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## Truth, and Nothing but the Truth, about Colorado's Death Penalty

## TRUTH, AND NOTHING BUT THE TRUTH, ABOUT COLORADO'S DEATH PENALTY

SAM KAMIN & JUSTIN MARCEAU

George Brauchler and Rich Orman begin their critique of our empirical study of the death penalty in Colorado with the word "Lies." From there, their article descends into ad hominem attack. They refer to our "study" in scare quotes, they accuse us of being results-driven, and they claim that our work is dishonest, flawed, and unscientific. What all of this invective cannot do, however, is change the facts or law regarding the death penalty in Colorado; as our study shows, Colorado's death penalty statute fails to pass constitutional muster.

Although we wanted to respond fully to the Brauchler and Orman article in this volume because we take issue with its omissions and misstatements of fact, the Law Review's production schedule made that impossible. We were given this space, however, to outline the full defense of our work, which will appear in Volume 94 of the journal at 94 *DENV. L. REV.* 1 (2016) (forthcoming). Rather than using either that reply or this preview to refute, point-by-point, the repeated mischaracterizations of us and our work contained in the Brauchler and Orman article, we will instead emphasize the strength and probative value of our study.

Our study showed that nearly every murder in Colorado could have been charged as first degree murder and that nearly every first degree murder case contained facts that would make it statutorily eligible for the death penalty, revealing that Colorado's statutory scheme fails to perform the narrowing function required by the Eighth Amendment. Brauchler and Orman criticize us for focusing on only one of the findings necessary to qualify a defendant for a death sentence in Colorado; they argue that our study is flawed because we fail to empirically examine every step in Colorado's death "eligibility" process, including the jury's moral judgment whether aggravating factors outweigh mitigating factors. However, our methodological decision, which they speciously assert reflects our ignorance of Colorado law, follows directly from U.S. Supreme Court precedent. The Supreme Court has repeatedly required legislative narrowing through the statutory definition of murder and the use of aggravating factors. While the Eighth Amendment permits a jury to decide for any number of reasons not to impose death (as in the third and fourth steps of Colorado's process) it also requires that the class of persons against whom that punishment may be imposed be narrowly circumscribed *by statute*. We demonstrate in our study that the Colorado *statute* fails to do so.

Having failed to engage with the central constitutional principle in our study, Brauchler and Orman repeatedly insist that we are unqualified to conduct an empirical study of the death penalty in Colorado because we have not practiced law in this state. One can see why career trial lawyers like Brauchler and Orman might wish to identify this quality as the sine qua non of empirical legal research, but their complaint has literally nothing to do with the merits of our empirical study. First, our qualifications to conduct a study of the death penalty in Colorado are clear and unimpeachable. One of us has been a capital litigator, the other holds a Ph.D in Jurisprudence and Social Policy from UC Berkeley, having authored a dissertation on the death penalty decisions of the California Supreme Court as well as other empirical studies of the American criminal justice system. Together we have taught criminal law and procedure for more than 25 years at the University of Denver. More specifically, we are experts in the law of capital punishment in the United States. We have both taught Death Penalty Jurisprudence at DU, we are the co-authors of one of the leading casebooks in the field of capital punishment, and we have published a number of scholarly articles on the death penalty in the United States. Second, in conducting our study we benefited from an extensive literature regarding the best practices for the empirical study of the death penalty in the United States. Our research has been lauded by other experts, testifying under oath, as having met or exceeded the best practices employed by prior studies. Brauchler and Orman completely ignore this methodology and literature, arguing instead that our “study” is invalidated by our personal views on the death penalty. However, an analysis by Mr. Brauchler’s *own prosecutors* makes clear that our personal views had no bearing on the outcome of this study. When our study was first introduced in capital litigation in this state, the prosecution requested (and received) time and resources to conduct a parallel study. It had direct, independent access to the same state database which was used to produce our study. The prosecution hired, among others, a mathematician to examine and look for any holes in our study methodology and results. In the end, the court evaluating our study stated on the record that the differences between the analysis done by us and the analysis done by members of the prosecution’s team were insignificant. If our study is biased in favor of criminal defendants, the state and its experts apparently suffer from the same bias.

On the substance of our findings, Brauchler and Orman’s central critique is that we “cherry-picked” the dates for our study in a deliberate effort to manipulate our results. Nothing could be further from the truth. Brauchler and Orman are in possession of affidavits from the Colorado State Judiciary and Alternate Defense Counsel attesting under oath to the fact that reliable, electronic data searches were not possible prior to 1999. Accordingly, our study’s dataset includes *every* case between January 1, 1999, and the end of the last calendar year before we commenced our study in mid-2011. In other words, we looked at every murder case

that could be made available to us by the state. To blame us for not including cases, like that of James Holmes, *that had not yet occurred*, demonstrates the absurdity of the accusations leveled by Brauchler and Orman. What is more, we have continued analyzing cases arising after the end of our original study and will publish those results as they become available.

To summarize: when one ignores the inflammatory language of the Brauchler and Orman article, one is left with little more than a demand to be left alone. Only experienced trial lawyers and elected officials we are told, and certainly not academics and social scientists, can understand the death penalty process in Colorado. Repeatedly Brauchler and Orman tell their readers that academics are out of touch; all one has to do is look at the structure of our state's death penalty statute to see how narrow it is and how difficult Colorado makes it to sentence a murderer to death. However, their approach is utterly belied by quantitative data produced through the best practices for empirical study in this field. They don't like our study, and we don't blame them, because the objective data is clear: when one looks at the Colorado statute in action, one discovers a statute that makes virtually every killer eligible for death prosecution, something that is unequivocally forbidden by existing Eighth Amendment law. But don't take our word for it. Recall that Mr. Brauchler's own prosecutors replicated our study with their own team of experts and produced results virtually indistinguishable from our own. Having failed to undermine our own assessment of the data, they have now written an article attacking us and our motives rather than confronting the fundamental problems with Colorado's death penalty. Our response in the next issue will provide a more detailed accounting of the misstatements of law, mischaracterizations, and factual errors that are now, unfortunately, published in the pages of this issue of the *Denver Law Review*.

