Has the Grand Jury Outlived its Usefulness?

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In the waning days of 2014, two grand juries—one in St. Louis County, Missouri and the other in Richmond County, New York—deliberated whether to indict police officers involved in the deaths of civilians. And, as had been the case since the fourteenth century, they deliberated in secret.

Late on the evening on November 24, St. Louis County Prosecuting Attorney Bob McCulloch announced the grand jury had reported no true bill against Officer Darren Wilson in the shooting death of Michael Brown. Ten days later, Staten Island District Attorney Dan Donovan announced no true bill had issued against Officer Daniel Panaleo in the death by asphyxiation of Eric Garner.

In the nearly two years since then, a national discussion has taken place about the role of grand juries in cases involving police and the use of deadly force. While most jurisdictions throughout the United States use grand juries in these type of cases, there is a growing concern in many quarters that grand juries no longer serve the present evolving standards of justice, accountability, and transparency.
The Hennepin County Attorney’s Office, as the state’s largest public law office, re-examined this question in the summer and fall of 2015. We spent many long hours trying to develop a hybrid grand jury system—one that preserved the values of the grand jury process, but that was more transparent, allowing the public to understand what had transpired, and made the facts presented to the grand jury more readily available for public discussion. We had tentatively scheduled a press conference to announce the plan for the Monday after Thanksgiving, a little more than a year after the Ferguson decision.

That announcement was never made. Tragically, our community was drawn deeper into this discussion with the fatal shooting of Jamar Clark on November 15, 2015. It was inappropriate to talk about changes to the grand jury system so soon after Jamar’s death.

To use or not use a grand jury in police shooting cases, resulting in death of a civilian, was a difficult decision for me. We used grand juries in Hennepin County for at least the last 40 years in police shooting cases. On one hand, is having 23 people make a factual decision better than just the prosecutor’s office? And how to balance, societies, and this prosecutor’s, demands for accountability and transparency are critical concepts for a just and healthy democracy. On the other
hand, our society, and this prosecutor, believes accountability and transparency are critical concepts for a just and healthy democracy.

Ultimately, I decided that my office would no longer submit police use-of-force cases to the grand jury. I believe the accountability and transparency limitations of a grand jury are too high a hurdle to overcome in this type of case—cases in which the very confidence of citizens in the criminal justice system are at stake. As the elected prosecutor for Hennepin County, I made the factual and legal determination, with the excellent assistance of senior attorneys in our office and the fine work of both the BCA and the FBI, that there was insufficient evidence to support a criminal charge against the police officers in the tragic death of Jamar Clark.

It is my fervent hope never to have to make this kind of decision again. But, as long as I am in office, grand juries will not be used in police use-of-force cases in Hennepin County. As I emphasized when I announced my intention not to seek a grand jury indictment, this is a decision with which each individual county attorney must grapple on his or her own based on the individual case and community needs.

Since that announcement in March, I have been repeatedly asked whether there is any place at all left for grand juries in our criminal justice system—whether, as the
title of this talk suggests, the grand jury has outlived its usefulness. In order to consider the future of the grand jury, we must first consider its past.

Grand juries have their roots in the “le grande inquest” of the fourteenth century. Twenty-four knights were selected by the sheriff and charged with beginning prosecutions; at the same time the older institution of the petit (trial) jury took on its responsibility for rendering verdicts in capital crimes. These twin institutions—the indicting grand jury and the adjudicating petit jury—persist to the present day.

Over time, grand juries became viewed as institutions “capable of being a real safeguard for the liberties” of citizens. In 1681, King Charles II sought to indict his political enemy, the Earl of Shaftesbury, for treason. Two London grand juries returned no true bill, refusing to indict an innocent man. In 1734, two grand juries empaneled in New York City refused to indict publisher John Peter Zenger, whose New-York Weekly Journal had criticized royal Governor William Cosby for violation of the rights of the people.

The Fifth Amendment, adopted in 1791 as part of the Bill of Rights, includes a grand jury clause which insures “no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.” The Founders believed the grand jury protected citizens against an arbitrary and
capricious government by protecting against “hasty, malicious, and oppressive
prosecution.”

The modern Minnesota grand jury is a creature of statute. It is made up of 23
randomly selected adults, and charged with deciding, in private, whether in any
particular case there exists probable cause to indict an individual for a crime. Rule
17.01(1) of the Minnesota Rules of Criminal Procedure requires the use of grand
juries for any crime publishable by life in prison—serious crimes like all first-
degrees are life, not just premeditated; with or without parole is the difference and
certain criminal sex 1st degrees. The use of grand juries in all other cases is up to
the discretion of each individual county attorney.

The grand jury is, at its heart, a fact finder. Evidence is presented through
witnesses questioned first by the prosecutor, then by jurors independently, as well
as through documents, images, and videos. Rules of law are presented by the
prosecutor, laying out the legal elements necessary to indict a person for a
particular crime. The grand jury seeks to answer the same question as the
prosecutor—whether probable cause exists to charge—but with 23 diverse
members of the community making the determination, rather than a single
individual.
Our republican form of government prefers systems that protect individuals from unilateral government action; that checks the consolidation of power in any one institution; and that provides an opportunity for collective decision making of a deliberative body. The grand jury seems well suited to those considerations. However, grand juries are criticized as a result of its most unique feature: secrecy.

As I mentioned earlier, grand juries have deliberated in secret since the 1300s. The shroud of secrecy provided necessary independence from the crown. A number of justifications have been articulated for secrecy of modern grand jury proceedings: preventing the escape of offenders, the destruction of evidence, and the tampering of witnesses; preserving the reputations of innocent persons whose actions are investigated by grand juries; encouraging witnesses to disclose their full knowledge of wrong doing; and preventing prejudice of the petit jury pool.

I believe the most compelling reasons for secrecy of grand jury proceedings are protecting the rights of individuals to be free from unfounded prosecutions, and protecting grand jurors. A vote to indict a popular public official for corruption, or to report no true bill against an unpopular person or group when the evidence is insufficient, should be made on the merits rather than fear of public censure and scorn.
Critics also point to the perceived close relationship between prosecutors and grand juries. In Minnesota, representatives from the county attorney’s office do present evidence of wrongdoing for consideration by grand juries. However, they are not present for either deliberations or votes. Additionally, grand jurors themselves are charged, if they “shall know or have reason to believe that a public offense has been committed which is triable in the county, the member shall declare the same to the other jurors, who shall thereupon investigate the same.”

One key point bears repeating. Grand juries, when considering whether to hand down an indictment, ask the same question we ask ourselves as prosecutors: is there sufficient evidence, under the applicable rules of law, to have probable cause to charge an individual of a crime. When our office uses the grand jury in cases not mandated by statute, we do so in the belief that the opinion of 23 randomly-selected, diverse individuals insures broad consensus that charges should be brought in the name of the people of Hennepin County, and the State of Minnesota.

It was the weighing of these different interests—of community involvement through the grand jury against the values of transparency and accountability—that led me to make the decision to suspend use of grand juries in police use-of-force cases. This is not to say my office will not use the grand jury in other permissive
cases. The institution of the grand jury—protected by the federal constitution and enshrined in our state laws—will not, and should not, be completely cast aside.

What, then, is the future of the grand jury? First, it should be noted that roughly half the states do not have grand juries at all. Those states that do are beginning to innovate on this question—particularly when it comes to exempting police use-of-force cases from grand jury jurisdiction. In New York Governor Andrew Cuomo issued an executive order naming the state attorney general as special prosecutor for police-related civilian deaths. California’s legislature exempted police fatalities from grand jury investigations in a law signed by Governor Jerry Brown. In Utah, a prosecutor wishing to seek an indictment must first persuade a panel of five district court judges that good cause exists to empanel a grand jury.

Having a special prosecutor review police use-of-force cases has drawn some attention. The devil, of course, is in the details. Who selects this person or persons? To whom do they report, and to whom are they accountable? Which law enforcement agency investigates? If the special prosecutor feels the case is a close question, will they have the option of using a grand jury?

Here in Minnesota, the legislature provides county attorneys with the discretion to decide for themselves whether or not to use a grand jury in all but the most serious
cases. I am grateful for that discretion—because it allowed me to make the choice best suited for the community I represent. Every other county attorney must be free to make the same decision, based on their understanding of the community that elected them.

I am certainly open to considering other innovations designed to improve the grand jury system, particularly as they relate to providing for protecting an ongoing grand jury presentation and allowing for greater transparency after the conclusion of an investigation. As President Barak Obama is fond of reminding us, we are constantly striving to build a more perfect union. Our criminal justice system is a reflection of our democratic values, and we should never shy away from difficult conversations about how to more fully give life to those values in our institutions. I look forward to continuing this discussion, and to finding other ways to reform and improve the criminal justice system here in Minnesota.