Behind the Gray Door: Williams, Secrecy, and the Federal Grand Jury

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In the 1990s, as if to fulfill the promise of the sixth amendment, n1 criminal trials became more public than ever. Where once "courtroom windows and doors were thrown wide open so that country folk [could] ... hear great lawyers plead," n2 television now brought trials into America's bedrooms. n3 As one late night talk-show host quipped in early 1994: "There's good news for Lyle and Erik Menendez. Court TV has renewed them for another season." n4

At the same time the trial was becoming ubiquitous, the other constitutionally mandated criminal proceeding - that of the indicting grand jury n5 - seemed to be disappearing. Once considered ""a great channel of communication between those who make ... the laws and those for whom the laws are made,"" n6 and a sacred protector of citizens' rights, the indicting grand jury had long since become an igno n[*564] minious prosecutorial puppet. n7 In terms of its public profile, it did not help that the indicting grand jury does what little work it does in secret. n8 Unlike their high-profile courtroom cousins, n9 grand jurors are rarely seen n10 and never heard. n11

The trouble with this mismatched pair of institutions - in-your-face trials and out-of-sight grand juries - is that the latter are responsible for many more convictions than the former. n12 The typical defendant pleads guilty after the prosecutor obtains an indictment - in practice, a powerful bargaining chip n13 - during a closed-door session. [*565] Thus, a criminal justice system widely regarded as predominantly open is, in fact, largely closed.

For more than a decade, the Supreme Court has been extolling the value of public access to the functioning of the criminal justice system. n14 As Justice Brennan has stated, access to criminal proceedings acts ""as an important check, akin in purpose to the other checks and balances that infuse our system of government." n15 In Press-Enterprise Co. v. Superior Court (Press-Enterprise II), n16 the Supreme Court noted that public access to pretrial hearings ""enhances both the basic fairness of the ... [proceedings] and the appearance of fairness so essential to public confidence in the system."" n17 Moreover, the Court has found that public access can be particularly significant in areas in which other procedural safeguards are lacking. n18 Under the test derived from Press-Enterprise II, unless the advantages of grand jury secrecy outweigh the arguments the Court itself has made for public access, such proceedings would have to be opened to the public.

So far, however, no such weighing has taken place. Strengthening the right of access to pretrial proceedings generally while defending the secrecy of the grand jury, the Court has acted like a host who accidentally invites two enemies to the same party and must struggle to keep them apart. This was most apparent in Press-Enterprise II, where the Court acknowledged no advantages to closed preliminary hearings, and no disadvantages
to closed grand jury hearings, although the two are functionally equivalent. n20

Why would the Supreme Court - which has spent a decade shoring up the first amendment right of access to criminal proceedings stop just outside the grand jury room door?

Although the Court has argued that the functioning of the grand jury would be frustrated if conducted in the open, this is only true of the investigative grand jury. While some grand juries do, in fact, conduct lengthy investigations, most issue indictments on demand. As one commentator has observed, "whatever the validity of the reasons traditionally given for grand jury secrecy, those arguments apply solely to the investigating grand jury." Yet the same blanket secrecy rule applies to indicting and investigative grand jury proceedings. This Note will examine the Supreme Court's reluctance to consider the functional differences between investigative and indicting grand juries - differences that suggest very different secrecy rules - in light of the purposes of the Court's criminal procedure jurisprudence.

In its criminal procedure decisions, the Supreme Court balances three competing interests. First, it tries to do justice - by insuring that the guilty are punished and that the innocent go free. Second, it tries to preserve the appearance of justice, which it has frequently described as an end separate from justice itself. Third, it tries to ensure that the criminal justice system functions efficiently. Sometimes, the Court is explicit about this balancing process; other times, it is not.

If, in the case of the indicting grand jury, the Court has lately emphasized efficiency rather than fairness, it has faced strong institutional pressures to do so as the number of federal prosecutions has outstripped the capacity of the federal courts to process cases. In its effort to keep criminals moving through the pipeline, the Court can expect little help from Congress - which continues, over the judiciary's protests, to increase the number of federal crimes - or even from district judges, whose primary duty is, and must be, to do justice in individual cases. Least likely of all is a constitutional amendment to eliminate the indicting grand jury, which, from the point of view of efficiency, looms as a mandated obstruction.

Unable either to strengthen or eliminate the indicting grand jury, the Court has allowed it to wither, refusing to quash indictments on the grounds that the evidence presented by the government was unreliable or insufficient. The result: the government has little incentive to make a complete presentation, and grand jurors have little opportunity to evaluate the prosecution's case. Yet given the rise of the plea bargaining system, the indicting grand jury is "the only significant sieve through which most federal prosecutions [will] pass." For as the grand jury was becoming an ineffective screening device, trials were becoming unavailable to most defendants.
Commentators have decried these transformations. For example, Professor Arenella has argued that "by confining most procedural safeguards to a stage of the process that most defendants never reach, the courts have seriously diluted the basic values of our ... criminal justice system." As recently as the early 1980s, it was common for criminal justice reformers to claim that because the grand jury proceeding had replaced the trial as the stage at which charges are aired, grand jury targets deserved the benefit of safeguards previously reserved for trial. Arenella proposed reforms that would strengthen the grand jury’s screening function by transposing a variety of trial safeguards onto the grand jury proceeding.

Although Arenella's argument - that a system that values fairness should be fair throughout - is both ethically and logically unassailable, in retrospect, it seems overly optimistic. In a world of limited resources, it is precisely because there are few procedural safeguards for the many that there can be many procedural safeguards for the few. This applies, as well, to openness, which is both a procedural safeguard par excellence and an opportunity to see that other safeguards are in place.

In choosing to favor efficiency over fairness in the case of the indicting grand jury, the Court has not had to sacrifice, to any significant degree, the appearance of fairness. This is the "fortuitous" result of grand jury secrecy, an institution that has among its official rationales the protection of the innocent accused, but which also serves to conceal the inequities of the grand jury system. Secrecy helps ensure that a society that sees the elaborate safeguards in the courtroom does not observe the lack of safeguards in the grand jury room down the hall.

As one commentator has observed: "A consequence of grand jury secrecy is that neither the courts nor Congress, nor, especially, the public, can gauge how the institution is being used." This Note will explore that consequence, and with it the nexus between secrecy and unfairness. It will focus, in particular, on the Court's recent decision in United States v. Williams. The question presented in Williams - "whether a district court may dismiss an ... indictment because the Government failed to disclose to the grand jury 'substantial exculpatory evidence' in its possession" - had no apparent secrecy connection. And the Williams Court nowhere stated that enhancing grand jury secrecy was one of its objectives. Commentators, who have been highly critical of the opinion, have focused exclusively on its ostensible result: freeing prosecutors from the duty to present exculpatory evidence. Yet, as this Note will demonstrate, strengthening grand jury secrecy was a significant collateral effect of the Williams opinion.

First, under Williams, district and circuit court judges are no longer able to monitor the fairness of grand jury proceedings. Describing the indicting grand jury as something it is not - an independent body, free of judicial and prosecutorial control - the Court denied the lower courts the power to oversee grand jury procedure, ostensibly because such oversight would compromise that independence. The whole theory of [the grand
jury's] function," the Court announced, "is that it belongs to no branch of the institutional government"; its relationship with the courts must remain "arm's length." Thus Williams foreclosed debate on grand jury reform by arguing that any reform requires oversight, and oversight is incompatible with the grand jury.

Second, Williams made it more difficult for criminal defendants to obtain grand jury transcripts. Under the Federal Rules of Criminal Procedure, judges are permitted to release grand jury transcripts to defendants "upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." Williams, however, dramatically narrowed the available grounds for such motions. Thus, after Williams, transcripts are more likely to remain in the prosecutor's sole possession. A number of trial court opinions have already demonstrated this effect, as judges, deferring to Williams, have "regretfully" denied defendants' requests for grand jury transcripts.

Thus Williams shuts out defendants interested in learning about specific grand jury proceedings; judges interested in ensuring the fairness of the grand jury system; and, by extension, journalists, legislators, and academics interested in knowing more about the workings of grand juries.

Part I of this Note will trace the history of the indicting grand jury. It will focus on the decline of the grand jury as a check on prosecutorial power; commentators' proposals for reversing that decline; and the Court's responses to the problem. It will end with a discussion of Williams, in which the Supreme Court considered a measure reformers suggested would restore a modicum of independence to the indicting grand jury. As Part I will show, the Court not only declined to adopt this measure, but went on to deny, generally, the power of federal courts to protect the indicting grand jury from prosecutorial overreaching.

Part II will review the history of grand jury secrecy, tracing its development both under common law and, since 1945, under Federal Rule of Criminal Procedure 6(e). It will suggest that secrecy, which historically protected the grand jury's target, now primarily protects the interests of the prosecution. Finally, it will revisit Williams to show how that decision, in combination with Rule 6(e), ensures that most grand jury transcripts remain secret.

Part III will analyze grand jury secrecy in light of important first amendment values. In a line of cases beginning with Richmond Newspapers, Inc. v. Virginia in 1980, the Supreme Court affirmed the right of access to pretrial criminal proceedings and prescribed a test for determining which proceedings should be open to the public. This Part will apply that test to the indicting grand jury as it exists, rather than as the Supreme Court has described it. It will conclude that in the case of the most basic grand jury proceedings, at which the only witnesses are government agents who make cursory
presentations, the Richmond Newspapers line of cases strongly supports the right of access. [*573]

The purpose of this Note is not to propose an end to grand jury secrecy where it serves legitimate interests (as in the case of the investigative grand jury). Instead, this Note will explore the Court's balancing of efficiency and fairness in its treatment of the indicting grand jury. It will suggest that the public, if it knew more about the indicting grand jury, might prefer that its ability to screen prosecutions be strengthened, not weakened, and that encouraging such discourse is the very purpose of the first amendment right of access.

I

The History of the Grand Jury Through Williams

To preserve the Innocent from the Disgrace and Hazards which ill Men may design to bring them to, out of Malice, or through Subornation, or other sinister Ends; for so tender is the Law, of the Reputation and Life of a Man, that it will not suffer the one to be sullied ... and the other indangered by a Trial, until first the Matter and Evidence against him have been scann'd, examined, and found by a Grand Jury, upon their Oaths, against him. n54

My record? Fifteen indictments in 45 minutes. n55

This Part will examine the history of the indicting grand jury, tracing its route from scanner and examiner to prosecutorial "playtoy." n56 It will describe the effects of such cases as Costello v. United States, n57 in which the Court held that a hearsay summary of the prosecution's case was a sufficient basis for indictment. It will then examine the recent case of United States v. Williams, n58 in which the Court, given a chance to strengthen the grand jury's screening function, instead went a "step beyond Costello." n59

A survey of lower court [*574] decisions confirms that Williams has, in fact, served to consolidate the prosecutor's power over the grand jury.

A. The Grand Jury Prior to Williams

Nearly a thousand years old, the grand jury arose in England out of several overlapping institutions. Reviewing its origins a century ago in Ex Parte Bain, n60 the Court observed that, "for a long period [the grand jury's] powers were not clearly defined; and it would seem from the account of commentators on the laws of that country that it was at first a
body which not only accused, but which also tried, public offenders." n61 The Assize of Clarendon, in 1166, clarified the grand jury's function, establishing

juries of 12 persons, selected from each community, who were directed to accuse those persons ... believed to have committed crimes.... The Assize was designed not to protect against improper prosecutions by the Crown, but rather to lend assistance to government officials .... Any hesitancy the jurors might have in bringing accusations against their neighbors would be overcome by the substantial fines the jurors faced for failing to bring forward any known offense. n62

In the late seventeenth century, when it refused to indict Protestant reformers n63 and helped fight official corruption, the grand jury established a reputation as ""a bulwark against the oppression and despotism of the Crown."" n64 "In the struggles which at times arose in England between the powers of the king and the rights of the subject, it often stood as a barrier ... until, at length, it came to be regarded as an institution by which the subject was rendered secure against oppression." n65 By the time it was adopted in this country - first by the colonial courts n66 and then in the Constitution - the grand jury was regarded as protection from prosecutorial overreaching. n67 [§575]

Indeed, as it appears in the Bill of Rights, n68 the grand jury's only official function was to stand between the government and its citizen-targets, serving as a safeguard against "hasty, malicious, and oppressive public prosecutions." n69 Yet the grand jury has often been described as both a sword and a shield, able to invoke - or fend off - the prosecutorial power. n70 In the former, investigative role, it has itself been called malicious and oppressive. n71 As described by Professor Younger, the nineteenth century investigative grand juries were so zealous that reformers described them as "secret conclaves of criminal accusers, repugnant to the American system." n72 By the 1860s, according to Professor Younger, "efforts to abolish the ... grand jury in the United States assumed almost epidemic proportions." n73

In fact, prior to the twentieth century, the investigative grand jury was a remarkably independent institution. Justice James Wilson, in 1790, "rejected summarily the views of those persons who would restrict the grand jury to the consideration of matters laid before them by the public prosecutor or [the] court." n74 Likewise, in 1868, in a charge that has been described as typical of both federal and state courts at the time, Justice Salmon P. Chase "urged jurors ... to call before them and examine fully government officials or any other persons who possessed information useful to them. He warned them, "You must not be satisfied [with] acting upon such cases ... as may be brought before ...." n75

The focus of this Note, however, is the indicting grand jury. Although it is true that most grand juries alternate investigate and indict, that is not always the case. In some big-city districts, separate grand juries handle indictments and investigations, lest the latter stand [§576] in the way of the former's time-pressured processing of cases. n76 Elsewhere, the roles of the indicting and investigative grand juries are easily distinguished, n77 as
reformers who have called for procedural safeguards relevant to one, but not the other, have concluded. n78 Public perceptions of the indicting grand jury are based largely on descriptions of the investigative grand jury. Many of the criminal cases that reach the Supreme Court arise out of long investigations by grand juries, n79 which the Court acknowledges in periodic paean to the grand jury's investigative powers. For example, in 1972, the Court described the grand jury as "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." n80 Similarly, in 1983 in United States v. Sells Engineering, Inc., n81 the Court noted that without broad investigatory powers, "the grand jury would be unable ... to ferret out crimes deserving of prosecution." n82

The effectiveness of the investigative grand jury is itself the subject of debate. Given the complexity of modern prosecutions, one commentator has asked:

Who can believe that even a moderately complex inquiry can be managed by twenty-three untrained people ... ? The work of examining and collating documents, interviewing witnesses, analyzing discordant evidence, all these require the application of skills and techniques which are totally outside the knowledge of the average grand juror. The so-called grand jury "investigation," therefore, is [*577] really nothing more than a review of the prosecutor's predigested evidence and a ratification of his conclusions. n83

As for the indicting grand jury: if the grand jury as sword is somewhat dulled, the grand jury as shield is riddled. That the indicting grand jury has surrendered to the very prosecutorial power against which it was meant to protect is well-established. The Supreme Court has, throughout this century, described the grand jury as

primary security to the innocent against hasty, malicious and oppressive prosecution; it serves the invaluable function in our society of standing between the accuser and the accused ... to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will. n84

The reality is that "few scholars or practitioners take [the grand jury's] accusational function seriously today." n85 Instead, judges, prosecutors, grand jurors, and attorneys who practice in the criminal courts paint a picture of a vestigial institution. n86 The prosecutor generally calls one witness, a federal agent whose only role is to summarize what other witnesses, if any, told her. Eyewitnesses, even if [*578] available, rarely appear. n87 The presentation may take as little as three minutes. n88

After the attorney, the witness, and the court reporter leave the room, the grand jurors deliberate and vote. n89 The prosecutor, however, is rarely kept in suspense. In the last year for which figures are available, federal grand jurors returned 17,419 indictments and
In some federal districts, there was not a single "no true bill" that year.

Prosecutors have not bothered to keep the grand jury's diminution secret; they brag that grand jurors are more likely to "sleep through a presentation" than to challenge the sufficiency of the evidence based on which an indictment is based. In describing the modern grand jury, they - and the commentators - disagree only on what to call it: Is it an "indictment mill" or a "rubber stamp," a "tool" or a "playtoy" of the prosecution?

The decline of the indicting grand jury occurred as the federal system was straining to keep up with an increasing number of criminal prosecutions. Changes in recommended grand jury instructions reflect these pressures. In 1979 the federal grand jury handbook assured jurors that "you alone decide how many witnesses you want to hear." Five years later, grand jurors were instead told that the United States Attorney would "advise [them] on what witnesses should be called." This watered down instruction is a far cry from Justice Chase's 1868 exhortation.

The indicting grand jury's collapse could not have occurred without the Supreme Court's acquiescence. That acquiescence was most apparent in Costello v. United States, in which the Court held that an indictment based entirely on hearsay evidence was valid. The Court described its decision as upholding the right of the grand jurors to do their job unfettered by the technical rules of evidence - as if the Court was making a concession to the needs of lay grand jurors. In fact, Costello was a concession to the government, which had called 144 witnesses to testify at Costello's tax evasion trial. When his attorneys asked for the witnesses' grand jury testimony, they discovered that only three of the witnesses had testified, and then only to summarize the testimony of the other 141. In approving this procedure, the Supreme Court was denying the grand jurors the opportunity to put the government to its proof.

In the wake of Costello, the Court issued a series of opinions upholding indictments based on evidence that would not be admissible at trial. Taking this principle to its logical extreme, at least one commentator has suggested, and one federal court has held, that an indictment issued by a validly constituted grand jury on the basis of no evidence at all would nonetheless be valid.

Ironically, at the same time that it has diminished in effectiveness as a shield from prosecutorial overreaching, the indicting grand jury has vastly increased in importance relative to the other elements of the criminal process. Given the rise of plea-bargaining - now the route to more than eighty-five percent of federal convictions - "the trial has become no more than an occasional adornment on the vast surface of the criminal process." Often, the indictment serves as a powerful inducement to plead guilty. Professor Michael Finkelstein describes the present system as "inducing conviction by "consent" in a significant number of cases in which the protections of the formal system would have precluded a condemnation."
Professor John Langbein has presented a model for understanding this erosion in his classic essay on the vices of medieval and modern criminal procedure. According to Langbein, courts in thirteenth to eighteenth century Europe, in a "valiant effort ... to exclude completely the possibility of mistaken conviction," developed a system of proof in which only a confession or the testimony of two eyewitnesses was sufficient to convict. In so doing, they set the level of proof too high and, unable to obtain convictions in most cases, were forced to create a separate system in which physical torture was used to elicit confessions. The trouble was that "the innocent might" - and did - "yield to the pain and torment and confess [to] things that they never did."

To Professor Langbein, "the parallels between the modern American plea bargaining system and the ancient system of judicial torture are many and chilling." Such "reforms" as the development of the law of evidence and the "lawyerization of the trial," Professor Langbein observes, have made the jury trial "so complicated and time-consuming that they rendered it unworkable as the routine dispositive procedure." Thus arose the need for an alternative procedure - the plea bargaining system - which, like torture, may induce the not-guilty to "confess."

The lesson, according to Professor Langbein, is that "a legal system will do almost anything, tolerate almost anything, before it will admit the need for reform in its system of proof and trial." And what we are tolerating, according to Professor Langbein, is a plea bargaining system that puts too much power in the hands of the prosecutor. Part of that power is the ability to obtain indictments freely. As Professors McConville and Mirsky have pointed out, the terms of an indictment may have the practical effect of sealing the defendant's fate.

Other commentators have picked up where Professor Langbein left off, demanding that Congress or the courts take steps to strengthen the grand jury's screening function. Among the most frequently mentioned reforms is a rule requiring prosecutors to present exculpatory evidence, which is generally defined as any evidence that would tend to negate guilt. Such rules, which do not require prosecutors to seek out exculpatory evidence but merely to present evidence they have, have been described as both ethically compelled and necessary to the proper performance of the grand jury's screening function. In the federal system, disclosure rules were adopted by several circuits, while the Justice Department, setting a code of conduct for United States Attorneys, stated: "When a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence which directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment." The American Bar Association's criminal justice section similarly concluded: "The prosecutor should disclose to the grand jury any evidence which he knows will tend to negate guilt."

Opponents of such rules assert that requiring prosecutors to present exculpatory evidence would turn grand jury proceedings into costly, time-consuming minitrials.
was presented with a challenge to a disclosure rule in United States v. Williams, the Court was asked to choose between grand jury independence and the type of prosecutorial control. PAGE 1069 N.Y.U.L. Rev. 563, *583

exemplified by its Costello holding. [*583]

B. United States v. Williams

John Williams, a Tulsa, Oklahoma investor, was indicted for bank fraud under 18 U.S.C. 1014. Prior to trial, Williams applied to the district court for disclosure of exculpatory evidence under Brady v. Maryland. Among the Brady materials turned over to Williams' counsel was a "heavily edited" transcript of the grand jury proceeding leading to his indictment. Reviewing that transcript, Williams concluded that the prosecutor had failed to apprise the grand jury of the existence of financial records that, in his opinion, proved his lack of intent to defraud. Citing the Tenth Circuit rule of United States v. Page that "when substantial exculpatory evidence is discovered in the course of an investigation, it must be revealed to the grand jury," Williams moved to have his indictment dismissed.

The district court, finding that the withheld evidence created "a reasonable doubt about [Williams's] guilt" and thus "rendered the grand jury's decision to indict gravely suspect," dismissed the indictment. The government appealed, acknowledging its duty to present "substantial exculpatory evidence," but arguing that Williams's financial records did not reach the Page threshold. The Tenth Circuit, restating its disclosure rule and applying a "not clearly erroneous" standard to the district court's finding that the prosecutor had failed to present "substantial exculpatory evidence," affirmed.

The Supreme Court had not ruled on the exculpatory evidence question, despite a split among the circuits. Indeed, given the variation among disclosure rules espoused by various district and circuit courts, Williams presented the opportunity for the kind of judicious line-drawing at which high courts excel. Instead, the Court turned almost immediately to a larger question: whether the courts had the power to make a disclosure rule in the first place, or, for that matter, to make any rule of grand jury procedure.

In answering that question, the Court relied on the work of Professor Sara Sun Beale, a critic of the supervisory power doctrine "invented" by the Court in McNabb v. United States in 1943. In McNabb, the Supreme Court, excluding a confession because it was the product of a prolonged illegal detention, described its decision as resting neither on constitutional nor on statutory grounds but on its "supervisory power" over the administration of justice within the federal system, a power necessitated by "considerations of justice." Since then, the "supervisory power" has been used by federal judges to formulate new, generally applicable rules of fairness, to enforce judicial compliance with already existing standards of fairness, and to avoid miscarriages of
justice where existing procedures prove inapplicable to new fact patterns. The supervisory power "is now commonly [*585] invoked to refer generally to the courts' inherent power to preserve the integrity of the judicial process." n144

According to Professor Beale, "the lower courts have frequently employed their supervisory authority in connection with federal grand jury proceedings." n145 Yet to Professor Beale, the grand jury, because it is constitutionally outside the three branches of government, is in "a gray area on the margin of the federal courts' ... authority to establish procedural rules.".

n146 While federal rules "promulgated pursuant to statutory authority, are presumptively valid, ... rulings premised only on supervisory power [are not]." n147

In an opinion by Justice Scalia, the Williams Court agreed. Given the "arm's length" relationship between the courts and the grand jury, Justice Scalia stated, he was reluctant to invoke the supervisory power as a basis for prescribing modes of grand jury procedure, and would instead limit that power to enforcing the "few, clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury's function." n148 To require the prosecutor to introduce exculpatory evidence would not be enforcement but rule-creation, a process that would alter the "traditional relationships between the prosecutor, the constituting court, and the grand jury." n149 [*586]

To support his vision of grand jury independence, Justice Scalia described the grand jury as an investigative body acting independently of either prosecuting attorney or judge. n150 Thus he ignored both the modern grand jury's dependence on the district court - which convenes grand juries, administers their oaths, and issues their subpoenas - and the Supreme Court's own prior pronouncements on the subject. n152 More troubling still, Justice Scalia rejected without discussion Williams's claim that, without an exculpatory evidence rule, the grand jury "merely functions as an arm of the prosecution." n153 Proceeding as if the grand jurors themselves call the shots, he observed that "if the grand jury has no obligation to consider all "substantial exculpatory evidence,' we do not understand how the prosecutor can be said to have a binding obligation to present it." n154 By characterizing the prosecutor as a passive participant, Justice Scalia avoided recognizing the Supreme Court's opportunity to help the grand jury retain, much less reclaim, its independence. n155

Having rejected the supervisory power of the courts to monitor grand jury fairness, Justice Scalia turned to the question of whether the history of the grand jury implied a common law duty to disclose. The answer, Justice Scalia said, is no, since "requiring the prosecutor to present exculpatory ... evidence would alter the grand jury's historical role, transforming it from an accusatory to an adjudicatory body." n156 Justice Scalia cited Blackstone's description of the "prevailing practice in 18th Century England," namely, that "the grand jury [*587] was "only to hear evidence on behalf of the prosecution, for the finding of an indictment is only in the nature of an enquiry or accusation, which is afterwards to be tried and determined."" n157 Then he moved on to "an early American
court, which stated, three years before the Fifth Amendment was ratified," that it was the
grand jury's function not "'to enquire upon what foundation [the charge may be] denied,'
or otherwise try the suspect's defenses, but only to examine "upon what foundation [the
charge] is made' by the prosecutor." n158 Finally, he noted, "Justice Nelson, riding
circuit in 1852," found no case furnishing an authority "for looking into and revising
the judgment of the grand jury." n159

Justice Scalia's history lesson says little about the needs of the modern grand jury.
Blackstone's assertion, which presupposed a trial, is irrelevant to late-twentieth century
criminal procedure. The same can be said for the Shaffer opinion, which can be read to
suggest that the grand jury should have access to all evidence relevant to the prosecutor's
decision to indict. As for Justice Nelson, it is possible he could not find any cases

dismissing indictments for lack of evidence. Justice Scalia, however, could find many such cases, some arguing that
unless prosecutors are required to present exculpatory evidence, the grand jury cannot
properly perform its screening function. n160

By going back in time, Justice Scalia found what he could not find in the present:
plausible evidence of grand jury independence. Instead of giving a realistic account of the
present-day grand jury, he described the grand jury as it once was, and then vowed not to
tamper with this "traditional" arrangement. n161 By placing the grand jury outside the
control of either the prosecutor or the courts, Justice Scalia simultaneously denied the
need for an exculpatory evidence rule and the courts' power to make one. n162 [*588]

In order to argue, credibly, that the grand jury must not be subject to judicial oversight,
Justice Scalia had to ignore the true state of the indicting grand jury. n163 Thus, in
reading Williams, one is struck by its omissions. n164

First, the Court said almost nothing about the grand jury's screening function. One
commentator noted that, "while the Supreme Court used to give lip service, at least, to the
ideal of the grand jury as the citizen's shield against oppression, the Williams majority
studiously avoided doing even that." n165 Williams, likewise, said nothing about the
prosecutor's duty to the criminal justice system. The Court that once acknowledged that a
prosecutor's "interest ... in a criminal prosecution is not that [she] shall win a case, but
that justice shall be done," n166 in Williams seemed to favor an adversarial model more
appropriate to civil litigation. Thus Williams supports an ethics professor's observation
that some "students express shock and skepticism at the notion that a prosecutor's job is
to "do justice,' because the only place they hear that message is in their professional
responsibility classes." n167 They did not hear it in Williams. [*589]

Williams also said nothing about the problem of prosecutorial control of the grand jury.
In reality, "the sweeping powers of the grand jury are exercised by the prosecutor alone,"
because "the grand jury must ... rely on the prosecutor's leadership." n168 Accepting this
truism would have undermined the Court's argument that the prosecutor has no duty to
present exculpatory evidence unless the grand jury requests it. In fact, grand jurors cannot
know what to ask for; their "failure to consider" exculpatory evidence is indistinguishable from the prosecutor's failure to present it.

The Court likewise said nothing about the rarity of trials, with their accompanying procedural safeguards, in the modern criminal justice system. To the Supreme Court, tainted grand jury indictments "are not perceived as resulting in a miscarriage of justice since the indictee is still "entitled [at trial] to a strict observance of all the rules designed to bring about a fair verdict."" n169 Yet in many cases this "entitlement" proves worthless. A trial is unlikely, because "the law, in its even-handed majesty, permits the innocent as well as the guilty to plead guilty" n170 - and provides powerful incentives to do so.

Miscarriages of justice become more likely as the restraints on prosecutorial overreaching, another issue the Williams decision ignored, are weakened. Those who have observed the criminal justice system are concerned that "the enormous range of discretion held by prosecuting authorities in the United States allows them to use the law for political and other improper ends," n171 .

and that "the absence of any effective limits on prosecutorial discretion in filing charges permits the prosecutor to enhance the government's plea-bargaining position by charging the defendant with more serious crimes than the ... facts of a particular case warrant." n172 After Williams, prosecutorial discretion is virtually absolute.

Finally, Williams said nothing about the ethical dimensions of the exculpatory evidence question. The Court failed to concede that the question implicates the prosecutor's duty to tell the whole truth. n173 [*590] Instead, the Court compared the exculpatory evidence debate to the "technical" question of whether prosecutors can introduce otherwise inadmissible evidence before grand juries. n174 The Court's reliance on such cases as Costello is misplaced. Costello's notion of a grand jury system "in which laymen conduct their inquiries unfettered by technical rules" n175 seems to have little relevance to the question of whether a prosecutor should tell the whole story as she knows it. The relaxation of evidentiary procedure is justified by the desire to give the grand jury as much factual information as possible. This aim is understandable in light of the Court's desire to enhance the truth-finding function of the criminal justice system, which it has given as the reason for decisions narrowing the scope of the fourth amendment exclusionary rule. n176 Requiring that exculpatory evidence be disclosed is consistent with this desire to let the truth come out. n177

Commentators who have written about Williams have focused on its diminution of grand jury independence. To date, four student notes have analyzed Williams. One concluded that "if the Fifth Amendment right to a grand jury indictment is to provide any protection to an accused, it must, at a minimum, ensure that the grand jury is prepared to make an informed and impartial determination of probable cause." n178 The second observed that "the added discretion given to the prosecution [by Williams] may lead to ... grand juries that, because they are less informed, are less accurate in determining probable cause." n179 The third declared that "if the judiciary does not defend the grand jury's functional
as well as its formal independence, [*591] ... nothing will." n180 And the fourth argued that, in Williams, "Scalia has handed the grand jury over to the prosector." n181

These are all correct conclusions, but they do not go far enough. They seem to suppose that the Court, had it only understood the effects of its holding, would have chosen a "fairer" result. In fact, Williams's omissions reflect the Court's decision to focus on efficiency, not fairness. n182

In Edmonson v. Leesville Concrete Co., n183 decided shortly before Williams was argued, a majority of the justices held that race-based exclusion of petit jurors violated the equal protection clause of the fourteenth amendment. n184 In dissent, Justice Scalia warned that:

The concrete costs of today's decision... are enormous. We have now added to the duties of already-submerged ... federal trial courts the obligation to assure that race is not included among the other factors ... used by private parties in exercising their peremptory challenges. That responsibility would be burden enough if it were not to be discharged through the adversary process; but of course it is.... Thus, yet another complexity is added to an increasingly Byzantine system of justice that devotes more and more of its energy to sideshows and less and less to the merits of the case.... It is a certainty that...

the amount of judges' and lawyers' time devoted to implementing today's newly discovered Law of the Land will be enormous. That time will be diverted from other matters, and the overall system of justice will ... suffer. n185

In Williams, Justice Scalia reiterated this position. But where he failed to convince a majority in Edmonson, he succeeded in Williams, instructing lower courts to avoid looking beneath the surface of a [*592] grand jury indictment because disputes over the sufficiency of evidence "consume "valuable judicial time."" n186 This instruction, contrasted with the decisions in Edmonson and Rose v. Mitchell, n187 which prohibited racial discrimination in grand jury selection, suggests that the Court is more concerned about the grand jury's appearance than its inner workings - as long as those inner workings are secret. n188

In fact, nowhere in Williams did Justice Scalia suggest that prosecutors should stop introducing exculpatory evidence. n189 Rather, Justice Scalia's opinion ensured that whatever choices prosecutors make will not be vetted by the courts. n190 Williams is, this Note suggests, an instruction to the lower courts to stop thinking about grand juries. The Court accomplished that, in part, by failing to acknowledge that there is anything to think about, thereby locating the grand jury permanently in the gray area on the margin of the courts' field of vision. n191

C. Lower Court Opinions in the Wake of Williams

Suspicions that Williams would free the grand jury from scrutiny were more than academic. Since Williams was decided, a number of judges have complained that it has
forced them to turn a blind eye to prosecutorial misconduct. Among the first courts to demonstrate this effect was the Ninth Circuit Court of Appeals. In United States v. Isgro, a bribery case, the prosecutor neglected to tell the grand jury that his chief witness against Isgro had testified, under oath at an earlier trial, that Isgro was innocent of the charges against him. The district court dismissed the indictment with prejudice, finding that the government had misled the grand jury.

The decision was appealed to the Ninth Circuit, where it was settled law that prosecutors had "no duty to present exculpatory evidence" to the grand jury. Yet, in reversing the district court's dismissal of the indictment, the court relied on Williams. Judge Dorothy Nelson, writing for a unanimous panel, "condemned the government's behavior" but "reluctantly" concluded that, after Williams, the indictment should not have been dismissed.

Likewise, in United States v. Orjuela, Judge I. Leo Glasser found that a prosecutor, having obtained an indictment of Orjuela on a drug conspiracy charge, later learned of evidence that "called into question the grand jury testimony [implicating] Mr. Orjuela." Instead of returning to the grand jury, the prosecutor proceeded to trial. Orjuela moved to dismiss. In denying his motion, Judge Glasser relied on "the Supreme Court's latest pronouncement on the judiciary's supervisory power over the grand jury - United States v. Williams - [which] sounds a death knell for Orjuela's arguments." Thus, despite finding that "the government's failure to reconvene the grand jury in this case constituted arrogance and irresponsibility of the most dangerous kind," Judge Glasser was unable to grant relief. "Regrettably ... Williams ... compels the conclusion that this court lacks power to remedy the government's apparent abuse of its power."

The process by which the Supreme Court's instructions filter down has essentially three stages. In the first, lower courts explain why the Supreme Court's ruling forces them to take a particular position. In the second, the courts take that position without any, or much, explanation. In the third, the motions are no longer brought.

A review of the case law suggests that we are rapidly moving from the second stage to the third. This portends a move from the kind of secrecy where questions about the grand jury are not answered to the kind where questions are not even asked.

II

The History of Grand Jury Secrecy

Justice cannot survive behind walls of silence.

This Part will trace the history of grand jury secrecy. It will argue that secrecy, which originally served to protect the grand jury from governmental interference, now does the reverse, protecting the government's dominion over the grand jury. Part I demonstrated
that the Supreme Court in Williams n206 freed the grand jury from judicial oversight. This Part will conclude with a look at how Williams, in conjunction with Federal Rule of Criminal Procedure 6(e), prevents many defendants from viewing grand jury transcripts. [*595]

A. Secrecy of the Grand Jury at Common Law

The Supreme Court has described the grand jury as an institution whose purposes would be totally frustrated if conducted in the open. n207 Thus federal courts have refused to allow grand jury transcripts to be released thirty years after trial; n208 have cited "leakers" for criminal contempt n209 and theft of government property; n210 and have exaggerated the effects of secrecy violations. n211 Like most predictions that "if happens, the system will collapse," these warnings are hyperbolic. As Judge Posner has observed, "California allows liberal access to grand jury transcripts, and the heavens have not fallen."n212

Although its precise origins are unclear, grand jury secrecy originally functioned as a means of securing the grand jury's independence from the state:

At the inception of the grand jury, in 1166, there was no secrecy surrounding its deliberations .... By 1368 .... le graunde inquest [as the charging body was known] .... adopted the custom of hearing witnesses in private, thereby establishing some independence ... from the Crown.

However, ... the institution of grand jury secrecy ... received its first real impetus in 1681 as a result of the Earl of Shaftesbury Trial. In that case, the King's counsel had insisted that the grand jury hear in open court .

testimonial evidence of certain treason charges that had been lodged by the Crown against the Earl .... Following the hearing, the jurors demanded and were granted the right to interview the witnesses in private chambers. Although the Crown had expected full acquiescence, .... the jurors ... declined to indict. The case was thereafter celebrated as a bulwark against the oppression and despotism of the Crown. n213 [*596]

Thus it was prosecutors, not defendants, who were kept away from the indicting grand jury. n214 "Gradually, in the late nineteenth and early twentieth centuries, there evolved greater freedom in the use of grand jury proceedings by the state ...." n215 By then, with the prosecutor inside the grand jury room, the purposes of grand jury secrecy were no longer apparent. In 1870, for example, one New York judge, n216 urging liberalization of secrecy rules, seemed to suggest that secrecy was far from absolute:
That there was never any secrecy in this country in regard to who testified before a grand jury is shown by the fact that until recent statutes were passed giving the foreman power to administer oaths, the witnesses were sworn in open court and such is the custom now in many of the States, and in some States the accused may be present at the examination of the witnesses. n217

In 1931, a federal district court, without citation to precedent, offered five justifications for grand jury secrecy. n218 The reasons were:

1) to prevent the escape of those whose indictment may be contemplated; 2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; 3) to prevent subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at the trial of those indicted by it; 4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; and 5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation. n219

Since then, the five reasons have moved, verbatim, from case to case, like a fruitcake that is passed from family to family but never cut [*597] into. n220 Often, they appeared as justifications for secrecy with little or no analysis of how, or whether, they should be applied. n221 In one case, according to Justice Brennan, "the Court, while making obeisance to "a long-established policy' of secrecy, made no showing whatever how denial of ... grand jury testimony serves any of the purposes justifying secrecy." n222 Lower courts, too, have avoided testing the reasons against unusual - or even typical - fact patterns. Even the normally inquisitive Judge Posner has stated that "the view that grand jury secrecy is very much worth preserving ... is far too well established in the federal system to be questioned by [circuit court judges]." n223 [*598]

In the thicket of caselaw surrounding the common law secrecy rules, the courts have generally hauled out all five reasons even where it was obvious that not all five applied. n224 Most significantly, a scheme based on the needs of the investigative grand jury has been applied, without modification, to the far more common indicting grand jury. Commentators agree that "the major function served by keeping law enforcement material secret ... lies in protecting the investigatory process." n225 Yet no court has "checked" the five Amazon-Procter & Gamble reasons against the reality of a grand jury proceeding at which the suspect has already been arrested and the only evidence presented is the hearsay testimony of a lone government agent. Although courts cannot be expected to create new secrecy rules in every case, they can be expected to distinguish between classes of grand jury proceedings. Part III of this Note will demonstrate that the traditional reasons do not fit the most "basic" indicting grand jury proceeding.

While the traditional reasons for grand jury secrecy may no longer apply, new ones have taken their place. As criminal prosecutions became more complex, secrecy gave the
government an opportunity to prepare prosecutions without the knowledge, or the scrutiny, of the defendant. \textit{n226} No wonder, then, that as the demands for criminal discovery increased, \textit{n227} "government lawyers ... fought with religious fervor to maintain the secrecy surrounding grand jury proceedings." \textit{n228} The tradition of secrecy provided a centuries-old retort to defense discovery requests, which were based on the Court's own pronouncement that, in the adversary system, "the need to develop all relevant facts [is] fundamental." \textit{n229} Of course, any secrecy \textit{[*599]} rule that excludes the defendant from the grand jury room necessarily excludes the public.

\textbf{B. Rule 6(e)}

Federal Rule of Criminal Procedure 6(e) codifies the common law secrecy rule, \textit{n230} Proposed by the Supreme Court and adopted by Congress in 1945, the rule requires jurors, interpreters, stenographers, operators of recording devices, attorneys for the government, and other government and court personnel who have access to grand jury proceedings to keep all matters occurring before the grand jury secret. \textit{n231} However, in a development that would seem to be incompatible with a secrecy regime, Rule 6 has been modified so often that "it has now become one of the most complex ... federal rules." \textit{n232} Many of the added exceptions have been made at the government's request, and accrue to its benefit in preparing prosecutions. Thus a 1985 amendment allows prosecutors to disclose to "such government personnel ... as are deemed necessary by an attorney for the government to assist an attorney for the government." \textit{n233} Another amendment, in 1977, redefined "attorney for the government" so as to "facilitate an increasing need, on the part of government attorneys, to make use of outside expertise in complex litigation." \textit{n234} As the rulemakers themselves noted, "the trend seems to be in the direction of allowing disclosure to government personnel who assist attorneys for the government." \textit{n235} \textit{[*600]}

To be sure, the courts have not always accepted arguments in favor of easy government access to grand jury transcripts, \textit{n236} and the rise of criminal discovery in the modern era has brought some concessions to defendants. Yet "this development has been far less extensive than the parallel development of civil discovery." \textit{n237} In particular, as Professor Anthony Amsterdam has noted:

\begin{quote}
A special shibboleth of secrecy has traditionally surrounded grand jury proceedings and made courts reluctant to disclose grand jury records. There has .
\end{quote}

been some erosion of this protectionistic attitude, "consonant with the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of justice." ... Nevertheless, ... pretrial discovery of the grand jury transcript remains difficult to obtain. \textit{n238}

Indeed, compared to the exceptions that benefit the prosecution, those that assist defendants are scarce. Brady v. Maryland, \textit{n239} which mandates the release to the defendant of exculpatory evidence prior to trial, results in disclosure of some grand jury material, \textit{n240} and the Jencks Act, \textit{n241} a partial retraction of the liberal discovery rule
announced in Jencks v. United States, gives defendants the right to read the grand jury testimony of government witnesses after they testify at trial. Together, these provisions fall far short of allowing defendants a general right of access to grand jury transcripts.

Prior to trial, defendants determined to obtain grand jury transcripts must rely on Rule 6(e)(3)(C)(ii), which permits disclosure to a defendant "upon a showing that grounds may exist for a motion to [§601] dismiss the indictment because of matters occurring before the grand jury." Thus defense attorneys may be able to obtain transcripts by moving to quash:

Fringe benefits of the motions to quash or dismiss should also not be ignored: ... whether granted or denied, they may occasion some inquiry into the proceedings before the grand jury (perhaps even serving as the basis for a defense request to examine all or portions of the grand jury transcript), knowledge of which may enable counsel to gain some measure of informal discovery of the prosecution's case.

Given the reality that a "review of grand jury minutes is rarely permitted without specific factual allegations of government misconduct," this method is circuitous. The defendant must generally move to quash on the basis of irregularities he hopes will be apparent from a transcript he has never seen. At the very least, however, motions to quash bring the judge into the loop. As the government noted in its Williams reply brief:

When a defendant moves to dismiss his indictment on the ground that the prosecutor had in his possession but did not present "substantial" exculpatory evidence, the court generally comes to that motion cold, without any background as to the details of the offenses charged. The court must familiarize itself with the documents and witnesses the grand jury considered.

Thus, the motion to quash has functioned as a route to judicial review of grand jury procedure. Under Williams, such review will rarely be required.

C. The Effect of Williams on Rule 6(e)(3)(c)(ii)

In Williams, the Supreme Court limited the judicial supervisory power over grand jury procedure to the enforcement of the "few, clear rules which were carefully drafted by [the] Court and by Congress to ensure the integrity of the grand jury's function." These rules pertain to secrecy and such related "housekeeping" matters as the duties of the court reporter, not to the quantity or quality of evidence presented. In fact, the difference between the rules Williams says the courts can enforce and the ones it says they cannot is that the former rarely require knowledge of the case. Judges no longer have the power to make decisions that require them to evaluate the prosecution's presentation to the grand jury, since none of the "few, clear rules" pertain to evidentiary matters.
In short, Williams' "few, clear rules" formulation means few allegations of prosecutorial misconduct are cognizable by the courts. Thus Williams has dramatically reduced the range of situations in which Rule 6(e)(3)(C)(ii) can be used by defendants to obtain grand jury transcripts.

United States v. Puglia, n249 a recent Seventh Circuit case, illustrates the nexus between Williams and the secrecy of the grand jury. In Puglia, the defendant moved to quash an indictment based on evidence that had already been ruled inadmissible on fourth amendment grounds at a prior proceeding. n250 Citing Williams, the district court refused not only to quash the indictment but even to review the grand jury transcript. On appeal, the defendant argued that the failure to review the transcript was an abuse of discretion. The Seventh Circuit, also relying on Williams, disagreed. The court concluded that the defendant had not alleged a violation of one of "the few, clear rules established by Congress" n251 and, further, that "Williams indicates that the court does not have the power to dismiss an indictment based on Fourth Amendment violations." n252 Thus, according to the court, "the grand jury's alleged use of previously-suppressed evidence does not create a requirement that the court conduct an in camera review pursuant to Rule 6(e)(3)(C)(ii)." n253

Puglia is not the only opinion to apply Williams in this way. n254 In United States v. Turner, n255 the court issued this taut syllogism:

Defendant moves to inspect grand jury minutes. Defendant contends that he is entitled to this information because the government failed to present exculpatory evidence to the grand jury.... The government has no obligation to present exculpatory evidence to the grand jury, United States v. Williams, and therefore the purported basis for requesting the grand jury minutes is insufficient .... The motion to inspect grand jury minutes will be denied. n256

The Williams decision discourages scrutiny of the grand jury in two related ways: first, by discouraging judges from evaluating the performance of prosecutors before the grand jury; and second, by restricting the ability of defendants under Rule 6(e) to obtain transcripts of grand jury proceedings.

III

The First Amendment Right of Access to Pretrial Criminal Proceedings

Without publicity, all other checks are insufficient; in comparison of publicity, all other checks are of small account. n257.

The same Court that has kept the public, the press, and even district judges from observing the grand jury at work has championed the public's "right of access" to nearly every other phase of the criminal justice system. In little more than a decade, the Court
has established and strengthened the right of access to both trials and to pretrial proceedings. So far, however, the right has had no effect on the grand [*604] jury, the functioning of which, the Court has stated, would be totally frustrated if conducted in the open. n258

In fact, it is the investigative grand jury that would, in many cases, have difficulty functioning in public. The indicting grand jury, which is meant to protect the innocent accused, might benefit from public access. Yet inviting the public to observe the indicting grand jury could lead to calls for time-consuming procedural safeguards. In terms of efficiency, it makes sense to lump the indicting grand jury together with the investigative grand jury and conduct both in secret. The Court can maintain the secrecy of the indicting grand jury, however, only as long as it can continue to treat the grand jury as a black box - unknowable, unwatchable, and outside courts' control - in other words, as it described the grand jury in Williams. n259

This Part will briefly examine the first amendment right of access to pretrial proceedings. It will then apply the test created by the Court in Press-Enterprise Co. v. Superior Court (Press-Enterprise II), n260 as clarified by commentators and several recent circuit court opinions, to the indicting grand jury as it actually functions after Williams. It will assume that the only witness is a government agent who is prepared to offer three minutes of testimony on matters about which she has no firsthand knowledge. In short, it will perform the type of analysis that no court will perform as long as the historic fact of a bold, independent institution is allowed to overshadow the reality of the post-Williams grand jury.

A. The Supreme Court's Public Access Jurisprudence

Although the defendant's right to a public trial is guaranteed by the sixth amendment, n261 the public's corresponding right to observe that trial was not established until 1980. n262 In Richmond Newspapers, [*605] Inc. v. Virginia, n263 the Court voided a state court's order banning the press and the public from a murder trial on the defendant's motion. The plurality n264 found a right of public access in the "amalgam of the First Amendment guarantees of speech and press" and the right of assembly. n265 Two years later, in Globe Newspaper Co. v. Superior Court, n266 the Court held that a Massachusetts rule barring the media from sex offense trials involving underage victims violated the first amendment. The Court relied on its own history of eschewing any ""narrow, literal conception"" of the first amendment. n267 Beginning the work of turning Richmond Newspaper's pronouncements into a workable test, the Court adopted a strict scrutiny standard for determining when a court may close a trial. n268 Only if the court finds that denial of access "is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest," n269 can a proceeding be conducted in camera.

A test began to take shape in Press-Enterprise I, n270 in which the Court added jury voir dire to the list of presumptively open proceedings. In its analysis, the Court relied on two factors cited in Globe Newspaper - the historical tradition of openness and the functional value of openness to the.
proceeding. Two years later, in Press-Enterprise II, the Court transformed these factors into a formal test for determining which proceedings should be open to the public. Under this test, a court is to consider whether a tradition of openness surrounds the "place and process" in question and whether public access would have a salutary effect on the proceeding. If a class of proceedings passes the "tradition" and "function" prongs, a court may close a particular proceeding in that class only if the government's interests in closure satisfy a strict scrutiny standard. Applying this test, the circuit courts have held plea hearings and pretrial detention hearings to be presumptively open.

The limitations of the Press-Enterprise II test, however, quickly became apparent: The "tradition" prong, though born as a "helpful principle" in Justice Brennan's Richmond Newspapers concurrence, had proved surprisingly unhelpful. It was both substantively irrelevant - "the connecting link between a claim of access and the first amendment's core purpose [was] not furnished by the coincidence of traditional openness" - and procedurally confusing. Commentators debated its importance: Was it a separate and equal prong, which could make or break the case for public access? Was it a one-way ratchet, which could strengthen, but not weaken, the presumption in favor of access? Or was it merely a chance for courts to fill pages with compelling but inconclusive historic exegesis? As one commentator observed:

One drawback of Chief Justice Burger's millennium-long history of the open trial [in Richmond Newspapers] is that it is an exercise that one could not repeat for any other aspect of the modern criminal justice system. Most, if not all, modern judicial practices, such as the suppression hearing and the search warrant affidavit, came into existence relatively recently. As long as the Court knew where it was going - and so far, Supreme Court public access jurisprudence has been a one-way street - the answer to those questions did not matter. A tradition of complete, or even substantial, openness would guarantee continued access; the Court was not about to weaken an established first amendment right. Ambiguous history could be handled in one of two ways. First, the Court could reframe the question, so as to push conflicting accounts out of the picture. Thus, in Globe Newspaper, the question of whether, historically, trials concerning the sexual molestation of minors have been open was reformulated in terms that guaranteed that the Court would reach the function prong: have trials traditionally been open? Second, the Court could simply ignore evidence of closure, as Justice Stevens accused it of doing in Press-Enterprise II itself.

Even a history of closure could not lead to a presumption against access. For one thing, the stated rationale for the tradition prong was that a history of openness implies that openness is beneficial; by contrast, a history of closure says nothing about the benefits of public access. For another, many processes are too new, or have changed too much over the years, either in their structure or in their relationship to other stages of the criminal justice system, to lead to any sure conclusion. In particular, "reliance on
historical analysis to preclude recognition of a right of access to pretrial proceedings is inappropriate in light of the significant increase in the relative importance of pretrial proceedings to the criminal justice process during the past two centuries." n283 The limitations of the tradition test - which Justice Stevens noted in his Press-Enterprise II dissent n284 - leave courts no choice but to overlook an absence of conclusive history n285 or to discard the prong altogether. n286 The Third Circuit followed the latter approach in United States v. Simone, n287 holding that post-trial hearings to investigate allegations of jury tampering must be open to the public. The Simone court looked at the history of such proceedings; conceded that, in many cases, such proceedings have been held in camera; and then decided that history would not be a factor in its decision. n288 The few courts that have gone to the other extreme - denying access on the basis of history alone n289 - have both misunderstood the purpose of the "tradition" prong and ignored the Court's instruction to eschew a ""narrow, literal conception" of the first amendment. n290

The "function" prong was also problematic. Perhaps because it had long focused on the defendant's sixth amendment right to a public trial, n291 the Court seemed ill-prepared to articulate the purpose of the public's first amendment right of access. Access, the Court explained, was important as a way of educating the public about the criminal justice process; n292 as a means of providing a public catharsis; n293 and as a way of enhancing the fairness of the system. n294 If there were disadvantages to openness, they were never mentioned, much less factored into the equation. Instead, any cognizable functional value seemed to trump all other considerations. As Justice Stevens argued in his Press-Enterprise II dissent, "if the Court's historical evidence proves too little, the "value of openness" ... proves too much, for this measure [*609] would open to public scrutiny far more than preliminary hearings." n295 One commentator went so far as to assert that the "prong serves no purpose because every conceivable judicial process ... can satisfy its broad requirements." n296

The Court, in other words, had failed to include limiting language. Thus, commentators have taken the function test to extreme lengths, concluding, for example, that the Press-Enterprise II rule mandates making the names of sex crimes victims public. n297 Courts, too, have had to do little more than find any benefit to public access to declare a proceeding presumptively open. n298 Thus one district judge held that mug shots must be made public because defendants' appearance at the time of ... booking may well be of interest in examinations of how ... government works, essentially, whether the operations of this part of the judicial process are as fair, as open, and as reasonably conducted ... as any other part that has already been thrown open to public scrutiny. n299

In another recent case, n300 a highly regarded circuit court judge argued in dissent that, under the function prong of the public access cases, criminal defense attorneys should be permitted to obtain the names of drunk driving defendants in order to send them direct mail solicitations. Judge Ruggiero Aldisert wrote that, because the lawyers' solicitations
could help arrestees obtain legal counsel and serve an educational purpose "[by informing] members of the public of their rights in traffic court proceedings," the requested access "not only ... provides significant value ... but ... goes to the very heart of our judicial system." n301 [*610]

Despite these inherent weaknesses in the Press-Enterprise II test, some federal courts have tried to apply the Supreme Court's instructions faithfully. n302 To the Third Circuit, this has meant resolving all doubts in favor of public access. In United States v. Simone, n303 the court was asked to decide whether the first amendment right of access applies to post-trial hearings to determine whether jurors had been tainted by improper communications with third parties. After deciding that the Press-Enterprise II test applied to post-trial, as well as pretrial, proceedings, n304 the court turned to the tradition prong. The court was unable to "find cases dating before 1980 in support of either openness or closure for this type of post-trial proceeding," n305 although it acknowledged that most post-1980 hearings of this type had been held in camera. n306 However, the court did not allow this history of closed proceedings to decide the case. Instead, it noted that none of the post-1980 cases addresses the propriety of holding such hearings in camera. The cases simply mention ... that the hearings were held in camera. Second, being of such recent vintage they do not establish a tradition of closure. [Third, g]iven the overwhelming historical support [*611] for access in other phases of the criminal process, we are reluctant to presume that the opposite rule applies in this case .... n307

The court observed that the tradition prong provides little guidance in this case.... As such, this case is similar to United States v. Criden ... in which this court, because it did not believe that historical analysis was relevant to the determination whether the First Amendment right of access applied to pretrial criminal proceedings, focused on "the current role of the first amendment and the societal interests in open pretrial criminal proceedings." n308

Consequently, the court decided to "rely primarily" on the function prong of the test. n309

Turning to the function prong, the court reduced the Richmond Newspapers opinions to a list of six advantages of public access:

[1] promotion of informed discussion of governmental affairs by providing the public with a more complete understanding of the judicial system; [2] promotion of the public perception of fairness which can be achieved only by permitting full public view of the proceedings; [3] providing a significant community therapeutic value as an outlet for community concern, hostility and emotion; [4] serving as a check on corrupt practices by
exposing the judicial process to public scrutiny; [5] enhancement of the performance of all involved; and [6] discouragement of perjury. n310

The court acknowledged the district judge's grave concerns that "the presence of the press will be coercive and will interfere with the expressions of candor of the jurors" n311 on matters that, the court conceded, "pose a substantial threat to the fairness of the criminal proceeding." n312.

Nonetheless, in the space of a single paragraph, it satisfied the function prong by determining that "access to these proceedings will in general have a positive effect" n313 and "as a general rule, it would be beneficial for the public to have access to [such] post-trial hearings." n314

In particular, public access to such proceedings helps provide the public with the assurance that the system is fair to all concerned. Furthermore, ... opening the judicial process to public scrutiny [*612] discourages [corrupt] practices and assures the public of the integrity of the participants in the system. Finally, public access to such proceedings will in many cases discourage perjury. Members of the public who might be able to contradict ... perjured testimony ... will not be able to learn of the perjury unless the public and press are given access to these proceedings. n315

That is as specific as the court got before announcing that "the First Amendment right of access applies" to this class of proceedings. n316 Only after announcing this holding did the court examine the lower court's objections to public access, in an effort to determine whether this particular hearing should have been held in camera. Here, the circuit court showed little deference to the trial judge's concerns: "While the trial court in this case alluded to a number of factors that it felt militated in favor of closure[,] ... the district court's findings do not meet the test set out in Press-Enterprise I, under which it must clearly articulate the overriding interest that it feels is jeopardized by the presence of the public and the press ...." n317

Finally, the court examined the government's contention that the release of transcripts ten days after the hearing was "adequate to cure any unjustified restrictions on the right of access." n318 Here, the court concluded that "the ten day interval between the hearing and the release of the transcript had very little effect on the value of [the] information as news" n319 but found that "this argument ... "minimizes ... the value of "openness" itself, a value which is threatened whenever immediate access to ongoing proceedings is denied, whatever provision is made for public disclosure.' ... [A] transcript is not the equivalent of presence at a proceeding ...." n320 To hold otherwise "would [be to] undermine one of the essential aspects of [public] access." n321 [*613]

It is difficult to imagine a more pro-access opinion than Simone, in which the court overlooked both history and a number of factors that, in the district court's view, "militated in favor of closure," n322 Compare this approach to the treatment given grand juries, which are covered by a blanket rule of secrecy that makes no distinction between year-long investigations and three-minute presentations of the prosecution's case. In both
situations, the public is barred absolutely. Can one help believing that the trial and its
accoutrements (including post-trial hearings) have become a kind of impeccably detailed
public performance, while much of the real work of the criminal justice system is
performed in secret?

In fact, while grand jury proceedings vastly outnumber hearings to investigate jury
tampering, there is no case like Simone for the grand jury. No circuit court has suggested
that Rule 6(e) violates the first amendment. n323 After all, the Supreme Court's views on
the matter are well known. n324 In Press-Enterprise II, in which the Court held that the
preliminary hearing as conducted in California must be open to the public, it was careful
to point out that ""the proper functioning [*614] of our grand jury system depends upon ... secrecy."" n325
Even those Justices who did not concede that the California preliminary hearing is
"functionally identical to the traditional grand jury," n326 as Justice Stevens noted in his
dissent, must have seen some similarities between the two types of proceedings. It is true
that the preliminary hearing, as practiced in California, is an adversarial proceeding. As
such it is more trial-like than the grand jury proceeding, and thus easier to bring under the
"public trial" rubric. On the other hand, there are ways in which the grand jury
proceeding, precisely because it lacks the procedural safeguards present at the
preliminary hearing, is a stronger candidate for public access.

B. Applying the Press-Enterprise II Test to the Indicting GrandJury

A correct application of the Press-Enterprise II test to the indicting grand jury would treat
history as enlightening but not decisive. n327 As shown in Part II, the post-Williams
grand jury bears little resemblance to its common-law forbears, either in its own character
n328 or in its relationship to other criminal proceedings. In fact, there is little historical
precedent for the modern, prosecutor-dominated indicting grand jury. In addition, in
some jurisdictions, openness has been tried, with encouraging results. n329

As for the function prong, a correct application would weigh both the advantages and
disadvantages of public access. n330 To remain faithful to the Supreme Court's mandate,
however, a court must maintain [*615] "the presumption of openness" n331 that tilts the
scales in favor of the first amendment right.

1. The Advantages of Public Access

In the majority and dissenting opinions in Press-Enterprise II, n332 in earlier public
access opinions (particularly its Richmond Newspapers n333 opinions), and in other first
amendment cases, the Supreme Court has indicated which goals of public access it deems
most important. This Section transforms those goals into a series of questions that can be
used to gauge the positive effects of public access on a class of proceedings:

a. Is It About "What the Government Is Up To"? Courts and commentators agree that ""a
major purpose of [the First] Amendment was to protect the free discussion of
The right of access is meant to "ensure that this ... "discussion of governmental affairs' is an informed one." The indicting grand jury proceeding focuses on a presentation of the government's case against a putative defendant. Thus, public access to the indicting grand jury proceeding would provide an opportunity to observe choices the government has made and methods it has used in bringing citizens to justice.

b. Is It a Criminal Proceeding? Although the Court has noted that civil, as well as criminal, trials have historically been open, access to criminal proceedings - steps in a process through which the state seeks to deprive citizens of their freedom - is of greater import to the public. The grand jury is one of only two constitutionally mandated criminal proceedings. [*616]

c. Is It Likely To Be Final? Under a plea-bargaining system, "[a] grand jury indictment is ... likely to be the "final step' in a criminal proceeding and the ... sole occasion' for public scrutiny." Moreover, after Williams, which narrows the possible grounds for subsequent dismissal, a grand jury indictment is more likely than ever to be the final "airing" of a case.

d. Does It Involve Live Testimony? Courts have long acknowledged the value of openness in ensuring the reliability of live testimony. "Open examination of witnesses viva voce, in the presence of all mankind, is much more conducive to the clearing up of truth, than [is] the private and secret examination ... where a witness may frequently depose [that which he would] be ashamed to testify in a public ... tribunal." Courts have noted that the presence of the public may discourage witnesses from specific acts of perjury and generally encourage them to "perform" more conscientiously than they would in private. Finally, the courts have noted that unknown witnesses may be induced to come forward if the existence of the proceeding is made public.

e. Is There an Absence of Other Procedural Safeguards? Public access can act as a check when other procedural safeguards are missing. At indicting grand jury proceedings, virtually none of the procedural safeguards associated with criminal trials, including the right to counsel, the rules of evidence, and the exclusionary rule, are present. Likewise, neither judges nor defense attorneys are present at grand jury proceedings.

f. Is There Potential for Abuse?

"Openness leads to a better-informed citizenry and tends to deter government officials from abusing the powers of government." In the grand jury context, the potential for prosecutorial abuse is well-established. Prosecutors, unchecked by a skilled legal opponent, judge, or public opinion, can too easily smear a citizen's good name with a wrongful indictment.
g. Is It Purposeful and Decisive? Deliberative and investigative proceedings are not strong candidates for public access. As the Supreme Court noted in Branzburg v. Hayes: n345 "Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations." The problem with this list is that it confuses grand jury hearings with grand jury deliberations. The latter, like the Supreme Court's conferences but not its oral arguments, must remain closed. The grand jury hearing, at which the case for an indictment may be made in a matter of minutes, is not a "conference" but a purposeful and decisive proceeding. n346

h. Is the Same Information Likely To Become Public in Less Desirable Ways? Prosecutors routinely leak one-sided accounts of grand jury proceedings, securing political advantage for the government but depriving the public of the benefits of knowing everything that happened. As Judge Morris Lasker has noted: "Leaks of pending indictments have become so commonplace as to make a mockery of the secrecy provisions of the grand jury." n347 In one case, there was evidence that "the government persistently leaked information about grand jury proceedings to the press ... both to induce the cooperation of potential witnesses and to supplant state prosecutorial efforts in a bureaucratic turf fight." n348 [*618]

i. Will Access To This Proceeding Educate the Public? Where "ignorance of the law is no excuse," n349 society has a moral obligation to educate the public about the types of behavior that deserve condemnation. The grand jury hearing is the paradigmatic proceeding at which such societal standards are effectuated. Since the prosecutor's role before the indicting grand jury is to convince a panel of lay jurors to indict, such proceedings are already comprehensible to the public.

j. Will Access Have Therapeutic Value for the Community? Seeing justice done has "significant community therapeutic value.... No community catharsis can occur if justice is "done in a corner [or] in any covert manner." n350 The grand jury proceeding, in which the public decides whether a particular act warrants criminal charges, is a prime opportunity for catharsis. The swiftness of the proceeding and the direct participation of members of the public strengthen this cathartic effect.

In addition to these factors, the indicting grand jury may well be an institution that would benefit from the introduction of an extra-legal perspective. Implicit in the Court's pronouncements on the value of public access to particular proceedings is the idea that the presence of non-lawyers can have a salutory effect on those proceedings.
It is difficult to reconcile the presumption of this benefit with the fact that the public is invited to observe criminal proceedings in silence. The adversarial system is assumed sufficient to vindicate procedural rights; when it does not, the public has no standing to complain.

And yet the notion that judicial personnel perform their jobs differently in public is not a new one. In considering the effects of televising trials, Justice Harlan acknowledged that "the public-trial guarantee embodies a view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings." n351 [*619]

What has rarely been discussed is the nature of the effect public access will have on the performance of judicial personnel. In what way will they act "more responsibly"? The public, as lawyers often forget, is largely unfamiliar with "the law." n352 The public can, however, make ethical judgments. n353 Consequently, permitting public access may not ensure compliance with the law, but could increase compliance with broad ethical standards. This distinction is often overlooked, as when scholars describe the role of the public in monitoring enforcement of "the law." n354

In choosing how open to be, a system implicitly decides to what degree it should be guided by the public's extra-legal perspective. In a closed judicial system - one administered entirely by legally trained personnel, in secret - the public's ethical judgments are likely to have little impact. By contrast, in a relatively open system, judicial personnel may make concessions to the public's views. Consequently, an official, such as a prosecutor, who works within a highly codified system and under public scrutiny must mediate between these two conflicting worldviews, risking both the sanctions of the legal system and the disapproval of the public. This interplay between law and ethics is a natural - and desirable - feature of an open system. As Professor Roscoe Pound has argued: "Law cannot depart far from ethical custom nor lag far behind it. For law does not enforce itself. Its machinery must be set in motion ... and guided by . PAGE 28 69 N.Y.U.L. Rev. 563, *619

individual human beings [rather than by] abstract ... legal precepts." n355 Permitting the indicting grand jury to operate in secret, and thus preventing the public from judging how the grand jury is being used, severs this natural tie. [*620]

2. The Disadvantages of Public Access

In the case of a grand jury proceeding at which a government agent makes a summary presentation, and the grand jurors themselves are little more than spectators, none of the five Amazon-Procter & Gamble reasons poses a strong argument for closure. n356

a. Preventing the Defendant's Flight. Most defendants are interrogated and arrested, and thus have ample opportunity to flee, before they are indicted. As for defendants who are
in custody, "no amount of argument about generalities can make concerns for flight, bribery or intimidation anything other than preposterous when the defendant is an indigent ... jailed in default of bail." n357

b. Importuning of Jurors. As many commentators have noted, importuning has never been sufficient grounds for hiding petit jurors from the public. n358 Moreover, the grand jury, like the petit jury, retires to deliberate in secret. As the Seventh Circuit Court of Appeals has held, disclosure of the results "the Government derived from its own investigation and then presented to the grand jury ... cannot be said to discourage the grand jurors from engaging in uninhibited investigation, full discussion and conscientious voting." n359

c. Protecting Witnesses from Importuning. Commentators have long wondered why grand jury witnesses need protections that trial witnesses do not. n360 In the case of government agents, who work closely with prosecutors, tampering is unlikely to go unnoticed or unpunished. Moreover, as the Supreme Court itself has recently noted:

If the accused is of a mind to suborn potential witnesses against him, he will have an additional opportunity to learn of the existence of such witnesses.... But ... [the law] provides substantial criminal penalties for both perjury and tampering with witnesses, ... and its [*621] courts have subpoena and contempt powers available to bring recalcitrant witnesses to the stand. n361

d. Encouraging Frankness. Most grand jury witnesses are government agents who do not need encouragement to testify against grand jury targets. Moreover, given both the legal and illegal means by which grand jury testimony is regularly disclosed, n362 it seems unlikely that the promise of secrecy would make much of a difference to the reluctant witness the rule is said to protect. n363

e. Protecting the Unindicted. Seeing that "persons who are accused but exonerated by the grand jury will not be held up to public ridicule" n364 is the only one of the five Procter & Gamble reasons that can be said to benefit the grand jury target. Yet using secrecy to protect this right is inconsistent with the line of cases in which the Supreme Court has held that, "absent exceptional circumstances, reputational interests alone cannot justify the proscription of truthful speech." n365 That a defendant may be acquitted at the end of a lengthy and embarrassing trial has never been reason enough to close a trial. In addition, as long as information relating to arrests and arraign [*622] ments is freely available to the press, it is hard to see why the grand jury proceeding alone requires closure. n366

Under Costello and now Williams, indicting grand juries have become audiences for summary government presentations. n367 As this Section has shown, the traditional justifications for secrecy do not apply to such proceedings. n368 Unless the government were to develop convincing new arguments for closure, the rule of secrecy would have to yield to the first amendment right of access.
Conclusion

In all but the most exceptional cases, the process by which criminals are indicted is devoid of procedural safeguards, including most of the safeguards the public associates with the criminal justice system. Efforts to strengthen the indicting grand jury, including rules requiring disclosure of exculpatory evidence, have foundered. The case for fairness has proved less compelling than the case for efficiency in an era of burgeoning federal caseloads.

The Supreme Court has allowed this situation to persist - by describing the grand jury as something it is not; by keeping the public, the press, and defendants out of the grand jury room; and, most recently, by requiring federal judges to turn a blind eye to prosecutorial misconduct. The Court has never, in a majority opinion, described the routine work of the indicting grand jury. Nor has it conceded that, in the vast majority of cases, the grand jury is merely a prosecutorial rubber stamp. Instead, it has clung tenaciously to an image of the [*623] grand jury as a noble and independent body, perhaps to avoid acknowledging that which it will not, or cannot, change.

In preferring efficiency to fairness, the Court has struck a balance that is dependent on the invisibility of the grand jury. And that invisibility is, in turn, dependent on a secrecy rule that has yet to meet the first amendment right of access.

Nothing in this Note suggests that the investigative grand jury should be stripped of the secrecy that permits it to function. But the indicting grand jury proceeding, which often consists of little more than a recitation of charges by a government witness, is another matter. A fair application of the Press-Enterprise II test to the routine indicting grand jury proceeding would lead to openness, which could lead to calls for reform.

The efficiency-fairness balance that the Supreme Court reached in Williams - a balance secrecy has helped sustain - may not survive the public's gaze. But that possibility is an argument for, not against, public access.

FOOTNOTES:

n1. The sixth amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial ...." U.S. Const. amend. VI.


n5. The fifth amendment provides 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." U.S. Const. amend. V. This Note applies, except by implication, only to the federal grand jury. From 1980-89, federal grand juries returned 209,587 indictments against 336,796 defendants. Reply Brief for the United States at 7, United States v. Williams, 112 S. Ct. 1735 (1992) (No. 90-1972) [hereinafter United States Reply Brief, Williams]. Further, its arguments regarding public access apply only to the indicting grand jury. For a discussion of the severability of indicting and investigative grand juries, see Part I.A infra.


n7. See Part I infra.

n8. See Part II infra.

n9. See Abraham S. Goldstein, Jury Secrecy and The Media: The Problem of Postverdict Interviews, 1993 U. Ill. L. Rev. 295, 296 (noting that in recent years "newspapers and radio programs have quoted jurors extensively, jurors have appeared singly or in groups on television, and some have written articles and even books about their experiences"). By contrast, "in many jurisdictions efforts of the media to learn about secret grand jury proceedings have long been punishable by contempt." Id. at 308.


n11. Fed. R. Crim. P. 6(e)(2) provides, in pertinent part: "A grand juror ... shall not disclose matters occurring before the grand jury ...."

In 1993, federal grand jurors investigating the mismanagement of a nuclear weapons factory in Rocky Flats, Colorado became incensed when the government settled the case, sealing the grand jury's findings and indictments. The grand jurors called a press conference on the courthouse steps and demanded that President Clinton publicize their findings. In response, the Justice Department threatened all 23 grand jurors with arrest and incarceration if they disclosed their findings. See Jonathan Turley, Who Controls Justice, Citizens or Government?, Houston Chron., Oct. 11, 1993, at A17. Professor Turley observed: "The modern grand jury is expected to vote with all of the independence and free will of a potted plant.... You can imagine the surprise, therefore, when the Rocky Flats grand jurors decided to act like a real grand jury.... Now they themselves are targets of an FBI investigation." Id.; see also In re Grand Jury...
Proceedings, Special Grand Jury 89-2 (Rocky Flats Grand Jury), 813 F. Supp. 1451, 1455 (D. Colo. 1992) ("A breach of a grand juror's [secrecy] oath threatens to undermine the effectiveness and purpose of the grand jury and can be neither countenanced nor rewarded.").

n12. About 90% of federal criminal cases are disposed of before trial. United States Department of Justice, Sourcebook of Criminal Justice Statistics - 1993, at 520 tbl. 5.43 (Kathleen Maguire & Timothy J. Flanagan eds., 1994) [hereinafter Dep't of Justice Sourcebook]. Most cases begin with grand jury indictments.

n13. In their detailed description of the functioning of New York's criminal courts, Professors Mike McConville and Chester Mirsky describe the treatment of a man accused of selling a small quantity of cocaine. The suspect intends to plead not guilty, but a series of events, set in motion by the indictment, weakens his resolve. According to McConville and Mirsky, once an indictment was filed, the court would treat the allegations in the indictment as true. "And it is this understanding," rather than actual events, "that would ultimately control the method of case disposition." Mike McConville & Chester Mirsky, Teaching People to Plead Guilty: A Social Disciplinary Model of Criminal Justice 33 (Dec. 1993) (unpublished manuscript, on file with the New York University Law Review). Grand jury secrecy, to the extent it gives grand jury indictments a cloak of respectability they would lack if the public saw the government's cursory presentations, is consistent with the "social disciplinary model" of criminal justice. See also Susan P. Koniak, When Courts Refuse to Frame the Law and Others Frame It to Their Will, 66 S. Cal. L. Rev. 1075, 1106 (1993) ("In recent years, the Supreme Court has shown little interest in bolstering institutions like the grand jury that are designed to check the government's ability to transform force into law.").

n14. See Part II.A infra.


n17. Id. at 9 (quoting Press-Enterprise Co. v. Superior Court (Press-Enterprise I), 464 U.S. 501, 508 (1984)).

n18. Grand juries operate free of most procedural safeguards. For example, the double jeopardy rule does not bind the grand jury. See Ex Parte United States, 287 U.S. 241, 250-51 (1932); United States v. Thompson, 251 U.S. 407, 413-15 (1920). Similarly, the Court has suggested that grand jury witnesses - even when targets of the grand jury's investigation - do not enjoy the right to counsel. See United States v. Mandujano, 425 U.S. 564, 566-67, 581 (1976) (plurality opinion). Further, the Court has suggested that an


n20. Indeed, in his dissent, Justice Stevens wrote:

The Court's ... reasoning applies to the traditionally secret grand jury with as much force as it applies to California preliminary hearings. A grand jury indictment is just as likely to be the "final step" in a criminal proceeding and the "sole occasion" for public scrutiny as is a preliminary hearing. Moreover, many critics of the grand jury maintain that the grand jury protects the accused less well than does a legally knowledgeable judge who personally presides over a preliminary hearing. Finally, closure of grand juries denies an outlet for community rage. When the Court's explanatory veneer is stripped away, what emerges is the reality that the California preliminary hearing is functionally identical to the traditional grand jury.

Id. at 26 (Stevens, J., dissenting) (emphasis added) (citations omitted).


n22. See Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218 (1979) ("We consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings.").

n23. For a discussion of the severability of indicting and investigative grand juries, see Part I.A infra.

n24. Samuel Dash, The Indicting Grand Jury: A Critical Stage?, 10 Am. Crim. L. Rev. 807, 809 (1972). Dash goes on to note that, "on close examination these traditional arguments [for grand jury secrecy], when applied to the indicting grand jury, are at best as substantial as gossimer [sic]." Id. at 819 (emphasis added); see also Marvin E. Frankel & Gary P. Naftalis, The Grand Jury: An Institution on Trial 143 (1977) (arguing that grand jury secrecy is premised on problems presented in investigations into organized crime and political corruption).

n25. See, e.g., Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) (noting that it is important to "preserve both the appearance and reality of fairness" and that the former "generates the feeling, so important to a popular government, that justice has been done" (quoting Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring))). As Professor Peter Arenella has noted:

One can take American criminal procedure's protection of fair process norms at face value as an ethical prerequisite of a just legal system that places some substantive and procedural restraints on the state's exercise of power. Or, one can explain this legitimation function from an instrumentalist perspective. To perform its dispute-
resolution function effectively, American criminal procedure must provide a mechanism that settles the conflict in a manner that induces community respect for the fairness of its processes as well as the reliability of its outcomes. From this instrumentalist perspective, the most important consideration is how the process appears to the community. Given this definition of legitimation, criminal procedure need not in fact consistently respect these fair process norms, but it must create the appearance of doing so.


The Court's need to satisfy the public that justice has been done is closely related to its "educative function." "In a nation where, as Lincoln observed, "public sentiment is everything," the importance of [the relationship between judicial interpretation and public opinion] is difficult to exaggerate." Christopher L. Eisgruber, Is The Supreme Court an Educative Institution?, 67 N.Y.U. L. Rev. 961, 965 (1992) (quoting Created Equal?: The Complete Lincoln-Douglas Debates of 1858, at 128 (Paul M. Angle ed., 1958)); see also note 177 infra.

n26. Professor Arenella has described a similar triad:

First, criminal procedure must provide a process that vindicates substantive criminal law goals. This procedural mechanism must determine ... guilt reliably, authoritatively, and in a manner that promotes the criminal law's sentencing objectives. Second, criminal procedure must provide a dispute resolution mechanism that allocates scarce resources efficiently .... Finally, criminal procedure can perform a legitimation function by resolving state-citizen disputes in a manner that commands the community's respect for the fairness of its processes as well as the reliability of its outcomes.

Arenella, supra note 25, at 188 (emphasis added).

Some commentators have described the Court as balancing two competing interests. As Herbert L. Packer noted in a celebrated essay:

The kind of criminal process that we have is profoundly effected by a series of competing value choices which, consciously or unconsciously, serve to resolve tensions that arise in the system. These values represent polar extremes .... The choice, basically, is between what I have termed the Crime Control and the Due Process models. The Crime Control model sees the efficient, expeditious and reliable screening and disposition of persons suspected of crime as the central value to be served by the criminal process. The Due Process model sees that function as limited by and subordinate to the maintenance of the identity and autonomy of the individual.

Whitebread accepted Packer's model when he wrote, "it is now clear that the crime control model of the criminal process commands a majority of the present Court." Charles H. Whitebread, The Burger Court's Counter-Revolution in Criminal Procedure: The Recent Criminal Decisions of the United States Supreme Court, 24 Washburn L.J. 471, 471 (1985).

Professors McConville and Mirsky believe that Packer has articulated "essentially two means of accomplishing the same end, i.e., the reliable identification of the perpetrator of a criminal act." McConville & Mirsky, supra note 13, at 64 n.4. By contrast, they see the criminal justice system in urban centers as following a "social disciplinary model" in which the guilty plea "is a carrier of messages, ... about the status of the accused, the authority of the 'policing system,' ... and the nature of the judicial system." Id. at 6 (citations omitted).

n27. For example, in Rose v. Mitchell, 443 U.S. 545, 551-57 (1979), the Court held that racial discrimination in the selection of a grand jury foreman was sufficient grounds to dismiss a murder indictment. The Court explained that "selection of members of a grand jury because they are of one race and not another destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process." Id. at 555-56 (emphasis added). The Court noted, "we do not deny that there are costs associated with this [decision]." Id. at 557. But, it stated, "we believe such costs as do exist are outweighed by the strong policy the Court consistently has recognized of combating racial discrimination in the administration of justice." Id. at 558. The contrast between this decision and United States v. Williams, 112 S. Ct. 1735 (1992), is striking. See text accompanying notes 186-88 infra.

n28. See Administrative Office of the United States Courts, Court Administration Bulletin, Sept. 1994, at 16 (noting that Congress has enacted 202 laws in the last twenty years that have increased the courts' workload); Committee on Long Range Planning, Judicial Conference of the United States, Proposed Long Range Plan for the Federal Courts 85 (1995) ("The judicial branch will have to do more with less.... Justice is expensive ....").

n29. See, e.g., Federalization of State Crimes Opposed, Third Branch, July 1992, at 7 (newsletter of the federal courts reporting that the Judicial Conference has taken a stand against the "pronounced trend of federalizing traditional state crimes"); see also Anthony Lewis, Where Is Janet Reno?, N.Y. Times, Nov. 22, 1993, at A11 ("One [bill] ... turns into Federal offenses all state crimes involving a gun that has crossed state lines. There are about 600,000 such crimes every year in this country, and that is only one of many federalizing provisions [before Congress].").

n30. See, e.g., Daniel J. Freed, Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers, 101 Yale L.J. 1681, 1687 (1992) (noting that for trial judges, "charged with the daily administration of the criminal law," a "sense of justice is essential to ... participation in [the system]").
Professor Harold Berman has identified three roles of the legal system as described by Coke, Selden, and Hale. "It was their understanding . . . that law . . . has both a moral character (its purpose is to do legal justice) and a political character (its purpose is to maintain legal order), but it also has an historical character (its purpose is to preserve and develop the legal traditions of the people whose law it is)." Harold J. Berman, The Origins of Historical Jurisprudence: Coke, Selden, Hale, 103 Yale L.J. 1651, 1731 (1994). This author suggests that the "characters" identified by Professor Berman correspond, respectively, to the primary roles of the district, circuit, and Supreme courts.

n31. The Court has recognized that due process does not require an indictment by grand jury. See Hurtado v. California, 110 U.S. 516 (1884) (holding grand jury requirement does not apply to states). Indeed, starting with Michigan in 1859, nearly two-thirds of the states have provided for alternatives to grand.

Jury indictments, generally preliminary hearings conducted in public. See Press-Enterprise Co. v. Superior Court (Press-Enterprise II), 478 U.S. 1, 24 n.6 (1986) (Stevens, J., dissenting). In states that provide for both methods, prosecutors may choose between them. "For the prosecution, the advantage of a grand jury proceeding is that it is almost always easier to get an indictment that way than to satisfy a judge that there is probable cause .... [Moreover, a] grand jury proceeding is ... secret and closed to the defense, unlike a preliminary hearing." B. Drummond Ayres Jr., A Grim O.J. Simpson Pleads "Not Guilty" in Two Murders, N.Y. Times, June 21, 1994, at A1, B8.

Resolutions calling for amendments to eliminate the federal grand jury have attracted little congressional support. See Peter Arenella, Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication, 78 Mich. L. Rev. 463, 537 n.376 (1980). If the Court had hopes of influencing Congress to eliminate the grand jury, it would need to concede the ineffectiveness of that institution in its present form. However, such an admission could backfire, leading to reform efforts rather than abolition.

n32. See Part I.A infra.

n33. Interview with an Assistant United States Attorney (Dec. 15, 1993).

n34. Arenella, supra note 31, at 484.

n35. As one report noted:

[The consequence of our] inability to provide trials [is] a fundamental failure to satisfy popular conceptions of justice .... Americans have always regarded trials as the way to resolve criminal cases. Basic constitutional values - the presumption of innocence, ... the state's obligation to prove an accused's guilt beyond a reasonable doubt - ... are lost when the capacity to try cases is lost.
The same report recognized that the loss of trials means a loss of public oversight of the criminal justice system:

Trials put official behavior on public display; professionalism is reinforced and sloppy, dishonest or abusive conduct is exposed for correction. When it is extremely unlikely that a hearing or trial will ever examine the propriety of their conduct or the truthfulness of what they say, police officers inevitably become less concerned with how they make their arrests, conduct searches and treat defendants. Likewise, since the young prosecutors and defense lawyers ... are almost never required to prove their facts, they are encouraged to be lax about learning them in the first place.


n37. See, e.g., Arenella, supra note 31. Arenella devotes more than 100 pages to proposed reforms, including the repudiation of Costello v. United States, 350 U.S. 359 (1956), and United States v. Calandra, 414 U.S. 338 (1974). See Arenella, supra note 31, at 558-59 (discussing Costello); id. at 570-71 (discussing Calandra).

n38. See generally Arenella, supra note 31, at 539-75.

n39. See, e.g., Louis D. Brandeis, Other People's Money and How Bankers Use It 62 (1933) ("Sunlight is said to be the best of disinfectants ....").

n40. See text accompanying note 219 infra.

n41. M. Frankel & G. Naftalis, supra note 24, at 125.


n43. 112 S. Ct. 1735 (1992).

n44. Id. at 1737.

n45. See text accompanying notes 178-81 infra.

n46. After instructing courts not to use their supervisory powers to monitor grand juries, Williams reassures federal judges that they may still enforce the ""few, clear rules which were carefully drafted and approved by [the Supreme] Court and by Congress to ensure the integrity of the grand jury's functions." Williams, 112 S. Ct. at 1741 (quoting United
States v. Mechanik, 475 U.S. 66, 74 (1986) (O'Connor, J., concurring in judgment)). Those rules pertain almost exclusively to grand jury secrecy, a "coincidence" the Court could not have failed to notice.

n47. This is how the Ninth Circuit Court of Appeals has interpreted Williams. See United States v. Isgro, 974 F.2d 1091, 1096 (9th Cir. 1992) ("Williams clearly rejects the idea that there exists a right to ... "fair' or "objective' grand jury deliberations."). cert. denied, 113 S. Ct. 1581 (1993); see also text accompanying notes 193-97 infra.

n48. See text accompanying notes 156-59 infra.

n49. Williams, 112 S. Ct. at 1742.


n51. See Part II.B infra.

n52. See text accompanying notes 230-31 infra.

n53. 448 U.S. 555 (1980).


n55. Interview with an Assistant United States Attorney (Dec. 15, 1993). According to this A.U.S.A., the 15 indictees were drug carriers - "mules." In each case, the A.U.S.A. asked a federal agent: "Did you examine after he got off the plane? Did you find drugs in ?" Affirmative answers to those questions were the only evidence presented.


n57. 350 U.S. 359 (1956).


n60. 121 U.S. 1 (1887).

n61. Id. at 10-11 (citation omitted).


n63. Most notably the Earl of Shaftesbury in 1861. See text accompanying note 213 infra.

n64. Y. Kamisar et al., supra note 62, at 690.


n66. In the infamous prosecution of John Peter Zenger for seditious libel, grand juries twice refused to indict, bringing prestige to the colonial grand jury. Y. Kamisar et al., supra note 62, at 690.

n67. As the Court wrote in Hale v. Henkel, 201 U.S. 43, 59 (1906):

Under the ancient English system, criminal prosecutions were instituted at the suit of private prosecutors, to which the King lent his name in the interest of the public peace .... In such cases the usual practice was to prepare the proposed indictment and lay it before the grand jury for their consideration. There was much propriety in this, as the most valuable function of the grand jury was not only to examine into the commission of crimes, but to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will.

n68. See U.S. Const. amend. V. Having achieved fame as a bulwark against oppression, the requirement of indictment by grand jury was adopted by the founders "without controversy." Y. Kamisar et al., supra note 62, at 690.

n69. Ex Parte Bain, 121 U.S. 1, 12 (1887) (citation omitted).

n70. The Supreme Court of California has described this duality as "institutional schizophrenia." Hawkins v. Superior Court, 586 P.2d 916, 920 (Cal. 1978).

n71. These early grand juries possessed the power to issue reports even in cases in which no formal indictment was requested. Such powers have survived in many jurisdictions. See generally Barry J. Stern, Revealing Misconduct by Public Officials Through Grand Jury Reports, 136 U. Pa. L. Rev. 73 (1987).

n72. Younger, supra note 6, at 38 (citation omitted); see also note 31 supra.
n73. Younger, supra note 6, at 37.

n74. Id. at 26.

n75. Id. at 40 (quoting Charge to Grand Jury, 30 F. Cas. 980, 980 (C.C.D.W.V. 1868) (No. 18,248)) (alterations in original).

n76. See 1 S. Beale & W. Bryson, supra note 54, 1:07, at 1-36 ("In large federal districts ... there is usually one grand jury impanelled to perform the routine screening or indicting function, while another investigative grand jury hears cases requiring lengthy and complex investigations.").

n77. See Dash, supra note 24, at 809-10 (describing "very real" distinction between investigative and indicting grand juries).

n78. See Arenella, supra note 31, at 570-71 (calling on Congress to pass rule "precluding the same grand jury from performing both functions"). Arenella believes such a separation is not only possible but desirable: "We simply cannot expect the same grand jurors who have spent months ferreting out criminal activity to suddenly shift roles and exercise their protective function." Id. (emphasis added); see also Dash, supra note 24, at 828 (arguing that defendants should be represented by counsel before indicting grand jury).

n79. See, e.g., Bank of Nova Scotia v. United States, 487 U.S. 250, 252 (1988) ("In 1982, after a 20-month investigation conducted before two successive grand juries, eight defendants ... were indicted on 27 counts.").

n80. Branzburg v. Hayes, 408 U.S. 665, 688 (1972) (quoting Blair v. United States, 250 U.S. 273, 282 (1919)). It would have been beyond the capability of the Court to concede that the prosecutor wields so much power. To see how startling such an admission would be, substitute "prosecutor" for "grand jury" in the Branzburg-Blair quotation.


n82. Id. at 424 (emphasis added).


A.B.A. J. 153, 155 (1965). Even when the grand jurors do not actually investigate, their presence may aid the prosecution in several ways. First, the prosecutor can utilize the grand jury's broad subpoena powers; second, the prosecutor may obtain testimony that will be useful at trial, see United States v. Garner, 571 F.2d 1141, 1143-44 (5th Cir.), cert. denied, 439 U.S. 936 (1978) (holding grand jury testimony may be admissible at trial under Federal Rule of Evidence 804(b)(5)); and, third, by using the grand jury as a sounding board, the prosecutor can discover the strengths and weaknesses of her case.
n84. Wood v. Georgia, 370 U.S. 375, 390 (1962) (footnote omitted). It is not likely that
the same statement would pass the straight-face test in 1995, except as a description of
how things ought to be. In that posture, it most recently turned up in the Williams dissent.

1982). In Supreme Court opinions, this fact is acknowledged only in dissents. See, e.g.,
United States v. Mara, 410 U.S. 19, 23 (1973) (Douglas, J. dissenting) ("It is ... common
knowledge that the grand jury, having been conceived as a bulwark between the citizen
and the Government, is now a tool of the Executive.").

n86. ""The grand jury is the total captive of the prosecutor who, if he is candid, will
concede that he can indict anybody, at any time, for almost anything, before any grand
jury."" Hawkins v. Superior Court, 586 P.2d 916, 919-20 (Cal. 1978) (quoting William J.
Campbell, Eliminate the Grand Jury, 64 J. Crim. L. & Criminology 174, 174 (1973)). In
Hawkins, Judge Mosk declared that, given the alternative of a preliminary hearing, a
grand jury indictment was itself a denial of equal protection under the California
constitution.

n87. Under Costello v. United States, 350 U.S. 359 (1956), the prosecutor need only call
government agents.

n88. See Ann Woolner, D.A. Speeds Indictments to Close Atlanta Backlog, N.J. L.J.,
Sept. 27, 1990, at 5 (describing state grand jury that issued "one indictment every two to
three minutes"); see also text accompanying note 55 supra.

n89. This Note, and even the most radical reformers, believe that this process should
remain secret.

n90. Thomas P. Sullivan & Robert D. Nachman, If It Ain't Broke, Don't Fix It: Why the
Grand Jury's Accusatory Function Should Not Be Changed, 75 J. Crim. L. &
Office, Fiscal Year 1984).

n91. See John R. Wing & Jacqueline C. Wolff, Defense Input into Grand Jury

n92. Grand Jury Reform: Hearings on H.R. 94 Before the Subcomm. on Immigration,
Citizenship and International Law of House Comm. on the Judiciary, 95th Cong., 1st


n94. Lee Hamel, Grand Jury Is No Check on Prosecutors, Legal Times, June 22, 1992, at
32.


n99. See text accompanying note 75 supra.

n100. 350 U.S. 359 (1956).

n101. Id. at 362. The Court made short work of the history of the grand jury, stating that: There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor.... [The grand jury] acquired an independence in England free from control by the Crown or judges.... As late as 1927 an English historian could say that English grand juries were still free to act on their own knowledge if they pleased to do so. Id. (citing 1 William Holdsworth, A History of English Law 323 (1927)). The Court failed to note that Britain eliminated the grand jury in 1933. See Nathan T. Elliff, Notes on the Abolition of the English Grand Jury, 29 J. Crim. L. & Criminology 3, 20-21 (1938).


n103. Under the Jencks Act, 18 U.S.C. 3500 (1988), the grand jury testimony of prosecution witnesses must be made available after they testify at trial. See text accompanying notes 241-43 infra.

n104. 350 U.S. at 361.

n105. Judge Jack B. Weinstein offered perhaps the best critique of the Costello holding: The practice ... of relying on hearsay rather than upon the testimony of eye-witnesses is pernicious for two reasons. First, it habituates the grand jury to rely upon "evidence" which appears smooth, well integrated and consistent in all respects. Particularly because neither cross-examinations nor defense witnesses are available to them, grand jurors do not hear cases with the rough edges that result from the often halting, inconsistent and incomplete testimony .
of honest observers of events. Thus, they are unable to distinguish between prosecutions
which are strong and those which are relatively weak. All cases are presented in an
equally homogenized form. A grand jury so conditioned is unable to adequately serve its
function as a screening agency. It cannot exercise its judgment in refusing to indict in
weak cases where, technically, a prima facie case may have been made out. It is,
moreover, unlikely to demand additional evidence.


n106. Costello was followed by holdings that an indictment was not invalidated by the
introduction of evidence obtained in violation of the fourth amendment, United States v.
Calandra, 414 U.S. 338 (1974), or the discovery that a key witness perjured himself
before the grand jury, Bracy v. United States, 435 U.S. 1301 (1978). In Bracy, Justice
Rehnquist approvingly quoted Justice Black's Costello opinion: "An indictment returned
by a legally constituted and unbiased grand jury, ... if valid on its face, is enough to call
for trial of the charge on the merits. The Fifth Amendment requires nothing more." Id. at
1303 (quoting Costello, 350 U.S. at 363).

n107. See United States v. Cruz, 478 F.2d 408, 412 (5th Cir.) (refusing to hear claim that
no "probative evidence, either hearsay or direct," was presented to grand jury), cert.
denied, 414 U.S. 910 (1973); Y. Kamisar et al., supra note 62, at 1008-09 (noting that
Costello is generally viewed as rejecting "no evidence" objection). But see United States
v. Romero, 585 F.2d 391, 399 (9th Cir. 1978) (recognizing "no evidence" objection), cert.

Historically, defendants received some benefit from another procedural protection: "At
common law, even the slightest technical defect might fell an indictment." United States
Mar. 14, 1995). Such "rigidity in reviewing indictments [has] largely disappeared." Id. at
*12.

n108. See Dep't of Justice Sourcebook, supra note 12, at 520 tbl. 5.43; see also United


n112. Id. at 4.

n113. Id. at 7 (internal quotation marks omitted).
Moreover, according to Langbein, "we allowed [the prosecutor] this power in large part because the criminal trial interposed the safeguard of adjudication against the danger that he might bring those resources to bear against an innocent citizen.... But the plea bargaining system has largely dissolved that safeguard." Id. at 18.

This effect is even more pronounced under mandatory sentencing and guidelines schemes, in which sentences are controlled by the terms of the indictment. See generally Lois G. Forer, A Rage to Punish (1994).

The failure to disclose exculpatory evidence also has been characterized as producing a form of prosecutorial deception analogous to the use of perjured testimony." Y. Kamisar et al., supra note 62, at 1025 (describing consensus of many courts). One court held that a prosecutor is under an "ethical obligation... to present evidence which is exculpatory of persons under investigation, since the grand jury cannot protect citizens from malicious prosecutions if it is not given information which is material to its determination." United States v. Gold, 470 F. Supp. 1336, 1353 (N.D. Ill. 1979) (citing United States v. DeMarco, 401 F. Supp. 505, 513 (C.D. Cal. 1975), aff'd, 550 F.2d 1224 (9th Cir.), cert denied, 434 U.S. 827 (1977)). Likewise, Erwin Chemerinsky, a distinguished constitutional scholar, had no difficulty concluding that, "if the criminal justice system is to be fair, especially to innocent individuals, the grand jury must evaluate all of the evidence - including exculpatory material - in deciding whether to indict." Erwin Chemerinsky, Is the Rehnquist Court Really That Conservative?: An Analysis of the 1991-92 Term, 26 Creighton L. Rev. 987, 995 (1993); see also text accompanying note 167 infra.

See text accompanying notes 84-95 supra (describing decline of indicting grand jury as shield).


n126. See United States Reply Brief, Williams, supra note 5, at 3-8.


n128. 18 U.S.C. 1014 (1988) provides criminal penalties for "knowingly making any false statement or report ... for the purpose of influencing in any way the action [of a federally insured financial institution]."

n129. Under Brady v. Maryland, 373 U.S. 83, 87 (1963), prosecutors must provide exculpatory evidence to defendants before trial. Compliance with Brady suggests that prosecutors know exculpatory evidence when they see it.

n130. Telephone Interview with James Lang, Esq., attorney for John Williams (Feb. 19, 1993).


n132. 808 F.2d 723 (10th Cir.), cert. denied, 482 U.S. 918 (1987).

n133. Id. at 728. The Page rule did not require the prosecutor to ferret out exculpatory evidence. In Williams, the evidence in question was in the prosecutor's possession at the time of the grand jury hearing. See Williams, 112 S. Ct. at 1737.

n134. Williams, 112 S. Ct. at 1737.

n135. Id. at 1738 (citations omitted).

n136. Id. at 1747 n.1 (Stevens, J., dissenting).

n137. The government was free to seek another indictment. "The Double Jeopardy Clause of the Fifth Amendment does not bar a grand jury from returning an indictment when a prior grand jury has refused to do so." Id. at 1743 (citing Ex parte United States, 287 U.S. 241, 250-51 (1932)).

n138. One circuit, in addition to the Tenth, had found that prosecutors have a duty to disclose exculpatory evidence. See United States v. Ciambrone, 601 F.2d 616, 622 (2d Cir. 1979). Three circuits had declined to adopt such a rule. See United States v. Larrazolo, 869 F.2d 1354, 1359 (9th Cir. 1989); United States v. Hawkins, 765 F.2d 1482, 1488 (11th Cir. 1985), cert. denied, 474 U.S. 1103 (1986); United States v. Adamo, 742 F.2d 927, 937 (6th Cir. 1984), cert. denied, 469 U.S. 1193 (1985).

n139. 1 S. Beale & W. Bryson, supra note 54, 6.03.

n140. However, as Justice Stevens would point out, the question of whether there was an obligation to present such evidence had not been "pressed or passed upon below"; the
government had not contested the disclosure rule before the circuit court. Thus, the dissenters argued, certiorari had been improvidently granted. See Williams, 112 S. Ct. at 1748-49 (Stevens, J., dissenting).

The majority, however, seemed eager to bypass this alleged jurisdictional defect, claiming that the government had satisfied the "pressed ... below" requirement by arguing the exculpatory evidence question five years earlier, in another Tenth Circuit case, United States v. Page, 808 F.2d 723 (10th Cir.), cert. denied, 482 U.S. 918 (1987). Justice Scalia conceded that such a jurisdictional rule would work to the benefit of the government, "the United States being the most frequent litigant in our courts." Williams, 112 S.Ct. at 1741.

n141. See Williams, 112 S. Ct. at 1744 (citing Sara S. Beale, Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts, 84 Colum. L. Rev. 1433, 1490-94, 1522 (1984)).

n142. 318 U.S. 332 (1943). In McNabb, Justice Frankfurter held that the standards of federal criminal justice "are not satisfied merely by observance of ... [constitutional] safeguards." Id. at 340. Rather, "judicial supervision of the administration of criminal justice ... implies the duty of establishing and maintaining civilized standards of procedure and evidence." Id. "McNabb ... is generally regarded as the first supervisory power decision." Beale, supra note 141, at 1435; see also Note, The Judge-Made Supervisory Power of the Federal Courts, 53 Geo. L.J. 1050, 1050 (1965).

n143. McNabb, 318 U.S. at 341.


n145. Beale, supra note 141, at 1458; see also id. at 1459 nn.177-78 (citing, e.g., United States v. Hogan, 712 F.2d 757, 761-62 (2d Cir. 1983) (finding that dismissal of indictment is warranted where prosecutor's extensive use of hearsay, inflammatory language, and false testimony interfered with grand jury's independence); United States v. Samango, 607 F.2d 877, 882 (9th Cir. 1979) (finding that dismissal of indictment is warranted where "'grand jury has been overreached or deceived in some significant way'" (quoting United States v. Thompson, 576 F.2d 784, 786 (9th Cir. 1978))); United States v. Estepa, 471 F.2d 1132, 1137 (2d Cir. 1972) (finding that dismissal of indictment is warranted where prosecutor misled grand jury with hearsay evidence)).

n146. Beale, supra note 141, at 1493. Even Beale, the standard-bearer of the supervisory power critics, notes that in employing their supervisory power the courts have had in mind "the ends of justice and good public policy," id. at 1434, and that they have used their supervisory power in connection with grand jury proceedings as a sanction against "serious government misconduct," id. at 1459. Nonetheless, she concludes that a proper understanding of the limits of the courts' supervisory powers would mean 'eliminating some restrictions on federal investigators and prosecutors" and that "this is as it should be." Id. at 1521.
n147. Id. at 1493.


n149. Id. at 1744. There is nothing inevitable about Justice Scalia's decision to "honor" the independence of the grand jury by forbidding the lower courts to make rules of grand jury fairness. He could have held that, given the traditional independence of the grand jury, courts should exercise their supervisory power only when the issue presented goes to the heart of the grand jury's role. Under such a holding, the courts would deal with "core" issues, including sufficiency of evidence, but not "housekeeping" matters, such as the number of people in the grand jury room - a reversal of the Williams formulation.

n150. "The grand jury can investigate merely on suspicion that the law is being violated .... It need not identify the offender it suspects, or even the precise nature of the offense it is investigating." Id. at 1742 (emphasis added)

(internal quotation marks and citations omitted).

n151. See id. at 1752 (Stevens, J., dissenting) ("Throughout its life, ... the grand jury is subject to the control of the court."); Brown v. United States, 359 U.S. 41, 49 (1959) ("It is the court's process which summons the witness to attend and give testimony, and it is the court which must compel a witness to testify if, after appearing, he refuses to do so."). overruled in relevant part by Harris v. United States, 382 U.S. 162, 167 (1965).

n152. The Court has repeatedly described the grand jury as "part of the judicial process" and "an arm of the court" and noted the functional connections between the court and the grand jury. See Levine v. United States, 362 U.S. 610, 617 (1960); Cobbledick v. United States, 309 U.S. 323, 327 (1940).

n153. Williams, 112 S. Ct. at 1745.

n154. Id.

n155. One commentator has argued that the federal courts, in their role as guarantors of the separation of powers, have a duty to prevent the grand jury from becoming a tool of the executive branch (i.e., the prosecutor), and that a disclosure rule "would have been a sensible way to fulfill [this] obligation." The Supreme Court, 1991 Term - Leading Cases, 106 Harv. L. Rev. 163, 196 (1992).

n156. Williams, 112 S. Ct. at 1744.

n157. Id. (quoting 4 William Blackstone, Commentaries *300 (1769)).
n158. Id. at 1744 (quoting Respublica v. Shaffer, 1 U.S. (1 Dall.) 236, 236 (1788)) (alterations in original).

n159. Id. at 1745-46 (citing United States v. Reed, 27 F. Cas. 727, 738 (C.C.N.D.N.Y. 1852) (No. 16,134)).

Scalia further stated that "motions to quash indictments based upon the sufficiency of the evidence relied upon by the grand jury were unheard of at common law in England." Id. Yet the common law grand jury functioned very differently from the modern grand jury. See text accompanying notes 213-15 infra.

n160. See, e.g., State v. Gaughran, 615 A.2d 1293, 1297 (N.J. Super. Ct. Law Div. 1992) ("The Grand Jurors could not have been expected to ask for the [exculpatory evidence]. They were skillfully misled by omission .... By withholding relevant and highly exculpatory evidence in its possession, the State treated this Grand Jury as its rubber stamp, its 'playtoy,' and clearly infringed upon [its] decision-making function." (citation omitted)).

n161. Williams, 112 S. Ct. at 1736, 1742-44.

n162. Williams does not absolve the federal courts of all responsibility for grand jury procedure. Under the "'few, clear rules'" formulation, see id. at 1741 (quoting United States v. Mechanik, 475 U.S. 66, 74 (1986) (O'Connor, J., concurring in judgment)), dismissal of an indictment would be warranted in a case where a student intern witnessed a grand jury proceeding, a prima facie violation of Federal Rule of Criminal Procedure 6(d), though not where a .

prosecutor failed to inform a grand jury that the key prosecution witness had testified in favor of the target at an earlier trial. See text accompanying notes 193-97 infra (discussing United States v. Isgro, 974 F.2d 1091 (9th Cir. 1992), cert. denied, 113 S. Ct. 1581 (1993)). Under Williams,

prosecutorial conduct in the grand jury that many would consider highly reprehensible, such as abusive or threatening interrogation of witnesses, inflammatory remarks, deceiving the grand jury, misusing the grand jury for illegitimate purposes, suppressing exculpatory evidence, presenting false evidence and violating witnesses' privileges or rights, is [now] exempt from judicial review.


n163. Cf. Renee B. Lettow, Note, Reviving Federal Grand Jury Presentments, 103 Yale L.J. 1333, 1333 (1994) ("Although grand juries had considerable independence ... their powers have dwindled. Courts have clouded the issue by periodically reasserting the grand jury's traditional powers, then suppressing them again.")
n164. The list of subjects the Court failed to discuss is not presented as a catalogue of the justices' frailties. It is an accounting. For, as Professor Anthony Amsterdam stated in his analysis of an earlier Court's fourth amendment jurisprudence: "When I discuss what the Court has not discussed, [I do not suppose] that I am gifted with insights not granted to the justices. To the contrary, I suspect that the Court's failure to discuss these issues has been altogether advertent." Anthony G. Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 352 (1974).

n165. Taylor, supra note 93, at 32.


n172. Arenella, supra note 31, at 505-06.


n174. See Williams, 112 S. Ct. at 1744.


n177. The Court's failure to mention the moral dimension of Williams is particularly troubling given the Court's role as educator. According to Professor Eisgruber, "Dean Rostow ... wrote that the "Supreme Court is, among other things, an educational body, and the Justices are inevitably teachers in a vital national seminar." In the four decades since Rostow wrote, an astonishing range of thinkers has endorsed some version of this idea." Eisgruber, supra note 25, at 962 (quoting Eugene V. Rostow, The Democratic Character of Judicial Review, 66 Harv. L. Rev. 193, 208 (1952)). Eisgruber goes on to "take[ ] seriously [the notion] ... that the Court's interpretations of American politics are somehow "inspirational,"" and that "this educative practice is fundamental to the Court's work because it enhances public support essential to the Court's other functions." Id. at 964.


n182. Efficiency was a key theme in the government's briefs:

Respondent understates the cost that his rule would impose on the administration of criminal justice....

A court cannot enforce compliance with such a duty without a detailed and burdensome inquiry into the grand jury's functions....

... The court would have to conduct a minitrial on the ... prosecutor's culpability for failing to present exculpatory material to the grand jury. Yet this Court has recognized that "any holding that would saddle a grand jury with minitrials ... would ... frustrate the public's interest in the fair and expeditious administration of the criminal laws."

United States Reply Brief, Williams, supra note 5, at 3-6 (quoting United States v. Dionisio, 410 U.S. 1, 17 (1973)); see also id. at 6 ("This delay "might be fatal to the enforcement of criminal law."" (quoting United States v. Calandra, 414 U.S. 338, 350 (1974))).

n184. U.S. Const. amend. XIV, 1.

n185. Edmonson, 500 U.S. at 644-45 (Scalia, J., dissenting) (emphasis added).

n186. Williams, 112 S. Ct. at 1746.


n189. Nor did the government, which still requires prosecutors to present exculpatory evidence according to Justice Department rules, see text accompanying note 124 supra, recommend that they no longer do so.

n190. The government made this distinction in its brief: "It is one thing to say that a particular practice is preferred; it is another to say that its omission is legal error." United States Reply Brief, Williams, supra note 5, at 4.

In Butterworth v. Smith, 494 U.S. 624 (1990), Justice Scalia revealed himself to be the most grand-jury-secrecy-minded member of the Court. The Court unanimously held unconstitutional a Florida law prohibiting a newspaper reporter from writing about information she had previously revealed to a grand jury. Id. at 628-29. But Justice Scalia wrote separately to make clear that, in his view, the decision meant that the witness could reveal previously known information, but could not reveal that she had divulged the information to the grand jury. Id. at 636 (Scalia, J., concurring).

n191. It was as if to neutralize the grand jury, to "gain mastery over it in reality, it [was] first ... necessary to subjugate it at the level of language, control its free circulation in speech, expunge it from the things that were said, and extinguish the words that rendered it too visibly present." 1 Michel Foucault, The History of Sexuality: An Introduction 17 (Robert Hurley trans., Pantheon Books 1978) (1976).


n193. 974 F.2d 1091, 1093-94 (9th Cir. 1992), cert. denied, 113 S. Ct. 1581 (1993).

n194. Id. at 1094.
Williams is a rare example of an opinion that does not just change the answer to a question but eliminates the need to ask it in the first place. Such opinions, despite the efforts of judges who would prefer to see less litigation, are rare: It is easier to give people a different answer to a question than to stop them from asking it, easier to move a line than to erase it. Any court can complicate procedure, and this Court, as it struggles to reach consensus, is no exception. See, e.g., Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786, 2796-97 (1993) (replacing Frye test - which admitted expert scientific evidence only if based on "generally accepted" scientific principles, Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923) - with a balancing test in which "general acceptance" is one of five factors). In Williams, Justice Scalia could have created a five-factor "exculpatory evidence balancing test"; instead, he mooted the entire question of disclosure. To a conservative jurist, anxious to uncomplicate - to govern complex institutions with a "few, clear rules," - this is a considerable feat. See Peter J.
Henning, Testing the Limits of Investigating and Prosecuting White Collar Crime: How Far Will the Courts Allow Prosecutors to Go?, 54 U. Pitt. L. Rev. 405, 410 (1993) (describing Williams as one of the "few instances in which the Supreme Court has ... draw[n a] bright- line rule[ ]").


n207. See Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218 (1979) ("We consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings.").

n208. See Hiss v. Department of Justice, 441 F. Supp. 69 (S.D.N.Y. 1977). Alger Hiss asserted that historic interest in his case militated in favor of disclosure. The government supported his motion, but the court held that disclosure "would be a mischievous precedent." Id. at 70-71.

n209. See, e.g., Barry v. United States, 865 F.2d 1317, 1324 n.6 (D.C. Cir. 1989).

n210. See, e.g., United States v. Jeter, 775 F.2d 670, 674-75 (6th Cir. 1985) (upholding conviction for stealing carbon copies of grand jury transcripts under federal larceny statutes).

n211. Judge Richard Posner has noted that "some people think that the federal courts make a fetish of grand jury secrecy." Illinois v. F.E. Moran, Inc., 740 F.2d 533, 539 (7th Cir. 1984).

n212. Id. at 539 (citation omitted). Judge Posner went on, however, to observe that the view that grand jury secrecy is worth preserving has been "ably defended." Id.


n214. See id.

n215. Id. (emphasis added).

n216. Given the dearth of nineteenth century federal criminal prosecutions, grand jury secrecy was then largely a matter of state law.


n219. Id. The court followed the list of reasons with a candid assessment of their purpose:

It is obvious that the basis of all but the last of these reasons for secrecy is protection of the grand jury itself, as the direct independent representative of the public as a whole, rather than of those brought before the grand jury. Of course, these latter are intended directly to share in the benefits of this rule of secrecy, but it is to be noted that none of the reasons for it are founded upon an inherent right in the individual who is being investigated to the same constitutional safeguards that are unquestionably his when he is brought to trial for a given crime. In other words, presentment or indictment for an offense are not to be confused with trial.

Id.

n220. Their first appearance in a Supreme Court opinion came in United States v. Procter & Gamble Co., 356 U.S. 677, 681 n.6 (1958) (citing United States v. Rose, 215 F.2d 617, 628-29 (3d Cir. 1954)). In Procter & Gamble, the Court denied the defendant in a civil suit access to a grand jury transcript that the plaintiff, the United States Government, was using to prepare for trial. See id. at 678. The Court held "that a much more particularized, more discrete showing of need is necessary [to convince the court to release transcript]." Id. at 683.

Although not announced as such, Justice Scalia suggested a sixth reason in his concurrence in Butterworth v. Smith, 494 U.S. 624 (1990), in which the Court struck down a state law imposing grand jury secrecy on a journalist-witness. Secrecy, according to the concurrence:

helps to assure ... that grand jurors will not be intimidated in the execution of their duties by the fear of unjustified public criticism to which they cannot respond. To allow them to respond, on the other hand - by denying that the witness in fact said what he claims to have said, or by pointing out the contradictory testimony of other witnesses - would have its own adverse effects, including the subjection of grand jurors to a degree of press attention and public prominence that might in the long run deter citizens from fearless performance of their grand jury service.

Id. at 636-37 (Scalia, J., concurring).

n221. "Courts have so completely lost sight of the reasons underlying the doctrine of grand jury secrecy that they have even refused disclosure when the prosecution itself has lifted the veil of secrecy and used the grand jury minutes to refresh ... its witnesses." Calkins, supra note 213, at 30.


n223. Illinois v. F.E Moran, Inc., 740 F.2d 533, 539 (7th Cir. 1984). Butterworth v. Smith, 494 U.S. 624 (1990), the one recent case in which the Court seemed willing to
treat the five reasons as less than absolute, involved a state secrecy law - suggesting that the Court is less concerned with secrecy where the efficiency of the federal system is not at stake. In Butterworth, the Supreme Court examined grand jury secrecy in the course of overturning a Florida statute, Fla. Stat. ch. 905.27 (1989), that has no equivalent in the federal system. Smith, a newspaper reporter, testified before a state grand jury on the alleged improprieties of government officials, and then announced his intention to write an article about the case. Under the Florida law, a witness could not disclose the content of his own grand jury testimony. This provision would have prevented Smith from disclosing information he possessed before he testified before the grand jury. Butterworth, 494 U.S. at 626-28.

The Court, after describing grand jury secrecy as "important," id. at 629 - not quite the "indispensable" or "critical" of past decisions - repeated the Amazon-Procter & Gamble reasons. Id. at 630. But then, after acknowledging that grand jury secrecy is not "'some talisman that dissolves all constitutional protections,'" id. (quoting United States v. Dionisio, 410 U.S. 1, 11 (1973)), the Court announced its intention to "balance respondent's asserted First Amendment rights against Florida's interests," id., something it had never done with the federal secrecy rules. After performing this balancing, the Court unanimously held the Florida rule unconstitutional. Id. at 636.

n224. See note 208 and accompanying text supra (discussing Hiss v. Department of Justice, 441 F. Supp. 69 (S.D.N.Y. 1977), in which the court refused to release grand jury transcripts thirty years after the trial).


n226. "Naturally, the prosecution, like many other government entities, sees enormous advantage in keeping its actions and processes secret, however antithetical such secrecy may be to the First Amendment ...." Paul S. Diamond, Federal Grand Jury Practice & Procedure 10.01 (1993).


n228. M. Frankel & G. Naftalis, supra note 24, at 81.


n230. "This rule continues the traditional practice of secrecy on the part of members of the grand jury, except when the court permits a disclosure ...." Fed. R. Crim. P. 6(e) advisory committee's note to 1944 adoption. "Rule 6(e)[,] which was not intended to create new law, remains subject to the law or traditional policies that gave it birth." In re Report and Recommendation of June 5, 1972 Grand Jury, 370 F. Supp. 1219, 1229 (D.D.C. 1974).

n232. 2 S. Beale & W. Bryson, supra note 54, 7:02, at 7-7.


n235. Id. Courts have sometimes allowed government employees to share grand jury information even when no exception to the rule applied. See, e.g., In re William H. Pflaumer & Sons, Inc., 53 F.R.D. 464, 468, 476-77 (E.D. Pa. 1971) (permitting access to grand jury records by IRS agents although language of Rule . 6(e) permitted disclosure only to "attorneys for the government").

As Professor Hughes has noted, "despite the superficially resounding reaffirmation of the secrecy principle and the restricted nature of disclosure under Rule 6(e) ... there has been a certain, stealthy relaxation of the traditional position, particularly with respect to disclosure to government attorneys and agencies." Graham Hughes, Administrative Subpoenas and the Grand Jury: Converging Streams of Criminal and Civil Compulsory Process, 47 Vand. L. Rev. 573, 652 (1994).

n236. For instance, in United States v. Sells Eng'g, Inc., 463 U.S. 418 (1983), the Court declined to interpret Rule 6(e) as allowing automatic disclosure to attorneys for the Justice Department's Civil Division. The Court argued that such disclosure would discourage witnesses from coming forward and could encourage misuse of the grand jury's investigative powers - misuse, the Court says, that would be "very difficult to detect and prove." Id. at 432. Yet the most convincing reason given by the Court is that "fundamental fairness" precludes providing the government "a virtual ex parte form of discovery, from which its ... opponents are excluded." Id. at 433-34. Thus, in turning down a government request, the Court seemed to suggest that if it allowed more disclosure on one side, it would have to allow more disclosure on the other. Seen this way, the decision is consistent with the Court's pro-government opinions.

n237. 2 A. Amsterdam, supra note 227, 265, at 191.

n238. Id. 271, at 222-23 (quoting Dennis v. United States, 384 U.S. 855, 870 (1966)) (emphasis and citations omitted).


n243. The public has no right of access to grand jury transcripts under the Freedom of Information Act, 5 U.S.C. 552 (1988), which is trumped by Rule 6(e). See 2 S. Beale & W. Bryson, supra note 54, 7:15, at 7-75.


n245. 1 A. Amsterdam, supra note 227, 172; see also 2 S. Beale & W. Bryson, supra note 54, 7:01, at 7-3 ("Defense counsel occasionally succeed in obtaining extensive discovery of the grand jury proceedings [by moving to dismiss].").


n247. United States Reply Brief, Williams, supra note 5, at 4 (emphasis added).


n249. 8 F.3d 478 (7th Cir. 1993).

n250. Id. at 479-80.

n251. Id. at 482.

n252. Id. Prior to Williams, some circuit courts would have dismissed this indictment, despite United States v. Calandra, 414 U.S. 338 (1974), on the theory that Calandra did not apply to evidence that had already been suppressed during an earlier proceeding.

According to the Seventh Circuit, Williams foreclosed that option:

The Supreme Court considered the extent to which a district court can exercise supervisory powers over the grand jury in United States v. Williams, ... [holding] that a violation of a circuit-wide judicial rule is not enough to invoke the [courts'] limited supervisory powers ... over the grand jury proceedings.... The Court noted that many constitutional protections afforded defendants in criminal proceedings have no application to grand jury proceedings because the grand jury is an accusatory, not adjudicatory, body.
Puglia, 8 F.3d at 482.

n253. Id. (citations omitted).

n254. See, e.g., United States v. Torres, No. 93 Cr. 673 (KMW), 1994 U.S. Dist. LEXIS 1554 (S.D.N.Y. Feb. 11, 1994). Defendant Tarantino, indicted on a cocaine charge, suspected that the prosecutor had "presented ... testimony that the prosecutor knew or should have known was inaccurate." Id. at *1. He requested, inter alia, "disclosure or in camera inspection of the transcript of the colloquy between the prosecutor and the grand jurors in [his] case." Id. Judge Kimba Wood reviewed the Second Circuit cases under which the defendant might challenge his indictment, including United States v. Brito, 907 F.2d 392, 394 (2d Cir. 1990) (holding that a district court "may dismiss an indictment for prosecutorial misconduct if the grand jury was misled or misinformed"). Judge Wood concluded that "obviously, the Williams decision calls into question the continuing validity of [the] Brito holding." Torres, 1994 U.S. Dist. LEXIS 1554, at *9. Unable to find one of the "few, clear rules" that the prosecutor may have violated, id. at *8, Judge Wood denied both Tarantino's motion to dismiss the indictment and, consequently, his request to review the grand jury transcript. Id. at *21.


n256. Id. at *6-*7 (citations omitted).


n258. See Press-Enterprise Co. v. Superior Court (Press Enterprise II), 478 U.S. 1, 8-9 (1986) ("It takes little imagination to recognize that there are some kinds of government operations that would be totally frustrated if conducted openly. A classic example is that "the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." (quoting Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218 (1979))).


n261. See note 1 supra.

n262. Prior to Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), the strongest argument for public access to grand jury proceedings would have rested on the sixth amendment. Given that the grand jury proceeding is the closest thing to a trial in some cases, this argument would not have been outlandish. In Waller v. Georgia, 467 U.S. 39, 46 (1984), the Supreme Court based a right of access to a pretrial suppression hearing on
the accused's sixth amendment right to a public trial. The Court noted that the "aims and interests [of a public trial] are no less pressing in a hearing to suppress wrongfully seized evidence.... In many cases, the suppression hearing [is] the only trial, because the defendants thereafter plead[ ] guilty." Id. at 46-47 (citations omitted). Moreover, the need for an open suppression hearing may be particularly strong because a "challenge to the seizure of evidence frequently attacks the conduct of police and prosecutor," subjects in which the public has a "strong interest." Id. at 47. These arguments would seem to apply as well to the indicting grand jury.

n263. 448 U.S. 555 (1980).

n264. The Court produced a total of seven opinions. The plurality opinion was written by Chief Justice Burger.

n265. Richmond Newspapers, 448 U.S. at 577 (Burger, C.J., plurality opinion)

n266. 457 U.S. 596 (1982).

n267. Id. at 604 (quoting NAACP v. Button, 371 U.S. 415, 430 (1963)).

n268. Id. at 606-07.

n269. Id.


n271. Id. at 508-10.


n273. Id. at 8.

n274. Id. at 9-10. Based on language in the Press-Enterprise II opinion, see id. at 9, some courts label these the "experience" and "logic" prongs, respectively. See, e.g., United States v. Simone, 14 F.3d 833, 837 (3d Cir. 1994).

n275. See In re Washington Post Co., 807 F.2d 383, 389 (4th Cir. 1986) (holding that, even without Press-Enterprise II test, plea hearings should be open because they fall within scope of right of access to criminal trials).

n276. Seattle Times v. United States District Court, 845 F.2d 1513, 1517 (9th Cir. 1988).


n280. See Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 603-06 (1982). By contrast, Chief Justice Burger, choosing to look at the narrower question, noted that "there is clearly a long history of exclusion of the public from trials involving sexual assaults, particularly those against minors." Id. at 614 (Burger, C.J., dissenting).

n281. "It is uncontroverted that a common-law right of access did not inhere in preliminary proceedings at the time the First Amendment was adopted, and that the Framers ... could not have intended such proceedings to remain open." Press-Enterprise Co. v. Superior Court (Press-Enterprise II), 478 U.S. 1, 22 (1986) (Stevens, J., dissenting).

n282. "Because a "tradition of accessibility implies the favorable judgment of experience,' we have considered whether the place and process have historically been open to the ... public." Id. at 8 (emphasis added) (citations omitted) (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 589 (1980) (Brennan, J., concurring in judgment)).


n284. "The Court's lengthy historical disquisition demonstrates only that in many States preliminary proceedings are generally open to the public. In other states ... such proceedings have been closed... That determination [whether to open or close] must stand or fall on whether it satisfies the second component of the Court's test." Press-Enterprise II, 478 U.S. at 23-25 (Stevens, J., dissenting).

n285. In Seattle Times v. United States District Court, 845 F.2d 1513, 1517 (9th Cir. 1988), the Ninth Circuit found a right of access despite difficulty satisfying the tradition prong.

n286. In United States v. Criden, 675 F.2d 550 (3rd Cir. 1982), the court explicitly bypassed as irrelevant the Richmond Newspapers historical analysis, announcing that "there was no counterpart at common law to the modern suppression hearing"; that "the relative importance of pretrial procedure to that of trial has grown immensely in the last two hundred years"; and that "the Supreme Court has [held] that the first amendment is to be interpreted in light of current values and conditions." Id. at 555.
n287. 14 F.3d 833 (3d Cir. 1994).

n288. Id. at 837-38.

n289. See Baltimore Sun Co. v. Goetz, 886 F.2d 60, 64 (4th Cir. 1989). Similarly, the Eleventh Circuit used tradition as the primary justification for continued secrecy of grand jury transcripts. See In re Subpoena Directed to Custodian of Records, University of Florida Athletic Program, 864 F.2d 1559, 1562 (11th Cir. 1989). For a description of the confusion among the federal courts over the proper application of the tradition prong, see Michael J. Hayes, Whatever Happened to "The Right to Know?": Access to Government-Controlled Information Since Richmond Newspapers, 73 Va. L. Rev. 1111, 1131 (1987).

n290. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604 (1982) (quoting NAACP v. Button, 371 U.S. 415, 430 (1963)). As one commentator has pointed out, it was this approach that "made the development of modern first amendment doctrine possible by freeing the Court from the historical assumption that the first amendment was limited to preventing prior restraints on speech or publication." Hayes, supra note 289, at 1131.

n291. See, e.g., In re Oliver, 333 U.S. 257, 271 (1948). As recently as 1979, the Court stated that "our cases have uniformly recognized the public-trial guarantee as one created for the benefit of the defendant." Gannett Co. v. DePasquale, 443 U.S. 368, 380 (1979) (emphasis added).

n292. See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572 (1980) (""The educative effect of public attendance is a material advantage. Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy."" (quoting 6 John H. Wigmore, Evidence 1834, at 438 (James H. Chadbourn rev. 1976))).

n293. See id. at 571 ("No community catharsis can occur if justice is "done in a corner [or] in any covert manner."" (quoting the 1677 Concessions and Agreements of West New Jersey, reprinted in Sources of Our Liberties 188 (Richard L. Perry ed. 1959))).

n294. See id. at 570 (noting "nexus between openness, fairness, and the perception of fairness").


n296. Levy, supra note 279, at 683.

function test satisfied, in part, because "knowing the victim's identity allows a reporter to interview the victim").

n298. See, e.g., Seattle Times v. United States District Court, 845 F.2d

1513, 1517 (9th Cir. 1988) (finding bail hearings satisfy function test because access would "enhance public confidence in the process and result"). One commentator properly noted that the function prong "overemphasizes the effects of access on specific processes, when what is important is its more general effect on increasing citizens' understanding of ... the workings of the government they must control." Hayes, supra note 289, at 1135.


n301. Id. at 1518 (Aldisert, J., dissenting).

n302. Other courts abandoned the "pure" form of the Press-Enterprise II test. Instead, they have chosen to weigh the advantages and disadvantages of openness, considering tradition only to the extent it illuminates that balance. See, e.g., United States v. Chagra, 701 F.2d 354, 361-64 (5th Cir. 1983) (finding right of access to bail reduction hearings must be weighed against competing governmental interests); Newman v. Graddick, 696 F.2d 796, 801-03 (11th Cir. 1983) (same for hearings on the release of convicted prisoners); United States v. Criden, 675 F.2d 550, 555-57 (3d Cir. 1982) (same for pretrial suppression, due process, and entrapment hearings); United States v. Carpentier, 526 F. Supp. 292, 294-96 (E.D.N.Y. 1981) (same for public sentencing hearings), aff'd, 689 F.2d 21 (2d Cir. 1982), cert. denied, 459 U.S. 1108 (1983). Several states, see Hayes, supra note 289, at 1126-29 (reviewing state court decisions employing balancing test), and at least one circuit, see Times Mirror Co. v. United States, 873 F.2d 1210, 1213 (9th Cir. 1989), have argued that the Court intended to create such a balancing test. Thus the Ninth Circuit found that the Supreme Court "implicitly recognized that the public has no right of access to a particular proceeding without first establishing that the benefits of opening the proceedings outweigh the costs to the public." Id. Concurring in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), Justice Brennan had argued for a balancing test. "[T]he Court's decisions must ... be understood," he wrote, "as holding only that any privilege of access to governmental information is subject to a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality." Id. at 586 (Brennan, J., concurring in judgment). The Ninth Circuit's evenly weighted test contradicts the Court's declaration that "the presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." Press-Enterprise Co. v. Superior Court (Press-Enterprise I), 464 U.S. 501, 510 (1984).
n303. 14 F.3d 833 (3d Cir. 1994).

n304. See id. at 839.

n305. Id. at 838.

n306. See id. and cases cited therein.

n307. Simone, 14 F.3d at 838 (emphasis added). This argument suggests that it makes little sense to single out one type of criminal proceeding for closure.

n308. Id. (quoting United States v. Criden, 675 F.2d 550, 555 (3rd Cir. 1982)).

n309. Id.

n310. Id. at 839.

n311. Id. at 841.

n312. Id. at 840.

n313. Id.

n314. Id.

n315. Id. at 839.

n316. Id. at 840.

n317. Id. at 841-42 (discussing test created in Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984)) (citations omitted) (emphasis added). The circuit court seemed to go out of its way to avoid considering the merits of the district court's opinion:

The trial court's concern with the "coercive" effect of the press suggests that it may have been concerned with preserving the defendant's interest [in] a fair hearing or perhaps some more generalized interest in truthfulness in these proceedings. That is, it may have felt that the jurors would be more willing to admit that improprieties took place if the press and public were not present. In either case, the court should have stated the position more clearly.

Id. at 841 (emphasis added).

n318. Id. at 842.
n319. Id.

n320. Id. (quoting In re Charlotte Observer, 882 F.2d 850, 856 (4th Cir. 1989)).

n321. Id.

n322. Id.; see also United States v. Antar, 38 F.3d 1348 (3d Cir. 1994). In Antar, the trial judge, responding to a request from the media for the names and addresses of jurors in a highly publicized criminal case, sealed the transcript of the jury voir dire until after the jury had reached a verdict. The court of appeals found that the sealing order violated the first amendment, in part because the trial court had not, prior to entering the order, made specific findings that harassing or intrusive interviews were occurring or intended. See id. at 1363. The court held: "In order to restrict the right of access, ... a court must carefully articulate specific and tangible, rather than vague and indeterminate, threats to the values which the court finds override the right of access." Id. at 1351.

n323. It is not known if a suit to invalidate Rule 6(e) has ever been brought. Newspapers and TV stations are the logical parties to bring suit to overturn the Rule as applied to the indicting grand jury. Media plaintiffs have tended, however, to sue for access to grand jury transcripts in cases involving lengthy investigations of public figures. In In re Secretary of Labor Raymond J. Donovan, 13 Media L. Rep. 1533 (D.C. Cir. 1986), the D.C. Circuit denied a request by two newspapers - the Washington Post and the New York Daily News - for materials that would reveal elements of a grand jury investigation of the alleged organized crime connections of the former Secretary of Labor. Applying the two-part Press Enterprise II test, the court noted, first, that "federal grand jury proceedings ... have historically been inaccessible to the press," id. at 1536, and, second, that secrecy is especially valuable in the case of an investigation under the Ethics in Government Act of 1978, 28 U.S.C. 591-599 (1988 & Supp. V 1993). Donovan, 13 Media L. Rep. at 1536. In such cases, secrecy may in fact be essential. The media should instead sue for the right to observe a grand jury issue routine indictments, where the advantages of secrecy are insignificant at best. See Part III.B infra.

n324. See, e.g., Globe Newspaper Co. v. Pokaski, 868 F.2d 497, 509 (1st Cir. 1989) (holding there is no right of access to records of "no bills" because grand jury proceedings have traditionally been closed and because "the Supreme Court has stated repeatedly that "the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings."" (quoting Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218 (1979))).


n326. Id. at 26 (Stevens, J., dissenting).
n327. See United States v. Simone, 14 F.3d 833, 838 (3d Cir. 1994) (emphasizing current, rather than historic, role of first amendment right of access).

n328. See text accompanying notes 213-15 supra.

n329. For instance, "California allows liberal access to grand jury transcripts, and the heavens have not fallen there yet." Illinois v. F.E. Moran, Inc., 740 F.2d 533, 539 (7th Cir. 1984) (citation omitted). The historical test yields an even more ambiguous result if one heeds the advice of the First Circuit Court of Appeals to apply the experience test by looking not at the particular practice of any one jurisdiction, but instead "to the experience in that type or kind of hearing throughout the United States." Rivera-Puig v. Garcia-Rosario, 983 F.2d 311, 323 (1st Cir. 1992). The Supreme Court endorsed this nationwide sampling approach in Elvocero de Puerto Rico v. Puerto Rico, 113 S. Ct. 2004, 2006 (1993) ("As the First Circuit Court of Appeals has correctly stated, the "experience' test of Globe Newspaper does not look to the particular practice of any one jurisdiction ...." (citing Rivera-Puig, 983 F.2d at 323)).

n330. See note 302 supra. Put another way, courts should consider the net advantages of public access.


The Court's rationale for opening the "California preliminary hearing" is that it "is often the final and most important step in the criminal proceeding"; that it provides ""the sole occasion for public observation of the criminal justice system""; that it lacks the protective presence of a jury; and that closure denies an outlet for community catharsis.

Id. at 25-26 (Stevens, J., dissenting) (quoting id. at 12-13 (quoting San Jose Mercury-News v. Municipal Court, 638 P.2d 655, 663 (Cal. 1982))).


n335. Id. at 605.

n336. Richmond Newspapers, 448 U.S. at 580 n.17.

n337. Press-Enterprise II, 478 U.S. at 26 (Stevens, J., dissenting).

Richmond Newspapers, 448 U.S. at 597 (Brennan, J., concurring in judgment) (quoting 3 W. Blackstone, supra note 157, at *373) (second alteration in original).

See text accompanying note 315 supra.

One of the "traditional" justifications for grand jury secrecy, see text accompanying note 219 supra, is that some witnesses may be unwilling to testify in public. Which is more likely - the flushing out or the deterring of witnesses - would vary according to the circumstances of a particular case. However, at a grand jury proceeding in which the only witness is a government agent, deterrence is extremely unlikely.

See notes 18, 100-07 and accompanying text supra. But see Illinois v. Abbott & Assocs., Inc., 460 U.S. 557, 566-67 n.11 (1983) ("Grand jury secrecy has traditionally been invoked to justify the limited procedural safeguards available to witnesses and persons under investigation.").

Times Mirror Co. v. United States, 873 F.2d 1210, 1213 (9th Cir. 1989).

United States v. Williams, 112 S. Ct. 1735, 1750 (1992) (Stevens, J., dissenting) (citing United States v. Serubo, 604 F.2d 807, 817 (3d Cir. 1979)).


By contrast, the investigative grand jury's work is tentative and meandering. As such, it is more akin to a deliberation than a presentation.


United States v. Friedman, 854 F.2d 535, 582 (2d Cir. 1988), cert. denied, 460 U.S. 1004 (1989). This statement calls into question the "traditional" notion that publicity will discourage testimony.


n351. Estes v. Texas, 381 U.S. 532, 588 (1964) (Harlan, J., concurring). Chief Justice Warren similarly noted that "openness of the proceedings ... may move all trial participants to perform their duties conscientiously." Id. at 583 (Warren, C.J., concurring). Earlier, the Court stated that "the knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." In re Oliver, 333 U.S. 257, 270 n.25 (1947). That Court reiterated the famous words that: "'The presence of interested spectators may keep [the] triers keenly alive to a sense of their responsibility and to the importance of their functions.'" Id. at 270 n.25 (quoting 1 Thomas M. Cooley, Constitutional Limitations 647 (8th ed. 1927)).

n352. According to Justice Brennan, even journalists cannot be counted on to understand the law. "With too rare exceptions their capacity for misunderstanding the significance of legal events and procedures, not to speak of opinions, is great. But this is neither remarkable nor peculiar to newsmen. For the law, as lawyers best know, is full of perplexities." Time Inc. v. Firestone, 424 U.S. 448, 480 (1975) (Brennan, J., dissenting) (citing Pennekamp v. Florida, 328 U.S. 331, 371-72 (1946) (Rutledge, J., concurring)).

n353. See, e.g., Duncan v. Louisiana, 391 U.S. 145, 156 (1967) (distinguishing between "common-sense judgment of a jury" and "tutored ... reaction of the ... judge").

n354. Lewis F. Powell, Jr., The Right to a Fair Trial, 51 A.B.A. J. 534, 538 (1965) ("The ultimate public concern is ... the assurance that trials are ... fair and according to law.") Thus Justice Powell distinguished between fairness and law but assumed public interest in both.


n356. See notes 219-20 and accompanying text supra.

n357. 2 A. Amsterdam, supra note 227, 269, at 200.

n358. See note 322 supra (discussing United States v. Antar, 38 F.3d 1348 (3d Cir. 1994). In some cases, courts have withheld the names of jurors from the parties. See Jose Maldonado, Anonymous Juries: What's the Legislature Waiting For?, N.Y. St. B.J., July/Aug. 1994, at 40, 40 (noting that, unlike federal and several state courts, New York does not permit impanelment of anonymous juries).

n360. See, e.g., J. Robert Brown, Jr., The Witness and Grand Jury Secrecy, 11 Am. J. Crim. L. 169, 184 (1983) (calling "disingenuous" the notion that grand jury witnesses need particular protection when a trial involves "the more important determination of guilt or innocence").


n362. See GAO Report, supra note 10. With all the candor of a documentary on toxic waste dumps, the report depicts a grand jury secrecy system gone awry. Thus in one district, "an assistant U.S. attorney said that grand jurors and assistant U.S. attorneys sometimes discussed grand jury proceedings in elevators and other public areas when newsmen were present." Id. at 20. Elsewhere, "two examples were identified in which witnesses' identities and the fact that they were going to testify before the grand jury were revealed because subpoenas were served to them at their place of employment in full view of their fellow employees." Id. "Five of the seven U.S. marshal offices visited showed that witness attendance certificates and travel voucher receipts, log books containing witness names, and subpoenas were left on desk tops during working hours and never locked up at night." Id. at 25. "In six of the seven districts reviewed, contract court reporters or their typists worked out of their homes, storing grand jury tapes, notes, and transcripts in spare rooms and garages." Id. As for disposal, "of the 11 U.S. attorney and organized crime strike force offices reviewed, 8 merely put grand jury materials - such as lists of witnesses, subpoenas with typographical errors, carbons, typewriter ribbons, and extra copies - into wastebaskets to be removed by the regular cleaning personnel." Id. at 26. The report goes on to critique the layouts of federal courthouses, noting that "optical and electronic intrusion was possible in four districts where the grand jury rooms are located along the outside wall of the building." Id. at 28.

n363. As Judge Posner has noted, "so little is kept secret nowadays that ... witnesses, jurors, or prosecutors probably have no expectations of long-term secrecy." Illinois v. F.E. Moran, Inc., 740 F.2d 533, 539 (7th Cir. 1984). Yet the law envisions a witness who would be afraid to testify before a grand jury if not for Rule 6(e)'s protections.


n365. Butterworth, 494 U.S. at 634 (citing Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 841 (1980) (holding injury to judicial reputation insufficient interest to justify conviction for publishing proceedings of state judicial review commission)).

n366. Justice Scalia's "sixth reason," protecting the grand jurors from criticism to which they cannot respond, see note 220 supra, begs the question of why grand jurors, who issue indictments, require protections that petit jurors, who convict, do not.
n367. See text accompanying notes 262-74 supra.

n368. Where the presentation to the grand jury is little more than a summary of the proposed indictment, the "sealing" of grand jury proceedings could conceivably follow the same procedures as the sealing of indictments. Under Federal Rule of Criminal Procedure 6(e)(4), "an indictment is properly sealed when the government requests that the magistrate judge seal the indictment "for any legitimate prosecutorial objective or where the public interest otherwise requires it." United States v. Sharpe, 995 F.2d 49, 52 (5th Cir.) (quoting United States v. Richard, 943 F.2d 115, 118 (1st Cir. 1991); United States v. Lakin, 875 F.2d 168, 171 (8th Cir. 1989)), cert. denied, 114 S. Ct. 234 (1993). Courts generally do not require that a contemporaneous record of the government's reasons for sealing be made. See Lakin, 875 F.2d at 171-72 (citing United States v. Srulowitz, 819 F.2d 37, 41 (2d Cir.), cert. denied, 484 U.S. 853 (1987)). Later, "if challenged, the government must explain and support the legitimacy of its reasons for sealing the indictment." Sharpe, 995 F.2d at 52. However, the "initial decision to seal the indictment is given great deference." Id. at 52. An indictment may remain sealed only for a "reasonable" length of time. United States v. Watson, 599 F.2d 1149, 1155 (2d Cir. 1979), modified sub nom. United States v. Muse, 633 F.2d 1041, 1042 (2d Cir. 1980) (en banc), cert. denied, 450 U.S. 984 (1981).