

**Choosing Justice:
The Implications of a Key-man System for Selecting a Grand Jury**

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Abstract:

Unlike the generally random process that is common in petit juries, grand juries have been selected by means guaranteed to produce partiality with juries being drawn from those who are part of or propertied in the criminal justice system. Recognizing the potential problems associated with a key-man approach to jury selection, we examine the process used in Harris County, Texas to select grand jurors and we attempt to identify both the types of individuals who select the grand jurors and the types of individuals chosen as jurors, specifically looking at Hispanic surnamed grand jurors.

For over two hundred years the United States has had a grand jury system in place serving as both a “sword” to vanquish the guilty and a “shield” to protect the innocent from the vagrancies of the government (Leipold 1995, p. 182). The grand jury was considered so important by the nation’s founding fathers that the Bill of Rights included an amendment guaranteeing the right of an indictment by a grand jury for all infamous or capital crimes yet its use was so accepted by the colonists that it wasn’t even considered an issue to be defended when the Federalist Papers were published in support of the proposed Constitution (Hamilton 1788). The historic role of the grand jury has been twofold. First, though not always foremost, the grand jury has been responsible for determining if probable cause exists for the trial of a given individual for the commission of a crime. The premise was that the *citizens*, not agents of the government, would have the power to censure one of their own via an indictment. Second, the grand jury has had the ability to initiate an investigation into any matter that one of their members suspected violated criminal law. These inquests became famous for addressing municipal corruption during the past one hundred plus years. From the 1871 investigation of New York City’s Tweed Ring to the 1937 Philadelphia grand jury that indicted 107 persons for various vice charges and demanded the dismissal of 41 police officers, the grand jury has served the interests of justice when the “professional” members of the justice system failed to do so (Younger 1963, pp. 182-186, 236-237).

Recognizing the power of the grand jury both to investigate and indict members of the community, controlling the selection of its members has always been crucial to those in positions of authority. From its reputed original creation in England by King Henry II to the modern utilization of the key-man system for selecting grand jurors in states such as Texas, its “hand-picked members almost always came from the settled, relatively affluent, ‘respectable’ segments of the community” (Frankel & Naftalis 1977, p. 34).

Though Massachusetts chose their grand jurors by town meetings during the colonial period, most, like the colony of Virginia, utilized the English process of having the county sheriff select the grand jurors. Along with disallowing women, slaves and the indentured from service, many of the states had property requirements that specified that candidates had to be landholders. These propertied individuals were assumed to have a stake in the established system of government and would support the goals and objectives of the Crown (Clark 1975, pp. 15-16).

As the new nation expanded westward, the grand jury system followed. Again, representatives of the constituent government selected the jurors from those deemed eligible. The selecting officials might be the clerk of court, the county supervisors or the judges of election, but whoever chose, they were part of or propertied in the political and criminal system which, historically, have been one and the same. The concept of being *propertied* in the system means to have the power to create the laws, to decide who will be defined as the law breaker, to have the ability to use the law to support one's own interests or to be able to have the law serve the interests of the "ruling class," however one may choose to define it (Adler, Mueller & Laufer 2003, pp. 190-210). Social power was retained through the political power process (Mann 1986, p. 27). Whichever criminological perspective one may accept for the origins of criminal law, the propertied are those who have the ability to influence the definition of the law. The law, for all intents and purposes, *is* their property. Some states also continued limiting those eligible for jury duty to those who were landholders - those who were propertied in the traditional sense of the word (Younger 1963, pp. 74-75).

Eventually the formal property requirement would be dropped, but the control of the selection process would not. In lieu of the sheriff, many states would select their grand jurors by the use of special individuals called jury commissioners, responsible for

identifying candidates for service on the grand and, in some cases, petit juries (Fukurai 2001, n35). These commissioners, instead of themselves necessarily being landholders, were still propertied in the sense that they were associated with, supportive of, and actually “owned” the legal and political system in their local community.

Unlike the generally random process that would become common for the selection of petit juries, and whether selected by sheriffs or commissioners, “from the earliest days...in keeping with a frank and fairly open tendency toward elitism, grand jurors were selected by means guaranteed to produce partially” (Frankel & Naftalis 1977, p. 34).

Robert and Helen Lynd, in their classic 1929 sociological study of a typical American city, quoted a weekly Democratic paper describing those selected to serve on juries by the local jury commissioners: “Juries drawn by _____ and _____ are made up almost wholly from men and women connected with the _____ [local Republican boss] outfit – precinct committeemen, deputy road superintendents, deputy assessors, school hack drivers, ditch commissioners, relatives of Judge _____, Sheriff _____, Deputy Sheriff _____ and other beneficiaries of the system.” (Lynd & Lynd 1929, p. 429).

Each of the two methods of grand jury selection, whether random or key-man, has its inherent difficulties.

Random selection

The random selection process is extremely time-consuming for the courts as all the candidates need to be individually interviewed for eligibility (Tobias, personal communication)¹. The logistics of assembly, including the management and movement of potentially hundreds of candidates also becomes an issue for court administrators. The inconvenience to the numerous potential jurors that the court must sift through to find a

small group of people capable of serving as jurors for an extended period of time is a further problem, if not for the court, then for the electorate who potentially will serve.

Key-man selection

Bruce Olson, in his preface to Edwards' 1973 edition of *The Grand Jury*, notes that the Key-man method allows for a panel of individuals to be selected who have an understanding of the local government, a grasp of the concept of due process, are motivated and able to ask pertinent questions and can work in a committee environment. It also tends to be a much more efficient process. (Tobias, personal communication).

The difficulty is that, historically, the use of the key-man system in lieu of random selection of jurors has also continued to favor those in power, disenfranchising "...the poor, the racially disfavored, the young, women, and others thought inferior." (Frankel & Naftalis 1977, p. 34). Even the Supreme Court has noted that the system is susceptible to abuse. (*Hernandez v. Texas*, 347 U.S. 479, (1954)).

Issues to be examined

All of this leads us to an enumeration of potential problems associated with a key-man approach to grand juror selection. They are:

Gateway control: the system of indictment

The individuals who select the grand jury select the law. If a district attorney, an individual judge or a small faction of the community holds the power to indict or to not indict their fellow citizens, they have the ability to control the justice system's impact on their community. Whether the Klan preventing the indictment of murdering racists during the Civil Rights movement in Mississippi in the 1960s or rebels indicting British

soldiers for murder during the Revolutionary War, control of the grand jury effectively controls justice.

Disenfranchisement and discrimination

As previously discussed, the key-man system is susceptible to abuse and has assisted in the disenfranchisement of women and minorities by historically discriminating against them in the selection process (Fukurai 2001, Hamel 1998, Coffey & Norman 1978). Progress in effectively addressing discrimination has been realized, especially since the Civil Rights movement, with numerous federal court cases attempting to address the potential discriminatory aspects of the key-man system. Yet recently there has been a public discussion regarding the loss or retrenchment of the rights achieved by various minorities in the last fifty years (Lee 2004). “The gains that have been achieved in ethics and politics are not cumulative. What has been gained can also be lost and over time surely will be” (Gray 2004, p. 3). The legal limitations imposed on affirmative action are but one example of a loss imposed externally on the community. The failure to recognize the cost of securing those rights and utilizing the benefits thereof, such as access to the polls and education, is a further loss to the minority community. In both cases, the key-man system, when abused, can reinforce the perceived lower status of a given minority group by allowing the court system to revert to the historic days of racism and discrimination (Bryant 2004).

Impact of “system-proprieted” persons

Besides the effect on gateway control and the potential for discriminatory abuse, proprieted persons, by virtue of their grand jury nominations, can have an influence on the justice system and how it is perceived.

Fewer criminal justice system actors indicted

When those who are propertied in the justice system serve as jury commissioners or jurors, the potential exists for associates of the police to fail to investigate or indict their peers. The conflict is considered so evident that numerous communities have attempted to establish civilian review boards for the investigation of police misconduct with the objective of reducing the public belief that police will whitewash any wrongdoing by officers or their agency (Bennett & Hess 2004, p. 369).

Conservative mind-set

Two opposing ideologies expressed in the justice system are the liberal perspective that explains crime as being caused or influenced by psychological, social or biological rationales and a conservative perspective that views violators as “evil persons who freely choose actions and must be held accountable for them” (Pollack 2004, p. 369).

Conservative attitudes are linked to an acceptance of punitive solutions and to a belief in individual responsibility for criminal acts (Carroll, Perkowitz, Lurgio & Weaver 1987). Certain occupations, to include law enforcement (Skolnick & Fyfe 1993, Schiengold 1984), and certain religious orientations, such as Christian fundamentalism, are also coupled with a more punitive stance and a stereotypical view of minorities and women (Leiber, Woodrick, Roudebush & Michele 1995).

A conservative perspective held by potential jurors would, obviously, carry over to public service in the courthouse. Criminal prosecutors and defense attorneys are among the first to acknowledge the premise that jurors with a more conservative orientation will be more inclined to concur with the state when presented with a criminal case. The extent of these attitudes in the justice profession was, for example, exemplified in the “Harrisburg Seven” criminal trial of Viet Nam war protesters where the defense hoped to exclude religious fundamentalists and Republican businessmen, among others, if possible. It is

also illustrated in a suggestion given by a former prosecutor to a district attorney's office supervisor to use a peremptory challenge to remove anyone who gave money to public broadcasting because they were "too much of a mushy-headed liberal to give the government's case a favorable hearing" (Leipold 1998, p. 979).

If one acknowledges the documented premise that law enforcement personnel tend to develop a sub-culture (to include the court employees with whom officers and probation personnel deal with on a daily basis) which leads to a self imposed isolation from the community they serve (Gaines & Kappeler 2003, p. 336) and that "the occupational task of police work is inherently conservative because it nearly always involves the preservation of the status quo" (LaGrange 1998, p.105) then those personal friends and associates of police, probation personnel and the courts nominated for grand jury service will possess similar beliefs and attitudes of the police and the probation personnel who nominated them. To put it simply, a cop will identify cops or people who accept a cop's world view (a view grounded in conservatism) to be on the grand jury. This, unintentionally or not, effectively denies a broad cross section of the populace from "both a right and a benefit extended by the government to its citizens" (Leipold 1998, p.179).

Damage to public image of justice

A perceived failure of the justice system allows an individual to rationalize their relinquishment of responsibility to the community and the social contract. The loss of fairness and trust can lead to a moral corruption that destroys the very fabric of society (Bok 1978). With that dismissal of responsibility to the greater good comes the first crack in what can be considered the social fabric of a society. The loss of that trust in the justice system by a minority group contributed to the race riots of the 60s (Gaines & Kappeler 2003, p.91) and militia movements in the 90s.

Historically, the courts have continually attempted to address the potential for abuse in the Key-man system through numerous decisions yet always allowing it to continue with modifications made to attend to the specific concern of a reviewed case. If, as John Gray (2004) states, that “unlike the ascending spiral of scientific progress, freedom is recurrently won and lost in an alternation that includes long periods of anarchy and tyranny, and there is no reason to suppose that this cycle will ever end” (p. 3), then one can appropriately ask if the Key-man system has regressed to its previous forms of abuse and tyranny. Does it currently limit who and who does not come under indictment in ways unacceptable to a free society? Has racial discrimination been allowed to rear its ugly head? Are the members of the justice system given undue benefits within it? Does one segment of the community have an undue influence within the system? Does the Key-man system’s existence have the potential to damage the public’s perception of a fair and equitable criminal justice system? All are critical questions in a free society and issues we shall examine below.

Method of Examination

To examine these questions, we use the case of Harris County, Texas. The methodology will be twofold. First, we describe and examine the process of selecting grand jurors. Second, we attempt to identify the types of individuals who select grand jurors and the type of individuals who are chosen as jurors.

The Grand Juror Selection Process

In Harris County, Texas, where the city of Houston is located, the district court impanels 5 grand juries every three month session for a total of 20 grand juries a year. Every year these grand jurors issue approximately 90,000 true bills of indictment (Brooks, personal communication)². To select those 20 grand juries, the district court judges appoint 60 to 100 individual jury commissioners.

Though the district court can use a process of random selection to determine its grand jurors, the method identified previously as the key-man system is preferred in Harris County, allowing for individuals appointed by a state district judge to select the prospective jurors instead (*Casadena v. Partida*, 430 U.S. 482, (1977)). Only once in the recent past has a random selection been used in Houston and, in a demonstration of inefficiency, it took days to sit that one grand jury instead of hours (Tobias, personal communication).

Texas Grand Juror Selection Procedure

In the state of Texas Chapter 19 of the Texas Code of Criminal Procedure controls the use of the key-man system. The code describes the process of selecting grand jury commissioners and grand jurors. It states that a district judge “shall appoint not less than three nor more than five persons to perform the duties of jury commissioners,” individuals to be responsible for identifying 15 to 40 candidates for service as a grand juror. The qualifications include being “intelligent citizens of the county and able to read and write the English language”; “be residents of different portions of the county,” shall not have acted as a jury commissioner “more than once in any 12-month period” and be a “qualified juror in the county.” Chapter 19 directs the jury commissioners to retire “...to a suitable room to be secured” and that they are to be furnished with “...stationery, the names of those appearing from the records of the court that are exempt or disqualified from serving on the jury at each term and the last assessment roll of the county.” They are to be “kept free from intrusion of any person during their session and shall not separate without leave of the court until they complete their duties.” They are to select “not less than 15 nor more than 40 persons” from the county who are determined to “represent a broad cross-section of the population of the county, considering the factors of race, sex and age.”

Upon selecting the candidates for the grand jury, the list is returned to the district judge who directs the court clerk to deliver the same to the sheriff for execution of a court summons. If less than fourteen of those summoned to serve “are found to be in attendance or qualified to serve, the district judge shall order the sheriff to summon such additional number of persons as may be deemed necessary to constitute a grand jury of twelve persons and two alternates.”

When the district court has fourteen persons in attendance, each person is to “be interrogated on oath by the court or under his direction, touching his qualifications.” “When, by answer of the person, it appears to the court that he is a qualified juror, he shall be accepted as such...” When fourteen qualified jurors are found to be present, the court shall proceed to impanel the grand jury”...composed of not more than twelve qualified jurors” and “...two alternates to serve on disqualification or unavailability of a juror during the term of the grand jury.” Unavailable is defined as being dead or having a physical or mental illness preventing full participation of the juror. Nine members of a grand jury form a quorum with all the powers vested by statute in the jury.

The Selection of Grand Jury Commissioners

In attempting to determine how key-men are selected in Harris County, the names of the grand jury commissioners who served during the years 2002 and 2003 were obtained from the Harris County District Court Clerk. Due to the secrecy of the court system, the great majority of those lists of names had no other identifying information on them. The names were then run on the Internet through the Google search engine in an attempt to identify the individual commissioners. They were also run against the Texas State Bar association on-line membership list, the Harris County approved bondsmen list, and the Harris County On-line directory. Names were cross-checked against addresses on the Harris County on-line registered voter directory to determine probable familial

relationships. Various individuals associated with local law enforcement reviewed the lists in an attempt to further identify individuals. Finally, four individual grand jury commissioners were interviewed, three of whom served during the sampled years.

Using these identifiers, individual grand jury commissioners were categorized by occupation and/or personal relationships.

The determination of the number of Hispanic commissioners, Hispanic grand juror candidates and actual Hispanic grand jurors was based on a comparison of all identified names provided by the Harris County District Courts against the 1980 Census List of Spanish Surnames. This list, compiled in 1979 by the Bureau of Census and reportedly consisting of 12,567 names, was used in lieu of the 1996 Census Bureau list of the 639 Most Frequently Occurring Heavily Hispanic Surnames in an attempt to look at the data from the most conservative perspective. It is likely that some Hispanic females have Anglo surnames and thus were not identified. This was offset with Anglo females with Hispanic surnames being identified as Hispanic. Further any female shown with more than one surname, if either was a Hispanic surname, was also treated as Hispanic, again in an attempt to look at the data from a conservative perspective.³

In determining the Harris County adult Hispanic citizen population, the 2000 census figures were used as follows: The total population identified for Harris County was 3,400,528. The non-citizen population of 532,939 was subtracted, leaving a citizen population for Harris County of 2,867,639.

The Hispanic population was 1,120,625. The Hispanic non-citizen population of 404,592 was subtracted, leaving a Hispanic citizen population of 716,033. This calculates to

63.9% of Hispanics being citizens (and Hispanics making up 24.9% of the total citizen population).

Census data also showed the county population 18 and over to equal 2,416,022. The Hispanic 18 and over population totaled 716,111 (29.6% of the adult population of the county). Subtracting the Hispanic 18 and over figure of 716,111 from the overall figure of 2,416,022 gives a Non-Hispanic 18 and over population of 1,699,911 (conservatively assuming that all non-Hispanic adults are citizens).

63.9% of 716,111 Hispanics 18 years of age or over equals 457,595 adult Hispanic citizens, assuming that the ratio of adult Hispanics citizens to adult Hispanic non-citizens is similar to the ratio of Hispanics citizens to Hispanic non-citizens.

Adding the non-Hispanic 18 and over citizen figure of 1,699,911 to the Hispanic 18 and over citizen figure of 457,595 gives a total of 2,157,506 18 and over citizens. 457,595 equal 21.2% of 2,157,506,

Approximately 21.2% of adult citizen population of Harris County, Texas is Hispanic. This is the figure we will use in comparing jury representation to population.

Discussion

The key to justice in Harris County is, in part, who those commissioners are and how they are chosen. The choice to "...protect the innocent and indict those towards whom evidence leads" (Constitutional Rights... 2000, p. 20) starts with the selection of those commissioners. The commissioners' attitudes, beliefs and political ideology have an influence on which individuals are considered for the grand jury and ultimately, how a grand jury decides an indictment. And if a grand jury commissioner selects candidates

for the grand jury from their own personal acquaintances, the Supreme Court, if not the Texas Court of Appeals, has recognized that “discrimination can arise from commissioners who know no [minorities] as well as from commissioners who know but eliminate them” (Smith v. Texas, 311 U.S. 128, (1940)).

Gateway Control: the System of Indictment

Fully one half of the grand jury commissioners were identified as being propertied in the justice system.⁴ One former commissioner, originally serving as a grand jury alternate (his name having been passed on by a police lieutenant to a commissioner looking for volunteers) and later requested to serve as a commissioner by a court representative, stated that of the two individuals he remembered nominating, one was the wife of a police officer. He, a police captain, had the potential of influencing an otherwise secret grand jury to have a police perspective that could easily influence the determination of indictments instead of a community perspective by his recommendations (Corbett, personal conversation)⁵. Further examples of gateway control of the process will be discussed.

Discrimination and Disenfranchisement

In Texas, and Harris County in particular, the key-man system has historically allowed for extensive discrimination (Smith v. Texas, 311 U.S. 128, (1940)) and has prevented Hispanics and numerous other qualified citizens from having the opportunity to participate in the justice system, as is their right. This problem with participative justice is evidenced by the numerous court decisions related to under-represented minorities on juries and the historical antagonism of state law enforcement agents against Hispanics and African-Americans (Hammel 1998, Hayden 2004, Skolnick & Fyfe 1993, Wadman & Allison 2004).

Harris County is approximately 1/3 Hispanic. Based on Census figure calculations, *approximately 21.2% of the adult (over 18) citizen population of Harris County is Hispanic.* A review of the grand jurors actually nominated for grand jury duty in Harris County from January 2001 to December 2003 revealed the following:

Out of 40 grand jury candidates lists supplied by the court clerk, 32 identified the selected grand jurors and alternates. Out of the entire 40 candidate lists of 836 potential jurors, 98 were Hispanic surnamed, equaling 11.7% of the list.

Out of the identified grand jurors (384 individuals from 32 lists), 34 jurors were *Hispanic surnamed, equaling 8.85% of the total identified jurors.*

When looking at the alternate grand jurors (those individuals who are grand jurors in name only unless one of the primary jurors has an untimely death), 11 Hispanic surnames were found among 64 *alternates, equaling 17.1%*, almost double the actual grand juror percentage.

No forepersons were identified as Hispanics out of the 32 jury lists. Five assistant forepersons, a position of no import except in the absence of the foreperson, were identified, equaling 15.6% of the assistant positions.

If grand jurors were drawn randomly from the general adult citizen population, the expected number of Hispanics among the 676 grand jurors would be 141. The standard deviation is approximately 11 (10.56). The data in this case reflect a difference between the expected and observed number of Hispanic grand jurors of approximately 6 (5.6) standard deviations. That is twice what is considered acceptable by the United States Supreme Court (*Castaneda v. Partida*, 430 U.S 482, (1977)).

Hispanics represent over 21 per cent of the eligible population but were nominated at half that rate and those who actually served were even less – 8.85 per cent. When the district judges decided which of the nominated candidates were to actually serve, they failed to select any Hispanics from the sampled lists to act as foreperson and they appointed Hispanics to the alternate (non-voting) lists at twice the rate that they appointed them to the actual grand jury. In simple terms, the court system is presenting a front that, in theory, showed the active and full participation of the local Hispanic community in the grand jury but, in reality, that participation was literally in name only.

The February, 2002 term of the 208th District Court personified this. The List of Prospective Grand Jurors shows 20 individuals nominated, none Hispanic. Yet at the bottom of the list two other names were added in what looks to be a different type of penmanship and ink. Both of those names are Hispanic. Those two names are then identified as being appointed as alternates. Further research determined that one of those individuals served as a district criminal court bailiff – a law enforcement position. The voting members were all non-Hispanic but, when the list, with alternates, is looked at statistically, 14 per cent of the grand jurors would be identified as Hispanic.

The federal courts, in numerous decisions (*Jefferson v. Morgan*, 962 F.2d 1185, 1188 6th Cir., (1992); *Vasquez v. Hillery*, 474 U.S. 254, 266, (1986); *Duren v. Missouri*, 439 U.S. 357, 364, (1979); *Castaneda v. Partida*, 430 U.S. 482, 492-93, (1977)), have recognized the potential discriminatory aspects of the selection of the grand jury venire and, in particular, the potential abuse of the key-man system. Yet, for the sake of expediency, the Harris County district courts have continued to use the key-man system and have systematically discriminated against the Hispanic population by limiting their participation in the grand jury process. This failure effectively prevents the assurance of an impartial jury (*Holland v. Illinois*, 493 U.S. at 474, 480, (1990)) by not allowing a

fair- cross-section of the populace to be considered for service and it can be considered intentional discrimination as the jury pool selection practice “is susceptible of abuse and is not racially neutral” (Castaneda v. Partida 430 U.S. 494, (1977)).

On the basis of this evidence, we conclude that the selection process continues to limit the number of Hispanics who are allowed to serve. In so doing, the process reinforces a strong bias toward conservative values related to justice, the death penalty and the use, or misuse, of force by the police by limiting the pool of potential grand jurors to the personal associates of court employees and law enforcement officers. This bias, previously identified as New Institutionalism, a distinct form of institutional racism, is created by the organized setting of the court following standardized routines that perpetuate discrimination even though those participating may truly believe that they have no intention of doing so (Haney Lopez 2000)⁶.

On the Issue of Being Propertied

Our review of the grand jury system in Harris County, Texas provides evidence that the local judicial system has successfully compromised the historic intent of the grand jury by consciously and consistently appointing individuals responsible for identifying potential grand jurors from those actually propertied in the justice system itself: attorneys, court officers, probation officials, and law enforcement officers. These individuals, chosen by the district judges to find candidates to serve as grand jurors, have perpetuated a grand jury system that fails to represent an appropriate cross section of the community it supposedly embodies. A review of the records for the grand jury commissioners for the year 2002 and 2003 reveal that out of 129 individuals who served as commissioner, fully one half are propertied in the criminal justice system. These 66 persons, all of whose income and expected primary social interaction are derived from the criminal justice system, choose the individuals who would ultimately have power of

indictment over the 3.4 million people of Harris County. Information on those 66 persons revealed the following:

24 commissioners are, or were, employees of the court system of Harris County to include court reporters, court coordinators, trial coordinators, administrative assistants, clerks, etc. Three served twice during the two year reporting period.

14 are attorneys with at least two being former prosecutors. One of those had been with the local district attorneys office responsible for presenting cases to the grand jury. One of the 14 attorneys is also a judge on the 14th Court of Appeals responsible for reviewing appeals from the very district court judge that she nominated grand juror candidates for.

11 are, or were, employees of the Harris County Community Supervision & Corrections Department. These badge-carrying employees of the county probation office, working for the district court system, are responsible for pre-trial intervention, intensive supervision, electronic monitoring, community service restitution, as well as the apprehension and arrest of violators while also providing other services to the district court.

6 commissioners were either retired or current law enforcement officers identified as deputy sheriffs or deputy constables, of which 2 serve the district courts as bailiffs and 1 as a criminal process server. One officer served twice during the two-year reporting period. A 7th individual is the spouse of a senior management law enforcement officer.

2 are bail bondsmen, responsible for guaranteeing the bond of suspects released pending trial (quite probably for the same individuals that their nominated grand jurors eventually indicted). A 3rd individual, who served twice during the two-year reporting period, is the spouse of a bail bondsman.

At least 4 hold or have held executive positions in area governmental or semi-governmental agencies such as the Houston City Council, the Theatre District Association and the Metropolitan Transit Authority (the local Houston transit agency with its own police force).

1 is a former executive of the Harris County Youth & Family Services Division, whose duties included determining injuries to suspected victims of child abuse. One individual previously counted as a former court employee is the current director of the Children's Assessment Center under Youth & Family Services.

2 individuals are private investigators with one of them serving as a civil court process server.

Again, over one half of these Harris County grand jury commissioners are directly connected, i.e. "propertied," to the criminal justice system.

The Special Case of Police

In Harris County, besides testifying in front of the grand jury, police officers regularly serve *on* the grand jury, and in at least one known case, while the grand jury was investigating her peers. One of the grand juries that investigated the actions of the Houston Police Department and its crime laboratory included an officer of the department (May term, 2003 of the 228th District Court). As an aside, that same jury,

refusing to utilize the District Attorney for legal guidance, had little need for him as it also included at least two attorneys, one a former federal attorney.

The February term of the 185th District Court included a grand jury commissioner normally employed by the Harris County Community Supervision and Corrections Department (generally known as the probation department). The List of Prospective Grand Jurors, made up of 18 names, included two persons from the probation department, one court liaison officer and an attorney. The final selection included one of the probation personnel with the second probation officer being appointed as an alternate juror. The court liaison officer was identified as the second alternate juror. The assumption is that the presiding judge did not want to impact the court system's workload to the point of distraction by having all three serve as jurors at the same time.

In still another example, the August 2002 term of the 176th District Court, all three jury commissioners were employees of the Community Supervision and Corrections Department. For all practical purposes the county probation department determined the grand jury for the 176th District Court. That grand jury included a coordinator for the Children's Assessment Center – the organization responsible for assisting juvenile victims of sexual abuse, and a former Houston Police Department lieutenant who is now, reportedly, a captain with the Texas Department of Corrections.

Conservatism and the Status Quo

In Harris County the district court judges have, in recent years, been notorious for campaigning during primaries as being more conservative than their fellow Republican challengers (Robinson 1998, Campbell 2000, Flood 2002, Turner 2004). Upon election they then have, besides the duty of conducting felony trials, the responsibility of both selecting the grand jury commissioners from their personal circle of associates and of

eventually determining the qualifications of the grand jury candidates nominated by those commissioners. Those personal associates, liberal or conservative, become crucial to determining the grand jurors, and by extension, the initial perspective, after the arresting officer's, of the criminal justice system.

The difficulty is that in utilizing friends and court associates these individuals perpetuate a conservative viewpoint instead of a community viewpoint in the jury room. Prior to an article written by Mary Flood for the *Houston Chronicle* in 2002 exposing the fact that the district attorney's office submitted lists of volunteers for grand jury duty to any district judge that requested it, the author, when he inquired into the Texas grand jury process while talking to an investigator of the district attorney's office, was informed that, if he wanted, he would be appointed to the grand jury – this while serving at the time as a federal law enforcement agent. The implication was that the district attorney controlled the selection of at least some of the individuals who served. Though that process is now denied to be in use, if one were today to offer the district attorney a volunteer for grand jury service, her name would be passed to the court administrator for forwarding to any district court requesting candidates. The perception may be different but the reality is the same – an associate of the district attorney would be serving on the grand jury that the DA would be presenting cases to for indictment (Tobias, personal communication).

In at least one case, instead of using the DA's recommendations, a former district court judge appointed a fellow church congregante as a commissioner. He, in turn, and in full compliance with the Code of Criminal Procedure, nominated four other members of the same church to the grand jury. All were appointed (Brooks, personal communication). The doctrines of that one individual fundamentalist church suddenly had the ability to influence the life and death decisions for numerous non-member souls. As a quorum is

composed of nine jurors, those four congregates actually had the ability to prevent the grand jury from even meeting to fulfill the State's affairs. The intent of a geographical spread of grand jurors was subverted, unintentionally or not.

One couple served, they believed, at least eight times between them as jury commissioners over the years (with their son having served at least once). They would share potential juror names between themselves, as needed (Brooks, personal communication). Their service was out of a sense of civic duty to their community but they would have had an undue influence on the decisions of the grand juries beyond all expectations of the justice system. Their beliefs, as mirrored in the associates, friends and fellow church members they continually nominated to a grand jury, would have had the potential to influence the choice of a true bill or no bill in numerous cases. If a potential death penalty case was being considered, the personal beliefs of these two people, as reflected in their nominated grand jurors, would have had an influence far beyond their number - two - in comparison to the influence of the other 3.4 million people of Harris County.

In discussions with various district attorney offices in the state, it was mentioned that at least one Dallas County judge had used the same grand jury members for the past five years. One can only wonder about the similar perspectives these 12 citizens bring to the jury room.

On the Issue of the Death Penalty

Harris County has long been recognized as the number one county in Texas, if not the United States, for executions. From 1976 to December 7, 2003 Harris County had 271 persons sentenced to death. Dallas County had only 91 and Bexar County (San Antonio) only 66 (Texas Department of Criminal Justice 2003). As of March 17, 2004, 154

offenders were on death row from Harris County (Texas Department of Criminal Justice 2004).

The reasons for the county's reputation as a successful death machine include a district attorney in support of executions, adequate funding of the DA's office, a capital murder statute and court system process favorable to the implementation of the death penalty and numerous conservative judges with a prosecutor's background. And "behind it all, pushing execution totals ever higher, is an immense tide of regional culture, religion and history..."(Tolson 2001). The key-man selection process is one more cog in that death machine. With commissioners being chosen from the propertied, the opportunity for a grand jury to consider not accepting the recommendations of the district attorney for a capital murder indictment, especially when that may even have had their name forwarded to the courts by the DA's office for service, is limited. With police, probation officers and court personnel making recommendations for jury service, one can only expect conservatives with a belief in the use of the death penalty to vote their conscience. The problem is, once again, that they may not be voting the community's conscience as they are not representative of the entire community.

Jerome Skolnick and James Fyfe, in their 1993 study of the complexities of policing quote Mark Baker, who concluded, after interviewing more than one hundred cops, that "...police lean to the right politically and morally." He was also quoted as saying "They advocate the straight and narrow path to right living. They believe in the inviolability of the marriage vows, the importance of the family, the necessity of capital punishment" (p. 96). And if they serve on a grand jury considering a capital offense one can assume, based on Baker's research, that they would be one of the least likely to no-bill a suspect or recommend a less harsh charge for indictment. Since 1972 Texas has been in the forefront of the death penalty. Part of the reason can be traced to the grand jury and to

the individuals who choose them. With officers and friends of officers selecting and serving on grand juries, the conservative perspective can result in an increased number of executions.

Conclusions

The issue in this investigation has been broadly that of alleged problems in a key-man approach to grand jury selection. Using the Harris County, Texas, justice system process, that issue was examined. Based on our evaluation, it would seem that the Harris County, Texas, approach to selecting grand juries contains most of the problems suggested in previous grand jury literature. Our analysis suggests the existence of minority discrimination and disenfranchisement. A small segment of the population is over-represented in the Harris County system and, apparently, those not generally associated with the system have a lower probability of serving. The system makes heavy use of propertied personnel, especially in the critical key-man position, thus extending its reach into the citizen domain and potentially obviating control mechanisms. There is also evidence of a conservative mind-set in these propertied personnel and those in the system generally, which could lead to further control of the indictment decision-making process.

Beyond these problems, perception is critical. After an officer's action results in the death of an individual the media will often quote the officer as stating that it was in self defense and, later report that the grand jury no-billed the officer. Yet, one tends to question the system's decision not to indict for negligent homicide when it is later revealed that a fellow officer or associate from county probation or the courts was on the grand jury that failed to indict.

The suspicion, no matter how unjust, will always be that of “one hand washing the other” and that, with the exception of truly egregious cases, no officer will be indicted for killing the persons they are sworn to protect. That perception undercuts the integrity of the entire justice system. Examples abound.

A south Texas grand jury failed to indict a United States Marine working an anti-drug stakeout where he killed an animal herder on the Texas-Mexican border. No matter how justified the Marine may have been in believing his shooting was in self-defense, that conviction became questionable when it was revealed that two of the grand jurors were current or former border patrol agents and another two were customs employees. The recognition that the government agents were, quite possibly, protecting themselves and their peers from any future indictment for the same offense committed at a later date by either themselves or a fellow officer is left unsaid.

The Lise Olsen and Roma Khanna reported in a June 6, 2004, article for the *Houston Chronicle* that after completing a four month study they had found that Harris County sheriff's deputies have shot 22 individuals since 1999 by firing on autos claiming that they were firing in self-defense. Of the 22, at least seven were uninvolved passengers, including a two-year-old. Four of the injured reportedly were never charged with a crime. Of the 22, 18 were unarmed. Three were caused by deputies shooting at fleeing autos, in violation of department policy. None of these officers are known to have been indicted for negligent behavior with an assistant district attorney claiming, as quoted in the article, that all that an officer needs to prove is a reasonable perception of a deadly threat to himself or the public to avoid being indicted.

In October of 2003, an off-duty officer moonlighting in uniform at a part-time security job killed a 15-year-old when his weapon went off accidentally while arresting the teen.

Though he had not followed departmental procedures, and eventually being fired by the department for his actions, the grand jury declined to indict for gross negligence. One can only wonder if a fellow officer or associate sat on that grand jury based upon the history of Harris County. This lack of indictment was likely an important part of an arbitrator's decision to reinstate the officer. With no one in the justice system interested in finding out who was serving, an individual has a problem even determining which of the five grand juries sitting at the time were presented with the case. The defense will not pursue that information as a no-bill served their purposes quite well and the prosecutor, having already chosen not to press charges, has no interest whatsoever in any further controversy being initiated regarding evidence of the officer's culpability in a homicide. From the DA's perspective, "no harm, no foul" seems to be the operating standard, at least as it relates to the office's reputation.

On July 26, 2004 Olsen and Khanna also reported in the *Houston Chronicle* that in Harris County, law-enforcement officers seldom face criminal charges in shootings. Based on a review of 193 officers in 18 local agencies who killed or wounded citizens over the past five years, only three officers were prosecuted. One was indicted in 1999 for aggravated assault and official oppression (being acquitted at trial), one pled guilty to violating the Private Investigators and Private Security Act for a shooting off-duty while serving as a security officer (he was fined and terminated from employment under a plea agreement), and one officer is currently under indictment for murder. These three indictments were the total response by the grand jury to officers shooting 65 unarmed people, killing 17, since 1999 (Khanna & Olsen 2004, July 25).

When the courts willfully violate the law, whether in the name of expediency or in ignorance, a tendency for people to lose trust in the institution quickly develops. In the case of the Harris County courts, at least one grand juror and one commissioner illegally

served. Both previously served as commissioners during the preceding 12 months yet the courts allowed one to serve as a commissioner a second time and the second individual to serve as a grand juror in violation of the Texas Code of Criminal Procedure. Unless brought up by a knowledgeable defense attorney, the courts are not held accountable for their own violation of Texas law.

Further, with a belief by members of various minority groups that an erosion of civil liberties has taken place in recent years, the continued use of propriety individuals in the grand jury process can only lead to a worsening of that perception, even if it may be inaccurate.

A Left Realist Perspective

In their 1986 work, *Losing the Fight Against Crime*, Richard Kinsey, John Lea and Jock Young stated that, “The issue of local democratic accountability of the police relates to the issue of local participation in the control of other state agencies as a way of overcoming the increasing marginalization of the inner-city populations out of participation in the political system” (p. 159). They continue by remarking that, “A government which seeks to counter crime must start by guaranteeing the effectiveness of policing, which means asserting the primacy of democracy in the criminal justice system — a democratic magistracy and judiciary as much as a democratic police” (p. 214). That democratic judiciary includes a grand jury truly representing of the community it serves. It also means that officers are held accountable for their actions by the community they serve but, in Houston at least, the killing of unarmed suspects by officers is not something that generally leads to indictments. Until officers are held accountable for their use of deadly force, police-induced homicides will continue. A grand jury made up of a broad segment of the community may be more likely to do just that. But even if they choose not to indict, a community knowing that the jury truly represents their interests,

and not influenced by police interests, will tend to be more accepting of the justice system, its decisions and of those who serve it.

The Solution

Achieving a fair cross-section and avoiding the perception of intentional discrimination, racial, political or by class, is simple. Harris County district courts, along with the rest of Texas' courts, can, and should, use the same random selection process that the state uses for petit jury selection. The federal government recognized the inherent inequalities of the key-man system and Congress eliminated it in 1968 with the passage of the Jury Selection and Service Act. Most of the other states in the Union use a random selection process (California being one exception, as it, too, uses a key-man system (Fukurai 2001) and Texas law already allows for its use at the court's discretion. Bexar County, as an example, uses a separate random selection process for all of their district court grand jurors (but for one court and that one is manned by a long sitting judge who still insists on using the jury commissioners) (Hikle, personal communication)⁷. Justice Antonin Scalia considers the one argument offered against random selection - efficiency, a moot point. Quoting from a recent majority decision written by the justice regarding the expense of appeals for sentence reductions created by a Supreme Court decision, he wrote, "Our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice." His comments are no less applicable to correcting the potential injustices of the key-man system of grand jury selection.

By the simple expedient of random selection, a perception of impartiality will return to the decisions of the grand jury and, in so doing, the acceptance of the legitimacy of the police and the courts can only be enhanced. As Sunshine and Tyler stated (2003), "...the key antecedent of legitimacy is the fairness of the procedures used by the police." This is as applicable to the courts as it is to the police. When the community fails to perceive

that the social control mechanisms are fair and just, they no longer will deem it appropriate to live by its norms, rules and laws. When that happens, *our* government becomes *their* government, with all that loss would entail.

Notes

¹ Andy Tobias is an assistant district attorney serving as the grand jury division chief responsible for grand jury presentations and coordination in Harris County, Texas.

² James Brooks has served as a grand juror and as a grand jury commissioner in Harris County. During the two years sampled, he served as both a jury commissioner and as a grand juror and his wife served as jury commissioner, having nominated him for the grand jury. Based upon local newspaper articles, it was determined that Brooks served on one of the two grand juries that investigated the Houston Police Department laboratory for criminal wrongdoing.

³ In this case a conservative perspective is created by a procedure that will provide the highest estimated number of Hispanic surnames. This number will be used to determine proportional representation in comparison with all other surnames.

⁴ This figure is derived from those individuals whom we were able to identify. It is possible that unidentified others also are propertyed in the criminal justice system. Thus, this estimate is likely to be an underestimate.

⁵ A.H. Corbett, a captain with the Pasadena Police Department, Pasadena, Texas, has served as an alternate grand juror and as a grand jury commissioner while serving as the commander of the investigations division (and laboratory) of the Pasadena PD.

⁶ Ian F. Haney Lopez's article on institutional racism details on of the most cogent explanations for the Harris County court system bias available in print.

⁷ Greta Hikle is an assistant district attorney with the Bexar County District Attorney's Office.

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