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One More Call to Respect the Time of Grand Jurors

*Ben Trachtenberg**

ABSTRACT

This Article replies briefly to the robust response that Professor Frank O. Bowman III submitted in answer to my earlier contribution to this Issue.

I. INTRODUCTION

My good friend and valued colleague Frank O. Bowman III has performed a laudable service in taking the time to respond at length to my earlier contribution to this Issue. Among other things, he provides a careful examination of the Missouri grand jury process, including the necessity of the prosecutor's signature for a valid indictment. Further, he offers the perspective of someone who, unlike me, has presented evidence to grand juries and accordingly has a different view on their strengths, weaknesses, and importance to the criminal justice system more broadly. I appreciate the effort and his willingness to engage with my arguments, which he could not "in good conscience leave . . . unanswered."¹ Recognizing the limited space remaining in this Issue, as well as the tight schedule under which the *Missouri Law Review* operates, I will reply here only to a few of Professor Bowman's arguments.

In particular, Professor Bowman relies heavily on the distinction between a "true bill" – that is, a grand jury finding of probable cause – and a valid indictment.² Without denying the technical accuracy of the distinction, I dispute whether the distinction can support all of the weight placed upon it.

In addition, Professor Bowman advances a policy argument to the effect that grand jury deliberations in sensational cases boost public confidence in the justice system and that dispensing with the ritual would create risks to public safety. Relying on recent events in Cleveland and in St. Louis itself, I dispute this empirical claim.

* Associate Professor of Law, University of Missouri School of Law. I thank the *Missouri Law Review* for providing room for this debate between Professor Bowman and me.

1. Frank O. Bowman III, *Vox Populi: Robert McCulloch, Ferguson & the Roles of Prosecutors and Grand Juries in High-Profile Cases*, 80 MO. L. REV. 1111, 1112 (2015). See also *Duty Calls*, XKCD, <https://xkcd.com/386/> (last visited Feb. 4, 2016) ("Someone is *wrong* on the Internet.").

2. See Bowman, *supra* note 1, at 1114–15.

Finally, I take a moment to clarify what I did – and what I did not – argue in my earlier Article.³

II. THE “CLEFT STICK” OF AN UNWANTED TRUE BILL

Professor Bowman devotes substantial attention to the Missouri requirement that a “true bill” be signed by the prosecutor before it becomes a valid indictment.⁴ His analysis is correct, and I do not dispute it. I do not believe, however, that the distinction invalidates my argument in the manner that Professor Bowman appears to conclude. Indeed, Professor Bowman himself illustrates the hazard inherent in allowing grand juries to deliberate after prosecutors have decided that indictments are undesirable. After writing in the main text that “Mr. McCulloch’s silence before the grand jury did not even create a heightened risk that Wilson would be formally charged” because “in the unlikely event it returned a true bill, Mr. McCulloch would decline to sign and file it,”⁵ he provides a telling footnote:

Of course, if Mr. McCulloch really was resolved not to prosecute Officer Wilson, return of a true bill would truly have put him in a cleft stick, forcing him to decide whether to take responsibility for overruling the grand jury’s opinion or to take what he presumably thought an unwinnable case to trial. But the grand jury did not return an indictment, so we will never know what he might have done.⁶

True, no undesired true bill arose in the Darren Wilson case. But McCulloch’s good fortune should not blind us to the risks of tempting fate. I am breaking no new ground in asserting that one should not needlessly expose himself to ethical temptations.⁷ It may be the case that McCulloch is a person of such probity that an unexpected true bill would literally not even have “create[d] a heightened risk” of Wilson being charged – that is, that the odds of an indictment would truly have been completely unaffected by the grand jury’s surprising decision – but we should generally craft social policies that work for flawed human beings in addition to ethical supermen.

3. For the earlier Article, see Ben Trachtenberg, *No, You “Stand Up”*: Why Prosecutors Should Stop Hiding Behind Grand Juries, 80 MO. L. REV. 1099 (2015).

4. See Bowman, *supra* note 1, at 1115 (“Unless and until an indictment approved by the grand jury is signed by the prosecutor, there is no ‘charge’ against the defendant, no ‘prosecution’ has been initiated, and the defendant has no case to answer.”).

5. *Id.* at 1121.

6. *Id.* at 1121 n.40.

7. See, e.g., *Matthew* 6:13 (“And lead us not into temptation, but deliver us from evil.”); W. SOMERSET MAUGHAM, *OF HUMAN BONDAGE* 375 (The Floating Press 2009) (1915) (“I should be false to the trust laid upon me by your dead father and mother if I allowed you to expose yourself to such temptation.”).

In short, Professor Bowman is correct that a true bill by itself presents “[a] defendant . . . no case to answer.”⁸ Similarly, a loaded handgun left on a table will expel no bullet until someone picks it up. Notwithstanding this truism about firearms, one would be wise not to leave them in places where they might tempt passersby into mischief. And a prosecutor should not, absent good cause, risk the delivery of true bills in cases where she does not wish to bring indictments.

III. PUBLIC CONFIDENCE IN PROSECUTORS AND THE PREVENTION OF RIOTS

The question then becomes whether there exists good cause for allowing grand jurors to deliberate after a prosecutor decides no indictment is desired. More precisely, the question is whether whatever benefits are associated with such deliberations outweigh the costs, which include the risks described above as well as wasting the time of the grand jurors, who would prefer to be elsewhere.⁹

Professor Bowman identifies one benefit that merits serious consideration: public safety. Considering what McCulloch might have done had he “indeed concluded that no probable cause existed” to charge Wilson with a crime, Professor Bowman suggests that McCulloch could have “withdraw[n] the matter from the grand jury’s consideration and bar[red] them from deliberating on the ground that he believed no probable cause existed.”¹⁰ He then dismisses the idea, arguing that such action “would have guaranteed a riot and immediate charges of a prosecutorial whitewash.”¹¹ In light of the events that followed McCulloch’s announcement of the grand jury’s deliberations, it is difficult to argue that the final two days of deliberations prevented civil unrest or inspired confidence in the criminal justice system.¹²

In a more recent case that has similarly captured national attention, an Ohio grand jury declined to indict anyone for the killing of Tamir Rice, a

8. Bowman, *supra* note 1, at 1115 (emphasis omitted).

9. See Trachtenberg, *supra* note 3, at 1106 & n.31 (quoting MO. REV. STAT. § 494.450 (Cum. Supp. 2013)); *St. Louis County Jury Information*, ST. LOUIS CTY., <http://stlouisco.com/YourGovernment/CountyDepartments/StLouisCountyCircuitCourt/JuryInformation/jurypay> (last visited Feb. 19, 2016) (describing low pay provided to Missouri jurors as well as threat of contempt proceedings for those who evade service).

10. Bowman, *supra* note 1, at 1121–22.

11. *Id.* at 1122.

12. To be fair to Professor Bowman, he acknowledges this fact: “As it turned out, a riot happened anyway. And Mr. McCulloch was accused of manipulating the grand jury anyway.” *Id.* For a contemporaneous report, see Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), <http://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html> (“Several police cars were burned Flights to Lambert-St. Louis International Airport were not permitted to land . . .”).

twelve-year-old boy shot dead by police in Cleveland.¹³ After presenting evidence to the grand jury, the office of Cuyahoga County Prosecutor Timothy J. McGinty told the grand jurors what it believed was the proper result. “The prosecutors . . . told grand jurors that they did not believe charges were warranted against the officers involved in Tamir’s death”¹⁴ The protests that followed the announcement of the grand jury’s decision “included several tense moments but remained peaceful.”¹⁵

The data points from Ferguson and Cleveland certainly do not prove that when a prosecutor does not desire an indictment, allowing jurors to deliberate without knowing the prosecutor’s opinion somehow *causes* civil unrest. Nonetheless, in St. Louis County, the prosecutor left things in the hands of the grand jury, and civil unrest ensued. In Cleveland, the prosecutor explicitly told the grand jury that no indictment was warranted, and peace prevailed.¹⁶ If Professor Bowman wishes to convince us that my proposed strategy – dismissing the grand jurors after the close of evidence¹⁷ – is truly dangerous, I think he owes us some evidence. In Missouri, he has got to show us.

IV. ARGUMENTS MADE AND ARGUMENTS NOT MADE

Here I will reiterate briefly just what I intended to argue in my initial Article. My primary claim is that “prosecutors should not allow grand juries to consider indicting defendants whom the prosecutors themselves do not believe should be indicted.”¹⁸ Although I also argued that “leaving the grand jury to do what it will without any prosecutorial recommendation risks the return of unfounded indictments,”¹⁹ I did not intend to suggest that superfluous grand jury deliberations, in and of themselves, constitute violations of the Rules of Professional Conduct²⁰ or any other law.²¹ As indicated above,²²

13. Cory Shaffer, *Tamir Rice Grand Jury Did Vote Whether Shooting Was Justified*, CLEVELAND (Jan. 20, 2016, 8:25 PM), http://www.cleveland.com/metro/index.ssf/2016/01/tamir_rice_grand_jury_did_vote.html.

14. *Id.*

15. Evan MacDonald, *New Year’s Eve Protest of Tamir Rice Decision Includes Tense Moments but Remains Peaceful*, CLEVELAND (Jan. 1, 2016, 1:27 AM), http://www.cleveland.com/metro/index.ssf/2016/01/new_years_eve_protest_of_tamir.html.

16. Shaffer, *supra* note 13.

17. To be precise, I suggested that McCulloch “should have thanked the grand jurors for their service, reiterated their important role in his investigation, and then sent them home, sparing them two days of needless deliberations.” Trachtenberg, *supra* note 3, at 1109.

18. *Id.* at 1103.

19. *Id.* at 1100.

20. By “Rules of Professional Conduct,” I mean the laws governing lawyers as actually enacted in state rules, not the Model Rules of Professional Conduct, which themselves have no force of law. *See, e.g.*, MO. SUP. CT. R. 4.

however, such deliberations needlessly put prosecutors at risk of significant temptation to bring unfounded charges.

Further, I limited my claim to the time period in which “a prosecutor believes no indictment is appropriate.”²³ It appears, however, that at least some readers believe that I oppose the use of investigatory grand juries by prosecutors who are unsure of whether an indictment will eventually be deemed appropriate.²⁴ I do not. In my earlier Article, I wrote,

There is no problem when a prosecutor presents evidence to a grand jury without yet knowing whether an indictment is desired. Among other reasons, it is often the grand jury process itself that informs the prosecutor of what action is appropriate. The grand jury also serves useful investigatory functions and allows prosecutors to obtain sworn testimony and thereby “lock in” the stories of various witnesses.²⁵

My claim concerns only the time after the evidence is in, in cases where a prosecutor has decided that given the evidence, no indictment should be brought.

V. CONCLUSION

Professor Bowman has added some valuable insights to the debate about what a prosecutor should do when, after presenting evidence to a grand jury, she decides that no indictment is desirable. If I were more clever, I would have asked him to read my prior Article somewhat earlier in the publication process, and I then could have incorporated greater detail about just how a true bill becomes an indictment, eliminating one of his avenues of attack in exchange for a “thank you” buried in some unread footnote. In the end, however, I remain convinced that a prosecutor disserves the public when she allows – or, to be more accurate, requires – grand jurors to continue deliberations after the prosecutor has decided she does not want to indict. Such deliberations waste the time of citizens who could more fruitfully or pleasantly spend their days elsewhere, they risk leading prosecutors into temptation

21. Accordingly, I have made no claim that Robert McCulloch (or any other prosecutor) has engaged in unethical or unlawful conduct. Professor Bowman writes that I “strongly intimate[d] that Mr. McCulloch’s approach violated standards of professional ethics.” Bowman, *supra* note 1, at 1112. That was not my intention. I meant to argue only that McCulloch’s use of the grand jury – after he himself decided that an indictment of Darren Wilson was not desirable – was bad policy that other prosecutors should not imitate.

22. See *supra* Part II.

23. Trachtenberg, *supra* note 3, at 1100.

24. One Missouri prosecutor has contacted me directly to raise this concern.

25. Trachtenberg, *supra* note 3, at 1103 n.12.

should an undesired true bill appear, and (at least as far as I am aware) they provide neither public confidence in the justice system nor protection against civil disturbances. Absent some evidence of the utility of keeping grand jurors around for superfluous deliberations, prosecutors should dispense with the empty ritual.