

WHAT'S MESSING WITH TEXAS DEATH SENTENCES?

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I. INTRODUCTION

We've all been admonished: "Don't Mess with Texas"—originally an anti-littering slogan for the Texas Department of Transportation that has segued into an all-purpose declaration of Texas's presumed preeminence and prickliness.¹ But as to death sentences, in recent years something has definitely been messing with Texas in a dramatic way. During the peak five-year period for Texas death sentences—1992-1996—an average of 42 per year were pronounced; by contrast, in the most recent five-year period—2005-2009—an average of only 14 death sentences per year were handed down.² The drop from 42 to 14 per year represents a 70% decline.

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1. See Lilly Rockwell, "Don't Mess" Tops Slogan Contest, AUSTIN AMERICAN-STATESMAN, Sept. 30, 2006, at H01.

2. See generally *Annual Reports*, TEX. CTS. ONLINE, <http://www.courts.state.tx.us/pubs/annual-reports.asp> (under the heading "Annual Statistical Reports") [hereinafter *Reports*]. All Texas figures in this Article, unless otherwise noted, are based on Texas fiscal year data as compiled in the Texas Office of Court Administration's Annual Reports. The Texas fiscal year runs from September 1 of the prior year to August 31 of dated fiscal year—thus, for example, fiscal year 2005 was September 1, 2004 through August 31, 2005. *Id.* The specific charts with the referenced data can be accessed under the District Court heading for each year, as follows:

2004-2009: chart called "Summary of Activity by Case Type." *Id.*

2003: chart called "Statewide Activity Summary-Criminal." *Id.*

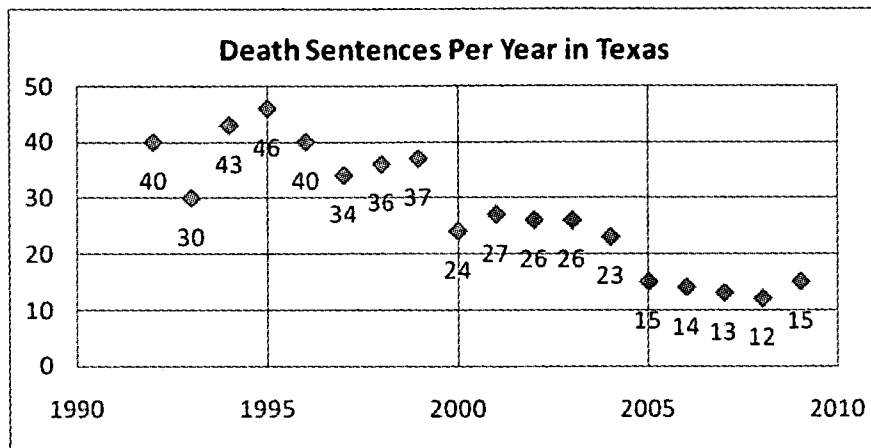
1995-2002: chart called "Statewide Summary of Reported Activity-Criminal." *Id.*

1993-1994: chart called Statewide Summary of Reported Activity." *Id.*

Data for earlier years provided by Angela L. Garcia, Judicial Information Manager, Research & Court Services Division, Office of Court Administration (on file with author).

In this, Texas has almost exactly mirrored and participated in the national trend: from an average of 312 death sentences per year nationwide in 1992-1996, to 119 per year for 2005-2009—a 62% decline.³

The Texas death sentence figures for the entire period 1992-2009 are portrayed graphically as follows:⁴



This radical decline in death sentences in the Lone Star State is startling. After all, Texas has long been justifiably considered as the “Death Penalty Capital” of the nation. As of September 20, 2010, Texas had executed 463 inmates since 1977, more than the six next highest states combined—Virginia (107), Oklahoma (92), Florida (69), Missouri (67), Georgia (47), and Alabama (48).⁵ Further, the decline in Texas is puzzling not only historically, but also in light of the relatively constant public support of

3. Tracy L. Snell, *Capital Punishment, 2005*, BUREAU OF JUST. STAT., 14 <http://bjs.ojp.usdoj.gov/content/pub/pdf/cp05.pdf> (last updated Mar. 6, 2007). The most authoritative figures on death sentences per calendar year nationwide are found in the United States Department of Justice’s Office of Justice Program’s Bureau of Justice Statistics (BJS) annual Capital Punishment reports, which can be found at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbse&sid=1>. The figures establish a slightly moving target, however, in that they sometimes vary a bit with each succeeding year’s report because BJS occasionally belatedly learns of death sentences from prior years. *Id.* It takes awhile for BJS to create a full report for a calendar year—the most recent full report is for 2005, with death sentence figures going back to 1973. *Id.* BJS does, though, put out more current Capital Punishment Statistical Tables prior to compiling the full reports, and the most recent of those is for 2008. *See* Tracy L. Snell, *Capital Punishment, 2008-Statistical Tables*, BUREAU OF JUST. STAT., tbl.14, <http://bjs.ojp.usdoj.gov/content/pub/pdf/cp08st.pdf> (last updated Jan. 13, 2010). The figures in this Table, however, only go back to 1993. *Id.* So for the average from 1992-1996, I used the most recent figures available, that is, the figure from the 2005 full report for 1992 (287), and the figures from the 2008 statistical table for 1993-1996 (295, 328, 326, and 323). *See id.* For 2005-2009, for the first four years, I used the figures from the 2008 statistical table (138, 122, 119, and 111), and for 2009, used the figure (106) from the Death Penalty Information Center. *See Fact Sheet*, DEATH PENALTY INFO. CENTER, 1, <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> (last updated Sept. 20, 2010).

4. *See Reports*, *supra* note 2.

5. *Number of Executions by State and Region Since 1976*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976> (last visited Oct. 20, 2010).

Texans for capital punishment for the last 40 years as measured by opinion polls, and the fact that most of the people who do not support capital punishment in the Texas polls would likely be excluded for-cause from serving on capital juries.⁶

What, then, is messing with Texas death sentences? Where did the missing 28 death sentences per year go—from 42 per year during the peak period to 14 per year during the most recent five-year period? More particularly, what accounts for the three different mini-eras manifested in the graph above: the 30's-and-40's per year from 1992-1999; the mid-20's per year that began with a steep drop-off in 2000 and continued through 2004; and the mid-to-low teens per year that began with another steep drop-off in 2005, which continues through the present?

Analysis reveals five causes for the decline, with varying degrees of effect. Three causes are changes in the legal landscape: (1) fewer capital murder convictions—modest effect; (2) the advent of the life-without-parole (LWOP) alternative—large effect; and (3) the exemption of mentally retarded and juvenile defendants from death sentences—modest effect.⁷ The other two changes are at the county level beyond what can be accounted for by the three causes above: (4) the less-populous county opt-out—large effect; (5) the Harris County plunge—large effect.⁸

II. THREE TEXAS-WIDE CHANGES IN THE LEGAL LANDSCAPE

A. Fewer Capital Murder Convictions

Under Texas law, “capital murder” is a specially-defined kind of murder for which either a death or life sentence can be imposed—thus, the word “capital” does not mean that death is the only sentencing option.⁹ Thus, a capital murder conviction is a necessary, but not sufficient, condition for a death sentence to be imposed; whether a death sentence will

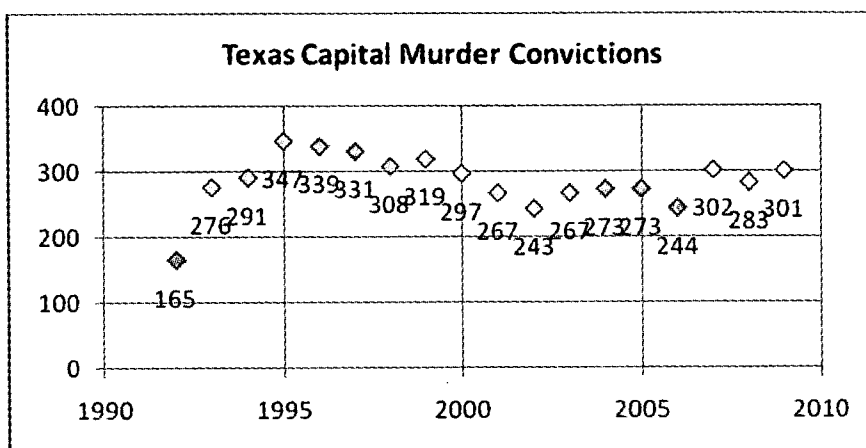
6. See *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)) (stating prospective capital jurors should be excluded for cause if the person's attitude will “prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath”); *Crime Poll: Texans Have Less Confidence in C.J. System*, U.S. STATE NEWS, May 30, 2007, available at 2007 WLNR 10457853 (“Three out of four Texans (74 percent) now support the death penalty for the crime of murder compared to four out of five (80 percent) in 2001.”); John Moritz, *Death-Penalty Poll: Most Texans Favor Executions, but Support Is Rising for a Moratorium*, FORT WORTH STAR-TELEGRAM, Nov. 13, 2004, at B5, available at 2004 WLNR 8594713 (“Over the past 16 years, support for the death penalty fell below 70 percent in the Texas Poll only once—in 1998 Support for the death penalty was at its highest, 86 percent, in 1988 and in 1994. The lowest support for death penalty was in 1998, when 68 percent favored it.”).

7. See *infra* Part II.

8. See *infra* Part III.

9. See TEX. PENAL CODE ANN. § 19.03 (West 2003 & Supp. 2010) (defining “Capital Murder”); TEX. PENAL CODE ANN. § 12.31(a) (West 2003 & Supp. 2010) (specifying the two possible sentences of death and life without parole for capital murder—prior to June, 2005, the alternative sentence to death was life with possibility of parole in 40 years).

be imposed depends on whether the parties are willing to plea bargain to a lesser sentence, and if not, whether a jury is willing to impose a death sentence. But since a capital murder conviction is a necessary condition for imposition of a death sentence, then the more capital murder convictions, the more possible death sentences. As the following graph illustrates, Texas capital murder convictions trended sharply upward from 1992 to their peak in 1995, generally trended modestly downward through 2006, and then rose significantly in 2007 to 2009.¹⁰



For the peak five-year period for capital murder convictions—1995-1999—they averaged 329 per year; by contrast, during the lowest five-year period—2002-2006—they averaged 260 per year—a decline of 21%.¹¹ A 21% decline from the peak of 40 death sentences per year would mean 8 fewer death sentences per year might be attributable to fewer capital murder

10. See generally CRIME IN THE UNITED STATES: UNIFORM CRIME REPORTS (1992-1996) [hereinafter FBI PRINT REPORTS] (specifically reviewing figures from 1992-1996); *Uniform Crime Reports*, THE FEDERAL BUREAU OF INVESTIGATION, <http://www.fbi.gov/ucr/ucr.htm> [hereinafter *FBI Online Reports*] (specifically reviewing figures from 2005-2008). There are various possible explanations why capital murder convictions have trended downward from the 1992-1996 peak period to the 2005-2009 trough period, but the most obvious explanation is that there was a significant decrease in murders from the earlier period to the later, which gives rise to the reasonable inference there was a significant decrease in capital murders between the two periods. See *id.* (emphasis added). The most relevant figures from comprehensive F.B.I.-collected yearly data are for the category “Murder and nonnegligent manslaughter.” *Id.* In Texas, during the 1992-1996 peak period, there was an average of 1,916 such crimes per year. See FBI PRINT REPORTS. By contrast, for the four years of the 2005-2009 trough period for which data are available—2005-2008, since the figure for 2009 has not yet been published—the average was 1,396. See *FBI Online Reports*. Less likely explanations for the decrease in capital homicides from the earlier period to the later period include: that the “solve rate” for murders declined; that prosecutors more often charged lower homicide crimes in cases that could have been charged as capital murder or more frequently plea-bargained capital charges down to lesser offenses; or that juries more often completely acquitted of capital charges or convicted of lesser offenses. I have not found evidence of any such trends.

11. *Reports*, *supra* note 2.

convictions.¹² But this explanation would be simplistic because there is an inexact correspondence between the number of capital murder convictions and the number of death sentences. In particular, the mid-20's per year mini-era of death sentences from 2000-2004 includes several of the years with the fewest capital murder convictions, while in the last three years of the mid-to-low-teens per year mini-era (2007-2009), capital murder convictions spiked above the level in the mid-20's per year mini-era.¹³ Thus, the effect of the number of capital murder convictions is confounding, but it nonetheless seems fair to conclude that the more-downward-than-not trend in the number of capital murder convictions since 1995 has had a modest effect in decreasing death sentences.

B. The Advent of the LWOP Alternative

Since 1993, sentencing juries in Texas were presented with two options in capital cases—death or “Hard 40” (life with possibility of parole after 40 years).¹⁴ But effective September 1, 2005 (the first day of Texas fiscal year 2006), Texas substituted LWOP for Hard 40.¹⁵ Logically, this change might have been predicted to have minimal effect because both prosecutors and juries should understand that capital murderers are unlikely candidates for parole and that even if paroled at the earliest opportunity, they would be statistically beyond the likely age of committing violent crimes, which is predominantly the province of young males.¹⁶

The numbers, however, belie this predicted minimal effect. Comparing death sentences for the last few years of the Hard 40 period with the first few years of the LWOP period reveals a stark contrast:

2001-2005 (Hard 40 years): 27, 26, 26, 23, 15;
2006-2009 (LWOP years): 14, 13, 12, 15.¹⁷

There were only about half as many death sentences each year in the LWOP period, except for 2005, during which death sentences probably tailed off in anticipation of the change.¹⁸ Prosecutors are more willing to plea bargain to

12. *See id.*

13. *Id.*

14. *See* TEX. PENAL CODE ANN. § 12.31(a) (West 2003 & Supp. 2010); *see also* Scott Phillips, *Legal Disparities in the Capital of Capital Punishment*, 99 J. CRIM. L. & CRIMINOLOGY 717, 732 n.55 (2009) (noting that before 1993 the rule was “Hard 35”).

15. *See* TEX. PENAL CODE ANN. § 12.31(a) (West 2003 & Supp. 2010).

16. *See, e.g.,* 2007 *Crime in the United States*, U.S. DEPARTMENT OF JUSTICE, tbl.39, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2007> (click on “go to arrest tables”; then click on “Table 39”) (last visited Oct. 20, 2010) (only 1.7% of violent crime by males is committed by those 55-59 years old, only .8% by those 60-64, and only .7% by those 65 or older).

17. *See Reports, supra* note 2.

18. *See id.*

LWOP, finding it provides sufficient protection to the public—and sufficient political cover; likewise, jurors often seem satisfied that LWOP provides sufficient incapacitation for offenders. The LWOP alternative has had a large effect in reducing death sentences.

C. U.S. Supreme Court Exemption of Juvenile and Mentally Retarded Defendants

In 2002, in *Atkins v. Virginia*, the United States Supreme Court ruled that mentally retarded defendants were ineligible to receive a death sentence;¹⁹ and it followed up in 2005 in *Roper v. Simmons* by holding that juveniles (defendants who were less than 18 years old at the time of the murder) were likewise ineligible.²⁰ Since mental retardation is not a bright-line concept, it is unclear how many mentally retarded defendants were sentenced to death during the peak period 1992-1996, but at least 4 defendants from that period have had their death sentences vacated due to retardation—an average of about one per year.²¹ Juvenile status, by contrast, is clearcut: 15 death sentences were imposed on juveniles from 1992-1996—an average of 3 per year.²² Defendants in neither category were eligible for death sentences during the five-year period 2005-2009.²³ Thus, a modest reduction of about 4 death sentences per year from the peak period to the recent period is likely attributable to the Supreme Court exemptions.

19. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

20. See *Roper v. Simmons*, 543 U.S. 551, 578 (2005);

21. I have not found a single source listing all Texas inmates whose death sentences have been reduced due to a post-trial determination of mental retardation. I have, however, found news reports for four such defendants sentenced to death during the 1992-1996 peak period. See *Retarded Killers' Sentences Commuted to Life*, HOUS. CHRON., Mar. 1, 2007, at B3, available at 2007 WLNR 3997404 (Darrell Carr—999057, Demetrius Simms—999814); *Inmate Given Life After Drug Use is Pardoned in Texas*, N. Y. TIMES, Mar. 11, 2007, at 122, available at 2007 WLNR 4594620 (Doil Lane—999092); Mike Tolson, *Texas Death Row Inmate's Sentence Reduced to Life*, HOUS. CHRON., Jan. 17, 2008, at B2, available at 2008 WLNR 981004 (Daniel Plata—999214).

22. See *Offenders No Longer on Death Row*, TEX. DEP'T OF CRIM. JUST., <http://www.tdcj.state.tx.us/stat/permanentout.htm> (last visited Oct. 20, 2010). The list has short notations regarding why the offender is no longer on death row, and 12 offenders from the 1992-1996 peak era of death sentencing have notations that their sentences were reduced because they were less than eighteen years old at the time of the offense: Steven Alvarado—999081; Oswaldo Soriano—999096; Raul Villarreal—999125; Jose Monterrubio—999128; Efrain Perez—999132; Tony Dixon—999138; Justin Dickens—999146; Johnnie Bernal—999155; Nanon Williams—999163; Edward Capetillo—999185; Anzel Jones—999193; and John Dewberry—999211. *Id.* The Texas Corrections website also has a list entitled *Executed Offenders*, with a click-on prison record for each showing age at the time of the crime. *Executed Offenders*, TEX. DEP'T OF CRIM. JUST., <http://www.tdcj.state.tx.us/stat/executedoffenders.htm> (last visited Oct. 20, 2010). From these records it can be determined that before *Roper* was handed down, Texas executed three offenders from the 1992-1996 peak era who were less than eighteen at the time of their crimes: T. J. Jones—999133; Napoleon Beazley—999141; and Toronto Patterson—999178. See *id.*

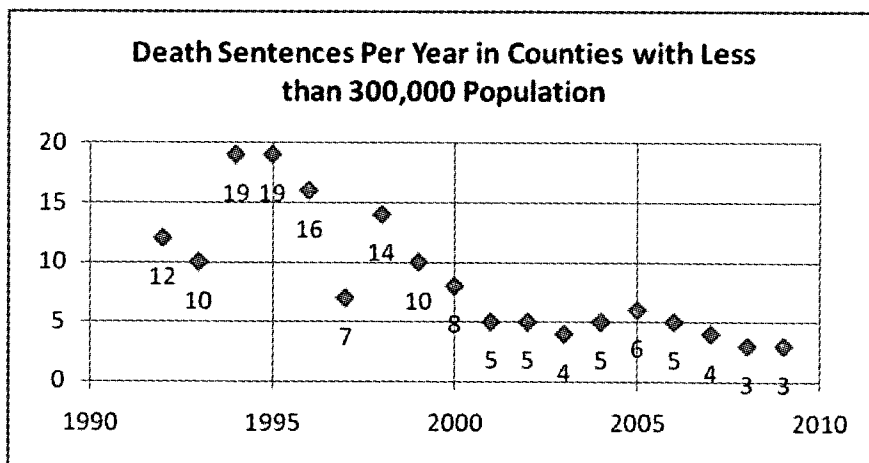
23. See *Executed Offenders*, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, <http://www.tdcj.state.tx.us/stat/executedoffenders.htm> (last visited Oct. 17, 2010).

III. TWO CHANGES AT THE LEVEL OF PARTICULAR COUNTIES

Decisions to pursue death sentences are made at the county level in each of Texas's 254 counties.²⁴ The three changes detailed above had effects throughout all of those counties.²⁵ But the numbers reveal changes in certain counties that resulted in steeper drops in death sentencing than can be accounted for by the three causes already mentioned.

A. The Less-Populous County Opt-out

Texas has twelve counties with populations greater than 300,000 (using 2000 Census data)—Bexar (San Antonio), Cameron (Brownsville), Collin (Dallas-Fort Worth metro area), Dallas, Denton (Dallas-Fort Worth metro area), El Paso, Fort Bend (Houston metro area), Harris (Houston), Hidalgo (McAllen), Nueces (Corpus Christi), Tarrant (Fort Worth), and Travis (Austin).²⁶ The remaining 242 counties are less populous.²⁷ The following graph depicts how those less populous counties have, in the last decade, largely opted out of death sentencing:²⁸



The less populous counties averaged 15 death sentences per year during the peak 1992-1996 period compared with 4 per year for the 2005-2009 period.²⁹ They also averaged only 5 per year for 2000-2004,

24. See Lucy Adams, *Death By Discretion: Who Decides Who Lives and Dies in the United States of America*, 32 AM. J. CRIM. L. 381, 386 (2006).

25. See *supra* Part II.

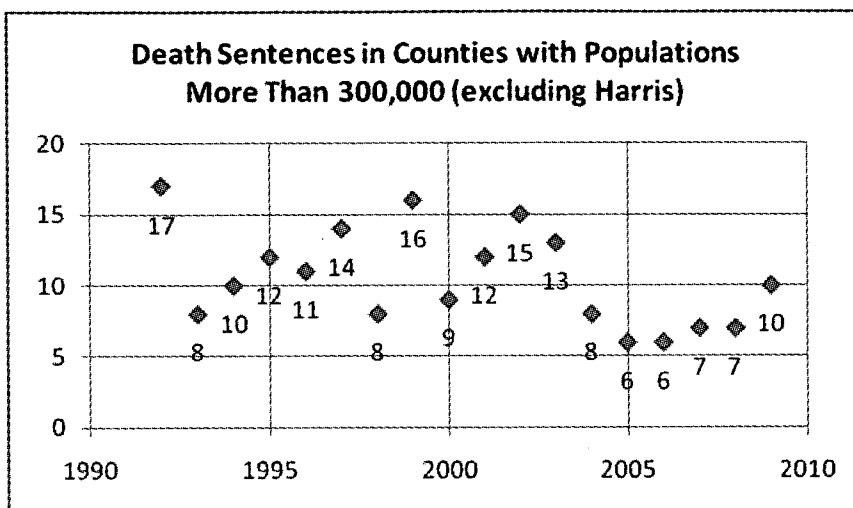
26. See *Texas By County*, U.S. CENSUS BUREAU, http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=04000US48&-_box_head_nbr=GCT-T1-R&-ds_name=PEP_2009_EST&-format=ST-2S.

27. *Id.*

28. *Reports, supra* note 2.

29. *Id.*

compared with 13 per year for 1992-1999, thus, accounting for much of the drop from the 30's-to-40's per year mini-era (1992-1999) to the mid-20's per year mini-era (2000-2004).³⁰ By contrast, the number of death sentences in the eleven most-populous counties—excluding Harris, which we will examine shortly—showed an overall general downward trend but with more upward ticks and not nearly as large a decline from the peak period to the recent period: from an average of 12 per year during the peak period to an average of 7 during the recent period.³¹



So, why are the less populous counties opting out of death sentencing? The likely explanation—long recognized in Texas as elsewhere—is that they simply cannot afford to mount death penalty prosecutions. As more and more procedural protections have been provided for capital defendants, and defense lawyers have become more proficient in invoking them, the costs of capital prosecutions have risen to the point that the budgets of many smaller counties cannot withstand the strain.³² Back in 2001, the *Houston Chronicle* reported that in smaller counties, “[County] commissioners have been known to second-guess prosecutors, raise property taxes[,] or suggest passing bond issues to pay for death penalty trials.”³³ Likewise, noting a nationwide trend in a 2009 article entitled *Cost is Slowly Killing Death Penalty*, the *Chicago Tribune* reported:

30. *Id.*

31. *Id.*

32. See Lupe S. Salinas, *Is It Time to Kill the Death Penalty?: A View From the Bench and the Bar*, 34 AM. J. CRIM. L. 39, 85 (2006).

33. Steve Brewer, *A Deadly Distinction: County Has Budget to Prosecute with a Vengeance*, HOUS. CHRON., Feb. 4, 2001, at A28, available at 2001 WLNR 11737721.

Death penalty cases can have an outsized effect in smaller counties that tend to have smaller budgets. There, a case can cost hundreds of thousands of dollars—close to \$1 million if the issues are particularly complicated—and force local officials to cut programs just to fund the prosecution. Prosecutors say they have to take that into consideration, although it is not the only factor. “Any good prosecutor is going to have to consider cost, especially in smaller, rural counties,” said Lowell Thompson, district attorney for Navarro County in Texas, south of Dallas. “But cost isn’t the only consideration. Our job is to seek justice, and we have to carry that out.”³⁴

Beyond cost, logistics can also be a problem for smaller counties—a long death penalty case can monopolize limited courtrooms and the limited number of judges, blocking other cases from proceeding.³⁵ For these reasons, prosecutors in smaller counties have become more inclined to resolve capital cases via plea bargains to life sentences, thus, drastically reducing their litigation costs—and particularly since the LWOP alternative became available in 2005.³⁶ This less-populous county opt-out has had a large effect in reducing death sentences.

B. The Harris County Plunge

There have traditionally been dramatic differences among Texas counties in their willingness to pursue death sentences. Harris County (Houston) has, until recently, been by far the most vigorous proponent of the death penalty in Texas—and in the nation; more executed inmates in the last forty years were sentenced to death in Harris County than in any *state*, besides the rest of Texas combined—Virginia comes in third, slightly behind Harris County (as of September 10, 2010: rest of Texas—344, Harris County—115, Virginia—107).³⁷

Given this history, the decline in the number of death sentences in Harris County from the 1992-1996 peak period to the 2005-2009 trough period is jaw-dropping: from a total of 66 for the earlier five-year period (an average of 13.2 per year) to a total of 12 for the later five-year period (an

34. Steve Mills, *Cost Is Slowly Killing Death Penalty*, CHI. TRIB., Mar. 8, 2009, at 10, available at 2009 WLNR 4437550.

35. See Brewer, *supra* note 33 (“In some smaller counties, judges are on a circuit, responsible for hearing cases in more than one county. When one judge stops to take on a capital case, another has to pick up the slack or a visiting judge has to be paid. In counties that have their own judges, backlogs are inevitable, and clogged dockets can lead to higher manpower costs down the line.”).

36. See *id.*

37. See Reports, *supra* note 2 (showing figures for Texas as a whole including Harris County and Virginia); *Texas Executions by County*, DEATH PENALTY NEWS & UPDATES, <http://people.smu.edu/rhalperi/texascounty.html> (last updated Oct. 16, 2010) (showing the 115 figure for Harris County). Subtracting the 115 for Harris County from the 459 for Texas leaves 344 for Texas outside Harris County. See *id.*

average of 2.4 per year).³⁸ The change becomes even more startling in light of the fact that the total number of death sentences for each five-year period in the other three counties with over 1 million population declined much more modestly: Dallas (from 9 to 6), Tarrant (from 12 to 10), and Bexar (from 12 to 7).³⁹

So, what happened in Harris County? An epoch-changing event was the retirement of long-time District Attorney Johnny Holmes effective January 1, 2001, although the effects of this change took some time to manifest.⁴⁰ Nationally recognized capital defense lawyer Stephen Bright says that under Holmes, the whole system in Harris County was streamlined to produce a large number of death sentences: Holmes and his chief assistants were very pro-death penalty; county officials never challenged Holmes's budget requests; there were always courtrooms and judges available; many of the judges were former Holmes assistants; and the rather small capital defense bar was accustomed to working quickly and cheaply.⁴¹ This produced a "death pipeline" from Harris County.⁴² Bright's insights were confirmed by Texas death penalty expert Professor David Dow, who says that Harris under Holmes was "a real club of a county"—with judges, prosecutors, and frequently-appointed defense lawyers all members of the club.⁴³

Holmes was succeeded by Chuck Rosenthal, a similarly pro-death penalty former-assistant prosecutor.⁴⁴ Rosenthal, however, never attained Holmes's legendary status.⁴⁵ Further, Rosenthal was soon saddled with the Houston Police Department Crime Lab scandal that began to unfold at the end of 2002.⁴⁶ The scandal resulted in the retesting of DNA in hundreds of

38. See *Reports*, *supra* note 2.

39. *Id.*

40. Lisa Teachey, *Rosenthal to Succeed Holmes as DA Quietly*, HOUS. CHRON., Dec. 31, 2000, at A1, available at 2000 WLNR 9384465.

41. Interview with Stephen B. Bright, President and Senior Counsel, S. Ctr. for Human Rights (Feb. 26, 2010).

42. *Id.*; see also Bill Jeffreys, *The Holmes Stretch: After 20 Years as Harris County D.A., Johnny Holmes Moves On*, Jan. 1, 2001 TEX. LAW. 1 (2001), available at 2001 WLNR 1290937 ("Outspoken and determined, Holmes' influence over the Harris County legal system is enormous. Much of the Republican-dominated judiciary is filled with his former employees . . . 'He's like Alan Greenspan,' says famed Houston defense attorney Richard 'Racehorse' Haynes, of Richard Haynes & Associates. 'If he hiccups, the market changes.' Haynes calls Holmes a 'vigorous' prosecutor and says he is one of the best in the country. But Haynes, among others, also believes Holmes has used his political power to put his former prosecutors on the bench, replacing judges he viewed as being too soft. Holmes downplays any such role, saying he is not politically active and generally stays out of Republican Party affairs.").

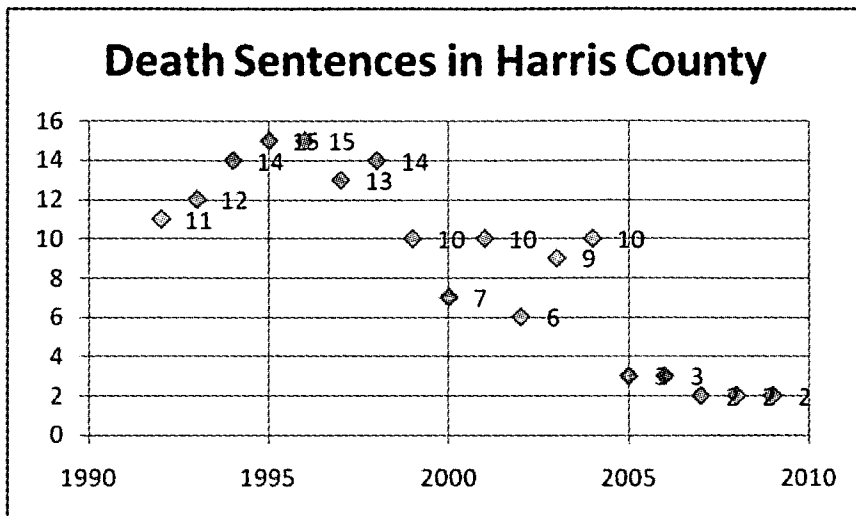
43. Telephone interview with David Dow, Professor, Univ. of Houston Law Ctr. and Litig. Dir., Tex. Defender Serv. (Oct. 28, 2009).

44. See Jeffreys, *supra* note 42.

45. See *Inadmissible*, Aug. 3, 2009 TEX. LAW. 3 (2009), available at 2009 WLNR 21607402.

46. See Bruce Nichols, *Will D.A. Survive Crime Lab Scandal?: With Harris County Vote in '04, He Says He's Trying to Fix Errors*, DALL. MORNING NEWS, Sept. 14, 2003, at 33A, available at 2003 WLNR 16473262 ("Ten months after it started, the scandal in the Houston Police Department crime lab

cases dating back to 1992, and it certainly shook confidence in the Harris County system, as well as in Rosenthal.⁴⁷ Nonetheless, in terms of death sentencing, Harris County was not much different in the first few years of the Rosenthal era than it had been in the last few years of the Holmes era.⁴⁸ In the following graph 1992-2000 are Holmes years; 2001-2007 are Rosenthal years; 2008 is Interim D.A. Kenneth Magidson's year; and 2009 is newly-elected Patricia Lycos's year.⁴⁹



In the last four years of the Holmes era, Harris County averaged 11 death sentences per year; in the first four years of the Rosenthal era it averaged 8.75—not a huge difference.⁵⁰ The big change was from 2004 to 2005—from 10 to 3, with the yearly total not having topped 3 since 2004.⁵¹

Of course, a good portion of the drop beginning in 2005 was due to the advent of the LWOP alternative. Death penalty expert Professor Dennis Longmire of Sam Houston State University in Huntsville says:

[T]he strong likelihood is that the decline in death sentences coming from Harris County is largely due to the passage of a true “life without parole” option for juries to consider. From the informal information I get from lawyers working in Harris County, they all agree that the DA’s office is

keeps unfolding. It has damaged the credibility of justice in Texas’ biggest city, which leads America in handing out death sentences. It has forced the chief of police to retire early.”)

47. *Id.* (“The district attorney’s office has been forced to review 1,300 convictions, identifying 377 for [DNA] retesting. Only 50 have been done so far. A man convicted of rape has been cleared and freed from prison, and flaws have been found in 11 other cases, though the degree of problems varies in each case.”).

48. *See Reports, supra* note 2.

49. *See id.*

50. *See id.*

51. *See id.*

now much more likely to agree to “plea negotiations” in capital cases if/when the defendant is willing to accept a true life sentence.⁵²

The LWOP alternative seems unlikely to completely explain the drop beginning in 2005, which was greater in Harris County than in Texas as a whole. The likely explanation is that the legendary power of Johnny Holmes slowly eroded after his retirement.

The fading of the effects of the Holmes regime also coincides with the increasing effectiveness of capital defense lawyering in Harris County. According to Professor David Dow, over the last few years capital defense lawyers in Harris County have increasingly been implementing the techniques provided by intensive capital defense training—something that defense lawyers in the other populous Texas counties had begun to implement years earlier.⁵³ In particular, training in how to “mitigate” capital cases; that is, how to unearth and present evidence to convince jurors to spare the offender’s life, has finally paid off for defendants in Harris County.⁵⁴

IV. CONCLUSION

Five factors—fewer capital murder convictions, the advent of the LWOP, the exemption of mentally retarded and juvenile defendants from death sentences, the less-populous county opt-out, and the Harris County plunge—have drastically reduced the number of death sentences in Texas in recent years.⁵⁵ The mid-to-low teens per year mini-era of death sentences

52. E-mail from Dennis Longmire, Professor, Sam Houston State Univ. to David McCord, Professor, Drake Univ. Law School (May 11, 2010, 4:05 CST) (on file with author).

53. See Telephone Interview, *supra* note 43.

54. See *id.*

55. See, e.g., Mike Tolson, *Fewer Killers Getting Sentenced to Death / Sharp drop seen across the nation, including Texas*, HOUS. CHRON. May 22, 2005, at A1, available at 2005 WLNR 24601123. Some commentators suggest that the exonerations in recent years of a significant number of inmates—some of whom were under death sentences—has caused prosecutors to be more hesitant to seek, and juries to be more hesitant to impose, death sentences. See *id.* (“‘With the introduction of DNA testing in past cases and finding mistakes have been made, I think the question of fallibility looms as a big issue in the decline of death sentences,’ said Joseph Peterson, head of the criminal justice department at the University of Illinois-Chicago.”). I am skeptical of this explanation for two reasons. First, as to prosecutors, they rarely believe there is an issue of innocence as to a defendant against whom they are seeking a death sentence. Second, as to jurors, those who would be most troubled by the prospect of sentencing an innocent person to death are the least likely to avoid being struck during the jury selection process. Nonetheless, noted death penalty expert Professor Jordan Steiker of the University of Texas School of Law disagrees with me:

We know that public opinion polls show some drop in support for the death penalty following the experience in Illinois. We also know that concerns about wrongful convictions/executions have been prominently noted in the legislative activity over the past ten years (repeal/abolition in NJ, NY, NM, and significant efforts to repeal/modify in MD, KS, MT, CO and elsewhere). Indeed, on the legislative side, most of the activity has been to restrain rather than expand over the past ten years (compared to a period of robust expansion

since 2005 has been comprised of about 3-4 death sentences per year in the less-populous counties, about 7 per year in the eleven populous counties other than Harris, and about 2-3 per year in Harris County. Whether this mini-era will continue remains to be seen, but it seems fair to conclude that there is little likelihood that in the near future Texas will approach the 30's-to-40's per year of death sentences from the 1990's mini-era, or even the mid-20's per year from 2000-2004 mini-era.

Texas need not worry, however, about losing its status as the "Death Penalty Capital" of the country. There is a large backlog of inmates on Texas Death Row—about 340—and Texas continues to be the runaway leader in converting death sentences into executions.⁵⁶ For 2009, there were 52 executions in the United States, and 24 of them were in Texas—the next-closest state, Alabama, had 6.⁵⁷

dating back to the 1970s). This trend is evident in the TX legislature as well. So it strikes me as a small step to say that the same considerations which have led to widespread efforts at leg[islative] restriction have contributed to less enthusiasm in securing death sentences at the local level. Again, I think the dynamic is less a reflection of actual jury decisions (rejection of the death penalty when sought) than a perception by prosecutors that the political benefits of securing death sentences have diminished in light of an emerging wariness on the part of the general public (in part because of concerns about wrongful convictions/executions).

E-mail from Professor Steiker to Professor David McCord, Drake Univ. Law School (June 3, 2010, 12:02 CST) (on file with author).

56. See *Death Row U.S.A. Fall 2009*, NAACP LEGAL DEF. FUND, http://naacpldf.org/files/publications/DRUSA_Fall_2009.pdf (showing 339 as of October 1, 2009).

57. See *Searchable Execution Database*, DEATH PENALTY INFO. CENTER, 62 (Fall 2009) <http://www.deathpenaltyinfo.org/executions>.