

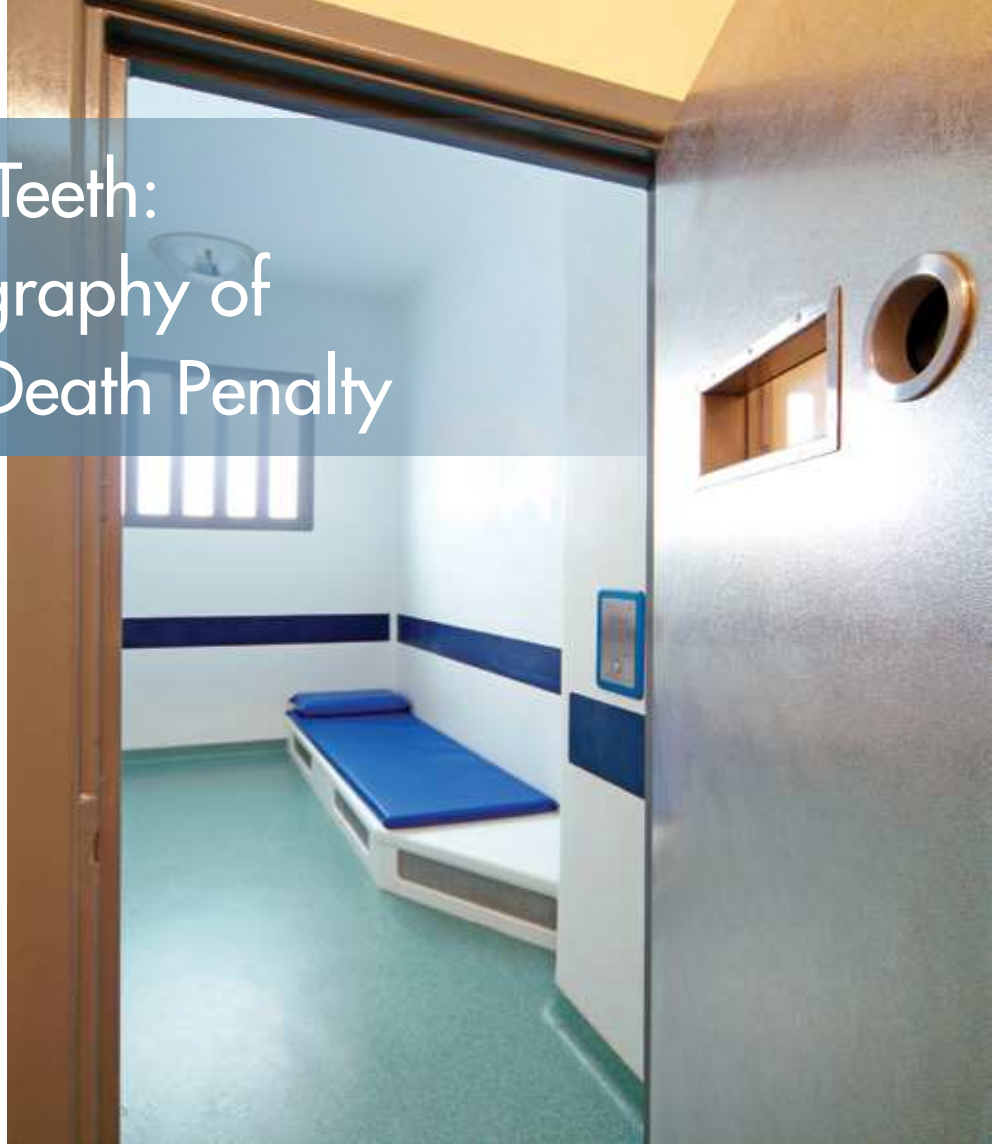
Rare as Hens' Teeth: The New Geography of the American Death Penalty

By Brandon L. Garrett

American death sentences have become just about as rare as hens' teeth—in far less time than the 80 million years it took for our modern-day hens' ancestors to lose the toothy beaks that enabled them to crunch food. In his dissenting opinion in *Glossip v. Gross*, 135 S. Ct. 2726, 2775 (2015), U.S. Supreme Court Justice Stephen Breyer noted the “dramatic declines” in death sentences, including in states like Texas and Virginia, as supporting his conclusion that the death penalty is categorically unconstitutional. As Justice Breyer also recognized, capital punishment is largely concentrated in a very few counties within those states that still implement it. He noted: “Between 2004 and 2009, for example, just 29 counties (fewer than 1% of counties in the country) accounted for approximately half of all death sentences imposed nationwide.” *Id.* at 2761. The frequency and geography of the death penalty in America has indeed radically changed, raising practical and constitutional questions for litigators and judges.

Fewer Death Sentences

The American death penalty today produces the fewest death sentences in three decades. Just over 50 defendants were sentenced to death in 2015. Compare that to the 10,000 or so homicides that occur each year across the country. In the 1990s, several hundred people were sentenced to death each year. This rapid and stunning drop is even more marked at the local level. Even within the biggest capital punishment states, death



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sentences now come from a shrinking group of individual counties, like Riverside County, California, and Duval County, Florida. While local patterns are less visible, the forces driving down the death penalty are actually working fastest at the county level. The vast majority of current U.S. prosecutors never have sought the death penalty and never will, even in the active death penalty states. This has long been true, but it is even more so in this era of a declining death penalty.

While there are over 3,000 total counties in the United States, each has its own distinct culture in the local criminal courts, where day in and day out, prosecutors and defense lawyers negotiate and litigate criminal cases, and judges and juries convict defendants. Although there were over 5,000 death sentences handed down from

1973 through 1995, the bulk of the nation's counties did not sentence anyone to death. But, during that period, death sentencing counties were more widely dispersed than they are now, so that at least some small rural counties did regularly impose death sentences. There were counties that sentenced five, 10, or more people to death in just a single year—more people than most entire states now sentence. The record for death sentences in a single year goes to Philadelphia County, Pennsylvania, which sentenced 20 people to death in 1983 (followed by Harris County, Texas, which sentenced 17 people to death in 1978, and then 15 people in both 1983 and 1992).

Such county-level data for death sentences had not been as readily available in the mid-1990s, the very

time period when the death penalty decline began in earnest. However, I have been collecting and analyzing such county-level death sentencing data starting with modern use and going back several decades. Today, what remains of the American death penalty is concentrated in just a few dozen scattered counties.

Indeed, over the last 20 years, the pace of this change has been remarkable. From 1996–2000, there were almost 500 different counties that imposed death. That dropped to 319 counties from 2001–2005, and to 263 from 2006–2010. Just 182 counties imposed death sentences from 2011–2015, and of those, only 66 counties sentenced more than one person to death (a marked drop from the more than 175 such counties in that category over the past 20 years). Then, in 2015, only 38 counties sentenced people to death, and only nine counties sentenced more than one person to death. In 2016, only 26 counties sentenced people to death, and *only one county*, Los Angeles, sentenced more than one person to death. Figure 1 depicts this sharp drop in the number of counties imposing death sentences each year.

Now that the death penalty has almost vanished, which are the outlier counties that still consistently sentence people to death? There are not many. Many of the counties that routinely sentenced people to death in the 1980s and 1990s no longer do so today. Los Angeles County, California; Maricopa County, Arizona; and Riverside County, California, all stand out, along with a handful of other counties. While other similarly large and urban counties like Harris County, Texas; Dallas County, Texas; and Philadelphia County, Pennsylvania, used to lead the pack, they are no longer producing many new death sentences.

Indeed, as a sign of the changing times, a judge once claimed: “Texas is called the Death Belt. Harris County is the buckle.” Yet even Harris County produced no death sentences in 2015.

A turning point in the eyes of some Texas observers was the case of Juan Quintero. On trial in 2008 for killing a police officer, his guilt was not disputed, and his lawyers did not succeed in arguing Quintero was criminally insane. And yet the Harris County jury sentenced him to life in prison, based on his remorse, mental health problems, and strong family ties. One juror commented: “He’s loved by many of his family and friends, and that was number one. I felt like he has potential.” His lawyer commented: “They saw his humanity.”

What had changed in Harris County? First, longtime district attorney Johnny Holmes Jr., nicknamed the “Texas Terminator” for leading the nation in death sentences and in executions, stepped down in 2000. While his immediate successor kept up those practices, the following district attorney promised to investigate wrongful convictions after a crime lab scandal, and obtained fewer death sentences. On the defense side, improved representation helped to develop more sophisticated mitigation evidence, like that which played such an important role in the Quintero case, to tell defendants’ stories. Training and resources for capital casework has improved, and the Texas Defender Service, the Gulf Region Advocacy Center, and other nonprofits have also stepped in to support capital cases.

After Texas, California is a perhaps surprising and inconsistent hot spot. Los Angeles County sentenced

the second most people to death in the country over the last 20 years: 150 from 1996–2015. Yet in 2015, nearby Riverside County topped Los Angeles in number of death sentences, after remaining neck and neck for several years. In general, 27 percent of the death sentences imposed across the United States in 2015 came from California counties. The state’s death sentencing counties—Los Angeles, Riverside, San Bernardino, Alameda, Orange, Contra Costa, San Diego, Sacramento, Tulare, and Ventura—are spread all around the state. They are both liberal and conservative in their politics. Some are quite urban and some are rural, some are wealthy while others are poorer. Neighboring counties with similar demographics do not send people to death row. They do not necessarily have the highest murder rates. Los Angeles, however, does have a higher murder rate than the average in California, but other counties with high death sentencing rates, like San Diego, have much lower murder rates. Law professor Franklin Zimring commented that these sentences are just “status prizes” for prosecutors, and “pretty expensive status rewards” at that, given the low likelihood of an execution ever occurring.

In line with the trend in California, the handful of counties around the country that still impose death sentences today are mostly large jurisdictions. The average population (based on 2010 Census figures) of the



Figure 1. Number of Counties with Death Sentences, 1991–2016

counties imposing death sentences in 2015 was over 1,000,000 people. Only 11 of the 38 counties that imposed death sentences had less than 100,000 people. However, a few small counties do stand out among the other outliers because of their low population but high rate of death sentences. The most notorious example had been Caddo Parish, Louisiana, where a longtime prosecutor, who became the interim prosecutor in 2015, emphatically said they should “kill more people” (and then, following severe criticism of his pro-death-penalty comments, declined to run for a full term). The Confederate flag flew at the local courthouse until 2011, atop a monument to “The Confederacy’s Last Stand” that still stands. Caddo Parish has just five percent of Louisiana’s population and its murders, but almost half of the state’s death sentences come from the parish. In fact, it has the highest rate of death sentences per capita in the country—or I should say *had* because it imposed no death sentences in 2015, and the only death sentence that year in Louisiana was elsewhere.

Or take Virginia, a state where in the 1980s and 1990s, dozens of small counties regularly imposed death sentences. These included places that few people who have not spent time in rural Virginia will have heard of, jurisdictions like Accomack County, the city of Appomattox, Chesterfield County, Culpeper County, the city of Lynchburg, and Pittsylvania County. However, in the past decade, only *seven counties* imposed any death sentences, and most were large, wealthy counties, like Fairfax County, the largest county in Virginia, and Virginia Beach, the largest city in Virginia. Many other large counties in Northern Virginia have not seen a capital trial in over a decade.

Fewer Executions

So far, I have discussed death sentencing changes but not executions—and indeed, even fewer executions occur than new death sentences, and even greater local geographic disparities

exist for executions. Just the three states of Texas (531), Oklahoma (112), and Virginia (111) together account for over half of all executions since 1976. Within those states, just a handful of counties produced the death sentences that resulted in executions. In Texas, Harris County (116) has produced the most executions of any county in the United States since 1976, followed by Dallas County (50), Oklahoma County (38), and Tarrant County (37). In its 2013 report, *The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases at Enormous Costs to All*, the Death Penalty Information Center describes how just 15 counties account for 30 percent of the executions in the United States since 1976, although they represent just one percent of the counties in states with the death penalty.

One important reason so few death sentences result in executions is that so many death sentences are reversed. Many of the thousands of individuals sentenced to death since the 1970s have had those sentences reversed. Data collected by the Department of Justice describe how of the over 8,000 death sentences entered from 1973–2013, only 16 percent resulted in executions. Forty percent had their cases overturned on appeal, including hundreds for whom the entire conviction was overturned, and not just the death sentence. Still more had their sentences commuted to life in prison. Over 100 have been exonerated from death row; 20 were exonerated by DNA tests. Many were sentenced to death under statutes declared unconstitutional by the U.S. Supreme Court. As of the date of this writing, over half of the inmates on Florida’s death row await possible relief, having been sentenced to death under a scheme that unconstitutionally permitted the judge and not the jury to sentence them. *See Hurst v. Florida*, 136 S. Ct. 616 (2016). Moreover, countless individuals have been executed in the past who would no longer be eligible for the death penalty today. For example,

before the 1970s, much of the death penalty was directed toward non-murders such as rape, and prior to the Court outlawing the practice, juveniles and the intellectually disabled could be sentenced to death and executed.

Reasons for the Decline

Why is this decline in death sentencing happening? While no one expected or predicted it, average death sentence rates began to decline in 1999. But murders had been falling in the 1990s, as did crime generally, and that national trend, with accompanying changes in public opinion, is likely responsible for part of the decline in death sentencing. While certain other legal changes, like adoption of life without parole and changes from judge to jury sentencing in some states, do not appear to correspond to declines I have identified in specific states’ death sentencing, one change that does correspond is states’ creation of dedicated trial offices to handle investigation and litigation of death penalty cases. For example, in Virginia, a sharp decline began in earnest after regional capital trial offices were created in the early 2000s, and there has not been a Virginia death sentence in five years.

There is more work to be done to better understand the remarkable and sudden decline in death sentences in America, and I am still exploring these data. Are there patterns that can be observed in the counties still sentencing people to death? Do county-level homicide patterns or demographics explain any of these trends? Moreover, what do these geographic patterns mean for the future of the death penalty—or for criminal justice more broadly? They certainly suggest that it really matters whether a case is brought in just a handful of counties in the country. According to the 2016 Fair Punishment Project report *Too Broken to Fix: An In-Depth Look at America’s Outlier Death Penalty Counties*, these outliers are plagued by persistent problems of

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Novel drug formulas. While several states continue to use pentobarbital to execute their prisoners, others have changed to novel drugs and drug combinations. Several states have used midazolam in combination with various other drugs, and California's proposed execution procedure would introduce amobarbital and secobarbital, two barbiturates never before used in executions.

As noted above, Oklahoma opted to use midazolam in its three-drug procedure, despite previous executions that called into question its effectiveness. In January 2014 in Ohio, Dennis

McGuire was the first man to be executed with a mixture of midazolam and hydromorphone. Ohio introduced the experimental procedure to unintended, disturbing results. A media witness reported, "McGuire started struggling and gasping loudly for air, making snorting and choking sounds which lasted for at least 10 minutes, with his chest heaving and his fist clinched. Deep, rattling sounds emanated from his mouth." McGuire took almost 30 minutes to die.

When Florida executed William Happ with midazolam in October 2013, a witness reported that "Happ

remained conscious longer and made more body movements after losing consciousness than other people executed recently by lethal injection." Happ, like all prisoners executed in Florida (and Oklahoma), received a paralytic drug shortly after the midazolam, so it is not possible to know what he experienced.

Despite the well-documented problems with the executions of Happ, McGuire, and Lockett—all of whom received midazolam—Arizona nevertheless elected to use midazolam and hydromorphone to execute Joseph

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overzealous prosecutors, inadequate public defenders, and racial bias. Defendants may also plead guilty fearing the death penalty, including defendants who are innocent, poorly represented, vulnerable, and underserving of harsh sentences.

The splintering of the death penalty may be part of its undoing under the U.S. Constitution, because it makes the imposition of capital punishment more and more "unusual" under the Eighth Amendment. Many other serious factors will continue to dominate the debates, of course, including wrongful convictions, endemic delays, costs, and concerns regarding the impact of mental illness, intellectual disability, and race discrimination in sentencing. But the shrinking geography, among those considerations, has not escaped the notice of judges, including, as noted earlier, Justice Breyer.

After all, the Supreme Court has recognized Eighth Amendment violations for practices used by far more states other than the current death penalty, which is now maintained by just a scattered collection of counties. In *Ring v. Arizona*, 536 U.S. 584, 607–08 (2002), the Court cited an effective consensus as part of its rationale, noting how "the great majority of States responded to this Court's Eighth Amendment

decisions requiring the presence of aggravating circumstances in capital cases by entrusting those determinations to the jury." Similarly today, the great majority of states with the death penalty do not impose death sentences, and even fewer have executions; and the story is still more powerful when one focuses on counties.

The Court has also noted in rulings like *Atkins v. Virginia*, 536 U.S. 304, 316 (2002), that there would be little need for states in which no executions have been carried out in decades to reconsider their death penalty statutes. The same logic may hold true of states in which the death penalty exists on the books but there have been no death sentences for years, except in a handful of counties. Extending this parallel, at the time of *Atkins*, 16 states had already barred the death penalty for the intellectually disabled. Perhaps similarly, only 16 states (and only 38 counties of 3,000+) imposed death sentences in 2015. Plus, death sentences are now at the same low point they had reached just before the Court's ruling in *Furman v. Georgia*, 408 U.S. 238 (1972).

Conclusion

Lawyers will increasingly use these data to show how few counties in their

states actually impose death sentences, how arbitrary it is which counties are the ones still using the death penalty, and thus how arbitrary the death penalty is overall. Already, briefs have made "data driven" arbitrariness arguments. Time will tell whether any other U.S. Supreme Court justices will come to agree with Justice Breyer that the geography of the death penalty and its rare occurrence make it a cruel and unusual punishment. Regardless of what happens in the courts, the death penalty is disappearing on the ground. Moreover, the extreme disparities in death penalty cases are just an emblem for the larger disparities in the uneven enforcement of criminal law. The dispersed geography of the death penalty provides a larger lesson: we should not let a few prosecutors or counties set cruel and extreme punishments that we all pay for in the end.

Brandon L. Garrett is the Justice Thurgood Marshall Distinguished Professor of Law at the University of Virginia School of Law. His recent book, Too Big to Jail: How Prosecutors Compromise with Corporations, was published in 2014. Portions of this piece are adapted from his forthcoming book, The Triumph of Mercy: How the Demise of the Death Penalty Can Revive Criminal Justice (in contract, Harvard University Press).