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Hire A Lawyer, Escape the Death Penalty?

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Scott Phillips*

I. Introduction

Death penalty opponents have claimed that wealthy defendants who hire legal counsel are exempt from capital punishment. U.S. Supreme Court Justice William O. Douglas, for example, noted that “[o]ne searches our chronicles in vain for the execution of any member of the affluent strata of this society.”¹ Noted abolitionist Sister Helen Prejean argued succinctly that “rich people never go to death row.”² Death penalty opponents also charge that indigent defendants who receive court appointed counsel are frequently condemned to death. Sister Prejean continued, “capital punishment means them without the capital get the punishment.”³ Law professor David Dow summarized the issue by saying that “race matters in the death penalty system, but socioeconomic status matters even more. Wealth matters because in many cases trial outcomes depend less on what really happened than on an advocate’s skill.”⁴

In this Issue Brief, I evaluate two central claims made by death penalty opponents: (1) defendants who can hire counsel are less likely to be sentenced to death; and (2) only the wealthy can afford to hire counsel.

Empirically, I focus on Harris County, Texas – home to Houston and surrounding areas. Specifically, the data include the 504 adult defendants indicted for capital murder in Harris County from 1992 to 1999. The data do not represent a random sample, but rather all the cases from the time period in question.

Harris County is an interesting place to conduct the research. To begin, Harris County is the largest jurisdiction in the nation that provides indigent defense using the appointment method, where a judge appoints a private defense attorney to the case, rather than a public defender, where cases are assigned to a salaried staff of government attorneys.⁵ Harris County is also the capital of capital punishment. With 112 executions since the reinstatement of the death penalty in 1976,⁶ Harris County has often captured the national and international spotlight in the

* Scott Phillips is an associate professor in the Department of Sociology and Criminology at the University of Denver. This Issue Brief is based on an article entitled *Legal Disparities in the Capital of Capital Punishment*, 99 J. CRIM. L. & CRIMINOLOGY 717 (2009). The findings described here are confirmed in the multivariate statistical models presented in the full paper. The author may be contacted by mail at Scott Phillips; Department of Sociology and Criminology; University of Denver; 2000 E. Asbury Avenue; Denver, CO 80208-2948; or by email at Scott.Phillips@du.edu. This Issue Brief has been updated by the author with additional information since it was originally published on February 23, 2010.

¹ *Furman v. Georgia*, 408 U.S. 238, 251-52 (1972).

² HELEN PREJEAN, *THE DEATH OF INNOCENTS: AN EYEWITNESS ACCOUNT OF WRONGFUL EXECUTIONS* 190 (2005).
³ *Id.*

⁴ DAVID R. DOW, *EXECUTED ON A TECHNICALITY: LETHAL INJUSTICE ON AMERICA’S DEATH ROW* 7 (2005).

⁵ Carol J. DeFrances & Marika F. X. Litras, *Indigent Defense Services in Large Counties, 1999*, BUREAU OF JUSTICE STATISTICS BULLETIN, November 2000, available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/idslc99.pdf>. Harris County is currently considering the creation of a public defender office, which is discussed in more detail below.

⁶ *See Gregg v. Georgia*, 428 U.S. 153, 207 (1976).

death penalty debate.⁷ To put the number of executions in perspective, if Harris County were a state, it would rank second in executions after Texas. In fact, Harris County has executed about the same number of offenders as all of the other major urban counties in Texas combined.⁸

Some Harris County officials have gone on the record to reject death penalty opponents' arguments. Texas District Judge Doug Shaver, in an interview with the *Texas Lawyer*, noted that appointed counsel might be superior to hired counsel: "From where I sit, the appointed attorneys may even be better than the paid attorneys."⁹ Texas District Judge Michael McSpadden went a step further in an interview with the *Houston Chronicle*, suggesting that appointed attorneys are definitely superior to hired attorneys: "If you are charged with a criminal offense in Harris County, you would be much better off in our court, and many of the other courts, with a court-appointed rather than a retained attorney."¹⁰ Offering a different response, John Holmes, the Harris County District Attorney (DA) from 1980 to 2000, contended in an interview with the *Houston Chronicle* that appointed and hired counsel are equally ineffective in capital cases: "I don't think it makes a hill of beans what kind of lawyer you are on these cases. These crimes are so horrible Clarence Darrow's not going to help these guys."¹¹

My findings both support and refute death penalty opponents' claims. In my study, defendants who hired counsel for the entire case were never sentenced to death. Even defendants who hired counsel for a portion of the case were substantially less likely to be sentenced to death than defendants with appointed counsel. Yet hiring counsel did not appear to be the province of the wealthy because virtually all capital defendants seem to be poor. Presumably, poor defendants can occasionally hire legal counsel because friends and relatives pool resources in the hour of need.

The study also reveals that defendants who hired counsel for the entire case were much more likely to be acquitted. Because the number of acquittals is small, the relationship between acquittals and hired counsel must be considered tentative. Nonetheless, the strength of the relationship, coupled with the potential implications for wrongful conviction and wrongful acquittal, suggest that the relationship demands attention.

To be clear, the findings are not an indictment of appointed attorneys, but rather an indictment of the structural deficiencies inherent in the appointment method of indigent defense. The system is flawed, *not* the individuals who work within the system.

⁷ See, e.g., AMNESTY INTERNATIONAL, ONE COUNTY, 100 EXECUTIONS: HARRIS COUNTY AND TEXAS – A LETHAL COMBINATION (2007), <http://www.amnesty.org/en/library/info/AMR51/125/2007>.

⁸ Data regarding the number of executions in each state can be found at: <http://www.deathpenaltyinfo.org/executions-united-states>. Data regarding the number of executions for Texas counties can be found at: <http://tdcj.state.tx.us/stat/deathrow.htm>. The other major urban counties in Texas – Dallas County (Dallas), Bexar County (San Antonio), Travis County (Austin), and Tarrant County (Fort Worth) – have executed a combined total of 114 offenders as of January 24, 2010.

⁹ Mark Ballard, *Gideon's Broken Promise*, TEXAS LAWYER, Aug. 28, 1995, at 19.

¹⁰ Bob Sablatura, *Study Confirms Money Counts in County's Courts: Those Using Appointed Lawyers are Twice as Likely to Serve Time*, HOUSTON CHRONICLE, Oct. 17, 1999, at A1.

¹¹ Mary Flood, *What Price Justice? Gray Graham Case Fuels Debate Over Appointed Attorneys*, HOUSTON CHRONICLE, Jul. 1, 2000, at A1.

In the next section of this Issue Brief, I describe the appointment method of indigent capital defense in Texas, including a historical overview and review of existing critiques. I then turn to my data and findings. Finally, I argue that Harris County should abandon the appointment method and create a public defender office, including a capital defender unit, with resources proportionate to the DA's office.

II. Indigent Defense in Texas

A. Description of the Appointment Method

During the time period considered in the research, the State of Texas did not fund indigent defense. Instead, each county was responsible for funding indigent defense.¹² In the arena of capital punishment, two methods had evolved: appointed counsel and public defender offices. Of the 254 Texas counties, 252 used the appointment method at the time of the research.¹³

The standards for being appointed to a capital case have changed over the years.¹⁴ Prior to 1991, state law was silent regarding standards – Texas judges could appoint any member of the bar to represent an indigent capital defendant. Most judges appointed members of the bar who were experts in criminal defense. But others were more cavalier, appointing friends who had no experience in the area such as real-estate specialists or local state legislators.

In 1991, Judge Jay W. Burnett spearheaded a capital certification program in Harris County designed to strengthen appointment standards. To be eligible for the program, a defense attorney had to: (1) be licensed in Texas for a minimum of five years; (2) devote at least 50% of his or her practice to criminal law; and (3) have tried to verdict either five or more first degree felonies or one or more capital cases. Those who met the eligibility requirements and were interested in being appointed to capital cases had to enroll in a class on capital litigation that culminated in a 100 question multiple-choice exam. Defense attorneys who failed the exam could re-enroll in the class and re-take the exam two more times. In addition to passing the exam, defense attorneys were required to complete 20 hours of continuing legal education on capital litigation each year. To enforce the capital certification program, Judge Burnett had the Texas Supreme Court pass an order stating that the Harris County Auditor could not pay a defense attorney in a capital case unless he or she had completed the program. The

¹² The state began contributing to counties' indigent defense funds as a result of the 2001 Texas Fair Defense Act, which created the Texas Task Force on Indigent Defense. *See* AMERICAN BAR ASSOCIATION, STATE AND COUNTY EXPENDITURES FOR INDIGENT DEFENSE SERVICES IN FISCAL YEAR 2005 29-30 (2006), *available at* http://www.abanet.org/legalservices/sclaid/defender/downloads/FINAL_REPORT_FY_2005_Expenditure_Report.pdf. In fiscal year 2009, Texas disbursed approximately \$8.6 million in state formula grant funds to 203 qualifying counties to improve indigent defense. *See* Formula Grant Program Summary Report, TEXAS TASK FORCE ON INDIGENT DEFENSE, <http://tfid.tamu.edu/FormulaGrantProgram/FGPSummaryReport.asp> (last visited Feb. 24, 2010).

¹³ TEXAS APPLESEED FAIR DEFENSE PROJECT, FAIR DEFENSE REPORT: ANALYSIS OF INDIGENT DEFENSE PRACTICES IN TEXAS (2000), http://www.texasappleseed.net/pdf/projects_fairDefense_fairref.pdf, at 48 [hereinafter FAIR DEFENSE REPORT].

¹⁴ The following information comes from personal correspondence with Judge Burnett: the description of indigent defense prior to 1991; the development of the capital certification program; and the relationship of the capital certification program to the subsequent 2001 Fair Defense Act. This correspondence is on file with the author.

implementation of the capital certification program gave Harris County the most rigorous standards for appointment to a capital case in the State of Texas during the 1990s.

The Harris County approach to strengthening appointment standards soon spread. Initially, Judge Burnett was asked to expand the capital certification program to the remaining counties in Texas's 2nd Judicial Region. Later, the Texas legislature passed the 2001 Fair Defense Act (FDA), which was modeled after the reforms made in the 2nd Judicial Region. The FDA set minimum standards for appointment to a capital case; all judicial regions and constituent counties were required to develop a plan to meet the promulgated standards.

The objective criteria for appointment to a capital case in Harris County after the passage of the FDA were:

- General Criteria:
 - Receive approval from a peer-review committee;
 - Pass the capital certification exam; and
 - Participate in CLE courses on capital litigation;
- Specific Criteria for Lead Counsel:
 - Eight years of experience in criminal law;
 - Tried a minimum of 15 felony jury trials to verdict as Lead Counsel;
 - Tried a minimum of two capital cases to verdict as Lead Counsel or Second Chair (must be defense counsel in one of the two cases unless five years of experience in criminal defense); and
 - No judgment of ineffective counsel in a prior capital case;
- Specific Criteria for Second Chair:
 - Five years of experience in criminal law; and
 - Tried a minimum of 10 felony jury trials to verdict as Lead Counsel.¹⁵

The fact that Harris County had the most rigorous standards for appointment to a capital case in Texas during the 1990s suggests that the current research is a conservative assessment of the state of indigent defense in other counties in Texas. If anything, the disparities that existed in Houston during the 1990s might be an accurate estimate or an underestimate of disparities across the rest of the state during the same time period, but are almost certainly not an overestimate. Moreover, the passage of the FDA in 2001 probably did not solve the disparities in Houston for two reasons: (1) the central elements of the FDA had already been established in Harris County during the 1990s; and (2) the FDA did not address critics' main concerns regarding the appointment method.

B. Critiques of the Appointment Method

Despite attempts at reform, some have argued that the appointment method of delivering indigent defense is broken. Two major reports have critiqued the appointment method: *Muting Gideon's Trumpet (MGT)*¹⁶ and *The Fair Defense Report (FDR)*.¹⁷ The putative problems

¹⁵ The complete standards can be found at: <http://www.justex.net/JustexDocuments/0/FDAMS/standards.pdf>.

¹⁶ Allan K. Butcher & Michael K. Moore, *Muting Gideon's Trumpet: the Crisis in Indigent Criminal Defense in Texas* (2000), at 18, available at <http://www.uta.edu/pols/moore/indigent/whitepaper.htm>.

¹⁷ FAIR DEFENSE REPORT, *supra* note 13.

surrounding the appointment method described in MGT and FDR can be divided into five categories: (1) flat fee compensation; (2) the potential for insufficient support services; (3) a potential conflict of interest for the appointed defense attorney; (4) a potential conflict of interest for the judge; and (5) questionable appointment practices. Each is considered in turn.

Under flat fee compensation, appointed defense attorneys receive a standard fee for a capital case disposed at trial regardless of the number of hours worked. The judge has the discretion to reduce the fee if a plea bargain is reached. The American Bar Association discourages flat fee compensation because of the potential for abuse – a rational actor could go to trial, but limit the number of hours worked, to maximize profit. Although few, if any, defense attorneys would engage in such a cold economic calculus, the flat fee arrangement creates an inevitable conflict: a defense attorney in private practice who spends a substantial amount of time on a capital appointment not only reduces her or his rate of compensation, but also has less time for paying clients.¹⁸ If one accepts the proposition that humans are rational actors who respond to financial incentives, then such an arrangement is bound to influence performance in a capital case.

The appointment method also suffers from the potential for insufficient support services. Appointed counsel must request approval from the judge to hire support services, such as investigators or expert witnesses. Judges do not rubber stamp defense requests. In fact, criminal defense attorneys report that 32% of requests for support services are denied.¹⁹ Judges can also approve requests but limit funding. Judges in Harris County, for example, tend to provide only enough money to hire experts from the Houston area. This practice forces the defense team to use local experts who might not be the most qualified and simultaneously allows prosecutors to “build a book” on experts who testify in numerous cases.²⁰ Judges in Harris County have even refused to compensate experts, or paid only a portion of the total bill, putting the defense team in the untenable position of covering the balance or alienating an expert who might be needed in the future.²¹ Although charges of insufficient support services from the mouths of appointed counsel might be dismissed as self-serving, MGT reports that 27% of Texas judges agree that appointed counsel do not receive sufficient support services.²²

The appointment method also has the potential to create a conflict of interest for the appointed defense attorney. The defense attorney must balance the adversarial mandate to provide the most rigorous defense possible with the need for continued personal income. Defense attorneys who fight too hard risk losing future appointments. One defense attorney summarized the conflict as follows: “An attorney who files a lot of motions and asks a lot of questions creates a problem for the judge. You tick off the judge and don’t get any more appointments.”²³ Another defense attorney noted: “Everything in this system is tempered by the symbiotic relationship between attorney and judge, where you have to weigh whether I’m going to defend the client or continue to get appointments.”²⁴ Yet another defense attorney explained

¹⁸ *See Id.* at 99-101.

¹⁹ Butcher & Moore, *supra* note 16, at 18.

²⁰ FAIR DEFENSE REPORT, *supra* note 13, at 119.

²¹ *Id.* at 120-121.

²² Butcher & Moore, *supra* note 16, at 18.

²³ FAIR DEFENSE REPORT, *supra* note 13, at 22.

²⁴ *Id.*

in an interview with the *Houston Chronicle* that mounting the most rigorous defense possible might be career suicide for an appointed attorney: “As a hired attorney, I work in the best interest of my client and that often puts me at odds with the judge. But if an appointed attorney gets at odds with the judge, he doesn’t get any more court appointments.”²⁵ The problem is simple: the appointed defense attorney’s personal income depends on remaining in the good graces of the judge, which is a situation that might not be in the best interest of the client.

The appointment method also has the potential to create a dual conflict of interest for the judge who must decide whether to approve support services. The judge must balance the mandate to fund indigent defense with the need to placate county commissioners and the personal desire to get reelected. Among judges who responded to the MGT questionnaire, 50% reported that other judges in their jurisdiction had been asked by a county commissioner to control expenses related to indigent defense.²⁶ Moreover, judges running for reelection do not want to be perceived as writing a blank check for indigent defense and thus “soft on crime.”²⁷

Finally, some judges appear to engage in questionable appointment practices. The MGT questionnaire asked judges whether certain factors influence other judges’ appointment decisions. The judges agreed that legal considerations are pivotal: more than 95% of judges reported that peers consider the difficulty of the case and the potential appointee’s knowledge and experience.²⁸ But a substantial number of judges also noted that irrelevant factors play a role: 52% reported that peers consider whether the potential appointee needs income; 40% reported that peers consider whether the potential appointee is a friend; 35% reported that peers consider whether the potential appointee is a political supporter; and 30% reported that peers consider whether the potential appointee contributed to the judge’s election campaign.²⁹ A criminal defense attorney from Harris County confirmed the charge of political partisanship: “I have been refused appointments because I cannot afford to give money to the judge’s reelection campaign . . . those attorneys who contribute the most money receive the most work.”³⁰ In fact, budget records indicate that funds spent on appointed counsel increase during election years, raising the possibility, although clearly not proving, that judges become more generous with the expectation of a quid pro quo.³¹

III. Data and Findings

A. Legal Counsel and Death

Existing research has identified procedural problems in the appointment method of indigent defense. But existing research has ignored the most important questions: Do procedural problems produce differences in case outcomes? Is the district attorney (DA) more likely to seek the death penalty against defendants who have appointed counsel? Is the jury more likely to render a death sentence against defendants who have appointed counsel? Put

²⁵ Sablatura, *supra* note 10, at A1.

²⁶ Butcher & Moore, *supra* note 16, at 20-21.

²⁷ *Id.*

²⁸ *Id.* at 13.

²⁹ *Id.*

³⁰ *Id.*

³¹ Ballard, *supra* note 9, at A1.

differently, is the appointment method merely procedurally flawed or truly a matter of life and death?

To answer such questions, I focused on the 504 adult defendants indicted for capital murder in Harris County from 1992 to 1999. The DA sought the death penalty at trial in 129 cases, securing 98 death sentences. Forty-one defendants have been executed to date. The DA pursued life imprisonment at trial in 218 cases and reached a plea bargain in the remaining 157 cases.³²

The defendant's form of legal counsel can be divided into three categories: appointed counsel for the entire case (appointed = 369 cases); hired counsel for the entire case (hired = 31 cases); and mixed counsel (mixed = 104 cases). Defendants with mixed counsel conform to one of the following scenarios: the defendant is appointed counsel but later secures the funds to hire counsel, or the defendant hires counsel but exhausts all funds and must be appointed counsel. Unfortunately, the data do not distinguish between these scenarios. But conversations with an official from the DA's office suggest that the former is much more common than the latter.

The findings suggest that the type of legal counsel for the defendant is pivotal. Consider the DA's decision to seek death: the DA sought the death penalty against 3% of defendants with hired counsel, compared to 26% of defendants with mixed counsel and 27% of defendants with appointed counsel. Focusing exclusively on cases in which the DA sought death, the jury imposed a death sentence against none of the defendants with hired counsel, 56% of defendants with mixed counsel, and 82% of defendants with appointed counsel. Combining the two stages of the process produces the following outcomes for all 504 cases: no defendant with hired counsel was sentenced to death, 14% of defendants with mixed counsel were sentenced to death, and 23% of defendants with appointed counsel were sentenced to death. Such patterns are stunning: hiring counsel for the entire case eliminates the chance of a death sentence, and hiring counsel for a mere portion of the case substantially reduces the chances of a death sentence.³³

³² Texas did not pass a true life without parole (LWOP) statute until 2005. Thus, the inmates sentenced to "life imprisonment" are eligible for parole. Defendants convicted in 1992 must serve 35 years before becoming eligible for parole; defendants convicted between 1993 and the passage of LWOP must serve 40 years before becoming eligible for parole.

³³ Some might argue that it is inappropriate to draw conclusions about the role of hired counsel based on just 31 cases. This is a valid concern. But three responses should ease the concern. First, the data represent a population of cases, not a random sample. Thus, the question of statistical significance becomes irrelevant – the findings are real for the time period in question. Second, it is extremely unlikely that the pattern has changed over time. Consider the following hypothetical example. Given that the period from 1992 to 1999 included 31 defendants who hired counsel, it is reasonable to assume, for the purposes of argument, that the period from 2000 to 2007 also included 31 defendants who hired counsel. For the death sentence rate among defendants with hired counsel and mixed counsel to reach parity, the DA would have had to secure a death sentence against 9 of the next 31 defendants with hired counsel ($9/62 = 14\%$). For the death sentence rate among defendants with hired counsel and appointed counsel to reach parity, the DA would have had to secure a death sentence against an extraordinary 14 of the next 31 defendants with hired counsel ($14/62 = 23\%$). Could the DA go from securing a death sentence against none of the defendants with hired counsel to 29% ($9/31$) or even 45% ($14/31$) of defendants with hired counsel? Parity is technically possible but extremely improbable. Parity is even more improbable in light of the DA's past record of allowing defendants with hired counsel to plea bargain (68% of defendants with hired counsel reached a plea bargain, compared to 29% of all other defendants). Third, and finally, the data include 104 defendants with mixed counsel: the fact that hiring counsel for a mere portion of a case is enough to reduce the chance of a death sentence confirms the advantage of hiring counsel based on a larger set of cases.

The data suggest that defendants who can hire counsel for some or all of the case are advantaged. But perhaps legal counsel is not the driving force. Perhaps defendants with hired counsel and mixed counsel committed murders that were less worthy of the death penalty. To consider the alternative explanation, I examined the relationship between counsel and the central legal dimensions of a case. The findings both support and refute the alternative explanation. It is true that defendants with hired or mixed counsel were less likely than defendants with appointed counsel to have a prior violent conviction – a critical consideration because Texas juries must conclude that the defendant is a future danger to render a death sentence. But defendants with hired or mixed counsel were just as likely to have acted alone. Most importantly, defendants with hired or mixed counsel were just as likely to have committed the most egregious murders. Indeed, defendants with hired or mixed counsel were slightly more likely to have killed multiple victims. Such counterbalancing forces suggest that the central legal dimensions of a case cannot account for the observed disparities.³⁴

B. Legal Counsel and Acquittals

Does hiring counsel also influence the chance of being acquitted? Because just eight defendants were acquitted, the following findings must be considered tentative. Nonetheless, the strength of the pattern demands attention: 30% of defendants who hired counsel and advanced to a life trial or death trial were acquitted (3 of 10), compared to none of the defendants with mixed counsel (0 of 79) and 2% of defendants with appointed counsel (5 of 258). Thus, defendants who hired counsel for the entire case were about 20 times more likely to be acquitted at trial than all other defendants (3 of 10 versus 5 of 337). Remarkably, if the acquittal rate for defendants who hired counsel and proceeded to trial were achieved for the entire pool of defendants who went to trial, then the total number of acquittals would have catapulted from 8 to 104 (30% of 347 = 104). The relationship between hired counsel and acquittals is troubling – it does not seem plausible to conclude that defendants who hired counsel were 20 times more likely to be factually innocent.

C. Legal Counsel and Socioeconomic Status

The findings are unequivocal: hiring counsel alters the legal landscape. Does that mean the rich are getting away with murder? After all, death penalty opponents claim that defendants who can afford to hire counsel are wealthy and defendants who must accept court appointed counsel are poor. Such a statement seems true by definition. But the reality turns out to be more complicated. To investigate the relationship between legal counsel and socioeconomic status, defendants were matched to residential neighborhoods. Data from the U.S. Census Bureau were used to estimate median household income in the defendant's neighborhood during the year the case occurred.

³⁴ The percentage distributions are as follows: 14% of defendants with hired or mixed counsel had a prior violent conviction, compared to 21% of defendants with appointed counsel; 53% of defendants with hired or mixed counsel acted alone, compared to 50% of defendants with appointed counsel; 22% of defendants with hired or mixed counsel and 22% of defendants with appointed counsel committed murders coded as the highest level of heinousness; 20% of defendants with hired or mixed counsel killed multiple victims, compared to 16% of defendants with appointed counsel.

The results provide a surprising twist: legal counsel and socioeconomic status are unrelated. Defendants with appointed counsel lived in neighborhoods with an average household income of \$25,493, compared to defendants with mixed counsel and hired counsel who lived in neighborhoods with average household incomes of \$27,310 and \$29,707, respectively. Although defendants with mixed and hired counsel lived in neighborhoods with slightly higher incomes, the difference is trivial. With few exceptions, capital murder defendants appear to be uniformly poor – meaning disparities based on legal counsel do not equate to disparities based on socioeconomic status. The fact that some defendants from such poor neighborhoods can hire counsel suggests that others, perhaps relatives and friends, have pooled resources in the hour of need. This assumption needs to be tested in future research.

IV. Creating a Public Defender Office in Houston

The appointment method of indigent capital defense in Houston is not merely procedurally flawed – it has life and death consequences. To bolster the point, consider one last finding: the research does not focus on executions because the process remains ongoing, but it is instructive to note that 38 of the 41 defendants executed to date had appointed counsel.

What should be done? In September 2009, the Harris County Commissioner’s Court voted to create a public defender office.³⁵ The implementation of the public defender’s office is under further consideration as the budget process unfolds; the Commissioner’s Court must finalize the county’s annual budget in March 2010.³⁶ The move to establish a public defender in Houston is a pivotal step in the right direction and the Commissioner’s Court should be commended. But the plan under consideration is a hybrid model: indigent defense would be provided by both public defenders and appointed attorneys. Indeed, some judges are interested in using the public defender, but many are not.³⁷

Rather than taking tentative and partial steps, I argue that Harris County should: (1) eliminate the appointment method; (2) create a public defender office to handle indigent cases; (3) create a capital defender unit to handle indigent capital cases; and (4) provide the public defender with a budget proportionate to the DA’s budget. Such a course of action would:

- Reduce disparities in capital cases: Existing research demonstrates that public defenders have a better performance record in capital cases than appointed attorneys. David Dow’s research indicates that the prosecution’s rate of securing death sentences ranges from zero to 50% in jurisdictions with a public defender, compared to 50 to 100% in jurisdictions that use the appointment method.³⁸ Dow argues that public defenders are more aggressive advocates due to a stronger ideological commitment to indigent defense, and public defender positions are highly competitive so an office can be selective in hiring top talent.

³⁵ James Pinkerton, *Public Defender Office: 5-0 Vote Gets Ball Rolling*, HOUSTON CHRONICLE, Sept. 30, 2009, at B1.

³⁶ Chris Moran, *County Budget Forecast Near Worst-Case Scenario: \$53 Million Drop Could Mean Layoffs, Cuts in Public Services*, HOUSTON CHRONICLE, Feb. 20, 2010, at B2.

³⁷ Pinkerton, *supra* note 35, at A1.

³⁸ David R. Dow, *Teague and Death: The Impact of Current Retroactivity Doctrine on Capital Defendants*, 19 HASTINGS CONST. L.Q. 23, 72 (1991).

- Eliminate the structural deficiencies inherent in the appointment method:
 - Flat-fee compensation: public defenders would receive an annual salary.
 - The potential for insufficient support services: the public defender would have a budget proportionate to the DA's budget, a change that would provide adequate resources and remove judges from decisions about the allocation of defense resources.
 - A potential conflict of interest for the defense attorney: public defenders would not be beholden to judges in a system of patronage.
 - A potential conflict of interest for the judge: judges would no longer be torn between competing demands from defense attorneys, county commissioners, and the electorate.
 - Questionable appointment practices: appointments would end.

V. Conclusion

Death penalty opponents charge that socioeconomic status shapes capital punishment – wealthy defendants who can hire counsel are exempt from death, but poor defendants who must accept appointed counsel are condemned. My findings both support and refute opponents' claims:

- Hiring counsel for the entire case not only eliminates the chance of death, but also dramatically increases the chance of an acquittal.
- Hiring counsel for a portion of the case substantially reduces the chance of death.
- Hiring counsel is not related to wealth – almost all capital defendants are poor.

It might be tempting to dismiss these findings. Some might argue that the problem is restricted to Houston. But 252 of the 254 counties in Texas used the appointment method at the time of the research, and Houston led the movement to reform the appointment method, suggesting that disparities in Houston are better understood as a conservative estimate of what was happening in other counties than an isolated problem. Others might argue that the 2001 Fair Defense Act solved the problem. But the major elements of the FDA had been implemented in Houston at the time the cases in the data were adjudicated. Moreover, the FDA did not eliminate the structural deficiencies inherent in the appointment method. Differential treatment is almost certainly a widespread and continuing problem in Texas.

I argue that the solution is to create a public defender office, including a capital defender unit, in Houston that is responsible for all indigent cases. The public defender must be funded at a level proportionate to the DA's office.³⁹ The hybrid plan currently being considered represents genuine progress and is a laudable step in the right direction. But Houston's distinction as the capital of capital punishment creates a special obligation to provide the most rigorous system of indigent defense possible. Only a top-notch public defender can meet such a standard.

³⁹ See generally Rebecca Copeland, *Getting it Right from the Beginning: A Critical Examination of Current Criminal Defense in Texas and Proposal for a Statewide Public Defender System*, 32 ST. MARY'S L.J. 493 (2001).