/2014/11/26/3597322/justice-scalia-explains-what-was-wrong-with-the-ferguson-grand-jury/>>.

³⁶ "Justice Scalia Explains What Was Wrong With The Ferguson Grand Jury." *ThinkProgress*.

him for the effort."³⁷ Professor Leipold and countless others like him argued that McCulloch was not a biased prosecutor attempting to set free a man who committed murder but a hardworking public servant who wanted to make sure that a case surrounding in so much controversy and speculation was handled properly and resolved fairly. The irony in the Wilson grand jury proceedings is that while typically the biggest complaint against the grand jury system is that it is extremely unfair to the defendant, because they are not allowed to testify or present any evidence, in this case the fact that the defendant was allowed these measures was a source of great agitation and anger from many citizens.

Erin Garner Case

On July 17th, 2014 another African-American male was killed at the hands of law enforcement, this time in Staten Island, New York. Police were called to an intersection in Staten Island when they were alerted to a black male allegedly selling untaxed cigarettes. While arresting Garner, who had a lengthy arrest record, officers grabbed him by the neck, putting him into a chokehold, and forced him to the ground onto his stomach. The entire altercation was recorded on phones by bystanders and has been viewed over 3 million times on Youtube.

³⁷ "Justice Scalia Explains What Was Wrong With The Ferguson Grand Jury." *ThinkProgress* RSS. 26 Nov. 2014. Web. 03 Apr. 2016. <<http://thinkprogress.org/justice/2014/11/26/3597322/justice-scalia-explains-what-was-wrong-with-the-ferguson-grand-jury/>>.

On the citizen-made recordings Garner can be heard repeatedly yelling, “I can’t breath” while on the ground with a police officer on top of him.³⁸ Shortly after Garner made these statements he stopped moving and responding to police. He was then taken to a nearby hospital where he was pronounced dead. Police made a statement claiming Garner died of a heart attack en route to the hospital. The chokehold tactic an officer is seen using on Garner in the video recording is a tactic that is prohibited by the New York Police Department. It was later determined that the officer performing the chokehold on Garner was Officer Daniel Pantaleo. The New York Medical Examiner stated that Garner’s cause of death was “compression of the neck (chokehold), compression of the chest and prone positioning during physical restraint by police” and ruled his death a homicide.³⁹ However, the examiner listed “acute and chronic bronchial asthma, obesity and hypertensive cardiovascular disease” as also being contributing factors.

Officer Pantaleo’s case was brought before a New York grand jury, which was comprised of 14 white and 9 non-white members. The grand jury eventually found that there was “no reasonable cause to indict” Officer Pantaleo.⁴⁰ Staten Island District Attorney, Daniel Donovan Jr., stated that the grand jury “conducted dozens of interviews with witnesses, including 22 civilians”. He also stated that Pantaleo “testified for approximately two hours on November 21st in front of the grand

³⁸ Sanchez, Ray, and Shimon Prokupecz. "Protests after N.Y. Cop Not Indicted in Chokehold Death; Feds Reviewing Case." *CNN*. Cable News Network, 2014. Web. 03 Apr. 2016. <<http://edition.cnn.com/2014/12/03/justice/new-york-grand-jury-chokehold/>>.

³⁹ Sanchez, Ray and Shimon Prokupecz. *CNN*

⁴⁰ Sanchez, Ray and Shimon Prokupecz. *CNN*

jury.”⁴¹ While a small amount of information regarding what happened behind close doors in the grand jury room was released, many things have been kept secret. “Transcripts of witness testimony, Garner’s autopsy report, the exact charges Donovan presented against Pantaleo and other key information was not made public”, as is common under New York law in grand jury cases.

The extreme secrecy behind grand juries has been one of the biggest complaints by advisories of the grand jury system, especially in high profile cases where no indictment is made, such as the Garner case. In December 2015, the New York Civil Liberties Union, the NAACP, and the New York Post sued the court in order to make all of the Garner grand jury proceedings available to the public. The case was heard by the New York Supreme Court, which ruled against releasing the grand jury documents. New York Supreme Court Justice William Garnett stated the plaintiffs “failed to demonstrate a compelling need to make the testimony public.”⁴² The court found that the plaintiffs simply wanted the documents to be made public but could state “no cognizable reason for the disclosure” other than to make them public.⁴³ Those documents are still undisclosed to the public and there remains much speculation as to why Officer Pantaleo was not indicted.

While examining these cases it is important to note that both are instances of civilian deaths at the hands of law enforcement officers, which make them uniquely different than other criminal cases. Average citizens are usually more hesitant to

⁴¹ Sanchez, Ray and Shimon, Prokupecz. *CNN*

⁴² Queally, James. "In Eric Garner Case, Judge Denies Request to Release Grand Jury Transcripts." *Los Angeles Times*. Los Angeles Times. Web. 03 Apr. 2016. <<http://www.latimes.com/nation/nationnow/la-na-nn-eric-garner-grand-jury-20150319-story.html>>.

⁴³ Queally, James. "In Eric Garner Case, Judge Denies Request to Release Grand Jury Transcripts."

indict or convict police officers for numerous reasons. The fact that most citizens admire police officers for the work they do to keep society safe, that the victims are not present to present their side of events, and that the victims usually have previous criminal records, lead grand juries to refuse to indict police officers more than they indict them. However, it is my belief that the backlash and anger expressed all over the U.S. due to the non-indictments of Officer Wilson and Officer Pantaleo were made more volatile by the already present, increasingly agitated societal feeling surrounding the grand jury system.

The grand jury system was once extremely necessary to protect the liberty and Constitutional rights of U.S citizens, however the grand jury system, in its current format, no longer accomplishes that goal. The secrecy behind the grand jury, the unnecessary amount of power yielded by the prosecutor, and the lack of participation allowed by the accused have created a system that increases the likelihood of producing injustice and unfairness. If the grand jury system is to survive the next decade it must go through reforms, such as those currently championed by the National Association of Criminal Defense Lawyers. A system in which grand jury documents can easily be made public, where the accused are allowed to testify at the proceedings and where all relevant information is presented to the jurors are essential in creating a grand jury system which is once again the bulwark of the rights of the people.