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# Disquieting Discretion: Race, Geography & the Colorado Death Penalty in the First Decade of the Twenty-First Century

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# DISQUIETING DISCRETION: RACE, GEOGRAPHY & THE COLORADO DEATH PENALTY IN THE FIRST DECADE OF THE TWENTY-FIRST CENTURY

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PHILLIPS<sup>†</sup>

## ABSTRACT

This Article demonstrates through original statistical research that prosecutors in Colorado were more likely to seek the death penalty against minority defendants than against white defendants. Moreover, defendants in Colorado's Eighteenth Judicial District were more likely to face a death prosecution than defendants elsewhere in the state. Our empirical analysis demonstrates that even when one controls for the differential rates at which different groups commit statutorily death-eligible murders, non-white defendants and defendants in the Eighteenth Judicial District were still more likely than others to face a death penalty prosecution. Even when the heinousness of the crime is accounted for, the race of the accused and the place of the crime are statistically significant predictors of whether prosecutors will seek the death penalty. We discuss the implications of this disparate impact on the constitutionality of Colorado's death penalty regime, concluding that the Colorado statute does not meet the dictates of the Eighth Amendment to the Constitution.

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#### INTRODUCTION: THE DEATH PENALTY IN COLORADO TODAY

The death penalty has taken center stage in Colorado politics in recent years. In the past, debate over capital punishment tended to focus on moral or theological issues.<sup>1</sup> Today, however, the discussion is largely about the practical application of the death penalty.

A number of facts about Colorado's death penalty stand out. One immediate and inescapable initial observation is that the use of the death penalty is in steep decline in Colorado, to the point that it is now virtually nonexistent. To describe the penalty's use in Colorado as rare is an extreme understatement. Since 1967, only one person has been executed during a period in which more than 8,100 homicides have been committed.<sup>2</sup> At present, there are only three men on Colorado's death row, arising from just two criminal incidents: one man convicted of a multiple murder of four people that occurred in 1993<sup>3</sup> and two men convicted of involvement in a double murder that occurred in 2005.<sup>4</sup> All three of these men are African-American and were very young—under 21 years old—at the time of the crimes. All are from the same county, and in fact, all attended the same high school in Aurora, Colorado.<sup>5</sup>

When Colorado Governor John Hickenlooper issued a temporary reprieve to Nathan Dunlap in 2014, forestalling indefinitely his execution, the Governor quoted a Colorado judge who had said to him: “[The death penalty] is simply the result of happenstance, the district attorney's choice, the jurisdiction in which the case is filed, perhaps the race or

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1. See generally, e.g., CESARE BECCARIA, ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS 51–57 (Aaron Thomas ed., Aaron Thomas & Jeremy Parzen trans., Univ. of Toronto Press 2008) (1764); JEREMY BENTHAM, THE RATIONALE OF PUNISHMENT 168–197 (Robert Heward, Wellington St., Strand 1917) (1830); JOHN LOCKE, SECOND TREATISE OF GOVERNMENT §§ 88–89, at 47–48 (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1690); JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES 32–34 (G.D.H. Cole trans., E.P. Dutton & Co. 1950) (1762), Hugo Adam Bedau, *Capital Punishment*, in MATTERS OF LIFE AND DEATH 148, 148, 167–69 (T. Regan ed., Random House 1980).

2. Gary Davis was executed in 1997 for a murder he and his wife committed in 1986. See *People v. Davis*, 794 P.2d 159, 167 (Colo. 1990). Homicide rates are provided by DisasterCenter.com using data from FBI Annual Crime Reports, which shows 8,117 murders committed in the years 1967 through 2013. *Colorado Crime Rates 1967–2013*, DISASTERCENTER.COM, <http://www.disastercenter.com/crime/cocrime.htm> (last visited April 9, 2015).

3. See *People v. Dunlap*, 975 P.2d 723, 733 (Colo. 1999).

4. See *People v. Ray*, 252 P.3d 1042, 1044 (Colo. 2011); *People v. Owens*, 228 P.3d 969, 970 (Colo. 2010).

5. Ivan Moreno, *Personal Stories Grip Lawmakers On Death Penalty*, CBS DENVER, (Mar. 17, 2013, 1:18 PM), <http://denver.cbslocal.com/2013/03/17/personal-stories-grip-lawmakers-on-death-penalty>.

economic circumstance of the defendant.”<sup>6</sup> Citing a recent study of the Colorado death penalty conducted by authors of this Article (the Colorado Narrowing Study),<sup>7</sup> the Governor added that, since the time that Dunlap had been sentenced in 1996, “we now have the benefit of information that exposes an inequitable system.”<sup>8</sup>

Indeed, we do. This Article demonstrates that the imposition of the death penalty in Colorado depends to an alarming extent on the race and geographic location of the defendant. Moreover, we use empirical data and statistical analysis to definitively rebut the argument that these racial and geographic disparities within Colorado’s death penalty system are simply the result of racial or geographic disparities in homicide commission. This study demonstrates that both the race of the defendant and the geographic location of the crime are statistically significant predictors of whether a death penalty prosecution will be pursued against a statutorily eligible defendant. In conjunction with the Colorado Narrowing Study,<sup>9</sup> we demonstrate two critical failures in the Colorado death penalty system: (1) the system does not sufficiently narrow the class of death-eligible defendants at the stage of statutory definition;<sup>10</sup> and (2) there is a statistically significant disparity between death prosecutions against whites and non-whites, and among judicial districts.

#### I. THE CONSTITUTIONALITY OF THE DEATH PENALTY

The Eighth Amendment’s prohibition on cruel and unusual punishments has been construed as imposing a variety of procedural requirements on the lawful imposition of a death sentence.<sup>11</sup> Beginning in 1972, in the groundbreaking *Furman v. Georgia*<sup>12</sup> decision, the Court announced its concern, as a constitutional matter, with arbitrariness in the death sentencing procedures of the states.<sup>13</sup> Although *Furman* was a plurality decision producing ten separate opinions from the Court’s nine Justices, Justice Stewart provided perhaps the most memorable summary of the Court’s reasoning in striking down the death penalty in the United States; he explained that when the death penalty is imposed on only a “random handful” of the defendants who are statutorily eligible for the punishment, then the death penalty is “cruel and unusual in the same way

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6. OFFICE OF THE GOV., STATE OF COLO., Exec. Order D2013-006, at 2 (May 22, 2013) (alteration in original) (internal quotation marks omitted), available at <http://www.colorado.gov/cs/Satellite/GovHickenlooper/CBON/1251650380954>.

7. Justin Marceau, Sam Kamin & Wanda Foglia, *Death Eligibility in Colorado: Many Are Called, Few Are Chosen*, 84 U. Colo. L. Rev. 1069 (2013). We refer to this study as the Colorado Narrowing Study.

8. OFFICE OF THE GOV., STATE OF COLO., *supra* note 6, at 2–3.

9. See Marceau et al., *supra* note 7.

10. This is the finding of the Colorado Narrowing Study. See *id.* at 1113; Sam Kamin & Justin Marceau, *Waking the Furman Giant*, 48 U.C. DAVIS L. REV. 981, 1014–16 (2015).

11. For a more thorough summary of the background Eighth Amendment law, see Marceau et al., *supra* note 7, at 1075–76.

12. 408 U.S. 238 (1972) (per curiam).

13. See *id.* at 243–48 (Douglas, J., concurring).

that being struck by lightning is cruel and unusual.”<sup>14</sup> That is, for Justice Stewart—as well as Justices Douglas and White<sup>15</sup>—the infrequency with which the death penalty was imposed was sufficient reason to invalidate the punishment on constitutional grounds.

Even more relevant for present purposes, the decision to invalidate the capital punishment systems at issue in *Furman* rested in large part on a fear that too much discretion in the hands of prosecutors and juries would lead to the arbitrary and racially disparate application of the death penalty. Justice Douglas explicitly linked the constitutional problem of arbitrariness to the death penalty’s racially disparate application. Douglas observed, “It would seem to be incontestable that the death penalty inflicted on one defendant is ‘unusual’ if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices.”<sup>16</sup> Douglas went on to say that death penalty systems that did not sufficiently narrow death eligibility through *statutory criteria* “are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on ‘cruel and unusual’ punishments.”<sup>17</sup>

In short, the *Furman* Court was concerned that the rarity of death sentences relative to statutory eligibility raised the specter of racial discrimination.<sup>18</sup> In light of the fact that the death penalty in Colorado is

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14. *Id.* at 309–10 (Stewart, J., concurring). Although *Furman* was only a plurality the Court itself has subsequently grappled with the precedential value of the decision on multiple occasions. A dissent by Justice Scalia provides a summary of the Court’s subsequent treatment of *Furman*:

In *Furman*, we overturned the sentences of two men convicted and sentenced to death in state courts for murder and one man so convicted and sentenced for rape, under statutes that gave the jury complete discretion to impose death for those crimes, with no standards as to the factors it should deem relevant. The brief *per curiam* gave no reasons for the Court’s decision, other than to say that “the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.” To uncover the reasons underlying the decision in *Furman*, one must turn to the opinions of the five Justices forming the majority, each of whom wrote separately and none of whom joined any other’s opinion. Of these opinions, [Justice Brennan’s and Justice Marshall’s] rested on the broadest possible ground—that the death penalty was cruel and unusual punishment in all circumstances. A third, that of Justice Douglas, rested on a narrower ground—that the discretionary capital sentencing systems under which the petitioners had been sentenced were operated in a manner that discriminated against racial minorities and unpopular groups. The critical opinions, however, in light of the subsequent development of our jurisprudence, were those of Justices Stewart and White.

Walton v. Arizona, 497 U.S. 639, 657–58 (1990) (Scalia, J., dissenting) (citations omitted), *overruled by* Ring v. Arizona, 536 U.S. 584 (2002).

15. *Id.* at 254–56 (Douglas, J., concurring); *id.* at 311 (White, J., concurring). See James S. Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963–2006*, 107 COLUM. L. REV. 1, 8 (2007) (describing the opinions of Justices Douglas, Stewart, and White as the controlling holdings in *Furman*).

16. *Furman*, 408 U.S. at 242 (Douglas, J., concurring).

17. *Id.* at 256–57.

18. Marceau et al., *supra* note 7, at 1073 n.9 (“Scholars have observed that the Court’s conclusion that the death penalty was unconstitutional in *Furman* was based in large part on the low death sentencing ratios—that is, the low percentage of defendants who were eligible for the death

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imposed in only a small fraction of the cases in which it is statutorily available,<sup>19</sup> the next question is whether, as Justice Douglas predicted, the broad definition of death eligibility has, in fact, created a death penalty system that is tainted by racially disparate application. Previous scholars have suggested that low death sentencing rates can be expected to produce a death sentencing system that is racially disproportionate.<sup>20</sup> This Article provides data and analysis to confirm this hypothesis. Colorado's death penalty, because it fails to provide a meaningful mechanism for narrowing in the legislative definition, opens the door to disparate impact.

In 1986, in a discussion of the role of race in capital jury sentencing, the United States Supreme Court made an observation that is equally applicable to exercises of prosecutorial discretion at the death penalty charging stage. In *Turner v. Murray*,<sup>21</sup> the Court noted that, while issues of race can theoretically enter into any case, there are exceptional concerns in a death penalty case because of the vast amount of discretion involved:

Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected. . . .

. . . .  
 . . . [T]he risk of racial bias at sentencing hearings is of an entirely different order, because the decisions that sentencing jurors must make involve far more subjective judgments than when they are deciding guilt or innocence.<sup>22</sup>

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penalty that were actually sentenced to death.”); *see, e.g.*, Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. REV. 1283, 1287 (“The Court’s determination in *Furman* that the death penalty was being applied to a ‘random handful’ was grounded in empirical data concerning death sentence ratios at the time.” (footnote omitted)); *id.* at 1288 (“In *Furman*, the Justices’ conclusion that the death penalty was imposed only infrequently derived from their understanding that only 15–20% of convicted murderers who were death-eligible were being sentenced to death.”); *see also* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 415 (1995) (“[T]he class of the death-eligible should not be tremendously greater than, say, five or ten percent of all murderers. What was intolerable at the time of *Furman* and what remains intolerable today is that the ratio of death-eligibility to offenses-resulting-in-death is much closer to ninety-to-one than five or ten-to-one.”).

19. *See infra* notes 45–46 and accompanying text.

20. Marceau et al., *supra* note 7, at 1115; *see, e.g.*, Chelsea Creo Sharon, Note, *The “Most Deserving” of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes*, 46 HARV. C.R.-C.L. L. REV. 223, 247 n.138 (2011) (“In particular, the Baldus group’s study of racial discrimination in Georgia, relied upon by the petitioner in *McCleskey v. Kemp*, reached this conclusion. The study found that, among cases with nearly universal death sentencing, there was only a 2% difference between death-sentence rates for black and white defendants with white victims. Among less aggravated cases, where death sentences were imposed only 41% of the time, this racial variation rose to 26%.”(citation omitted)).

21. 476 U.S. 28 (1986).

22. *Id.* at 35, 38 n.12.

The same risk of undetected, perhaps even unconscious, racial bias<sup>23</sup> is not restricted to jury decision making; the death penalty charging decisions being made by Colorado prosecutors have a strong racially disparate impact.

## II. PRIOR STUDIES ON RACE, GENDER, AND THE DEATH PENALTY

Since the Supreme Court issued its opinion in *Furman*, numerous empirical studies have been designed to assess how, and whether, the race of murder defendants and victims affects the likelihood that a death sentence will be imposed.<sup>24</sup> In 1990, for example, the General Accounting Office (GAO) conducted a review of studies of the administration of

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23. See, e.g., Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 951 (2006); Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 822 (2012) (“[T]here are compelling reasons to believe that prosecutors unwittingly display implicit racial bias at a variety of decision points.”).

24. See, e.g., DAVID C. BALDUS, GEORGE G. WOODWORTH & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY 140–88 (1990) [hereinafter BALDUS ET AL., EQUAL JUSTICE]; David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DEPAUL L. REV. 1411, 1421 (2004) [hereinafter Baldus & Woodworth, *Reflections*] (discussing the apparent decline, post-*Furman*, of race-of-defendant discrimination in exercises of prosecutorial discretion); David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973–1999)*, 81 NEB. L. REV. 486, 590 (2002) [hereinafter Baldus et al., *Nebraska Experience*]; David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1763–64, 1767 (1998) [hereinafter Baldus et al., *Findings from Philadelphia*] (examining death prosecutions in Philadelphia between 1983 and 1993 and finding that, after controlling for the severity of the crime and the defendant’s criminal background, the rate at which death-eligible black defendants were sentenced to death was 38% higher than the rate for other eligible defendants; finding also that death sentences were most likely to be imposed in cases involving black defendants and nonblack victims, and least likely to be imposed in cases involving nonblack defendants and black victims); David C. Baldus, Charles A. Pulaski, Jr. & George Woodworth, *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts*, 15 STETSON L. REV. 133, 147 (1986) [hereinafter Baldus et al., *Challenge*] (including data from Colorado); John J. Donohue III, *An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities?*, 11 J. EMPIRICAL LEGAL STUD. 637 (2014); Raymond Paternoster et al., *Justice by Geography and Race: The Administration of the Death Penalty in Maryland, 1978–1999*, 4 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 1, 13–14 (2004); Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides: 1990–1999, The Empirical Analysis*, 46 SANTA CLARA L. REV. 1, 36–37 (2005); Glenn L. Pierce & Michael L. Radelet, *Race, Region, and Death Sentencing in Illinois, 1988–1997*, 81 OR. L. REV. 39, 67 (2002); Michael L. Radelet & Glenn L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 FLA. L. REV. 1, 33 (1991); John J. Donohue, *Capital Punishment in Connecticut, 1973–2007: A Comprehensive Evaluation from 4686 Murders to One Execution 1* (June 8, 2013) [hereinafter Donohue, *Capital Punishment in Connecticut*] (unpublished manuscript), available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1095&context=john\\_donohue](http://works.bepress.com/cgi/viewcontent.cgi?article=1095&context=john_donohue) (analyzing murders in Connecticut from 1973 to 2007); ISAAC UNAH & JOHN CHARLES BOGER, RACE AND THE DEATH PENALTY IN NORTH CAROLINA: AN EMPIRICAL ANALYSIS: 1993–1997, at 2 (2001), available at <http://www.unc.edu/~jcboger/NCDeathPenaltyReport2001.pdf>; see also David C. Baldus & George Woodworth, *Race Discrimination and the Death Penalty: An Empirical and Legal Overview*, in AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT 501, 501 (James R. Acker et al. eds., 2d ed. 2003) [hereinafter Baldus & Woodworth, *AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT*] (providing another good overview of the multiple studies documenting the race effect).

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the death penalty in various states to determine whether the race of the victim and the defendant were affecting capital sentencing.<sup>25</sup> The GAO survey found that 82% of the studies selected as worthy of review had shown that the race of the victim affected charging or sentencing decisions or both.<sup>26</sup> According to GAO's review, although "legally relevant variables, such as aggravating circumstances, were influential . . . [they] did not explain fully the racial disparities researchers found."<sup>27</sup>

The GAO's conclusion is corroborated by research conducted in jurisdictions throughout the country, nearly all of which have documented strong race-of-victim correlations and some of which have also demonstrated race-of-defendant correlations with death prosecution and sentencing.<sup>28</sup> The first comprehensive empirical study of Colorado's death penalty was published in 2003 and was authored by Professor Michael Radelet; the research covered the period from 1859 to 1972.<sup>29</sup> In a subsequent article, Professor Radelet, Stephanie Hindson, and Hillary Potter continued that analysis, considering death penalty prosecutions for crimes that occurred from 1980 through 1999.<sup>30</sup> Radelet, Hindson, and Potter examined "all cases where the death penalty was imposed, 1972–2005, and . . . all cases where the death penalty was sought, 1980–1999."<sup>31</sup> The data revealed that Colorado death penalty prosecutions were extremely rare, having been sought only 110 times between 1980 and the end of 1999.<sup>32</sup> Radelet, Hindson, and Potter found that:

the odds of [a death prosecution] were much higher for those suspected of killing whites than for those suspected of killing blacks or Hispanics, and much higher for those suspected of killing white women than for other homicide suspects in the 110 cases where the death penalty was sought between 1980 and 1999.<sup>33</sup>

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25. U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT TO SENATE AND HOUSE COMMITTEES ON THE JUDICIARY, GAO/GGD-90-57, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 1 (Feb. 1990) [hereinafter DEATH PENALTY SENTENCING]; see also U.S. DEP'T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEMS: A STATISTICAL SURVEY (1988–2000), at 30–32 (2000), available at [http://www.justice.gov/sites/default/files/dag/legacy/2000/09/13/\\_dp\\_survey\\_final.pdf](http://www.justice.gov/sites/default/files/dag/legacy/2000/09/13/_dp_survey_final.pdf) (last visited July 23, 2015) (concluding that, between 1995 and 2000, 48% of death cases charging white defendants were resolved by plea, while 25% of death cases charging black defendants were resolved by plea—a 23 percentage point difference).

26. DEATH PENALTY SENTENCING, *supra* note 25, at 5.

27. *Id.* at 6.

28. See *supra* note 24.

29. Michael L. Radelet, *Capital Punishment in Colorado: 1859–1972*, 74 U. COLO. L. REV. 885 (2003).

30. Stephanie Hindson, Hillary Potter & Michael L. Radelet, *Race, Gender, Region and Death Sentencing in Colorado, 1980–1999*, 77 U. COLO. L. REV. 549 (2006).

31. *Id.* at 552.

32. *Id.* at 567.

33. *Id.* at 553. Hindson, Potter, and Radelet identified Colorado cases in which the death penalty was sought and compared this "death-prosecuted" pool of murders to the general pool of homicides in Colorado for the period 1980–1999. These researchers demonstrated that, statistically speaking, the odds of a death prosecution were greater in cases involving white murder victims (especially female victims) than in cases involving minority murder victims. *Id.* at 577–78. "While non-Hispanic white victims accounted for 54 percent of all homicide victims from 1980 to 1999,



Our work picks up where the Radelet studies left off. Our analysis of the race and geographic location of defendants found guilty of the most serious murders in Colorado involves two steps. First, it is necessary to identify the most aggravated murders—those for which death is a valid punishment under Colorado’s capital statute.<sup>34</sup> This task was taken up by two of the authors of this article, along with another researcher in the Colorado Narrowing Study, through an in-depth study of all concluded murder cases that had been filed in the Colorado district courts over a twelve-year period (January 1, 1999 through December 31, 2010).<sup>35</sup> The Colorado Narrowing Study required the researchers to examine the facts of each murder case during this period in order to determine which cases were statutorily eligible for prosecution under the Colorado Death Penalty Statute.<sup>36</sup> In particular, the study identified a pool of Colorado aggravated murders in which the death penalty was sought or legally could have been sought—those cases in which a jury’s finding of first-degree murder and aggravating factors would have been upheld on appeal.<sup>37</sup> These murders are referred to herein as “statutorily death-eligible”—they are murders for which the death penalty was permitted as a matter of law under the Colorado first-degree murder and death penalty statutes.<sup>38</sup> Having identified the statutorily death-eligible cases, we then compared these cases to those in which death was actually sought to determine what percentage of statutorily death-eligible cases were actually prosecuted as such.

Stated differently, the primary purpose of the Colorado Narrowing Study was to assess whether or not Colorado’s statutory death penalty scheme fulfills the constitutional task assigned to it by the Supreme Court in such cases as *Furman v. Georgia*,<sup>39</sup> *Gregg v. Georgia*,<sup>40</sup> and *Zant v. Stevens*.<sup>41</sup> In those cases the Court repeatedly required the states

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they account for 81.8 percent of victims in cases where the death penalty was sought.” *Id.* at 578 (emphasis omitted). The researchers found that the death penalty was “pursued against those who kill white women at almost twice the rate as their rate of homicide victimization.” *Id.* at 577. These researchers suggested that future efforts should focus on particular characteristics of the murders in those cases where the death penalty was sought (“death prosecutions”) and those in which prosecutors sought alternative lesser penalties, such as life imprisonment without parole. *Id.* at 582. The researchers explained their focus on the victim’s attributes (race, gender, and ethnicity) as follows: “Because the vast majority of research on the relationship between race and death sentencing conducted over the past three decades has found that death sentencing is correlated with the victim’s race and ethnicity, and not the defendant’s, we focus herein primarily on victim attributes.” *Id.* at 552.

34. COLO. REV. STAT. § 18-1.3-1201(5) (2012).

35. See *infra* Part III. For additional study parameters, see Marceau, et al., *supra* note 7, at 1098-1108.

36. See *infra* Part III. See also COLO. REV. STAT. § 18-1.3-1201(5) (2012).

37. Marceau et al., *supra* note 7, at 1072.

38. We use the phrase “statutorily death-eligible” for precision. Prior scholarship has demonstrated the confusion surrounding the terms “eligibility” and “narrowing” in the death penalty context. See Kamin & Marceau, *supra* note 10, at 1002-04.

39. 408 U.S. 238 (1972) (per curiam).

40. 428 U.S. 153 (1976) (plurality opinion).

41. 462 U.S. 862 (1983).

to establish a statutory basis for *narrowing* the few cases in which the death penalty is imposed from the many cases in which it is not.<sup>42</sup>

The Colorado Narrowing Study produced a number of notable findings. First, it showed that over 91% of murders during the study period either were or could have been prosecuted as first-degree murders.<sup>43</sup> Second, and even more significantly, the data showed that in over 90% of all cases that were or could have been charged as first-degree murder, one or more aggravating factors was present. That is to say, the study demonstrated that more than nine out of ten first-degree murderers were statutorily death-eligible.<sup>44</sup> Finally, because the Supreme Court in *Furman* had focused on the risk of disparate treatment that occurs when a death *sentence* rate is less than 15%–20%,<sup>45</sup> the study calculated Colorado's death sentencing rate for the period and determined it to be just "3 of 539, or 0.56%."<sup>46</sup>

On the basis of these data, the study concluded that Colorado's statutory sentencing scheme "has failed to produce legislative standards capable of genuinely narrowing the class of death-eligible offenders."<sup>47</sup> On the basis of these findings alone—the fact that nearly every murderer in Colorado could have been charged with first-degree murder and that nearly every first-degree murderer could have been sentenced to death—the Colorado Narrowing Study concluded that Colorado's capital sentencing regime was not meeting its Eighth Amendment obligations.

In response, proponents of the death penalty have asserted that the findings of the Colorado Narrowing Study are largely irrelevant to the question of the Colorado capital statute's constitutionality. Statutory narrowing, they argue, is unnecessary, because the prosecutors themselves take great care to ensure that the death penalty system in the state oper-

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42. *Zant*, 462 U.S. at 862–63; *Gregg*, 428 U.S. at 196–97; *Furman*, 408 U.S. at 299–301, 304–05 (Brennan, J., concurring). See Marceau et al., *supra* note 7 at 1072 ("[T]he Supreme Court has emphasized that a State's capital sentencing statute must serve the 'constitutionally necessary function . . . [of] circumscrib[ing] the class of persons eligible for the death penalty' such that only the very worst are eligible for the law's ultimate punishment." (alterations in original) (quoting *Zant*, 462 U.S. at 878)).

43. Marceau et al., *supra* note 7, at 1109.

44. *Id.* at 1110 (finding that in approximately 90% of first-degree murder convictions, a finding of at least one aggravating factor would have been upheld on appeal).

45. Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. Rev. 1283, 1288 (1997) ("In *Furman*, the Justices' conclusion that the death penalty was imposed only infrequently derived from their understanding that only 15–20% of convicted murderers who were death-eligible were being sentenced to death.").

46. Marceau et al., *supra* note 7, at 1112. It bears noting that one Colorado District Court found that, following an extensive review of these results, the prosecution effectively concurred and had no objection to the court's reliance on these statistical findings. See *People v. Montour*, No. 02CR782, at 2 (Douglas County District Court of Colorado May 2, 2013) ("The prosecution found that the aggravating-factor rate was 88.49%, and the death-sentence rate was 0.57%." (on file with author); *id.*, at 2 n.5 ("The Court will use the defense's statistics . . . to resolve this motion on the merits, because the parties' statistics are similar, and because the prosecution stipulated to the defense's numbers for purposes of this motion.").

47. *Id.* at 1113.

ates in a fair, rational, and non-arbitrary manner. Illustrative are the comments of Eighteenth Judicial District Attorney George Brauchler, who addressed the role of prosecutorial discretion in death prosecutions during a March 19, 2013 hearing, held before the Colorado General Assembly's House Committee on the Judiciary on House Bill 13-1264, which concerned a proposed repeal of Colorado's death penalty.<sup>48</sup> When asked whether the dearth of defendants on death row—in contrast with the “thousands” of murder convictions that had been obtained in Colorado—constituted evidence that the death penalty was being imposed arbitrarily and capriciously, Mr. Brauchler responded, “No . . . . In fact, what it is, it's the exercise of discretion. . . . [T]he fact that we don't pursue [the death penalty] on a greater percentage of murder cases only shows you the amount of discretion that these District Attorneys exercise in seeking it.”<sup>49</sup> Mr. Brauchler further stated:

It's false to say that every first degree murder case could arguably be the death penalty. . . . In fact, it requires more than existence of an aggravating factor. . . . [O]ne of the hallmarks of a free people and the best criminal justice system in the country is something that's called prosecutorial discretion. And it is because we have 22 separately-elected District Attorneys throughout this state, by the populations, over which they will impose laws of this State.<sup>50</sup>

The fact that the death penalty was frequently available but rarely used was, in Brauchler's view, a demonstration of the success of Colorado's death penalty system rather than evidence of its infirmity. Brauchler reasoned that although there was a great disparity between those eligible for the penalty and those who receive it, this was evidence merely of the careful use of discretion by the state's prosecuting attorneys.

At the same legislative hearing, some attempted to excuse the racially disparate operation of Colorado's death penalty by noting that non-whites commit more of the violent crime in our state and that, as a result, “African American[s] tend to be just easier to convict.”<sup>51</sup> Fourth Judicial District Attorney Dan May explained that the racial disparities in the capital punishment system are all “outside of the criminal justice area” because “when you really look at how many people commit robberies, how many are in prison, how many commit murders, how many in prison, they parallel quite a bit.”<sup>52</sup> The debate about Colorado's death penalty, then, has been shaped by an intuition—often explicit—that racial mi-

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48. *Proposal of Repeal of the Death Penalty: Hearing on H.B.13-1264 Before the Comm. on the Judiciary*, 2013 Leg., 69th Reg. Sess. 260–61 (Colo. 2013) (statement of George Brauchler, Dist. Att'y, 18th Judicial District).

49. *Id.* at 260–61.

50. *Id.* at 248–49.

51. *Id.*, at 302 (question posed by Rep. Jovan Melton, discussing race and the death penalty with Dan May, Dist. Att'y, 4th Judicial District). *See also id.* at 273–274 (discussion with George Brauchler, Dist. Att'y, 18th Judicial District).

52. *Id.* at 303 (testimony of Dan May, Dist. Att'y, 4th Judicial District).

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norities commit more (and more heinous) offenses than their white counterparts. In this Article we examine whether the “more” and “worse” arguments that have been advanced by legislators and district attorneys can account for the impact of race and geographic location on the administration of the Colorado death penalty.

At the outset, it is important to note that there are insurmountable constitutional problems with a capital sentencing regime that leaves to prosecutors the task of ensuring a non-arbitrary, Eighth Amendment-compliant death penalty regime.<sup>53</sup> Prosecutorial discretion alone can never satisfy the Eighth Amendment requirements of *statutory* narrowing—that narrowing must be done by statute, either in the definition of first-degree murder or in the enumeration of statutory aggravating factors.<sup>54</sup> That is, no matter how carefully prosecutors exercise their discretion about when to seek the death penalty, their exercise of discretion cannot substitute for the legislative narrowing required by the Constitution or save an otherwise unconstitutional capital statute. But this Article sets that larger constitutional issue to the side. Assuming *arguendo* that prosecutorial discretion could cure the problem of arbitrariness suggested by the Colorado Narrowing Study (and it cannot), this Article seeks to examine the data and expose the realities of prosecutorial discretion in Colorado. This Article examines the results of the broad discretion afforded prosecutors under Colorado’s capital statute.

If prosecutors were, in fact, using their discretion to prevent the arbitrary imposition of the death penalty, one would expect that only the most heinous murderers would face death penalty prosecution. One would also expect that neither race nor geography would be statistically relevant predictors of whether a death sentence is sought. Such care and thoughtfulness is certainly consistent with the narrative provided by prosecutors in Colorado. Repeatedly, prosecutors have claimed that the vast discretion afforded to them under Colorado’s sentencing statute is a force of good—that discretion ensures that only the worst are sentenced to death.<sup>55</sup> A careful study of the data, however, reveals a very different picture. The severity of the defendant’s crime is not the most important factor in determining whether someone will be sentenced to death in Colorado. Instead, as this Article’s original statistical research demonstrates, prosecutors were more likely to seek the death penalty against minority defendants than against white defendants. Moreover, defendants in Colorado’s Eighteenth Judicial District were more likely to face a

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53. Kamin & Marceau, *supra* note 10, at 992–94.

54. See *Zant v. Stephens*, 462 U.S. 862, 878 (1983); Kamin & Marceau, *supra* note 10, at 993–94.

55. See, e.g., George Brauchler, *Death Penalty Is a Tool of Justice*, DENVER POST, March 31, 2013, [http://www.denverpost.com/opinion/ci\\_22895409/death-penalty-is-tool-justice](http://www.denverpost.com/opinion/ci_22895409/death-penalty-is-tool-justice) (“[O]ur elected prosecutors prudently exercise discretion as to which few murder cases truly warrant the pursuit of the death penalty.”); *supra* note 48–52 and accompanying text.

death prosecution than defendants across the remainder of the state. Our look at the data shows that even if we control for the differential rates at which different groups commit statutorily death-eligible murders, non-white defendants and defendants in the Eighteenth Judicial District are more likely than others to face a death penalty prosecution.<sup>56</sup>

### III. METHODOLOGY AND DESIGN

The Colorado Narrowing Study analyzed hundreds of murder convictions obtained during a twelve-year time period.<sup>57</sup> From this extensive data pool, the Colorado Narrowing Study identified 524 cases which, based on their specific facts, could have been prosecuted as death penalty cases under the Colorado Death Penalty Statute based on a first-degree murder finding and the factual existence of one or more statutory aggravating factors<sup>58</sup> but in which the death penalty was not actually sought.<sup>59</sup> In addition to the 524 statutorily death-eligible cases in which the prosecution exercised its discretion and did not seek the death penalty, there were 22 cases in which the death penalty was actually sought by the prosecution during the twelve-year period of the Colorado Narrowing Study (death prosecutions).<sup>60</sup> These 22 death prosecutions, when added

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56. See *infra* Part IV.

57. For a detailed description of the methodology, see Marceau et al., *supra* note 7, at 1098–1108. The requirement for a conviction ensures that cases are not utilized in which the defendant was actually innocent. This requirement, dubbed the “controlling fact finder” rule, is standard practice in empirical murder studies. The exclusion of cases under the controlling fact finder rule, like the requirement that the death prosecution not be legally barred, best prevents misattribution of a non-death penalty outcome to mere prosecutorial discretion or the possibility that the case was simply a factually weak one. See David Baldus et al., *Empirical Studies of Race and Geographic Discrimination in the Administration of the Death Penalty: A Primer on the Key Methodological Issues*, in *THE FUTURE OF AMERICA’S DEATH PENALTY* 153, 165–66 (Charles S. Lanier et al. eds., 2009). Such a case is

properly excluded from any analysis of death sentencing outcomes. However, if on the basis of credible evidence, the prosecution viewed such a case as death-eligible, as evidenced by the advancement of the case to trial with the government seeking a death sentence, it would be appropriate to include the case in the sample of death-eligible cases that is used to model prosecutorial decision making.

*Id.* at 166. In other words, a prosecutor’s decision to seek death tells us something about the prosecutor’s exercise of discretion, even when the defendant was factually innocent or even when the prosecution was later barred on legal grounds.

58. Once a first-degree murder prosecution is commenced, the only additional requirement placed upon the prosecution to trigger a death penalty prosecution is the filing of a Notice of Intent and filing of a Notice of Statutory Aggravating Factors. COLO. REV. STAT. § 18-1.3-1201(3)(a) (2012); COLO. R. CRIM. P. 32.1(b). The statute includes a list of seventeen aggravating factors that may be alleged, and an allegation of any one of them is sufficient to commence the death penalty prosecution. COLO. REV. STAT. §18-1.3-1201(5) (2012). A death sentence may not be imposed unless a unanimous jury (or a judge if jury is waived) finds beyond a reasonable doubt that at least one of the aggravating factors was present. *Id.* § 18-1.3-1201(2)(a)(I). This finding is necessary, but not alone sufficient, for imposition of a death penalty. See *id.* § 18-1.3-1201(2)(a)(II)–(III).

59. See Marceau et al., *supra* note 7, at note 195.

60. The death-prosecuted cases are catalogued in Appendix I below. Seventeen of these twenty-two death prosecutions resulted in a first-degree murder conviction. In five cases (*Jimenez*, *Wilkinson*, *Sweeney*, *Melina*, and *Perez*), the defendants were acquitted at trial of the first-degree murder charge. See Marceau et al., *supra* note 7, at 1101 n.163. In two of the remaining seventeen cases (*Vasquez* and *Hagos*), the death penalty was legally barred after the prosecution filed its notice of intent to seek death. See *id.* at 1105 n.179. As Baldus explained, such cases are useful indicators

to the 524 cases in which death was not sought, form a larger pool of 546 statutorily death-eligible murders that either were prosecuted for death at the outset of the case, or could have been under the Colorado statute. These 546 cases are the focus of this Article.<sup>61</sup>

By taking a closer look at the pool of offenders who, under the Colorado statute, are statutorily eligible for a death penalty prosecution, we are able for the first time to make comparisons between the demographics of the large number of statutorily death-eligible Colorado murders and the much smaller number of killings actually selected for death penalty prosecution. As will be seen, this descriptive comparison reveals disturbing disparities in the operation of the Colorado death penalty system. While it is beyond the scope of this Article to identify or isolate the causes of this disparity,<sup>62</sup> which is left for future research, the existence of such disparity is undeniable.

#### IV. THE COLORADO DEATH PENALTY: RARE AND UNFAIR

##### A. Race, Place, and the Disparate Use of Discretion

As previously noted, all three inmates on Colorado's death row are African-Americans convicted in the Eighteenth Judicial District (the

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of prosecutorial discretion occurring at the outset of the case, even if they are not as useful in explaining system outcomes. See David Baldus et al., *Empirical Studies of Race and Geographic Discrimination in the Administration of the Death Penalty: A Primer on the Key Methodological Issues*, in *THE FUTURE OF AMERICA'S DEATH PENALTY* 153, 165–66 (Charles S. Lanier et al. eds., 2009). Because the Colorado Narrowing Study focused on constitutional “narrowing,” it excludes all seven of these death prosecutions. See, e.g., Marceau et al., *supra* note 7, at 1110 (reporting “539 cases in which we found one or more aggravating factors, including the death-noticed cases for which the prosecution actually sought (and was legally permitted to seek) the death penalty”). This was an extremely conservative approach that would tend to ultimately favor a finding that the statute was constitutional, by not “penalizing” the system for failing to produce death sentences in cases in which the defendants were actually innocent or the death prosecution legally barred. Even with this conservative approach, the Colorado Narrowing Study conclusively demonstrated the unconstitutionality of the Colorado Death Penalty Statute. See *id.* at 1113.

61. An alternative approach is to include only the seventeen death prosecutions that resulted in first-degree murder convictions, because in each of the 524 statutorily death-eligible cases in which death was not sought, the defendant was actually convicted of first-degree murder. At first blush, this methodology appears to offer the elegance of comparing two sets of convicted murder cases, rather than comparing one set of convicted murders (the 524 non-death prosecuted cases) and another set of murder cases that includes both convicted and acquitted defendants (the set of twenty-two death prosecutions, including the five death-prosecuted “acquittal” cases). The problem with the alternative approach is that it underreports the cases in which a prosecutor exercised her discretion to seek death. Because ultimately our goal was to examine the impact of prosecutorial decision making at the very early stages of the process and to evaluate the race and place effect of prosecutorial discretion, we opted for the inclusive approach (using all twenty-two death prosecutions). Inclusion of all twenty-two death prosecutions is warranted when our focus is on prosecutorial charging decisions. When reporting on system outcomes, we appropriately take into account the five acquittals and the two legally barred cases. It is nonetheless important to note that the substantive findings are the same under either approach.

62. We recognize that such disparities might be the result of implicit biases as opposed to explicit showings of racial discrimination. “Implicit biases are discriminatory biases based on implicit attitudes or implicit stereotypes,” and “they can produce behavior that diverges from a person’s avowed or endorsed beliefs or principles.” Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 951 (2006).

Eighteenth Judicial District is comprised of four counties: Arapahoe, Douglas, Elbert, and Lincoln). This fact makes a discussion of race and place inescapable. Indeed, if we are to have a real discussion about the death penalty in Colorado in the twenty-first century, then it is important to know whether prosecutorial discretion contributed to such an unusual and disquieting pattern of death sentencing. To investigate, we use conventional statistical methods to examine the relationship between race, place, and the decision to seek death in Colorado between 1999 and 2010.

Focusing initially on place, Table 1: Panel A reveals that prosecutors sought death against 11.7% of the death-eligible defendants in the Eighteenth Judicial District, while prosecutors in the state's remaining judicial districts sought death against only 3.1% of the death-eligible defendants.<sup>63</sup> Put simply, statutorily death eligible defendants in the Eighteenth Judicial District were nearly four times more likely to face death than were similar defendants elsewhere.

Race also matters.<sup>64</sup> Table 1: Panel B demonstrates that prosecutors throughout Colorado sought death against 5.6% of eligible minority defendants (20/358), compared to just 1.1% of eligible white defendants (2/188).<sup>65</sup> Thus, Colorado prosecutors were about five times more likely to seek death against minority defendants than they were to seek it against whites. Disaggregating minority defendants into distinct race/ethnic groups in Panel C shows that each group was treated more punitively than white defendants: prosecutors sought death against 4.8% (7/146) of eligible black defendants, 5.8% (11/190) of eligible Latino defendants, and 9.1% (2/22) of eligible "other" defendants (Asian and Native American).<sup>66</sup>

Given the independent effects of place and race, we also examined potential interaction effects: are there particularly pronounced disparities among certain groups in certain places? Table 1: Panel D provides an affirmative answer: from among statutorily death eligible defendants, prosecutors sought death against 15.9% of minority defendants in the Eighteenth Judicial District (7/44), compared to 4.1% of minority defendants outside the Eighteenth Judicial District (13/314), 1.2% of white defendants outside the Eighteenth Judicial District (2/172), and 0% of white defendants in the Eighteenth Judicial District (0/16). Table 1: Panel E demonstrates that prosecutors outside the Eighteenth Judicial Dis-

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63. The relationship is statistically significant at  $p \leq .01$ . Statewide, prosecutors sought the death penalty for 4.0% (22/546) of the statutorily death-eligible murders. *See* Table 1: Panel A.

64. We use the term "minorities" to describe both racial and ethnic minorities and the term "whites" to describe non-Hispanic whites. We use the term "race" to connote both racial and ethnic minorities.

65. The relationship is statistically significant at  $p \leq .01$ .

66. The relationship is statistically significant at  $p \leq .05$ . "Other" defendants are not included in the test of statistical significance because the expected cell count is too small.

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trict were about four times more likely to seek death against minority defendants than against white defendants (4.1% versus 1.1%), and strikingly, prosecutors in the Eighteenth Judicial District were about fourteen times more likely to seek death against minority defendants than against white defendants (15.9% versus 1.1%).<sup>67</sup> The disparities found at the intersection of place and race suggest that prosecutorial discretion is not a reliable force for ensuring the even-handed administration of the death penalty in Colorado.

<b>Table 1. Place, Race, and the Distribution of Possible and Actual Death Prosecutions</b>					
<b>Panel A. Place</b>					
	Potential Death Prosecutions		Actual Death Prosecutions		Likelihood of Actual Death Prosecution
	Number	Percentage of Statewide Total	Number	Percentage of Statewide Total	
18th Judicial District	60	11%	7	32%	11.7%
All Other Judicial Districts	486	89%	15	68%	3.1%
Total	546		22		
<b>Panel B. Race</b>					
	Potential Death Prosecutions		Actual Death Prosecutions		Likelihood of Actual Death Prosecution
	Number	Percentage of Statewide Total	Number	Percentage of Statewide Total	
Minority	358	66%	20	91%	5.6%
White	188	34%	2	9%	1.1%
Total	546		22		
<b>Panel C. Race Disaggregated</b>					
White	188	34%	2	9%	1.1%
African American	146	27%	7	32%	4.8%
Latino	190	35%	11	50%	5.8%
Other (Asian, Native American)	22	4%	2	9%	9.1%
Total	546		22		
<b>Panel D. The Intersection of Place and Race</b>					
	Potential Death Prosecutions		Actual Death Prosecutions		Likelihood of Actual Death Prosecution
	Number	Percentage of Statewide Total	Number	Percentage of Statewide Total	
Minority in 18th JD	44	8%	7	32%	15.9%
Minority Outside 18th JD	314	58%	13	59%	4.1%
White Outside 18th JD	172	31%	2	9%	1.2%
White in 18th JD	16	3%	0	0%	0%
Total	546		22		

67. The relationship is statistically significant at  $p \leq .01$ .



<b>Panel E. The Intersection of Place and Race – White Defendants Statewide as a Baseline</b>					
	Potential Death Prosecutions		Actual Death Prosecutions		Likelihood of Actual Death Prosecution
	Number	Percentage of Statewide Total	Number	Percentage of Statewide Total	
Minority in 18th JD	44	8%	7	32%	15.9%
Minority Outside 18th JD	314	58%	13	59%	4.1%
White Statewide	188	34%	2	9%	1.1%
Total	546		22		

### B. Exploring Legitimate Explanations

#### 1. The “More” Argument

According to some prosecutors, minorities are more likely to face death in Colorado because they commit more murders, or worse murders, than whites.<sup>68</sup> The question of “more”—if more is interpreted to mean raw numbers—is the wrong question, however. The correct question is one of proportions: Did prosecutors pursue death disproportionately against minority defendants? To avoid confusion, we examine both raw numbers and proportions. As Table 1: Panel B demonstrates, minorities were convicted of more statutorily death-eligible murders than whites: 358 versus 188. But the raw numbers do not tell the entire story. Given the fact that minorities were convicted of 66% of the death-eligible murders (358/546), and whites were convicted of 34% of the death-eligible murders (188/546), one would expect the distribution of death prosecutions to be roughly similar if the system were colorblind. Yet, 91% (20/22) of the death prosecutions were brought against minority defendants while only 9% (2/22) of the death prosecutions were brought against white defendants.<sup>69</sup> The same logic holds true for place in Table 1: Panel A. The Eighteenth Judicial District had far fewer statutorily death eligible cases (60/546) and fewer actual death prosecutions (7/22) than the rest of the state. Yet, the Eighteenth Judicial District accounted for a disproportionate share of death prosecutions: the Eighteenth Judicial District was the site of 11% of the potential death prosecutions<sup>70</sup> but 32% of the actual death prosecutions.<sup>71</sup> As previously mentioned, the Eighteenth

68. See, e.g., *supra* note 52 and accompanying text.

69. The relationship is statistically significant at  $p \leq .01$ .

70. In the Eighteenth Judicial District, there were seven death prosecutions and fifty-three statutorily death-eligible murder convictions that were not prosecuted for the death penalty. Six of the seven death prosecutions resulted in a first-degree murder conviction; if only convictions are used in both the numerator and denominator, the result is essentially the same ( $59/541 = 10.9\%$ ).

71. The relationship is statistically significant at  $p \leq .01$ . There were seven death prosecutions in the Eighteenth Judicial District during the study period, out of a total of twenty-two statewide death prosecutions. However, only six of the seven Eighteenth Judicial District death prosecutions, and eleven of the fifteen death prosecutions across the remainder of the state, resulted in a conviction for first-degree murder. Thus, the Eighteenth Judicial District was responsible for six of the seven statewide death prosecutions that resulted in a conviction, i.e., 35%.

Judicial District was also the site of 100% of the state's death sentences.<sup>72</sup>

## 2. The “Worse” Argument

Evaluating the “worse” argument—that the death penalty is used disproportionately against certain groups because those groups commit worse crimes—requires a different approach. To begin, we must determine which murders are the “worst.” Prior studies have used different metrics of heinousness, such as the number of statutory aggravators present in each case, or non-statutory factors that evince heinousness, or determining whether the victim was tortured prior to death.<sup>73</sup> We use an approach that is both simple and objective: in each case we inquire whether the defendant killed multiple victims—defined as killing multiple victims in a single criminal incident or killing multiple victims across multiple criminal incidents. Using multiple killings as a proxy for the worst murders is particularly relevant because each inmate currently on Colorado's death row is linked to more than one death—suggesting that prosecutors and juries agree that multiple killings are indicative of the worst of the worst. Moreover, as a general matter, it seems incontestable that killing more than one person is worse than killing just one person.<sup>74</sup>

Focusing on place, the data indicate that 22% of the death-eligible defendants in the Eighteenth Judicial District killed multiple victims, compared to 12% of the defendants across the rest of the state.<sup>75</sup> So by this metric, killings in the Eighteenth Judicial District were in fact worse than those committed elsewhere. And not surprisingly, statewide, prosecutors were more apt to seek death against defendants who killed multiple victims than a single victim—10% versus 3%.<sup>76</sup>

But this empirical pattern also raises a key question: Does the higher concentration of especially heinous murders in the Eighteenth Judicial

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72. One might wonder whether the disproportionate pursuit of death in the Eighteenth Judicial District is a response to disproportionate violence. But the data suggest that the Eighteenth Judicial District is not exceptional. From 1999 to 2008, the Eighteenth Judicial District comprised 16% to 18% of the state population compared to 13% of the murder victims in statutorily death-eligible cases in which a conviction entered. See *Historical Census Population*, COLO. DEP'T OF LOCAL AFFAIRS, [https://dola.colorado.gov/demog\\_webapps/hcpParameters.jsf](https://dola.colorado.gov/demog_webapps/hcpParameters.jsf) (last visited Jan. 23, 2015). In this calculation, we focus on the period from 1999 to 2008 because we had a sufficiently robust data set for those years.

73. See, e.g., Scott Phillips, *Continued Racial Disparities in the Capital of Capital Punishment: The Rosenthal Era*, 50 HOUS. L. REV. 131, 147–48 (2012) [hereinafter Phillips, *Continued Racial Disparities*]; Scott Phillips, *Racial Disparities in the Capital of Capital Punishment*, 45 HOUS. L. REV. 807, 824–26 (2008) [hereinafter Phillips, *Racial Disparities*]; Donohue, *Capital Punishment in Connecticut*, *supra* note 24, at 11.

74. We were precluded from using other methods, such as counting the total number of aggravating factors in a case, because the prior research—the Colorado Narrowing Study—did not analyze *how many* aggravating factors were present in each case, but rather it considered *whether any* aggravating factor was present in each case.

75. The relationship is statistically significant at  $p \leq .05$ .

76. The relationship is statistically significant at  $p \leq .01$ .

District explain the geographical disparity identified above? Perhaps prosecutors were more likely to seek the death penalty in the Eighteenth Judicial District simply because defendants in that district were more likely to kill multiple victims. To answer the question, we used logistic regression to examine the relationship between judicial district and the decision to seek death both *before* and *after* controlling for the heinousness of the murders, what we call the reduced model and the full model.<sup>77</sup> If the higher concentration of especially heinous murders explains the geographical disparity, then the disproportional use of the death penalty in the Eighteenth Judicial District will subside substantially and become statistically non-significant in the full model; in short, the effect will disappear when the heinousness of the crime is taken into account. Table 2: Model 1A demonstrates that the odds of the prosecutor seeking death are 4.1 times higher in the Eighteenth Judicial District than the rest of the state *before* controlling for the heinousness of the murders.<sup>78</sup> Table 2: Model 1B demonstrates that the odds of the prosecutor seeking death are 3.7 times higher in the Eighteenth Judicial District than the rest of the state *after* controlling for the heinousness of the murders.<sup>79</sup> Thus, when the heinousness of the crime is taken into account the odds ratio does drop slightly but remains large and statistically significant—the geography effect does not disappear. The fact that prosecutors were more likely to seek the death penalty in the Eighteenth Judicial District simply cannot be explained away by the fact that more heinous murders occurred in the Eighteenth Judicial District than occurred elsewhere.

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77. Logistic regression is the appropriate multivariate statistical model because the dependent variable is dichotomous: whether or not the prosecutor sought death.

78. The odds ratio is the odds for one group relative to the odds for another group. Odds are calculated as follows: the number of times an event did occur divided by the number of times an event did not occur (the number of times the prosecutor did seek death divided by the number of times the prosecutor did not seek death). The odds for defendants in the Eighteenth Judicial District are 7/53 (.132075). The odds for defendants across the rest of the state are 15/471 (.031847). Thus, the odds ratio is 4.1 (.132075/.031847). The odds ratio is interpreted as follows: the odds of a prosecutor seeking the death penalty are 4.1 times higher in the Eighteenth Judicial District than the rest of the state before controlling for the heinousness of the murders. The relationship is statistically significant at  $p \leq .01$ . After controlling for the heinousness of the murders, the logistic regression model adjusts the odds ratio for the Eighteenth Judicial District upward (the true geographical disparity is larger than the original estimate) or downward (the true geographical disparity is smaller than the original estimate). An odds ratio of one denotes no relationship (the odds of the event happening are the same for both groups). Here, the odds ratio is adjusted downward, because the true geographical disparity is slightly smaller than the original estimate. Nevertheless, the odds ratio remains large and statistically significant. The authors have the logistic regression model on file and are willing to share it with future researchers upon request.

79. The relationship is statistically significant at  $p \leq .01$ .

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	Model		Model		Model	Model	
	1A (R)	1B (F)	2A (R)	2B (F)	3	4A (R)	4B (F)
18th JD	4.1***	3.7***			3.6***		
Minority Defendant			5.5**	5.8**	5.7**		
Minority Defendant in 18th JD						17.6***	18.1***
Minority Defendant Out- side 18th JD						4.0*	4.2*
Heinousness (Multiple Victims)		2.9**		3.4***	3.2**		3.4**
P values: * p ≤ .10; ** p ≤ .05; *** p ≤ .01 (two-tailed tests)							

We use the same approach to determine whether the impact of race holds up after controlling for the heinousness of the murders. It is certainly possible that minority defendants are more likely to be prosecuted in capital cases because they commit more aggravated homicides than do white defendants. But the facts belie this theory: 13% of minority defendants killed multiple victims compared to 14% of white defendants (this is not statistically significant). In other words, minority group members in our study were actually less likely to kill multiple victims than were whites. Thus, controlling for the heinousness of the murders in a logistic regression model will necessarily increase—not decrease—the impact of race on case selection; prosecutors were substantially more likely to seek the death penalty against minority defendants despite the fact that such defendants were slightly less likely to commit the worst murders. Table 2: Models 2A and 2B, illustrates the point: the odds ratio for minority defendant *increases* from 5.5 in the reduced model to 5.8 in the full model.<sup>80</sup> So the odds of a prosecutor seeking death are 5.8 times higher against minority defendants than against white defendants after taking the heinousness of the murders into account.

Model 3 confirms that the findings remain unchanged if all the predictors—race, geography, and heinousness—are included in the model simultaneously (the impact of race remains statistically significant after controlling for both place and heinousness; the impact of place remains statistically significant after controlling for both race and heinousness). Finally, we extend the analysis to consider the interplay of race and place. The combined influence, evinced in Models 4A and 4B, is potent: even after controlling for the heinousness of the murders, the odds of the prosecution seeking death against a minority defendant are 4.2 times

80. Both odds ratios are statistically significant at p ≤ .05.

higher outside the Eighteenth Judicial District and 18.1 times higher within it, compared to white defendants statewide.<sup>81</sup>

We now have an answer to the question that drove our analysis: Do prosecutorial decisions to seek death have a disproportionate impact on defendants of particular races and in certain geographic locations? The results are unequivocal. During the time period under consideration, among statutorily death eligible defendants, prosecutors statewide were more likely to seek the death penalty against minority defendants than against white defendants. Moreover, prosecutors in the Eighteenth Judicial District were more likely to seek the death penalty than were prosecutors elsewhere. Finally, the intersection of race and place is particularly fateful—remarkably, statutorily death-eligible minority defendants in the Eighteenth Judicial District were fourteen times more likely to face a death prosecution than their white counterparts statewide (15.9% versus 1.1%). Moreover, we have shown that these differences *cannot* be explained by differences in the number or seriousness of the killings committed by minorities. Race and place are statistically significant predictors of whether the death penalty will be sought Colorado.

#### CONCLUSION

In Colorado, it is “exceedingly rare”<sup>82</sup> for a prosecutor to seek death or for a condemned prisoner to be executed. The contraction in the use of the death penalty has been steady for over three decades, ever since the return of the death penalty to Colorado in 1979. Indeed, there has been only one execution in the state since the 1960s. As was noted in the Colorado Narrowing Study, the very rarity of the death penalty is cause for concern; a jurisdiction in which very few of the defendants statutorily eligible for the death penalty actually receive that penalty is constitutionally suspect for that reason alone. Colorado imposes the death penalty on fewer of its death-eligible defendants than any other state that has been

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81. The former odds ratio is statistically significant at  $p \leq .10$  and the latter is statistically significant at  $p \leq .01$ . We created additional logistic regression models to ensure that the substantive findings were robust. Specifically, we controlled for the presence of a female victim and the presence of a child victim, and changed the measure of heinousness from whether the defendant killed multiple victims (a dichotomous indicator) to a count of the number of victims. Statewide, of the seventy-three defendants who killed multiple victims, sixty-one killed two victims, ten killed three victims, and two killed four victims. The findings for place, race, and the interaction of place and race were the same regardless of model specification. Thus, we present the most parsimonious models (doing so is particularly important because of limited variation in the dependent variable; death was only sought against 22 of the 546 death-eligible defendants). The additional models are available upon request.

82. See *Graham v. Florida*, 560 U.S. 48, 67 (2010) (considering the extreme rarity of a penalty when determining whether that penalty has become unconstitutional). In *Graham*, the United States Supreme Court ruled that imposition of a sentence of life imprisonment without parole upon a juvenile offender who did not murder violates the Eighth Amendment to the United States Constitution. *Id.* at 82. The Court relied in part upon *Atkins v. Virginia*, 536 U.S. 304 (2002), in which it had abolished the death penalty for persons with intellectual disability based in part upon the rarity of that practice. *Id.* at 65.

investigated.<sup>83</sup> Many Colorado killers are eligible for the death penalty—Colorado has an extraordinarily broad first-degree murder statute and over 90% of first-degree murderers are statutorily eligible for the death penalty<sup>84</sup>—but an increasingly small number of them face that ultimate punishment.

Colorado's system is thus based on a capital statute that vests extraordinary discretion in the hands of prosecutors. We now know that this essentially unfettered discretion has been exercised in ways that should trouble anyone interested in the even-handed application of justice. We have demonstrated that the location of a murder and the color of the killer's skin have far more to do with whether the death penalty is sought than whether a defendant's crime is among the worst of the worst, as measured by examining whether the defendant has killed multiple victims.

One understandable reaction to the data reported in this study might be to suggest that prosecutors should target more white men or women for death penalty prosecutions or that prosecutors outside the Eighteenth Judicial District should seek death more often. In that way, the reasoning goes, the administration of the death penalty would be rendered slightly less unfair. But, of course, this would miss the point and would constitute the very targeting and arbitrariness that any system of justice should abhor. Defendants should be selected for death based on desert, not according to a quota system that operates on the basis of race, geography, or any other factor extraneous to the defendant's moral culpability.

It is true that implicit bias is everywhere—in our hiring decisions, our social relationships, and throughout our criminal justice system. We need a criminal justice system, of course, and we have no choice but to tolerate some discrimination there even as we work to minimize it. But such discrimination in the exercise of a capital sentencing regime is significantly more problematic. This Article demonstrates that, in addition to being used infrequently, the death penalty is being applied disproportionately against certain groups in ways that have nothing to do with the seriousness of the offense. This infrequency, and the penalty's arbitrary application across racial and geographic lines compel the conclusion that the death penalty in Colorado is not constitutionally tolerable.

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83. See Kamin & Marceau, *supra* note 10, at 1015.

84. Marceau et al., *supra* note 7, at 1110.

APPENDIX I. DEATH PENALTY PROSECUTIONS, CASES FILED JANUARY 1,  
1999 THROUGH DECEMBER 31, 2010<sup>85</sup>

No.	County	Judicial District	Case Number	Defendant	Defendant Race/Ethnicity	Gender of Victim
1	Denver	2	1999CR189	Omar Ramirez	Hispanic	F, M
2	Denver	2	1999CR2325	Cong Than	Asian	F, M
3	El Paso	4	1999CR3818	Anthony Albert	Black	M
4	Denver	2	1999CR2029	Donta Paige	Black	F
5	Denver	2	1999CR2738	Abraham Hagos	Black	M
6	Teller	4	2000CR178	Anthony Jimenez	Hispanic	F
7	Adams	17	2000CR1675	Manuel Melina	Hispanic	M
8	Adams	17	2000CR634	John Sweeney	Hispanic	M
9	Adams	17	2000CR638	Jesse Wilkinson	White	M
10	Morgan	13	2000CR200	Cruz Palomo	Hispanic	F
11	Adams	17	2000CR1491	Leandro Lopez	Hispanic	M
12	Arapahoe	18	2001CR1744	Edward Brown	Black	M
13	Lincoln*	18	2002CR95	Edward Montour	Hispanic/Native American	M
14	Adams	17	2002CR2231	Jimmy Vasquez	Hispanic	F
15	Weld	19	2002CR457	Allen Bergerud	White	F, M
16	Rio Grande	12	2005CR65	Michael Medina	Hispanic	child
17	Lincoln	18	2005CR73	David Bueno	Hispanic	M
18	Lincoln*	18	2005CR74	Alejandro Perez	Hispanic	M
19	El Paso	4	2006CR5870	Marco Lee	Black	M
20	Douglas	18	2006CR636	Jose Rubi-Nava	Hispanic	F
21	Arapahoe	18	2006CR705	Sir Mario Owens	Black	F, M
22	Arapahoe	18	2006CR697	Robert Ray	Black	F, M

\*Venue was changed to a different county for trial. This is the venue in which the case was commenced.

85. The following five death prosecutions were commenced after 2010, and as such were beyond the scope of the Colorado Narrowing Study. They are included here only for thoroughness. As of this writing, there are two ongoing death penalty trials in Colorado: In Denver County, a black man (Dexter Lewis) is charged with killing five women and one man (Denver Cnty., No. 2012CR4743), and in Arapahoe County, a white man (James Holmes) has been convicted of killing twelve men and women (Arapahoe Cnty, No. 2012CR1522). In 2015, two white defendants (Cassandra Rieb (female) and Brendan Johnson (male)) in Logan County pleaded guilty for the killing of Johnson's grandparents (Logan Cnty., Nos. 2014CR98, 2014CR99), and in 2012, a white man (Josiah Sher) pleaded guilty in a double homicide in Douglas County that left one man and one woman dead (Douglas Cnty., No. 2011CR106).