THE "EVIL" DEFENDANT AND THE "HOLDOUT" JUROR: UNPACKING THE MYTHS OF THE AURORA THEATER SHOOTING CASE AS WE PONDER THE FUTURE OF CAPITAL PUNISHMENT IN COLORADO

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ABSTRACT

On August 7, 2015, after a trial lasting a total of almost seven months, an Arapahoe County jury returned a verdict that spared our client, James Holmes, from the death penalty.[1] Mr. Holmes was convicted of killing twelve people and wounding seventy others at a midnight premiere of *The Dark Knight Rises* at the Century 16 movie theater in Aurora, Colorado, on July 20, 2012.[2] His crime was one of the most horrific and tragic acts of mass violence in recent American history.[3]

Following the jury's life verdict, two troubling narratives have been advanced in the public discourse about the case. The first is that while Mr. Holmes may suffer from some form of mental illness, he is also "evil," and his "evil" nature, rather than his mental illness, drove him to commit these unspeakable acts.[4] The second is that a lone "holdout" on the jury who refused to budge in his or her opposition to the death penalty thwarted the remainder of the jurors from imposing the death sentence they thought Mr. Holmes deserved.[5]

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1. *See* Final Sentencing Verdict Forms, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. Aug. 11, 2015) (referencing the Final Sentencing Verdict Forms for all twenty-four counts sought against James Holmes); Jack Healy, *Life Sentence for James Holmes, Aurora Theater Gunman*, N.Y. TIMES (Aug. 7, 2015), http://www.nytimes.com/2015/08/08/us/jury-decides-fate-of-james-holmes-aurora-theater-gunman.html.

2. *See* Verdict Forms, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. July 22, 2015) (referencing the Verdict Forms for all twenty-four counts sought against James Holmes); Jack Healy & Julie Turkewitz, *Guilty Verdict for James Holmes in Aurora Attack*, N.Y. TIMES (July 16, 2015), http://www.nytimes.com/2015/07/17/us/james-holmes-guilty-in-aurora-movie-theater-shooting.html.

3. *See* Elizabeth Chuck & Helen Kwong, *Tragic List: The Deadliest Mass Shootings in U.S. History*, NBC NEWS (Oct. 1, 2015, 7:58 PM), http://www.nbcnews.com/news/us-news/deadliest-mass-shootings-u-s-history-n437086.

4. *See, e.g.*, Carol McKinley, *Coffee with George Brauchler: Theater Shooting Case DA Sits Back*, CU NEWS CORPS (Aug. 22, 2015), http://cunewscorps.com/3579/aurora-theater-trial/coffee-with-george-brauchler-theater-shooting-case-da-lays-back/.

5. *See, e.g.*, Sadie Gurman, *Theater Shooter Spared from Death Penalty by One Juror's Holdout*, HUFFINGTON POST (Aug. 15, 2015, 10:07 AM),

In this Article, we examine each of these narratives in turn. In doing so, we first unpack them. We conclude that, while convenient and perhaps even understandable, they are overly simplistic. Indeed, upon further scrutiny, neither of them have a solid factual or legal basis. We then explain why it is not only unhelpful but problematic to continue to legitimize and promote these myths about the case. Finally, in light of our discussion about these false narratives, we consider what lessons about the death penalty Coloradoans should draw from the case as we ponder the future of capital punishment in our state.

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I. THE MYTH OF THE "EVIL" DEFENDANT

In the immediate wake of the tragedy, and long before any information about Mr. Holmes's mental health was publicly available, the phrase "evil" cropped up in the media's coverage of the case. Addressing a crowd in Fort Myers, Florida, on Friday, July 20, 2012, just hours after the shooting, the press quoted President Barack Obama as stating, "Such violence, such evil is senseless. It's beyond reason."[6] On July 21, 2012, a columnist for the *Washington Post* wrote, "All such crimes can be described as senseless, or as the manifestation of evil, but what unfolded Friday at the midnight showing of the new Batman movie was something

http://www.huffingtonpost.com/entry/theater-shooter-spared-from-death-penalty-by-one-jurors-holdout_55cf4564e4b0ab468d9d7a8b.

6. Carol E. Lee, *Obama on Shooting: 'Such Evil Is Senseless*,*'* WALL ST. J. (July 20, 2012, 11:11 AM), http://blogs.wsj.com/washwire/2012/07/20/obama-on-shooting-spree-such-evil-is-senseless/.

that so far lacks even a madman's explanation."[7] Just four days after the shooting, a clinical psychiatrist published an article on *Psychology Today's* website entitled "The Colorado Shooter: Psychotic Victim or Evil Killer?"[8]

The phrase continued to appear in headlines once the trial got underway. "Insane or evil? Trial fills in details of Colorado movie gunman Holmes," questioned the headline of an article published during the merits phase of the trial.[9] At the conclusion of the penalty phase of the trial, the media's coverage pitted the prosecution's and defense's final closing arguments as a battle of "'Evil' vs. 'mercy.'"[10]

The narrative that Mr. Holmes was not just mentally ill, but "evil," picked up intensity following the final sentencing verdict. "I think he's got a mental illness," the elected district attorney, George Brauchler, told a reporter in an interview published online several days before the court formally sentenced Mr. Holmes.[11] "I don't know what that mental illness is, but there's no doubt he thinks differently than you or I do and thankfully most of the rest of the world."[12] According to the article, Mr. Brauchler then continued:

> It's interesting to note that when the first DSM *(Editor's note: Diagnostic and Statistical Manual of Mental Disorders)* came out, it had 60 diagnosable afflictions. The one that came out two years ago that we relied upon heavily in this case has 400. Are people getting more mentally ill or are we just coming up with ways to diagnose aberrant behavior and diagnose away evil? One thing is clear about this guy: Mental illness and evil are not mutually exclusive. Could he have a

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7. Joel Achenbach, *Motive Still a Blank in Aurora Shooter's Story*, WASH. POST (July 21, 2012), https://www.washingtonpost.com/national/health-science/motive-still-a-blank-in-aurora-shooters-story/2012/07/21/gJQAD69T0W_story.html.

8. Dale Archer, *The Colorado Shooter: Psychotic Victim or Evil Killer?*, PSYCHOL. TODAY (July 24, 2012), https://www.psychologytoday.com/blog/reading-between-the-headlines/201207/the-colorado-shooter-psychotic-victim-or-evil-killer. In the article, Archer in fact hypothesizes that Mr. Holmes is mentally ill and was psychotic at the time of the crime, and he advocates for the early detection and treatment of mental illness. *See id.* Still, the article is notable for its sensational headline contrasting mental illness against the alternative, "evil."

9. Keith Coffman & Daniel Wallis, *Insane or Evil? Trial Fills in Details of Colorado Movie Gunman Holmes*, REUTERS (May 1, 2015, 3:56 PM), http://www.reuters.com/article/2015/05/01/us-usa-shooting-denver-idUSKBN0NM4D320150501.

10. Maria L. La Ganga, *James Holmes Jurors Begin Final Deliberations: 'Evil' vs. 'Mercy*,*'* L.A. TIMES (Aug. 6, 2015, 5:34 PM), http://www.latimes.com/nation/la-na-james-holmes-deliberations-20150806-story.html. This headline was derived from the question the prosecution posed to the jury during its final arguments: "[W]hat is the appropriate sentence for such horror, such evil[?]," as well as the defense's argument, "James Holmes is sick, and he is damaged. . . . Mercy is what puts an end to violence. . . . Justice without mercy is raw vengeance." *See id.* (fourth alternation in original) (quoting first Closing Argument of George Brauchler, Arapahoe Cnty. Dist. Atty.; then quoting Closing Argument of Tamara Brady, Chief Deputy Public Defender).

11. McKinley, *supra* note 4.

12. *Id.*

> mental illness and still make evil decisions knowing they're evil? The jury said unequivocally and very quickly: Absolutely he could.[13]

In an online article published by People.com, the narrative of evil versus mental illness was again advanced:

> Holmes' [sic] attorneys had argued that he was mentally ill at the time of the shooting.
>
> Brauchler disagrees.
>
> "He made a conscious, deliberate decision to do wrong," he says, his voice rising slightly. "He knew it was wrong. He was writing that in his journal. He said it was evil and he hated mankind. He knew he was murdering human beings, and he wanted to do it because he wanted to be evil."[14]

A day later, an article covering the conclusion of the formal sentencing proceeding began as follows, "Condemning movie massacre gunman James Holmes to 12 life sentences and the maximum 3,318 years in prison for his rampage in a midnight screening of a Batman film, a Colorado judge said on Wednesday that evil and mental illness are not mutually exclusive."[15] The article continues, "[The judge] said whatever illness Holmes may have suffered, there was overwhelming evidence that a significant part of his conduct had been driven by 'moral obliquity, mental depravity, . . . anger, hatred, revenge, or similar evil conditions.'"[16]

And approximately a month later, an online article began, "There is legal insanity, and then there is pure evil, according to 18th Judicial District Attorney George Brauchler."[17] The article, reporting on a speech Mr. Brauchler gave to Logan County Republicans "[f]ollowing an afternoon of golf Sept. 26 at Riverview Golf Course," further reports that Mr. Brauchler told the group, "When evil showed up there, it had been planning to do what it was going to do for over 2 ½ months."[18]

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13. *Id.*

14. Steve Helling, *Aurora Shooting Prosecutor George Brauchler: The James Holmes Trial 'Will Always Stay with Me,'* PEOPLE MAG. (Aug. 25, 2015, 7:30 PM), http://www.people.com/article/james-holmes-prosecutor-george-brauchler-talks-emotional-toll (quoting statements made by George Brauchler to *People* magazine).

15. Keith Coffman, *Colorado Movie Gunman Sentenced to 12 Lifetimes and 3,318 Years*, REUTERS (Aug. 26, 2015, 3:20 PM), http://www.reuters.com/article/2015/08/26/us-usa-shooting-denver-idUSKCN0QV1RV20150826.

16. *Id.* (alteration in original) (quoting statement of Carlos Samour, Arapahoe Cty. Dist. Ct. Judge).

17. Forrest Hershberger, *Prosecutor Says Holmes Case Was 'Pure Evil,'* S. PLATTE SENTINEL (Sept. 30, 2015), http://www.southplattesentinel.com/2015/09/prosecutor-says-holmes-case-was-pure-evil/.

18. *Id.*

A. What Is "Evil"?

Before we delve into assessing whether there are facts and evidence to support this narrative of evil, it is worth pondering for a moment what "evil" means. How is it defined? How is it measured?

There is no question that Mr. Holmes's act of opening fire on a crowd of innocent moviegoers in the early morning hours of July 20, 2012, was incredibly horrific, shocking, and senseless. Nor can anyone dispute that his actions damaged and destroyed the lives of hundreds, if not thousands, of people and caused an incomprehensible amount of grief and suffering in the community of Aurora and beyond. If the sole metric by which "evil" is identified and measured was the amount of harm caused by a person, then there would not be much debate about the application of this term to Mr. Holmes or to his actions. Even Mr. Holmes himself, in an online chat with his former girlfriend four months before the shooting, used the phrase "evil" in an effort to explain that what his broken mind was urging him to do—kill people—was a very bad thing.[19]

But the narrative about evil that has been advanced in the media seems to be about much more than just the amount of harm caused by Mr. Holmes or his act in and of itself. Branding Mr. Holmes as "evil," regardless of, or perhaps in addition to, any mental illness he suffers from, implies a judgment about Mr. Holmes's character, his true nature, and his humanity—or, the proponents of this narrative would likely claim, his lack thereof. As psychiatrist James L. Knoll puts it, "The word evil . . . . It is 'emotionally loaded, morally judgmental, full of brimstone and fire.' . . . Labeling someone as evil suggests that he or she is beyond redemption. Defining someone as evil also suggests that the person is permanently beyond human understanding . . . ."[20]

Yet identifying and labeling someone as "evil" may not be as simple as we might wish it to be. As Professor Carol Steiker argues in a critique of a recent book by legal and political philosopher Matthew Kramer, which advances the eradication of evil from society as a moral justification for the death penalty, "[T]he essential nature of other people is more obdurately opaque than Kramer is willing to admit . . . ."[21] She adds, "[W]hat we think we know about unquestioned evil is, in fact, up

19. Michael Roberts, *Read Theater Shooter's Google Chats with Ex-GF: "What I Feel Like Doing is Evil,"* WESTWORD (June 16, 2015, 7:01 AM), http://www.westword.com/news/read-theater-shooters-google-chats-with-ex-gf-what-i-feel-like-doing-is-evil-6810733.

20. James L. Knoll, IV, *The Recurrence of an Illusion: The Concept of "Evil" in Forensic Psychiatry*, 36 J. AM. ACAD. PSYCHIATRY & LAW 105, 106 (2008) (citation omitted) (quoting June Price Tangney & Jeff Stuewig, *A Moral-Emotional Perspective on Evil Persons and Evil Deeds*, *in* THE SOCIAL PSYCHOLOGY OF GOOD AND EVIL 327, 338 (Arthur Miller ed., 2004)).

21. Carol S. Steiker, *Can/Should We Purge Evil Through Capital Punishment?*, 9 CRIM. L. & PHIL. 367, 370 (2015) (reviewing MATTHEW H. KRAMER, THE ETHICS OF CAPITAL PUNISHMENT: A PHILOSOPHICAL INVESTIGATION OF EVIL AND ITS CONSEQUENCES (2011)).

for questioning and may be quite different from what it appears so blatantly to be."[22] Steiker worries "about our ability to distinguish the quality of moral depravity from the symptoms of defects or diseases that might not only remove an actor from the realm of the extravagantly evil, but even place him or her outside the legitimate reach of the criminal sanction."[23] She questions whether "the line between 'evil' on the one hand, and 'sick' or 'broken' on the other, is sufficiently clear."[24]

Certainly, this is a line we should be concerned with before writing Mr. Holmes off as "pure evil" because, as we explain below, the evidence presented at trial unequivocally and conclusively demonstrated that he is seriously and chronically mentally ill.

B. Evidence of Mr. Holmes's Mental Illness

Prior to trial, Mr. Holmes underwent sanity examinations conducted by four different psychiatrists—two of whom the court appointed and two of whom the defense retained.[25] While the court-appointed doctors disagreed with defense experts on the issue of whether Mr. Holmes met the technical legal definition of insanity,[26] all four psychiatrists fundamentally agreed on two important issues. First, they each concluded that Mr. Holmes suffers from a serious and chronic mental illness that is on the schizophrenia spectrum of disorders.[27] Second, every single one of them agreed that Mr. Holmes was in no way malingering or faking his mental illness.[28]

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22. *Id.*
23. *Id.*
24. *Id.*
25. Mr. Holmes was forensically examined by Dr. Jeffrey Metzner and Dr. William Reid, both of whom were appointed by the court, and by Dr. Raquel Gur and Dr. Jonathan Woodcock, who were hired by the defense.
26. In Colorado, a person is insane if the person is (a) "so diseased or defective in mind at the time of the commission of the act as to be incapable of distinguishing right from wrong with respect to that act," or (b) if the person "suffer[s] from a condition of mind caused by mental disease or defect that prevented the person from forming a culpable mental state that is an essential element of a crime charged." COLO. REV. STAT. § 16-8-101.5 (2016).
27. Dr. Metzner testified that in his opinion, Mr. Holmes's "most likely diagnoses were schizoaffective disorder, social anxiety disorder, and trichotillomania." Transcript of Record at 83, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. June 8, 2015) [hereinafter June 8 Transcript]. Dr. Woodcock likewise opined that Mr. Holmes suffers from schizoaffective disorder. Transcript of Record at 142, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. June 25, 2015) [hereinafter June 25 Transcript]. Dr. Reid diagnosed Mr. Holmes with schizotypal personality disorder and testified that he "may well meet the criteria for . . . delusional disorder." Transcript of Record at 63, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. June 4, 2015) [hereinafter June 4 Transcript]. Dr. Gur, an expert on schizophrenia at the University of Pennsylvania, diagnosed Mr. Holmes with schizophrenia. Transcript of Record at 160, People v. Holmes, 12CR1522 (Arapahoe Dist. Ct. July 7, 2012) [hereinafter July 7 Transcript]. Dr. Reid testified that, "the diagnoses may differ a little, but I want to make it clear that we're all in the same -- in my opinion -- in the same ballpark." June 4 Transcript, *supra*, at 112.
28. *See, e.g.*, June 4 Transcript, *supra* note 27, at 101–02. The jury also heard testimony from two neuropsychologists who conducted testing on Mr. Holmes: Dr. Rose Manguso, who is employed by the Colorado Mental Health Institute at Pueblo and conducted psychological testing of Mr. Holmes along with another psychologist, B. Thomas Gray, at the request of Dr. Metzner, and Dr.

According to the experts, the most pronounced symptoms of Mr. Holmes's mental illness at the time of the shooting were delusions and significant negative symptoms.[29] A delusion is a "fixed belief[] that [is] not amenable to change in light of conflicting evidence."[30] Mr. Holmes's primary delusional belief[31] was that he could increase his "human capital" by killing other people.[32] Negative symptoms are associated with disruptions to normal emotions and behaviors. Mr. Holmes's negative symptoms included a flat affect (diminished emotional expression), alogia (paucity of speech), avolition (a decrease in motivated, self-initiated, purposeful activities), anhedonia (decreased ability to experience pleasure from positive stimuli), and asociality (lack of interest in social interactions).[33] In addition to these symptoms, there was also testimony at trial that Mr. Holmes had unusual perceptual experiences, such as seeing flickerings or shadows in the months before the shootings,[34] and exhibited paranoid thinking and excessive and chronic social anxiety.[35] Mr. Holmes also experienced a decrease in his level of functioning—including in his academic performance—in the period of time leading up to the shooting, which is consistent with a diagnosis of schizophrenia.[36] He further reported to examiners that he felt depressed in the

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Robert Hanlon, a neuropsychologist at Northwestern University, who conducted testing at the request of the defense. *See* Transcript of Record at 20–263, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. July 2, 2015) [hereinafter July 2 Transcript] (referencing the testimony of Dr. Robert Hanlon); Transcript of Record at 92–206, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. July 1, 2015) [hereinafter July 1 Transcript] (referencing the testimony of Dr. Rose M. Manguso); June 8 Transcript, *supra* note 27, at 133 (referencing the testimony of Dr. Jeffrey Metzner). The testing results of all of these doctors were consistent with a psychotic mental illness such as schizoaffective disorder or schizophrenia. *See* July 2 Transcript, *supra*, at 110–11; July 1 Transcript, *supra*, at 144–45, 154–70. Moreover, the testing revealed absolutely no indication whatsoever that Mr. Holmes was feigning his illness. *See* July 1 Transcript, *supra*, at 120–25; July 2 Transcript, *supra*, at 77–82.

29. *See, e.g.*, July 7 Transcript, *supra* note 27, at 23–25, 48–49, 62, 121 (referencing the testimony of Dr. Raquel Gur); June 25 Transcript, *supra* note 27, at 100–01, 104 (referencing the testimony of Dr. Jonathan Woodcock); June 8 Transcript, *supra* note 27, at 149–50, 154–55 (referencing the testimony of Dr. Jeffrey Metzner); June 4 Transcript, *supra* note 27, at 65–66, 70–73 (referencing the testimony of Dr. William Reid).

30. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 87 (5th ed. 2013).

31. Dr. Reid equivocated somewhat about whether Mr. Holmes technically met the criteria for delusional disorder. Nevertheless, he testified that "I'm pretty well convinced he has some experiences of delusion. . . . I believe, at various times, he has had them and probably has some chronic delusions as well." June 4 Transcript, *supra* note 27, at 64. With respect to the "human capital" belief in particular, Dr. Reid questioned whether it may be a "philosophical belief" but ultimately stated, "I lean toward the idea of delusion." *Id.* at 65–66.

32. *See, e.g.*, July 7 Transcript, *supra* note 27, at 136–38 (referencing the testimony of Dr. Raquel Gur); June 25 Transcript, *supra* note 27, at 164–65 (referencing the testimony of Dr. Jonathan Woodcock); June 8 Transcript, *supra* note 27, at 78–79 (referencing the testimony of Dr. Jeffrey Metzner).

33. *See, e.g.*, June 8 Transcript, *supra* note 27, at 155, 187.

34. *See, e.g.*, June 4 Transcript, *supra* note 27, at 71. Doctors differed in their opinions as to whether these visual perceptions were, in fact, hallucinations.

35. *See id.* at 71–73.

36. *See, e.g.*, July 7 Transcript, *supra* note 27, at 140 (referencing the testimony of Dr. Raquel Gur); June 8 Transcript, *supra* note 27, at 181 (referencing the testimony of Dr. Jeffrey Metzner); June 4 Transcript, *supra* note 27, at 55–56 (referencing the testimony of Dr. William Reid); Tran-

months leading up to the shooting and had chronic homicidal and suicidal thoughts.[37]

In addition to the symptoms of mental illness he exhibited around the time of the shooting, Mr. Holmes also became floridly psychotic in the Arapahoe County Jail approximately four months after his arrest.[38] He was transported to the Denver Health Medical Center where numerous physicians and psychiatrists treated him.[39] All of these doctors concurred that Mr. Holmes was suffering from psychosis and delirium and was not malingering or feigning his symptoms.[40] Evidence of this floridly psychotic episode introduced at trial lent further support to the foren-

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script of Record at 44–45, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. June 3, 2015) [hereinafter June 3 Transcript] (referencing the testimony of Dr. William Reid).

37. *See, e.g.*, June 25 Transcript, *supra* note 27, at 140–41 (referencing the testimony of Dr. Jonathan Woodcock); June 8 Transcript, *supra* note 27, at 152, 169–70 (referencing the testimony of Dr. Jeffrey Metzner); Transcript of Record at 15–16, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. June 1, 2015) [hereinafter June 1 Transcript] (referencing the testimony of Dr. William Reid). Mr. Holmes voluntarily sought mental health treatment in the spring of 2012 and disclosed to Dr. Lynne Fenton, his treating psychiatrist, that he was having homicidal thoughts three to four times a day during their first meeting. Transcript of Record at 184, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. June 16, 2015) [hereinafter June 16 Transcript] (referencing the testimony of Dr. Lynne Fenton).

38. Mr. Holmes began exhibiting bizarre and disorganized behavior in the jail, including lying naked and catatonic in a frozen position on the floor on his stomach with his arms twisted up and his legs bent up in the air, smearing feces, licking the walls, speaking gibberish, eating paper cups, and attempting to do a backwards summersault with a cup on his penis. *See, e.g.*, Transcript of Record at 48–53, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. June 30, 2015) [hereinafter June 30 Transcript] (referencing the testimony of Sandra Paggen); Transcript of Record at 178, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. June 29, 2015) [hereinafter June 29 Transcript] (referencing the testimony of Dr. John Craig Holland); June 29 Transcript, *supra*, at 281–82 (referencing the testimony of Sean Robison). He became unresponsive to jail staff and refused to eat or drink as a result of auditory hallucinations in the form of voices telling him not to eat. *See, e.g.*, June 30 Transcript, *supra*, at 54–55 (referencing the testimony of Sandra Paggen); June 30 Transcript, *supra*, at 123–24 (referencing the testimony of Dr. Elizabeth Lowdermilk); June 29 Transcript, *supra*, at 194 (referencing the testimony of Dr. John Craig Holland).

39. *See, e.g.*, Transcript of Record at 14–34, People v. Holmes, 12CR1522 (Arapahoe Dist. Ct. July 6, 2015) [hereinafter July 6 Transcript] (referencing the testimony of Dr. Christopher Colwell); June 30 Transcript, *supra* note 38, at 115–20 (referencing the testimony of Dr. Elizabeth Lowdermilk); June 29 Transcript, *supra* note 38, at 63–70, 113, 171, 174–75 (referencing the testimony of Dr. Rachel Davis, Dr. Phillip Weintraub, and Dr. John Craig Holland).

40. Four doctors from Denver Health Medical Center (three psychiatrists and an emergency medicine physician) testified at trial. *See supra* note 39 and accompanying text. The psychiatrists explained that Mr. Holmes exhibited many signs and symptoms consistent with psychosis, including catatonia, disorganized behavior, nonsensical speech, and auditory and visual hallucinations. *See, e.g.*, June 30 Transcript, *supra* note 38, at 119–20, 123–25 (referencing the testimony of Dr. Elizabeth Lowdermilk); June 29 Transcript, *supra* note 38, at 73–74, 80–82 (referencing the testimony of Dr. Rachel Davis); June 29 Transcript, *supra* note 38, at 190–91, 214 (referencing the testimony of Dr. John Craig Holland). Mr. Holmes was administered antipsychotic medication in the hospital, which dramatically improved his condition. *See, e.g.*, June 30 Transcript, *supra* note 38, at 121 (referencing the testimony of Dr. Elizabeth Lowdermilk); June 29 Transcript, *supra* note 38, at 119 (referencing the testimony of Dr. Phillip Weintraub); June 29 Transcript, *supra* note 38, at 180–81, 199 (referencing the testimony of Dr. John Craig Holland). The emergency medicine physician, Dr. Colwell, testified that when Mr. Holmes first arrived at the hospital, he responded to questions with "nonsensical words" and was moderately dehydrated, but his dehydration level on its own was not severe enough to have caused the delirium and altered mental status Mr. Holmes was exhibiting at that time. *See* July 6 Transcript, *supra* note 38, at 25, 32–33 (referencing the testimony of Dr. Christopher Colwell).

sic experts' conclusions that Mr. Holmes suffers from a serious and chronic mental illness on the schizophrenia spectrum of disorders.[41]

There was also uncontroverted evidence that Mr. Holmes was "genetically loaded" to develop a psychotic disorder.[42] There is a history of significant mental illness on both sides of Mr. Holmes's family.[43] At trial, the defense introduced evidence that Mr. Holmes's maternal grandfather suffered from a psychotic illness, for which he was hospitalized, and that Mr. Holmes's paternal grandfather also suffered from a severe and disabling mental illness that required hospitalization.[44] In addition, Mr. Holmes's aunt—the twin sister of his father—has schizoaffective disorder, which is the same illness with which court-appointed psychiatrist Dr. Jeffrey Metzner and defense-retained psychiatrist Dr. Jonathan Woodcock diagnosed Mr. Holmes.[45] The experts testified at trial that schizophrenia is a disease with a strong genetic component and that Mr. Holmes was at an increased risk of developing schizophrenia as a result of his family history of mental illness.[46] Mr. Holmes was also twenty-four years old at the time of the shooting, which is within the age range during which males most frequently experience the onset of schizophrenia and related illnesses.[47]

C. Did "Mental Illness" and "Evil" Really Coexist in This Case?

Nevertheless, even in the face of this strong, unrefuted evidence of mental illness, the questions evoked by the "evil" narrative remain: Even if Mr. Holmes is mentally ill, how much of a role did that mental illness play in the shooting? Did "moral obliquity, mental depravity, or passion growing out of anger, revenge, hatred, or other motives and kindred evil

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41. *See, e.g.*, July 7 Transcript, *supra* note 27, at 158–60 (referencing the testimony of Dr. Raquel Gur); June 8 Transcript, *supra* note 27, at 86, 141–43 (referencing the testimony of Dr. Jeffrey Meztner); Transcript of Record at 40–42, 125, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. June 5, 2015) [hereinafter June 5 Transcript] (referencing the testimony of Dr. William Reid).

42. *See* June 8 Transcript, *supra* note 27, at 153.

43. *See* June 25 Transcript, *supra* note 27, at 157–58 (referencing the testimony of Dr. Jonathan Woodcock).

44. *See, e.g.*, July 7 Transcript, *supra* note 27, at 82 (referencing the testimony of Dr. Raquel Gur); June 8 Transcript, *supra* note 27, at 153 (referencing the testimony of Dr. Jeffrey Meztner); June 5 Transcript, *supra* note 41, at 87 (referencing the testimony of Dr. William Reid).

45. *See, e.g.*, July 7 Transcript, *supra* note 27, at 83 (referencing the testimony of Dr. Raquel Gur); June 25 Transcript, *supra* note 27, at 159 (referencing the testimony of Dr. Jonathan Woodcock); June 8 Transcript, *supra* note 27, at 153 (referencing the testimony of Dr. Jeffrey Metzner); June 5 Transcript, *supra* note 41, at 83–86 (referencing the testimony of Dr. William Reid).

46. Dr. Metzner testified:

> [T]here's also no question that there's a genetic component to schizophrenia. Doesn't mean if you have a family history of schizophrenia that you're going to get schizophrenia. But you're more likely to get schizophrenia if you have a family history; just like if you have a family history of heart disease, you're more likely to get it.

June 8 Transcript, *supra* note 27, at 153. Dr. Reid noted, "[I]t's certainly true that, if certain kinds of close relatives have clear schizophrenia, your risk goes up substantially." June 5 Transcript, *supra* note 41, at 79.

47. *See* June 8 Transcript, *supra* note 27, at 152 (referencing the testimony of Dr. Jeffrey Metzner).

conditions,"[48] rather than mental illness, lead Mr. Holmes to commit this horrible act of violence?

The prosecution's answer to this question at trial was yes.[49] It intimated that Mr. Holmes's motives to commit the shooting were largely unrelated to whatever mental illness he had.[50] It suggested that Mr. Holmes opened fire on the theater, not because of his delusional and psychotic belief that he could increase his human capital by killing as many people as possible, but because he became angry and disillusioned after his first and only girlfriend broke up with him in early 2012, and he began to struggle academically in graduate school.[51] In other words, its theory was that Mr. Holmes somehow set his mental illness aside to make reasoned decisions rooted instead in anger, hate, vengeance, and selfishness. The prosecution posited that Mr. Holmes's mental illness did not cause the shooting; instead, it merely coincided with these preexisting character defects.[52]

However, none of the experts who forensically examined Mr. Holmes endorsed this theory. To the contrary, all four of the psychiatrists who testified at trial agreed that it was Mr. Holmes's mental illness, rather than some sort of bad character, that caused him to commit these horrific crimes.

Dr. Metzner—the first court-appointed psychiatrist to examine Mr. Holmes—made it unequivocally clear that, in his opinion, the tragic and horrible shooting was a direct result of Mr. Holmes's illness and that, without the mental illness, the shooting would never have taken place.[53] Dr. Metzner further opined that, although Mr. Holmes did not meet the criteria for legal insanity, it was very clear that his appreciation of the wrongfulness of his actions was significantly impaired as a result of his psychotic thinking.[54]

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48. COLO. REV. STAT. § 16–8–101.5(1)(b) (2016). Colorado's insanity statute distinguishes these conditions from a mental disease or defect that could cause a person to be legally insane. *See id.* § 16–8–101.5 (defining "mental disease or defect" for purposes of legal insanity, and noting that "care should be taken not to confuse such mental disease or defect with moral obliquity, mental depravity, or passion growing out of anger, revenge, hatred, or other motives and kindred evil conditions").

49. *See, e.g.*, Transcript of Record at 196–97, 200–03, 205–09, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. July 30, 2015) [hereinafter July 30 Transcript]; Transcript of Record at 7–18, 20–23, 33–35, 46–48, 54–55, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. July 14, 2015) [hereinafter July 14 Transcript] (referencing an uncertified rough transcript); June 5 Transcript, *supra* note 41, at 153–54; Transcript of Record at 70, 85–90, 102, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. Apr. 27, 2015) [hereinafter April 27 Transcript].

50. *See, e.g.*, July 30 Transcript, *supra* note 49, at 88–90.

51. *See, e.g.*, July 30 Transcript, *supra* note 49, at 210–12, 218–19; July 14 Transcript, *supra* note 49, at 7–18, 20–23, 33–35, 46–48, 54–55; June 5 Transcript, *supra* note 41, at 153–54; April 27 Transcript, *supra* note 49, at 70, 85–91.

52. *See* July 30 Transcript, *supra* note 49, at 88–90.

53. Transcript of Record at 89–92, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. July 27, 2015) [hereinafter July 27 Transcript] (referencing the testimony of Dr. Jeffrey Metzner).

54. *Id.*

Dr. William Reid—the second court-appointed psychiatrist to examine Mr. Holmes—likewise testified as follows on cross-examination:

> Q: And it's your opinion, sir, that, absent his mental condition, we wouldn't be here at all, would we?
>
> A: That's a true statement.
>
> Q: This crime would never have taken place without this mental illness?
>
> A: That's true in my opinion, yes.[55]

Dr. Woodcock and Dr. Raquel Gur, the defense-retained psychiatrists, also agreed. Dr. Woodcock testified that there was no doubt in his mind that Mr. Holmes was psychotic when he saw him in the jail just four days after the shooting and that he saw "no rational reason for the shooting."[56] Dr. Gur testified that she did not find a nonpsychotic reason for the shooting, and she agreed that "there wouldn't have been a shooting at all" but for the existence of Mr. Holmes's psychotic illness.[57]

Moreover, even the court-appointed experts who testified on the prosecution's behalf during the merits phase of the trial roundly rejected the prosecution's suggestion that Mr. Holmes committed the shooting because of his failures in school as well as his personal life. Dr. Metzner explained that, in his opinion, neither Mr. Holmes's breakup with his girlfriend nor his academic difficulties caused him to commit the shooting.[58] He explained that "it's very common to see someone who is - - has the underlying genetic predisposition to schizophrenia to have their first psychosis triggered by stress."[59] In other words, the breakup and Mr. Holmes's academic struggles were not causes of, or motives for, the shooting, but rather potential triggers that precipitated his first psychotic break.[60] Dr. Reid likewise repudiated these motives as significant contributors to Mr. Holmes's decision to commit the shooting.[61]

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55. June 4 Transcript, *supra* note 27, at 125 (referencing the testimony of Dr. William Reid).

56. Transcript of Record at 165, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. June 26, 2015) [hereinafter June 26 Transcript] (referencing the testimony of Dr. Jonathan Woodcock); June 25 Transcript, *supra* note 27, at 103 (referencing the testimony of Dr. Jonathan Woodcock).

57. July 7 Transcript, *supra* note 27, at 133 (referencing the testimony of Dr. Raquel Gur).

58. June 8 Transcript, *supra* note 27, at 151.

59. *Id.* at 152.

60. *See id.* at 151. However, Dr. Metzner explained that "I could be wrong on that" and that Mr. Holmes may have become psychotic at the time that he did even without these stressful events in his life, as "it could have just been the natural course of his illness," especially given that "the most frequent onset of schizophrenia [in men] is in the early 20s." *Id.*

61. The prosecution attempted to downplay Dr. Reid's testimony on cross-examination that, absent his mental illness, the crime would never have taken place, by asking him on redirect examination whether he agreed that "[b]ut for his girlfriend dumping him . . . could we say that this wouldn't have happened?" Dr. Reid responded, "I wouldn't go so far -- he was planning pretty carefully. Anything's possible. Certain things may have changed, but I don't think that was a big part of why he did this." June 5 Transcript, *supra* note 41, at 153–54 (referencing the testimony of

Additionally, not a single expert testified, or even suggested, that Mr. Holmes fit the diagnostic criteria for antisocial personality disorder, which is perhaps the mental condition that is most closely aligned with traits that the average layperson might perceive as "evil."[62] Dr. Reid agreed that there is "no indication at all" that Mr. Holmes has antisocial personality disorder,[63] and Dr. Metzner testified that he "ruled out antisocial personality disorder" as a diagnosis for Mr. Holmes.[64]

Finally, another significant fact cuts against the narrative that the shooting is attributable to Mr. Holmes's "evil" nature, rather than his mental illness: Mr. Holmes's behavior in the months leading up to and including the shooting was entirely inconsistent and completely out of character with the person he had been for his entire life.

In preparation for trial, both sides conducted an exhaustive investigation of Mr. Holmes's life history. What that investigation revealed was that he was a happy, social, and affectionate child who came from a loving and supportive upper-middle-class family.[65] None of Mr. Holmes's neighbors, friends, fellow students, teachers, professors, coworkers, or family who testified at trial identified Mr. Holmes as emotionally reactive, self-important, mean-spirited, attention seeking, or overly sensitive in the face of rejection.[66] To the contrary: witnesses described Mr. Holmes, throughout his life and prior to the time period leading up to the shooting, as self-deprecating, quiet, respectful, and kind.[67] He was never

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Dr. William Reid). Dr. Reid gave a similar response to the prosecution's suggestion that Mr. Holmes's "conclusion that he had no career in science" caused the shooting. *Id.* at 154. When pushed on these points, Dr. Reid ultimately reiterated to the jury in no uncertain terms, "I believe there is a substantial relationship between the presence of the mental illness and the eventual carrying out of the event." *Id.* at 155.

62. The essential feature of antisocial personality disorder is "[a] pervasive pattern of disregard for and violation of the rights of others, occurring since age 15 years." AM. PSYCHIATRIC ASS'N, *supra* note 30, at 659. Diagnostic criteria include:

> Deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure, . . . [i]rritability and aggressiveness, as indicated by repeated physical fights or assaults, . . . [r]eckless disregard for safety of self or others, . . . [and] [l]ack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another.

Id. The DSM-5 further indicates that persons with antisocial personality disorder "may repeatedly lie, use an alias, con others, or malinger" and "frequently lack empathy and tend to be callous, cynical, and contemptuous of the feelings, rights, and sufferings of others." *Id.* at 660.

63. June 5 Transcript, *supra* note 41, at 284.

64. June 8 Transcript, *supra* note 27, at 82.

65. Transcript of Record at 71–72, 88–89, 163–64, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. July 29, 2015) [hereinafter July 29 Transcript]; July 27 Transcript, *supra* note 53, at 182–84, 242, 246–47; Transcript of Record at 50–53, 62–63, 122–27, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. July 23, 2015) [hereinafter July 23 Transcript].

66. *See, e.g.*, July 27 Transcript, *supra* note 53, at 223–24, 255–56, 266–67; July 23 Transcript, *supra* note 65, at 64–65, 76, 79, 132, 155–56, 171–72; Transcript of Record at 70–71, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. May 13, 2015) [hereinafter May 13 Transcript]; Transcript of Record at 178–180, 245–47, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. May 11, 2015) [hereinafter May 11 Transcript].

67. *See, e.g.*, July 27 Transcript, *supra* note 53, at 172, 246, 253, 263, 265, 267, 269; July 23 Transcript, *supra* note 65, at 51, 62–63, 103, 146.

a poor loser, selfish, or self-centered.[68] He handled rejection and disappointments in his life by withdrawing inward and was a person who avoided the limelight.

If it is true that Mr. Holmes is not just mentally ill, but "evil" as well, then either (1) his true "evil" nature suddenly sprang forth when he experienced some mild personal difficulties during his first year in graduate school and caused him to drop out of school; dye his hair orange; spend thousands of dollars on weapons, ammunition, and ballistic gear (despite being a frugal person his entire life who had no prior interest in guns); build a series of homemade explosive devices in his apartment; plan and execute a mass murder; and throw his entire life and future away; or (2) he was secretly sinister his entire life but managed to masterfully fool every person who came into contact with him from a young age, including his own family, into thinking that he was a good person until the events of July 20, 2012.

The alternative, of course, is what the evidence actually supports and what we, his attorneys, sincerely believe: Mr. Holmes's chronic and serious mental illness caused him to commit this horrific crime. After years of displaying more subtle, negative symptoms of mental illness that were mistaken by those who knew him for shyness and other personality quirks, Mr. Holmes began to exhibit more overt symptoms of psychosis in early 2012 as schizophrenia began to take hold of his brain during his first year of graduate school.[69] And he was in the throes of his first psychotic break when he planned and committed the terrible and tragic shooting at the Century 16 movie theater.[70]

D. The Appeal of the False Narrative of "Evil"

If the narrative of "evil" is not actually supported very well by the facts in the case, then why has it become such a prominent feature of the discourse about Mr. Holmes? One obvious explanation is that it is more justifiable to seek the death penalty against a person who is viewed as "evil" rather than against someone who is legitimately sick, and the elected district attorney's attempts to advance this narrative in the media could be perceived as an effort to defend his decision to spend millions of taxpayer dollars to push the case to trial and to reject the defense's offer to plead guilty to all charges in exchange for a life sentence.

However, there is more to it than that. Regardless of what Mr. Brauchler's intentions were, or whether he genuinely believed Mr. Holmes was evil, the fact is that this narrative seems to be one that has been readily accepted and embraced by the media and the public. It

68. *See* July 23 Transcript, *supra* note 65, at 95.

69. *See* July 7 Transcript, *supra* note 27, at 23–27, 120–25 (referencing the testimony of Dr. Raquel Gur).

70. *See id.*

seems to be what people *want* to believe. We think there are several reasons this might be.

First, the narrative of "evil" offers a clear explanation for an otherwise incomprehensible tragedy. Deciding that Mr. Holmes—or other perpetrators of mass violence, for that matter—is inherently "evil" allows us as a society to divide up the world in terms of "good" and "bad" in a way that makes sense. It offers a simplistic, black-and-white way of viewing a situation that requires little further discussion. Some people are just "evil," and so they do terrible things that the rest of us, who are not "evil," could not even fathom. There is no rehabilitating someone who is evil, so the best thing to do when we encounter someone like this is to simply exterminate him or her. End of discussion. This narrative is particularly appealing in Mr. Holmes's case because, on the face of it, his crime, which, it turned out, was borne of a psychotic and delusional belief system about "human capital," had no other obvious motive like money, sex, religion, racism, politics, or terrorism.[71]

Second, there is a sense in which branding someone as "evil" makes us feel safer from ourselves. Even if we do not understand the origins of "evil," the narrative that people like Mr. Holmes are "evil" reassures us that we don't have to fear one of our own committing a mass atrocity like the Aurora theater shooting. While the threat of a horrific crime occurring still exists within this narrative of "evil," at least the threat comes from people who are outside the bounds of humanity and have nothing in common with the rest of us. We need not look inward, nor is there any need—or justification—for feeling any sort of compassion for the "evil" one. As the psychiatrist Knoll points out,

> [D]epicting an enemy as evil helps foster an obligation to oppose and dispose of him. Because he is evil, there is little need to concern oneself with his health, welfare, or gaining a better understanding of him. All of this can be done free of guilt, for those who are evil bring about their own just desserts.[72]

Finally, and relatedly, casting someone who has committed a horrific crime, such as Mr. Holmes, as "evil" absolves us as a society from playing any role in the horrors that have occurred. A person who is "evil" is exclusively responsible for his or her own conduct. It is not our fault they became the way that they are or did the awful things that they did. Moreover, because they are just "evil," there is nothing we could have

71. *See* July 7 Transcript, *supra* note 27, at 133–34 (referencing the testimony of Dr. Raquel Gur); June 26 Transcript, *supra* note 56, at 140–41 (referencing the testimony of Dr. Jonathan Woodcock).

72. Knoll, *supra* note 20, at 114.

done to stop them. In other words, "[T]here is a social virtue to outlining the face of evil; society is exonerated and bears no responsibility."[73]

E. The Damage Done by the "Evil" Myth

But labeling a person as "evil," especially a person who is indisputably, seriously mentally ill like Mr. Holmes, comes at a serious cost. It is problematic and troubling to adopt this way of thinking for a number of reasons.

As an initial matter, it sets us back several centuries in terms of the way we think about mental illness in this country. We have historically treated people with mental disorders with "contempt, fear, and cruelty, perhaps due to the belief that mental disorders stemmed from parental misdeeds, demonic possession, or deficient character."[74] As of 2009, an estimated "71% of Americans still believe[d] that mental illness is caused by mental weakness, 65% believe[d] that mental illness is the product of poor parenting, and 35% believe[d] that mental illness is a form of retribution for sinful or immoral behavior."[75] We can swiftly dispose of difficult discussions about seriously mentally ill people like Mr. Holmes by branding them as "evil" and banishing them from society, as the court did during the formal sentencing hearing in this case when it demanded that the sheriff's deputies "[g]et the defendant out of my courtroom, please."[76] But if we continue to do so, we will ensure that the American public remains ignorant of essential facts about mental illness, including how to recognize early signs and symptoms of psychosis and serious mental disorders. While it is certainly the case that most mentally ill people do not commit tragic acts of violence, a number of those who do commit such acts, including Mr. Holmes, *are* mentally ill.[77] It does not help us advance efforts to detect mental illness or prevent mass violence by pretending that this is not true.

Second, clinging to the simplistic narrative of "evil" prevents us from taking a hard look at the myriad and complex ways that we as a

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73. *Id.* at 109.

74. Stacey A. Tovino, *Neuroscience and Health Law: An Integrative Approach?*, 42 AKRON L. REV. 469, 475 (2009).

75. *Id.*

76. *'Get the Defendant Out of My Courtroom,' Judge Says in Sentencing James Holmes*, L.A. TIMES (Aug. 26, 2015), http://www.latimes.com/nation/nationnow/la-na-nn-james-holmes-sentenced-20150826-story.html (quoting statement of Carlos Samour Jr., Dist. Ct. Judge).

77. A 2015 law review article published in the Howard Law Journal notes that "[s]everal large-scale studies have indicated that serious mental illness is a risk factor for violence" and that "serious mental illness's greatest effect in increased violent crime is in substantially greater homicide." David B. Kopel & Clayton E. Cramer, *Reforming Mental Health Law to Protect Public Safety and Help the Severely Mentally Ill*, 58 HOW. L.J. 715, 727, 734 (2015). With respect to mass murders specifically, the authors cite to "[a] study of 30 adult mass murderers and 34 adolescent (19 years old or younger) mass murderers [which] found a very high rate of serious mental illness among the adults." *Id.* at 736. The article also notes that "the killers at the Aurora theater, Sandy Hook Elementary, Tucson, and the Washington Navy Yard had given clear signs of serious mental illness problems to police, family, or mental health workers." *Id.* at 738.

society do, in fact, contribute to the problem of mass violence. As Steiker writes,

> The communities in which heinous offenders commit their offenses doubtless have contributed in some ways—often in crucially important ways—to their characters and their crimes. The collective's contributions may lie in failing to offer treatment for mental illness or other defects, in failing to protect an offender from trauma, abuse or neglect, or more affirmatively in creating institutional or cultural conditions that promote anti-social violence.[78]

The point is that our search for the truth about what we are quick to call "evil" requires us to dig down into the complexities of the causes of violence and examine missed opportunities. Knoll explains,

> The real causes of violent or harmful behavior are always different from the way people think of evil, because it is myth and illusion that provide the definition. . . . To the best of our current and limited knowledge, people are led to commit acts of intentional harm by a complex interaction of biological, psychological, and social forces in concert with situational variables.[79]

For example, it is a fact that the law permitted Mr. Holmes to purchase thousands of rounds of ammunition on the Internet without raising an eyebrow.[80] It is also a fact that Mr. Holmes was able to purchase four firearms legally and that the law allowed those purchases to take place unbeknownst to the psychiatrist he was seeing at the time and to whom he had disclosed having recurring homicidal thoughts.[81] In addition, it is

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78. Steiker, *supra* note 21, at 372.

79. Knoll, *supra* note 20, at 106.

80. *See James Holmes Built Up Aurora Arsenal of Bullets, Ballistic Gear Through Unregulated Online Market*, CBSNEWS (Sept. 19, 2012, 4:27 PM), http://www.cbsnews.com/news/james-holmes-built-up-aurora-arsenal-of-bullets-ballistic-gear-through-unregulated-online-market/ ("In a world where Amazon can track your next book purchase and you must show ID to buy some allergy medicine, James Holmes spent months stockpiling thousands of bullets and head-to-toe ballistic gear without raising any red flags with authorities.").

81. Under Colorado law, if an individual has been involuntarily placed on a 72-hour mental health hold or has been committed against his or her will for short- or long-term treatment, the person's name is sent to the FBI's National Instant Criminal Background Check System. *See* COLO. REV. STAT. § 13-9-123 (2016). However, Colorado law does not place any restrictions on the purchases of individuals who are being treated for mental illness, nor does it require firearms dealers to contact mental health providers who are treating potential buyers for mental illness on an outpatient basis before a purchase can be approved. *See id.*; *see also* Nicholas Riccardi, *James Holmes' Psychiatrist: 'Dark Knight' Shooting Suspect Was Seeing Therapist Before Massacre*, HUFFINGTONPOST (last updated Sept. 26, 2012) ("Authorities said Holmes legally purchased four guns before the attack at Denver-area sporting goods stores - a semiautomatic rifle, a shotgun and two pistols. To buy the guns, Holmes had to pass background checks that can take as little as 20 minutes in Colorado. State law bars from purchasing firearms people who have been found mentally defective by a judge or have been committed to a mental institution. The statute makes no restrictions on buyers who are being treated for possible mental illness."). Mr. Holmes told Dr. Fenton he was having homicidal thoughts three to four times a day but denied specific plans or targets. *See* June 16 Transcript, *supra* note 37, at 114, 117–18 (referencing the testimony of Dr. Lynne Fenton); Ann O'Neill & Sara Weisfeldt, *Psychiatrist: Holmes Thought 3-4 Times a Day About Killing*, CNN (June 17, 2015, 9:58 AM), http://www.cnn.com/2015/06/16/us/james-holmes-theater-shooting-fenton/.

a fact that this psychiatrist suspected from the first day she met Mr. Holmes that he might be psychotic and had concerns about his dangerousness that led her to contact the University of Colorado's Behavioral Evaluation and Threat Assessment (BETA) team as well as Mr. Holmes's mother.[82] Further, it is a fact that despite these concerns, Mr. Holmes's psychiatrist never informed his mother that her son was having homicidal thoughts three or four times a day and also concluded she did not have enough evidence of imminent dangerousness to involuntarily hospitalize him.[83]

There are no easy answers to the issues raised by these facts, but by pronouncing Mr. Holmes to be "pure evil" and then pushing on in search of the next "evil" killer to banish from our midst, we disable ourselves from even having a conversation about them. To be clear, we are not suggesting that we should blame others for the shooting instead of Mr. Holmes or that Mr. Holmes himself should not be held accountable for his actions. What we are arguing is that if we distill the narrative about this case down to a single word— "evil" —we avoid the difficult task of investigating society's own contributions to the complex problem of mass shootings and, thus, how to stop the next one.

The final reason this false narrative of "evil" is so problematic is that it makes us less human when we dehumanize others. Adopting this narrative about Mr. Holmes enables us to feel morally superior to him. But ultimately, the narrative requires us to strip him of his humanity while we denounce him as evil for stripping the victims of theirs. We understand that it is a painful and difficult thing to imagine Mr. Holmes as more than just a "monster." Perhaps for many of those directly touched by this tragedy, it is impossible. It muddies the water considerably. It may make us feel disloyal to the victims and to the community that he ravaged. Moreover, accepting Mr. Holmes as sick, rather than evil, raises the scary possibility that any one of us, or any one of our loved ones, could be capable of committing unspeakable acts of violence if we had the misfortune of suffering from a serious psychotic mental illness that compelled us to commit acts of violence. But the truth is, and always has been, that Mr. Holmes is sick. Schizophrenia is a complex brain disorder that, as Dr. Gur explained, "affects almost everything that is unique to us as human beings."[84] While it may have changed Mr. Holmes, it did not cause him to lose his humanity. But when we pretend otherwise by adopting this false narrative of "evil," we are at significant risk of lessening ours.

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82. *See* June 16 Transcript, *supra* note 37, at 138–39, 142–43 (referencing the testimony of Dr. Lynne Fenton); O'Neill & Weisfeldt, *supra* note 81.

83. July 29 Transcript, *supra* note 65, at 54–56 (referencing the testimony of Arlene Holmes); June 16 Transcript, *supra* note 37, at 222 (referencing the testimony of Dr. Lynne Fenton).

84. July 6 Transcript, *supra* note 39, at 238 (referencing the testimony of Dr. Raquel Gur).

II. THE MYTH OF THE "HOLDOUT" JUROR

Immediately after the jury returned its verdict on August 7, 2015, one juror—Juror 17—elected to speak to the media in the parking lot of the courthouse about the jury's deliberations and verdict.[85] Juror 17 made it clear that while there was one juror who was "solidly in favor of life imprisonment," there were also two others who "had not made a complete decision."[86] According to Juror 17, the nine other jurors were in favor of the death penalty.[87] She explained that they "deliberated the entire time," and that "all the jurors were very respectful, of course, of others' opinions," but in the end "could not come to a unanimous verdict on death."[88] She also stated very clearly that, for the jurors who were not convinced beyond a reasonable doubt that death was the appropriate sentence, "mental illness was the issue" and that, while they all agreed that Mr. Holmes did not meet the narrow legal definition of insanity in Colorado, many of the jurors felt that "the mental illness played into his plans and actions."[89]

Despite her explanation that there were three jurors who were considering a life sentence for Mr. Holmes because of his mental illness, Juror 17's comments almost immediately produced sensational headlines about the "lone holdout" juror who was "likely all that stood between [the] theater shooter and [a] death sentence."[90] A handful of examples from an Internet search for articles published about the Holmes case shortly after Juror 17's interview reveal headlines such as "One Holdout Juror Was Likely Why James Holmes Avoided Death Penalty,"[91] "Juror Says Holdout Would Not Budge on James Holmes Death Penalty,"[92] "Theater Shooter Spared From Death Penalty By One Juror's Holdout,"[93]

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85. Carly Moore, *Juror 17 Reveals Details of Verdict, at Least 1 Theater Shooting Juror Was Against Death Sentence*, KWGN (Channel 2 television broadcast interview Aug. 7, 2015), http://kwgn.com/2015/08/07/juror-17-reveals-details-of-verdict-at-least-1-theater-shooting-juror-was-against-death-sentence/.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. Peter Holley, *A Lone Holdout Was Likely All That Stood Between Theater Shooter and Death Sentence, Juror Says*, WASH. POST (Aug. 8, 2015), https://www.washingtonpost.com/news/post-nation/wp/2015/08/08/a-lone-holdout-was-likely-all-that-stood-between-theater-shooter-and-death-juror-says/.

91. Daniel Politi, *One Holdout Juror Was Likely Why James Holmes Avoided Death Penalty*, SLATE (Aug. 8, 2015, 2:04 PM), http://www.slate.com/blogs/the_slatest/2015/08/08/one_holdout_juror_was_likely_why_james_holmes_avoided_death_penalty.html.

92. Phil Helsel, *Juror Says Holdout Would Not Budge on James Holmes Death Penalty*, NBC NEWS (Aug. 8, 2015, 12:54 AM), http://www.nbcnews.com/news/us-news/juror-says-holdout-would-not-budge-james-holmes-death-penalty-n406346.

93. Sadie Gurman, *Theater Shooter Spared from Death Penalty by One Juror's Holdout*, HUFFINGTON POST (Aug. 15, 2015, 10:07 AM), http://www.huffingtonpost.com/entry/theater-shooter-spared-from-death-penalty-by-one-jurors-holdout_55cf4564e4b0ab468d9d7a8b.

and "Juror Says a Single Holdout Prevented Death Penalty for James Holmes."[94]

A. The Appeal of the "Holdout" Myth

The explanation for why this "holdout" narrative took hold in the public discourse is more straightforward than the narrative about "evil." This narrative appears to have come about by a combination of two factors. First, the narrative emerged in part as a result of the mainstream media's attempt to simplify and sensationalize Juror 17's comments.[95] Second, the narrative took shape as a result of the elected district attorney's aggressive bid to defend his decision to seek the death penalty against Mr. Holmes against critics who argued that he should have accepted the defense's repeated offers to plead guilty in exchange for a life sentence.[96] At a press conference immediately after the verdict was announced, the district attorney pondered, "What was it that hung up the jurors?"[97] It did not take long before explicit misinformation about the dynamics in the jury room and the opinions of the two so-called fence-sitters was disseminated through the media.

Following an interview with Mr. Brauchler approximately a week after the verdict, the Associated Press wrote, "The lone holdout felt just as strongly that Holmes should get a life sentence as the 11 other jurors believed he should die for the 2012 shooting, District Attorney George

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94. Claudia Koerner, *Juror Says a Single Holdout Prevented Death Penalty for James Holmes*, BUZZFEED NEWS (Aug. 7, 2015, 10:05 PM), http://www.buzzfeed.com/claudiakoerner/single-hold-out-juror-james-holmes-verdict#.yu92YMvXJ.

95. The media has put forth a similar narrative in other high-profile cases involving so-called "holdout" jurors. For example, in addition to Mr. Holmes's case, fairly recently, the media has pursued story lines characterizing the outcomes in the cases of Jodi Arias and Pedro Hernandez (charged with murdering six-year-old Etan Patz in New York in 1979) as the result of a lone "holdout" juror who frustrated the majority. *See, e.g.*, Lindsey Bever, *The Perils of Being the Juror Who Did Not Want Jodi Arias to Die*, WASH. POST (Mar. 17, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/03/17/holdout-juror-in-jodi-arias-sentencing-says-shes-getting-threats/ ("The holdout who hung up the jury in Jodi Arias's sentencing trial earlier this month has spoken out amid backlash from fellow jurors who wanted to sentence Arias to death."); Jen Chung, *Most Etan Patz Jurors Still Hate the Holdout Who Forced Mistrial*, GOTHAMIST (June 11, 2015, 1:01 PM), http://gothamist.com/2015/06/11/etan_patz_jurors_hate.php ("While prosecutors are moving forward with a new trial, many jurors from the last one are still angry that the previous, grueling trial ended in mistrial because one juror believed that Hernandez was innocent. The forewoman said, 'There is going to be a retrial because of one individual with a huge ego and a small heart.'").

96. Immediately after the verdict was announced, the media began posing questions to Mr. Brauchler about his decision to push the case to trial rather than accept a plea deal offered by the defense. *See, e.g.*, Kirk Mitchell, *DA Brauchler Defends Decision to Seek Death Penalty Against Holmes*, DENV. POST (Aug. 7, 2015, 8:54 PM), http://www.denverpost.com/theater-shooting-trial/ci_28605354/da-brauchler-defends-decision-seek-death-penalty-against ("District Attorney George Brauchler defended his decision to seek the death penalty, explaining that the community deserved to have a role in the sentence of a mass murderer who tried to kill hundreds. 'This kind of a crime cries out for the community to be involved in the sentence,' Brauchler said after the jury handed down its sentence to James Holmes on Friday.").

97. *Id.* (quoting statement of George Brauchler, Dist. Att'y).

Brauchler said, based on prosecution interviews with some of the panel."[98] The *L.A. Times* reported Mr. Brauchler as stating,

> Wobbler is even too strong of a term. They had gone around the room at some point and said, "OK, how strong are you on your position?" They had gotten 10 [on a scale of 1 to 10 to gauge how strong the positions were] from everybody and eight on these two.[99]

According to another article, Mr. Brauchler stated, "What we've discovered from the other jurors is that 'waffler' may be too generous a term. These were people who were heavily leaning toward death but they wanted to continue to deliberate and talk about it."[100] The article reports that he added,

> [T]he jurors that have spoken to [us] have told us, "You guys put on a great case. There's nothing you could have done . . . WE were surprised at the hold out juror." They said this juror had never raised any of the issues that came out at the end during any other phase of the deliberations. They were frustrated as well.[101]

This misinformation about the jurors' penalty phase deliberations finally prompted a second juror to speak to the *Denver Post* seven weeks after the trial in an effort to correct the record.[102] This juror, who asked to remain anonymous, identified herself, not as the "holdout," but as one of the two other jurors who were not convinced that death was the appropriate sentence beyond a reasonable doubt: "There were three," she said.[103] "Not one."[104] She told the *Denver Post* that "she decided to end her silence because she could no longer bear to watch the weight of public scrutiny — what she described as a 'witch hunt' — fall solely on the shoulders of her fellow juror."[105] In stark contrast to the narrative promoted in the media that the two jurors who were unsure of their decision were leaning heavily towards death, this juror told the *Denver Post* that "she is adamant that death was not an appropriate sentence for Holmes."[106] The juror explained that Mr. Holmes's severe mental illness "ruled out death" as a punishment in her opinion.[107] "It's the fact that

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98. Gurman, *supra* note 93.

99. Maria L. La Ganga, *James Holmes Prosecutor Talks About the One Holdout Juror Who Spared the Killer's Life*, L.A. TIMES (Aug. 24, 2015, 4:00 AM), http://www.latimes.com/nation/la-na-holmes-da-qa-20150824-story.html (quoting interview with George Brauchler, Dist. Att'y).

100. McKinley, *supra* note 4 (quoting interview with George Brauchler, Dist. Att'y).

101. *Id.* (third alteration in original) (quoting interview with George Brauchler, Dist. Att'y).

102. Jordan Steffen, *Aurora Theater Shooting Juror Breaks Silence, Says 3 Voted for Life*, DENV. POST (Oct. 2, 2015, 10:51 AM), http://www.denverpost.com/theater-shooting-trial/ci_28911988/aurora-theater-shooting-juror-breaks-silence-says-3.

103. *Id.* (quoting statement of anonymous juror).

104. *Id.* (quoting statement of anonymous juror).

105. *Id.*

106. *Id.*

107. *Id.* ("While the juror does not feel Holmes deserved a life sentence, his severe mental illness also ruled out death, she said.").

mental illness is there," she stated, echoing much of what Juror 17 told the media about the reason three jurors were not convinced that death was the appropriate sentence for Mr. Holmes.[108] While she expressed deep sorrow for the victims and their families, she maintained, "I know that it [the verdict resulting in a life sentence] was the appropriate answer."[109]

B. The Damage Done by the "Holdout" Myth

Based on the statements of the two jurors who have spoken to the press, it is clear that the narrative of the single "holdout" who dug in his or her heels and mystified and shocked the other jurors with his or her unexplained decision to vote for life is not factually correct. Moreover, this characterization of the jury's deliberations is detrimental to the public's understanding of the issues in the case because it perpetuates an overly simplistic and legally inaccurate view of the jury's task in a capital sentencing trial. First, it confuses the kind of decision-making required of juries in capital sentencing proceedings with those required of juries in other types of proceedings where an individual's life is not at stake. Second, this narrative invites speculation that an individual with a political agenda infiltrated the jury, rather than focusing on the jurors' actual, stated reason for the life verdict: Mr. Holmes's mental illness.

1. The Task of the Jury in a Capital Sentencing Proceeding

The term "holdout" itself connotes negative images of an individual, determined to stymie the will of the majority, who stubbornly—perhaps irrationally—refuses to engage with the others and "withholds agreement or consent upon which progress is contingent."[110] This term is arguably appropriate to apply when discussing the dynamics at play in a non-capital case, or the merits phase of a capital case, where a defendant's guilt or non-guilt is at issue, unanimity is required for the jury to return a valid verdict, and non-unanimity results in a hung jury and a potential retrial.[111] However, it is plainly inappropriate to use this term to describe a non-unanimous result in a capital sentencing proceeding in Colorado.

For forty years, the United State Supreme Court's Eighth Amendment jurisprudence has required individualized sentencing in capital cases. In *Woodson v. North Carolina*,[112] the Court held "that in capital cases the fundamental respect for humanity underlying the Eighth Amendment

108. *Id.* (quoting statement of anonymous juror).
109. *Id.* (quoting statement of anonymous juror).
110. *Holdout*, THE FREE DICTIONARY, http://www.thefreedictionary.com/holdout (last visited May 2, 2016).
111. *See* COLO. REV. STAT. § 16-10-108 (2016) ("The verdict of the jury shall be unanimous . . . ."); COLO. R. CRIM. P. 31(d) (2016) ("If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.").
112. 428 U.S. 280 (1976).

requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."[113]

Moreover, the Court has repeatedly explained that, unlike the factual decisions a jury makes when deciding whether a defendant is guilty or not guilty, the jury's task in a capital sentencing proceeding requires them to give a "reasoned *moral* response to the defendant's background, character, and crime."[114]

The Court has likewise held that the moral decisions involving the assessment of mitigating evidence that jurors must make in a capital sentencing trial are individual decisions, rather than group decisions, and that jurors need not unanimously agree on the existence of mitigation or the weight they choose to assign to any particular mitigating evidence.[115]

Finally, Colorado, like the majority of states in the country that allow for capital punishment,[116] requires the jury to agree unanimously before a verdict of death can be returned.[117] By deliberate design, the Colorado legislature put into place a system in which a capital jury's non-unanimous sentencing decision is an entirely valid and acceptable verdict that results in a sentence of life imprisonment without parole.[118] As the Colorado Supreme Court has acknowledged, "Colorado has tailored its four-step death penalty process to *center on the proposition* that

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113. *Id.* at 304 (citation omitted).

114. Penry v. Lynaugh, 492 U.S. 302, 328 (1989) (quoting Franklin v. Lynaugh, 487 U.S. 164, 184 (1988)), *abrogated on other grounds by* Atkins v. Virginia, 536 U.S. 304 (2002); *see also* Abdul-Kabir v. Quarterman, 550 U.S. 233, 263–64 (2007) ("Our line of cases in this area has long recognized that before a jury can undertake the grave task of imposing a death sentence, it must be allowed to consider a defendant's moral culpability and decide whether death is an appropriate punishment for that individual in light of his personal history and characteristics and the circumstances of the offense."); Satterwhite v. Texas, 486 U.S. 249, 261 (1988) (Marshall, J., concurring) ("Unlike the determination of guilt or innocence, which turns largely on an evaluation of objective facts, the question whether death is the appropriate sentence requires a profoundly moral evaluation of the defendant's character and crime.").

115. *See, e.g.*, McKoy v. North Carolina, 494 U.S. 433, 435, 442–43 (1990) (describing how a state capital sentencing scheme must allow each individual juror to consider mitigating factors when deciding whether to impose death penalty, even if factors are not found unanimously by all jurors); Mills v. Maryland, 486 U.S. 367, 373–76 (1988) (finding that jurors cannot be precluded from considering any mitigating evidence unless they unanimously agree).

116. The exceptions are Alabama, Florida, and Delaware, which are the only states that allow people to be sentenced to death when jurors are less than unanimous. *See* Hurst v. Florida, CHARLES HAMILTON HOUSTON INST. RACE & JUST., HARV. L. SCH. (Oct. 9, 2015), http://www.charleshamiltonhouston.org/2015/10/hurst-v-florida/ (providing statistics about judicial override in wake of oral argument before the United States Supreme Court in the *Hurst* case). The constitutionality of non-unanimous juries was litigated in *Hurst*. *See* Brief for Petitioner at 36–52, Hurst v. Florida, 136 S. Ct. 616 (2016) (No. 14-7505). However, the Supreme Court resolved the case on other grounds and did not address the issue of non-unanimity in its opinion. *See Hurst*, 136 S. Ct. 616 (2016). Thus, the constitutionality of non-unanimous jury sentencing verdicts in capital cases remains questionable. *See* discussion *infra* note 189 and accompanying text.

117. *See* COLO. REV. STAT. § 18-1.3-1201(2)(d) (2016) ("If the jury's verdict is not unanimous, the jury shall be discharged, and the court shall sentence the defendant to life imprisonment.").

118. *See id.*

any individual juror may ultimately trigger life imprisonment by not agreeing to a death penalty verdict."[119]

Moreover, our state supreme court has held that both the cruel and unusual punishment and due process clauses of our state constitution require the jury in a capital case to be unanimously convinced beyond a reasonable doubt that death is the appropriate sentence before a death sentence can be imposed.[120]

In accordance with these very clear legal principles, the jurors in the Holmes trial were given instructions during the penalty phase of the trial explaining that the decision regarding the existence of mitigating factors was an individual decision—not a group decision—and that the jury need not unanimously agree that mitigating factors exist or that the same mitigating factors exist.[121] They were told that each juror has the responsibility and authority to decide for himself or herself what constitutes a mitigating fact or circumstance and that "[e]ach juror must use his or her own personal discretion, life experiences, and reasoned moral judgment in determining for himself or herself what mitigating factors exist."[122] The court instructed the jurors that they were obligated to consult with one another and to deliberate, but that they were not required "to agree with the determinations, opinions, feelings, or thoughts of other ju-

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119. People v. Harlan, 109 P.3d 616, 630 (Colo. 2005) (emphasis added). The Colorado Supreme Court has stated,

> Colorado's capital sentencing scheme consists of four steps. First, it narrows the group of individuals convicted of first degree murder at the eligibility stage by requiring that the jury be satisfied beyond a reasonable doubt of the existence of at least one of the statutorily specified aggravators. At the next stage, the statute contemplates that the jury will consider evidence to "decide whether any mitigating factors exist." Third, based upon that evidence, the jury must decide beyond a reasonable doubt whether "mitigating factors exist which outweigh any aggravating factor or factors found to exist." If the jury finds that the mitigating factors do not outweigh the statutorily specified aggravators, then the jury moves to the fourth and final stage of determining whether the defendant should be sentenced to death or to life imprisonment.

People v. Dunlap, 975 P.2d 723, 736 (Colo. 1999) (footnote omitted) (citations omitted) (quoting People v. Tenneson, 788 P.2d 786, 791 (Colo. 1990)).

120. *See* People v. Young, 814 P.2d 834, 845 (Colo. 1991) ("A death sentence imposed in [the absence of a unanimous finding that death is the appropriate sentence beyond a reasonable doubt] violates requirements of certainty and reliability and is arbitrary and capricious in contravention of basic constitutional principles. Accordingly, we conclude that the statute [eliminating the fourth step of Colorado's capital sentencing scheme] contravenes the prohibition of cruel and unusual punishments under article II, section 20, of the Colorado Constitution, and deprives the defendant of due process of law under article II, section 25, of that constitution."); People v. Tenneson, 788 P.2d 786, 796 (Colo. 1990) (concluding that the standard of "beyond a reasonable doubt" is an implicit part of the statutory scheme, and noting the importance of jurors understanding "the fourth step [in Colorado's capital sentencing scheme] is separate and independent and requires that their ultimate conclusion that death is the appropriate penalty be reached only if they possess the degree of certainty that is communicated by the standard of beyond a reasonable doubt").

121. *See* Jury Instructions–Phase 2 of Sentencing Hearing at No. 5, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. July 30, 2015).

122. *Id.*

rors."[123] The court also explained to them, "You must treat the defendant as a uniquely individual human being."[124]

Jurors were further informed during the final phase of the sentencing proceeding that their final sentencing verdicts were not dictated by law and that each of them was called upon to deliberate and to make decisions "based on your individual reasoned moral judgment."[125] They were told that "[n]o juror may ever decide that the defendant should be sentenced to death unless the juror is convinced beyond a reasonable doubt that death is the appropriate sentence" and that "the jury may only return a sentence of death on a count if every juror is convinced beyond a reasonable doubt that death is the appropriate sentence on that count."[126] And the judge explained, "None of you individually, nor the jury collectively, is ever required to impose a sentence of death. The law never requires a death sentence."[127] In fact, they were told,

> If any of you is not convinced beyond a reasonable doubt that death is the appropriate sentence on a particular count, that ends the inquiry with respect to that count because, in that situation, the law requires that the defendant be sentenced to life imprisonment without the possibility of parole.[128]

Likewise, the court explained, "There is no requirement that you explain or justify to your fellow jurors why your individual reasoned moral judgment leads you to a particular decision on a count."[129] The jurors were told, "After deliberating, if a juror disagrees with the rest of the jurors, that disagreement must be respected by the other jurors and will be respected by the Court."[130]

Based on the accounts of the jurors who have spoken to the media, the jury conscientiously followed these instructions to the letter.[131]

In short, given the unique task of the jury in a capital sentencing proceeding, it is misleading to characterize the jury's verdict as the result of a lone holdout thwarting a majority vote for death. Even if it were

123. *Id.* at No. 21.
124. *Id.* at No. 7.
125. Jury Instructions–Phase 3 of Sentencing Hearing at No. 3, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. Aug. 6, 2015).
126. *Id.* at No. 4.
127. *Id.*
128. *Id.*
129. *Id.* at No. 8.
130. *Id.*
131. *See, e.g.*, Steffen, *supra* note 102 ("The juror said deliberations were always cordial. The group took pride in not rushing anyone and examining key points 'with a microscope,' she said."); Phil Tenser, *Nine of the Theater Shooting Jurors Were in Favor of the Death Penalty, According to Juror No. 17*, 7NEWS, http://www.thedenverchannel.com/news/movie-theater-shooting/theater-shooting-jurors-decline-interviews-after-sentencing-james-holmes-to-life-in-prison (last visited Apr. 9, 2016) ("'We all stayed cordial, and the jury instructions were very clear that this was an individual decision that we each had to make with our own moral understanding of what was right and wrong,' [Juror 17] said.").

factually true that the jury's sentencing verdict for Mr. Holmes was the result of one juror's decision that death was not the appropriate penalty beyond a reasonable doubt, which, the jurors' own statements to the media reveal, was not in fact the case, that person cannot be fairly characterized as a "holdout" that impeded the jury's progress towards a unanimous verdict of death. Because each juror is required to make an individual, reasoned moral assessment about whether another human being should live or die,[132] the law forbids jurors from pushing each other towards unanimity.[133] Instead, jurors are required to respect the moral viewpoints of other jurors, even if those viewpoints differ from their own.[134] A life sentence resulting from one juror's position that death is not the appropriate sentence beyond a reasonable doubt is therefore in complete harmony with the intentions of the law. It is not the spurious consequence of a rogue juror who "held out" and "hung up" the other jurors and improperly prevented them from returning a death verdict. Even had such a lone holdout juror existed, that person would not have thwarted the law—he or she would have effectuated and honored it.

In this case, *three* jurors had doubts as to whether the death penalty was the appropriate sentence for Mr. Holmes, not just one. Under those facts, there is no question that the law not only required, but desired, a verdict resulting in a sentence of life without parole.

2. Speculation About the Motivations of Jurors

The second problematic aspect of the "holdout" narrative is that it encourages the public to speculate that the verdict was the result of a sole individual who infiltrated the jury with an agenda against the death penalty and distracts from what is most likely the actual basis for the life-giving jurors' views: Mr. Holmes's mental illness.[135]

To begin with, this hypothesis is extremely unlikely to be true for at least three reasons. First, the court and the parties took incredible care selecting the jury in this case. The court summoned an unprecedented 9,000 prospective jurors in the case, and by the defense's count, approximately 3,750 citizens of Arapahoe County responded to the summons and filled out a lengthy jury questionnaire. The process of filling out the questionnaire alone took fifteen days in court to complete. After the defense and prosecution stipulated to the release of jurors whose questionnaire responses obviously disqualified them from serving on a capital

132. *See* People v. Tenneson, 788 P.2d 786, 792 (Colo. 1990) ("This concern for the reliability of a jury verdict of death finds expression in United States Supreme Court decisions requiring that a jury's determination to impose the penalty of death *reflect the conviction of each juror*, guided by constitutionally sufficient statutory standards." (emphasis added)).

133. *See supra* notes 117–29 and accompanying text.

134. *See supra* notes 117–29 and accompanying text.

135. *See, e.g.*, Sadie Gurman, *Theater Victim's Granddad Questions Motive of Holdout Juror*, YAHOO! NEWS (Aug. 24, 2015, 8:13 PM).

case,[136] the parties and the court then spent nine weeks and two days individually questioning prospective jurors under oath about publicity, as well as their views on the insanity defense and the death penalty. One hundred eleven jurors were ultimately qualified and participated in a two-day group questioning session. From that group, twenty-four jurors—twelve deliberating jurors and twelve alternates—were chosen. Each side had the ability to exercise twenty-two peremptory strikes.[137]

All of the jurors who ultimately deliberated over Mr. Holmes's fate withstood this intensive death-qualification process. In fact, none of the deliberating jurors were subject to a challenge for cause by either the prosecution or the defense based on their death penalty views. From a practical standpoint, the odds are extremely low that a person with a specific agenda to prevent Mr. Holmes from receiving a death sentence and was one of 3,750 people who responded to their jury summons actually made it on the jury. Moreover, for that to be true, the juror would have had to have been a tremendously good liar who managed to successfully deceive both parties, as well as the court, about his or her ability to fairly consider both sentences for Mr. Holmes over the course of a three-month selection process that included a written questionnaire as well as individual and group questioning.

Second, if an activist had deliberately infiltrated the jury with the intention of sparing Mr. Holmes from death, then why didn't that person simply end the process earlier, rather than wait until the very last phase of deliberations? In addition to its merits phase deliberations about the issue of insanity, the jury deliberated three separate times during the penalty phase. First, it was required to determine whether it was unanimously convinced beyond a reasonable doubt that at least one aggravating factor existed. Second, jurors deliberated over the existence of mitigation and were required to weigh mitigation against aggravation to determine whether they were unanimously convinced that mitigation did not outweigh aggravation beyond a reasonable doubt. After answering that question in the affirmative, jurors went on to the final phase of deliberations where they were required to answer the question of whether they were unanimously convinced beyond a reasonable doubt that death was the appropriate punishment. It was only at this last and final phase that the jury was not unanimous. The fact that the non-unanimous verdict came at this last phase suggests that the jurors were conscientious about

136. The defense and prosecution conferred with one another after receiving each group of questionnaires from prospective jurors and agreed to stipulate to excuse those jurors who either expressed in their questionnaire that they were unalterably opposed to capital punishment or that they would automatically impose the death penalty on Mr. Holmes if he were convicted of first-degree murder.

137. The prosecution exercised twenty of their peremptory challenges, leaving two unused. The defense exercised all twenty-two of their available peremptory challenges.

resolving the specific issues that the law required them to answer during each stage of deliberations.

The third reason the hypothesis that a stealth juror with an anti-death penalty agenda threw the case is most likely false is that it is directly contradicted by the two jurors who spoke to the media about deliberations.[138] There is no reason to doubt the sincerity of these jurors. Both of them explicitly stated that mental illness was a significant issue for jurors, including the three who were not convinced that Mr. Holmes deserved the death penalty.[139]

The United States Supreme Court has made clear that the death penalty "must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'"[140] In theory, the presence of an aggravating factor or factors elevates a defendant's culpability beyond that of an ordinary murderer.[141] On the other hand, the existence of mitigating factors, such as intellectual impairments, a defendant's young age, mental illness, or childhood abuse and trauma, serves to reduce a defendant's moral culpability.[142] This is because it is central to the Eighth Amendment's concept of individualized sentencing that the punishment must fit the offender, not just the offense.[143] Thus, even for the worst

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138. *See* Moore, *supra* note 85 (referencing the video interview with Juror 17); *see also* Steffen, *supra* note 102 (referencing the text interview with anonymous juror).

139. As stated previously in this Article, Juror 17 told the media that "mental illness" was the issue for the three jurors who were not convinced beyond a reasonable doubt that death was the appropriate sentence for Mr. Holmes. *See* Moore, *supra* note 85. Likewise, the other juror who spoke to media told the *Denver Post* that Mr. Holmes's "severe mental illness also ruled out death" as a punishment in her opinion. Steffen, *supra* note 102.

140. Roper v. Simmons, 543 U.S. 551, 568 (2005) (quoting Atkins v. Virginia, 536 U.S. 304, 319 (2002)).

141. Notably, a 2013 study of Colorado's capital sentencing statute found serious constitutional deficiencies in the statute's use of aggravating factors that ostensibly narrows the class of offenders eligible for the death penalty in Colorado. *See* Justin Marceau et al., *Death Eligibility in Colorado: Many Are Called, Few Are Chosen*, 84 U. COLO. L. REV. 1069, 1087–88 (2013). The authors examined every murder case filed in Colorado from January 1, 1999, through December 31, 2010, to determine which of these cases satisfied the Colorado statute's death-eligibility requirements. *See id.* at 1070–71. They found that 90.4 percent of the factual or procedural first-degree murders they examined in Colorado "were death-eligible based on the existence of at least one aggravating factor." *Id.* at 1070–71, 1107. They noted that to the best of their knowledge, Colorado has "the highest death eligibility rate of any jurisdiction that has been studied." *Id.* at 1107. They argue that their study provides the facts, which are "unmistakably clear," to establish that "Colorado's capital statute fails to genuinely narrow the class of death-eligible offenders." *Id.* at 1114. They further note that "a scheme of 'such broad death-eligibility essentially guarantees that some defendants caught in the net will not be among the truly "worst" offenders.'" *Id.* at 1110 (quoting 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)).

142. *See, e.g.*, *Roper*, 543 U.S. at 558–59, 568–69; Atkins v. Virginia, 536 U.S. 304, 306–07 (2002); Eddings v. Oklahoma, 455 U.S. 104, 106–09 (1982); Lockett v. Ohio, 438 U.S. 586, 605–08 (1978).

143. *See Eddings*, 455 U.S. at 112 ("By requiring that the sentencer be permitted to focus 'on the characteristics of the person who committed the crime' the rule in *Lockett* recognizes that 'justice . . . requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender.'" (alterations in original) (citation omitted) (first

crime imaginable, the law limits the application of the death penalty only to those defendants who jurors find to be the most personally morally culpable.[144]

While there were clearly some very significant aggravating factors present in Mr. Holmes's case,[145] there was also very significant evidence of mitigation, and of mental illness in particular. While jurors rejected the notion that Mr. Holmes fit the narrow legal definition of insanity, as explained in Section I, the experts in the case agreed that Mr. Holmes would not have committed this horrible crime had he not been mentally ill.[146] Dr. Metzner testified for a second time during the penalty phase of the trial that it was very clear that, as a result of his mental illness and psychotic thinking, Mr. Holmes did not have the same ability to appreciate how terribly wrong his actions were that a mentally healthy person would have.[147] Rather, Mr. Holmes's ability to appreciate the wrongfulness of his actions was "significantly impaired" from a clinical perspective.[148]

The jurors' rejection of the death penalty in spite of the horrific aggravation present in the case, coupled with the two jurors' post-verdict explanations of the result, indicates that the jury's verdict came about,

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quoting Gregg v. Georgia, 428 U.S. 153, 197 (1976); then quoting Pennsylvania *ex rel.* Sullivan v. Ashe, 302 U.S. 51, 61 (1937))).

144. *See* California v. Brown, 479 U.S. 538, 545 (O'Connor, J., concurring) ("[P]unishment [in capital cases] should be directly related to the personal culpability of the criminal defendant. . . . [A]nd the sentence imposed . . . should reflect a reasoned *moral* response to the defendant's background, character, and crime . . . .").

145. The jury found that the prosecution proved four out of the five alleged statutory aggravating factors beyond a reasonable doubt:

> (1) The defendant unlawfully and intentionally, knowingly, or with universal malice manifesting extreme indifference to the value of human life generally, killed two or more people during the commission of the same criminal episode. COLO. REV. STAT. § 18-1.3-1201(5)(i) (2016).
>
> (2) In the commission of the offense of murder in the first degree, the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense. COLO. REV. STAT. § 18-1.3-1201(5)(i).
>
> (3) The defendant committed the offense of murder in the first degree in an especially heinous, cruel, or depraved manner. COLO. REV. STAT. § 18-1.3-1201(5)(j).
>
> (4) The defendant committed the offense of murder in the first degree while lying in wait or from ambush. COLO. REV. STAT. § 18-1.3-1201(5)(f).

See generally Sentencing Hearing Phase 1 Verdict Form, People v. Holmes, No. 12CR1522 (Arapahoe Dist. Ct. July 27, 2015) (referencing the Sentencing Hearing Phase 1 Verdict Forms for all twenty-four counts). The jury failed to find that the prosecution had proven beyond a reasonable doubt that Mr. Holmes intentionally killed a child who has not yet attained twelve years of age. *See id.*

146. *See* July 7 Transcript, *supra* note 27, at 133 (referencing the testimony of Dr. Raquel Gur); June 26 Transcript, *supra* note 56, at 165 (referencing the testimony of Dr. Jonathan Woodcock); June 25 Transcript, *supra* note 27, at 100–01, 103 (referencing the testimony of Dr. Jonathan Woodcock); June 8 Transcript, *supra* note 27, at 72, 163 (referencing the testimony of Dr. Jeffrey Metzner); June 5 Transcript, *supra* note 41, at 153 (referencing the testimony of Dr. William Reid); *see also supra* Section I.B.

147. *See* July 27 Transcript, *supra* note 53, at 73–77 (referencing the testimony of Dr. Jeffrey Metzner).

148. *Id.* at 89–90 (referencing the testimony of Dr. Jeffrey Metzner).

not because of a surreptitious death penalty opponent intent on nullification, but because of each individual juror's careful assessment of Mr. Holmes's personal moral culpability. Not only is this a legally permissible basis on which to reject the death penalty, it is a core value of the Supreme Court's Eighth Amendment jurisprudence.

In conclusion, the trouble with promoting the narrative of a single "holdout" juror who either got "hung up" on the issue of mental illness or was a stealth activist with a political agenda is that it misleads the public about what the law requires from jurors when they are asked to make a life or death decision in a capital case. Moreover, this narrative dissuades future jurors from following the law and obeying their own individual moral conscience, which is exactly what they are supposed to do. This narrative once again distracts from the real issues in the case and encourages the public to cling to the misguided notion that justice was thwarted, rather than served.

Portraying the jury's verdict as the result of the decision of an irrational, isolated individual also wrongly suggests that there is no real diversity of opinion with respect to whether Mr. Holmes was deserving of the death penalty. Thus, the narrative discourages the body politic from engaging in a dialogue about whether we should continue to have the death penalty in the State of Colorado. We believe this is an important conversation to have.

III. WHERE DO WE GO FROM HERE?

One can draw two rather obvious conclusions from our foregoing discussion. If one is inclined to accept the arguments we made above and agree with the result the jury reached in the Holmes case, one might conclude that our system of capital punishment in Colorado works—or at least that it worked in this case—and that no further reforms are needed. If, on the other hand, one disagrees with us and with the result in this case, then the response would likely be that a system of capital punishment that allows a person who committed a crime as egregious as Mr. Holmes's to escape the death penalty needs some reform.

There is, however, a third way to consider the issues we have raised above, which is to question whether we should continue to have a system of capital punishment in Colorado at all.

A. Who Receives the Death Penalty in the United States?

Recent research confirms what our own up-close observations of systems of capital punishment[149] have shown us: by and large, when the

149. Ms. Brady and Mr. King have spent a collective total of eighteen years as Chief Trial Deputies for the Colorado State Public Defender's Office. In that capacity, they have not only been involved in numerous capital and potential capital cases in Colorado but have also gained knowledge about capital sentencing practices in other jurisdictions while conducting and attending national

death penalty is imposed in this country, it is imposed upon people who, like Mr. Holmes, have diminished personal culpability. A 2014 study of the last 100 offenders executed in America revealed that the overwhelming majority of these offenders, nearly nine of every ten, possessed mitigating characteristics that demonstrated significant intellectual or psychological deficits.[150]

The authors of the study were interested in determining how well the existing "mitigation-facilitating procedures" for imposing the death penalty only upon those defendants with the most extreme personal culpability are working in practice.[151] The United States Supreme Court's current Eighth Amendment jurisprudence includes the doctrine of individualized sentencing discussed above and also categorically exempts two classes of individuals from the death penalty who have been deemed to possess insufficient personal culpability—intellectually disabled and juvenile offenders.[152] To examine the effectiveness of this mitigation regime, the study's authors undertook a review of documentation pertaining to the cases of the one hundred most recently executed capital offenders in the United States.[153] They pored over state and federal appellate decisions in the cases, as well as expert findings, news accounts, and pleadings, to determine how many of these defendants fell into at least one of the following mitigation categories: "intellectual disability, youthfulness, mental illness, and childhood trauma."[154]

The results revealed that over half—fifty-four—of the last one hundred executed offenders had been diagnosed with or displayed symptoms of a severe mental illness.[155] Fifty percent suffered from complex trauma, such as "severe physical abuse, sexual molestations, domestic violence, the violent loss of immediate family and chronic homelessness."[156] Thirty-two of the offenders demonstrated evidence of intellectual disability, either as a result of a borderline IQ or traumatic brain injury.[157] And

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trainings for capital defense lawyers. In addition to her capital experience in Colorado, Ms. Nelson spent four years as a staff attorney at the Equal Justice Initiative in Montgomery, Alabama, representing individuals on Alabama's death row.

150. *See* Robert J. Smith et al., *The Failure of Mitigation?*, 65 HASTINGS L.J. 1221, 1228–30 (2014).

151. *Id.* at 1223–24.

152. *See* Roper v. Simmons, 543 U.S. 551, 569 (2005) ("[J]uvenile offenders cannot with reliability be classified among the worst offenders."); Atkins v. Virginia, 536 U.S. 304, 306 (2002) (holding that "[b]ecause of their disabilities in areas of reasoning, judgment, and control of their impulses," mentally impaired offenders "do not act with the level of moral culpability that characterizes the most serious adult criminal conduct" and are therefore exempt from the death penalty); Smith et al., *supra* note 150, at 1222–23.

153. Smith et al., *supra* note 150, at 1224.

154. *Id*. at 1224, 1228–29 ("We considered only mitigating circumstances that demonstrate intellectual and psychological deficits that compare to those that intellectually disabled and juvenile offenders possess, namely: intellectual disability, youthfulness, mental illness, and childhood trauma.").

155. *Id.* at 1245.

156. *Id.* at 1247.

157. *Id.* at 1234–35.

more than one-third, or thirty-six percent, of these "offenders committed a capital crime before turning twenty-five—the age at which the brain fully matures."[158] In total, eighty-seven percent of the last one hundred executed offenders in the United States fell into at least one of these mitigation categories. Fifty-five percent—over half—of these defendants had mitigation that fell into two or more categories.

To put it bluntly, it appears that in America, we are not just seeking the death penalty against people who are damaged in some way, as we did unsuccessfully in the Holmes case[159] as well as the Dexter Lewis case.[160] Rather, when we actually do obtain and carry out death sentences, we end up executing not evil people, but sick, damaged, and broken people. At the very least, we are executing people who only became "evil" because they were sick, damaged, broken, or a combination of those things, in the first place.

B. Why Are Sick and Broken People Getting Sentenced to Death?

Why is this happening, and what accounts for the different result in the Holmes and Lewis cases? A full discussion of the answer to this question is well beyond the scope of this Article, but there are at least two potentially significant factors at play: the quality of representation many capital defendants in other jurisdictions receive at the trial level and variations in the procedures in place that govern capital sentencing proceedings amongst different states.

The Office of the Colorado State Public Defender is widely recognized as one of the best public defender agencies in the country for providing high-quality representation to indigent criminal defendants.[161]

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158. *Id.* at 1239.

159. To be clear, in our opinion, spending millions of taxpayer dollars and expending a mind-boggling amount of effort to seek the death penalty against an obviously mentally ill person like Mr. Holmes was the wrong decision. Morally speaking, we as a society should not try to kill people for being sick. We maintain that the elected district attorney should have accepted Mr. Holmes's offer to plead guilty in exchange for a sentence of life without parole instead of dragging the parties, the victims, and the public through a painful, three-year-long process that ultimately produced the same result.

160. Mr. Lewis was convicted of stabbing five people to death in a Denver bar. Jordan Steffen & Matthew Nussbaum, *Dexter Lewis Gets Life Sentence for Fero's Bar Massacre*, DENV. POST (Aug. 27, 2015, 2:05 PM), http://www.denverpost.com/news/ci_28713843/jury-deliberating-feros-bar-massacre-trial. The Denver District Attorney's Office reached plea agreements with Mr. Lewis's co-defendants, but sought the death penalty against him. *Id.* At trial, Mr. Lewis's attorneys presented substantial mitigating evidence demonstrating that Mr. Lewis's entire life was marked by significant trauma, abuse, and neglect. *See id.* On August 27, 2015, a Denver jury could not unanimously agree beyond a reasonable doubt that the mitigating evidence in the case did not outweigh the aggravation, and Mr. Lewis was consequently sentenced to life imprisonment without parole. *See id*.

161. *See, e.g.*, P. Solomon Banda, *Holmes Doesn't React to Talk of Struggling Victims*, CNSNEWS.COM (Aug. 16, 2012, 7:34 PM), http://www.cnsnews.com/news/article/holmes-doesnt-react-talk-struggling-victims ("Colorado defense attorney David Lane, who has been involved in a number of death penalty cases, said there is no issue with the public defenders' abilities. 'Colorado public defenders are the best death penalty lawyers in the United States,' Lane said."); Ben Markus, *Opening Statements to Begin Monday in Colorado Theater Shooting Trial*, NPR (Apr. 27, 2015, 3:25 AM), http://www.npr.org/2015/04/27/402480999/opening-statements-to-begin-monday-in-

Our agency's enabling statute mandates that we provide the same level of legal services to indigent persons accused of crimes that are available to non-indigent defendants and that we conduct our office, not only in accordance with the Colorado Rules of Professional Conduct, but also with the American Bar Association standards pertaining to criminal defense.[162]

With respect to capital cases, this requires our adherence to the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.[163] Under these guidelines, we have a number of important duties and obligations, including the requirement to conduct a full and complete, multi-generational investigation of our client's life history and background dating back at least three generations;[164] to "consider all legal claims potentially available; [to] . . . thoroughly investigate the basis for each potential claim before reaching a conclusion as to whether it should be asserted; . . . [to] evaluate each potential claim in light of . . . the unique characteristics of death penalty law and practice;" to present each claim as forcefully as possible, tailoring the presentation to the particular facts and circumstances in the client's case and to the applicable law in the particular jurisdiction;[165] to "seek a theory [of defense] that will be effective in connection with both guilt and penalty;"[166] and "a continuing duty to investigate issues bearing upon penalty and to seek information that supports mitigation or rebuts the prosecution's case in aggravation."[167]

The ABA Guidelines are not just hypothetical wish lists for capital defense lawyers. Not only does our enabling statute require us to abide

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colorado-theater-shooting-trial ("Former Colorado prosecutor Bob Grant says James Holmes is represented by some of the best-trained and best-financed public defenders in the country."); Laura Parker, *8 Years in a Louisiana Jail, but He Never Went to Trial*, USA TODAY (Aug. 29, 2005, 12:47 AM), http://usatoday30.usatoday.com/news/nation/2005-08-29-cover-indigents_x.htm ("Among the 24 states that fully fund local defender programs, Oregon, Minnesota, Colorado and Massachusetts are widely recognized for their programs' quality."); Jon Sarche, *Karr Could Get Public Defender in Colo.*, BOSTON.COM NEWS (Aug. 22, 2006), http://www.boston.com/news/education/higher/articles/2006/08/22/karr_could_get_public_defender_in_colo/ ("Unlike in many states, Colorado's public defender system is well funded and well respected for its work on complicated cases involving DNA evidence."); Max Wachtel, *Legal Issues for the Planned Parenthood Shooting Suspect*, 9NEWS (Nov. 30, 2015, 4:50 PM), http://www.9news.com/story/news/local/colorado-springs-shooting/2015/11/30/legal-issues-planned-parenthood/76571388/ ("Colorado's office of the public defender has some of the best death penalty defense attorneys in the country, and they are dedicated to ending the practice in the state.").

162. *See* COLO. REV. STAT. § 21-1-101(1) (2016).

163. The enabling statute was first enacted in 1979 and references "the American bar association standards relating to the administration of criminal justice, the defense function." *Id.* In 1989, the ABA first promulgated a set of guidelines specifically devoted to setting forth the obligations of defense counsel in death penalty cases. *See* Rompilla v. Beard, 545 U.S. 374, 387 n.7 (2005). A new version of these guidelines was promulgated in 2003. *See American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 916 (2003) [hereinafter *ABA Guidelines*].

164. *ABA Guidelines*, *supra* note 163, at 1024–25.

165. *Id.* at 1028.

166. *Id.* at 1047.

167. *Id.* at 1055.

by them, but the United States Supreme Court has repeatedly found that attorneys who failed to abide by the ABA Guidelines in cases in which the death penalty was imposed provided their clients with constitutionally ineffective assistance of counsel.[168] We would be on legally and ethically shaky ground if we willfully chose to ignore them. And needless to say, it takes a tremendous amount of time, energy, and financial resources to attempt to fulfill our duties and obligations under these guidelines in every case in which the prosecution chooses to seek the death penalty, including the Holmes and Lewis cases.

Unfortunately, it is no secret that the vast majority of individuals facing the death penalty in this country do not receive legal representation that even comes close to satisfying the requirements set forth by the ABA Guidelines.[169] The jurisdictions that prosecute these individuals are either unwilling or unable to abide by them for a host of complex reasons.[170] To be sure, there are a number of excellent, highly skilled capital defense attorneys representing defendants at the trial level across the country. However, stories of underfunded, overworked indigent defense systems, of capital defendants represented by lawyers who had substance abuse issues or were later disbarred, and of attorneys inexperienced in capital litigation botching legal claims and missing filing deadlines are ubiquitous in the modern era of capital punishment.[171] And "[w]hen lawyers fail to conduct adequate mitigation investigation, jurors are unable

168. *See, e.g.*, *Rompilla*, 545 U.S. at 387; Wiggins v. Smith, 539 U.S. 510, 524 (2003) ("[W]e long have referred [to these ABA Standards] as 'guides to determining what is reasonable.'" (quoting Strickland v. Washington, 466 U.S. 668, 688 (1984))); Williams v. Taylor, 529 U.S. 362, 396 (2000).

169. *See* Stephen B. Bright, *The Role of Race, Poverty, Intellectual Disability, and Mental Illness in the Decline of the Death Penalty*, 49 U. RICH. L. REV. 671, 686–88 (2015) (providing numerous examples and citations illustrating "[t]he remarkably poor quality of legal representation in some capital cases and the even more remarkable indifference of courts" and noting that "[c]ourts and prosecutors appear to have come to accept this gross ineptness by capital defense counsel, [i]t has become part of the culture").

170. *See id.*; *see also* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1839–40 (1994) (discussing interrelated reasons for the poor quality of legal representation in many capital cases); David Rudovsky, *Gideon and the Effective Assistance of Counsel: The Rhetoric and the Reality*, 32 L. & INEQ. 371, 394–97, 398–400, 408 (2014) (arguing that the crisis in indigent criminal defense is "the direct result of a lack of political and judicial responsibility" and providing examples of the complex forces at work in the battle over the quality of legal representation in capital cases in Pennsylvania).

171. *See, e.g.*, ACLU, SLAMMING THE COURTHOUSE DOORS: DENIAL OF ACCESS TO JUSTICE AND REMEDY IN AMERICA 7–8 (2010), https://www.aclu.org/files/assets/HRP_UPRsubmission_annex.pdf; Ken Armstrong, *Death by Deadline, Part One*, MARSHALL PROJECT (Nov. 15, 2014, 4:30 PM), https://www.themarshallproject.org/2014/11/15/death-by-deadline-part-one; Ken Armstrong, *Death by Deadline, Part Two*, MARSHALL PROJECT (Nov. 16, 2014, 5:00 PM), https://www.themarshallproject.org/2014/11/16/death-by-deadline-part-two; Ken Armstrong & Steve Mills, *Part 2: Inept Defenses Cloud Verdict*, CHI. TRIB. (Nov. 15, 1999), http://www.chicagotribune.com/news/watchdog/chi-991115deathillinois2-story.html; Marc Bookman, *This Man's Alcoholic Lawyer Botched His Case. Georgia Executed Him Anyway*, MOTHER JONES (Apr. 22, 2014, 6:00 AM), http://www.motherjones.com/politics/2014/04/alcoholic-lawyer-botched-robert-wayne-holsey-death-penalty-trial?page=1.

to perform their moral and legal function of deciding which offenders are truly among the most culpable offenders."[172]

Procedurally speaking, while the vast majority of states, like Colorado, require a unanimous jury vote to impose the death penalty, there are several significant outliers—most notably, Alabama, Florida, and Delaware—in which the law allows juries to recommend death sentences even if they are non-unanimous and allows judges to override a jury's life recommendation and impose the death penalty. Alabama and Florida have large death row populations: Alabama currently has 185 people on death row,[173] and Florida's death row houses a total of 388 inmates.[174] According to recent statistics published by the Charles Hamilton Houston Institute for Race and Justice at Harvard Law School, in the past five years, the three states that allow for the imposition of the death penalty following non-unanimous jury verdicts accounted for twenty-eight percent of all new death sentences in this country.[175] In seventy-seven percent of those new death sentences, the jury was less than unanimous.[176] Had those states required juror unanimity in order to impose the death penalty, those states would have had twenty-six death sentences, instead of 117.[177] The viability of these death sentences remains on shaky ground after the United States Supreme Court declined to specifically address the constitutionality of non-unanimous capital sentencing verdicts in *Hurst v. Florida*.[178] It remains to be seen whether the practice of allowing death sentences to be imposed following non-unanimous jury verdicts will be permitted to continue to exist in the United States or

172. Robert J. Smith, *Forgetting* Furman, 100 IOWA L. REV. 1149, 1173 (2015); *see also* Emily Hughes, *Arbitrary Death: An Empirical Study of Mitigation*, 89 WASH. U. L. REV. 581, 636 (2012) ("[D]isparities in the kinds of mitigation investigations individual defendants receive are much more serious than previously thought.").

173. *See Alabama Inmates Currently on Death Row*, ALA. DEP'T CORRECTIONS, http://www.doc.state.al.us/DeathRow.aspx (last visited May 2, 2016).

174. *See Corrections Offender Network: Death Row Roster*, FLA. DEP'T CORRECTIONS, http://www.dc.state.fl.us/activeinmates/deathrowroster.asp (last visited May 2, 2016).

175. *See* Hurst v. Florida, CHARLES HAMILTON HOUSTON INST. RACE & JUST., HARV. L. SCH. (Oct. 9, 2015), http://www.charleshamiltonhouston.org/2015/10/hurst-v-florida/ (providing statistics about judicial override in wake of oral argument before the United States Supreme Court in the *Hurst* case).

176. *See id.*

177. *Id.*

178. *See generally* Hurst v. Florida, 136 S. Ct. 616 (2016). In *Hurst,* the Supreme Court found Florida's capital sentencing scheme unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002), because it did not require a jury to make the critical findings necessary to impose the death penalty. *Id.* at 622. Under Florida's then-existing scheme, the jury merely returned an advisory verdict recommending a sentence, but was not required to make specific factual findings regarding the existence of mitigating or aggravating circumstances, and its recommendation was not binding on the judge. *Id.* at 620. Instead, Florida law required any factual findings upon which any death sentence was based to be made by a judge. *See id.* The Supreme Court held that this practice violated the Sixth Amendment but did not address the aspect of Florida's law that authorized the jury to recommend a sentence of death by majority vote. *Id.* at 621.

whether it will fail to pass muster under the Eighth Amendment, as have many other questionable capital sentencing practices in recent years.[179]

In addition to states that allow for the imposition of the death penalty upon non-unanimous jury verdicts, several states allow the prosecution multiple tries at obtaining a death verdict in the event of non-unanimity. California provides one example. California's capital punishment system is notoriously troubled and dysfunctional.[180] Its corrections department houses a whopping 748 individuals on death row despite the fact that the state has not executed anyone in nearly a decade.[181] If a California jury fails to reach a unanimous verdict as to penalty in a capital case, the statute provides that "the court shall dismiss the jury and shall order a new jury impaneled to try the issue as to what the penalty shall be."[182] Even after the second retrial, this process can continue multiple times unless the court, in its discretion, decides to impose a punishment of life without parole. Likewise, Arizona, which houses 119 inmates on its death row,[183] has a capital sentencing statute requiring that a new jury be impaneled in the event of a non-unanimous verdict on the issue of penalty.[184] If the verdict is not unanimous the second time around, the court is required to impose a sentence of life without parole.[185]

Thus, in jurisdictions like the ones described above, the law makes it easier for the prosecution to obtain death sentences for criminal defendants in general, either through non-unanimous verdicts or multiple

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179. *See, e.g.*, Hall v. Florida, 134 S. Ct. 1986 (2014) (finding that Florida rule limiting capital defendant's ability to show intellectual disability violates Eighth Amendment); Kennedy v. Louisiana, 554 U.S. 407 (2008) (finding Louisiana capital sentencing statute unconstitutional for allowing for death penalty for the rape of a child); Roper v. Simmons, 543 U.S. 551 (2005) (finding imposition of death penalty on juvenile offenders is unconstitutional); Ring v. Arizona, 536 U.S. 584 (2002) (Arizona statute allowing judge to find aggravating circumstance violates the Sixth Amendment); Atkins v. Virginia, 536 U.S. 304 (2002) (finding imposition of death penalty on mentally impaired offenders unconstitutional).

180. In July 2014, a federal judge appointed by President George W. Bush found California's capital punishment system unconstitutional due to its systemic delay and dysfunction. *See* Jones v. Chappell, 31 F. Supp. 3d 1050, 1068–69 (C.D. Cal. 2014), *rev'd*, Jones v. Davis, 806 F.3d 538 (9th Cir. 2015). The Ninth Circuit ultimately reversed that decision, holding that the petitioner's claim was barred under *Teague v. Lane*, 489 U.S. 288 (1989), which generally prohibits federal courts from announcing a new rule of constitutional law in a habeas case. Jones v. Davis, 806 F.3d 538, 546–53 (9th Cir. 2015). However, the appellate court did not address or dispute the underlying facts pertaining to California's troubled scheme. It ended its opinion by stating, "Many agree with Petitioner that California's capital punishment system is dysfunctional and that the delay between sentencing and execution in California is extraordinary." *Id.* at 553. Nevertheless, it concluded that "[b]ecause Petitioner asks us to apply a novel constitutional rule, we may not assess the substantive validity of his claim." *Id*.

181. *See* Paige St. John, *California's Death Row, with No Executions in Sight, Runs Out of Room*, L.A. TIMES (Mar. 30, 2015, 5:13 AM), http://www.latimes.com/local/crime/la-me-ff-death-row-20150330-story.html; *see also Condemned Inmate List*, CAL. DEP'T CORRECTIONS & REHABILITATION, http://www.cdcr.ca.gov/capital_punishment/docs/condemnedinmatelistsecure.pdf (last visited May 2, 2016).

182. CAL. PENAL CODE § 190.4(b) (2016).

183. *See Death Row*, ARIZ. DEP'T CORRECTIONS, https://corrections.az.gov/node/431 (last visited May 2, 2016).

184. *See* ARIZ. REV. STAT. ANN. § 13-752(K) (2016).

185. *Id.* § 13-752(J)–(L), (O), (Q).

opportunities to obtain unanimity. And the easier it is to obtain death sentences in general, the easier it is to obtain them despite the presence of significant mitigation in many cases, including evidence of intellectual disability, youthfulness, mental illness, and childhood trauma.

Even this cursory overview of some of the possible explanations for why people with diminished culpability like Mr. Holmes and Mr. Lewis received life sentences in Colorado, while so many other capital defendants throughout the country with significant mitigating factors in their backgrounds and life histories instead received the death penalty, is troubling.

C. Implications for Colorado

Critics of the verdicts in the Holmes or Lewis cases have suggested that a variety of reforms could "fix" or "improve" the system. This past legislative session, Republican State Senator Kevin Lundberg introduced Senate Bill 64, which would have allowed juries to impose death sentences upon a vote of 11-1.[186] Lundberg expressly stated that the reason he introduced the bill was because the result in the Holmes case "proves that our system is inadequate."[187] Fortunately, the bill died in the Senate Judiciary Committee on a 3-2 vote.[188] Not only would that change have placed Colorado in a tiny minority of states that allow for such a practice, but such a change would have been constitutionally tenuous at best given that the United States Supreme Court has not yet resolved this issue.[189] In the wake of the Holmes verdict, another Republican lawmaker in Colorado introduced a bill that would have allowed prosecutors the opportuni-

186. Jordan Steffen, *Colorado Bill to Allow Death Sentence Without Unanimous Vote Dies*, DENV. POST (Feb. 10, 2016, 4:28 PM), http://www.denverpost.com/news/ci_29501405/colorado-bill-allow-death-sentence-without-unanimous-vote (noting that Lundberg's original proposal would have allowed a death sentence upon a vote of 9-3 but was ultimately amended at the committee hearing to require 11 votes for a sentence of death).

187. *Id.*

188. *Id*.

189. *See* Hurst v. Florida, 136 S. Ct. 616 (2016). As noted previously, the Supreme Court invalidated Florida's capital sentencing scheme on other grounds and did not address the constitutionality of non-unanimous capital sentencing verdicts in its opinion. However, it seems likely that the Supreme Court will ultimately address this issue in the near future. The Delaware Supreme Court is currently considering the constitutionality of its capital sentencing scheme, including the practice of allowing the death penalty upon a non-unanimous sentencing verdict. *See* Jessica Masulli Reyes, *Public Defenders: Death Penalty Unconstitutional*, NEWS JOURNAL (Mar. 1, 2016, 7:29 PM), http://www.delawareonline.com/story/news/local/2016/03/01/public-defenders-del-death-penalty-law-unconstitutional/81146406/ (discussing litigation in *Rauf v. State*, No. 39, 2016). On May 2, 2016, the United States Supreme Court vacated the judgment in *Johnson v. Alabama,* an Alabama capital case, and remanded to the Alabama Court of Criminal Appeals for further consideration in light of *Hurst v. Florida*, indicating that it may consider the constitutionality of Alabama's capital sentencing scheme in the near future. *See* Order List: 578 U.S., SUPREME COURT U.S. (May 2, 2016), http://www.supremecourt.gov/orders/courtorders/050216zor_j4ek.pdf. Moreover, the issue of non-unanimity remains unresolved in Florida. *See generally Hurst*, 136 S. Ct. 616. On March 7, 2016, following *Hurst,* Florida enacted a new capital sentencing law eliminating judicial override but allowing for a sentencing verdict of death as long as 10 out of 12 jurors agree. *See* FLA. STAT. ANN. § 921.142(3) (West 2016). The constitutionality of this new scheme has, of course, not yet been tested.

ty to seek death a second time if the first penalty-phase jury verdict was non-unanimous.[190] That bill, which would have made Colorado's capital sentencing scheme even more expensive and inefficient than it already is, also failed to receive adequate support from legislators and died in committee.[191]

Another potential change would be to allow for more victim impact testimony to be admissible during the penalty phase of the proceeding. We believe in the importance of those stories and understand the desire for them to be told. However, the jury's ultimate task at a capital sentencing proceeding is to assess the defendant's moral culpability, not to assess the amount of pain he caused.[192] Exposing the jury to more heartbreaking stories of grief and loss will not assist the jury in determining how morally culpable a defendant is and will only increase the risk that the jury's sentencing decision in a case will be based on arbitrary, emotional factors. Moreover, such a change would be unlikely to pass muster in light of the constitutional limitations on victim impact evidence set forth by the Supreme Court.[193]

Finally, a critic of the result in the Holmes case, claiming that we had too many resources at our disposal, might even propose cutting our office's budget. This would inhibit our ability to comply with the ABA Guidelines and would provide more fodder for later arguments concerning the ineffective assistance of counsel in the event of a future death sentence. In other words, cutting our budget might increase the odds of a death sentence, but it would simultaneously increase the risk that a court would reverse any such sentence on appeal.

Proponents of reform should also bear in mind what happened the last time the legislature changed Colorado's capital sentencing scheme in a significant way. In 1995, the Colorado legislature changed Colorado's

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190. *See* Corey Hutchins, *Lawmaker: Prosecutors Need Two Chances to Win a Death Penalty Verdict*, COLO. INDEP. (Dec. 10, 2015), http://www.coloradoindependent.com/156613/death-penalty-colorado-second-chance.

191. *See* John Ingold & Joey Bunch, *Bills Inspired by Aurora Theater Shooting Trial Meet Different Fates*, DENV. POST (Feb. 29, 2016, 6:13 PM), http://www.denverpost.com/news/ci_29577942/bills-inspired-by-aurora-theater-shooting-trial-meet.

192. *See* Payne v. Tennessee, 501 U.S. 808, 823 (1991) (noting that victim impact evidence is not offered to encourage jurors to make comparative judgments that "defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy"); Tison v. Arizona, 481 U.S. 137, 149 (1987) ("The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.").

193. In *Payne*, the Court held that that the Eighth Amendment did not erect a per se bar prohibiting victim impact testimony in a capital sentencing trial and held that the State may accordingly offer "'a quick glimpse of the life' which a defendant 'chose to extinguish,' or demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide." 501 U.S. at 822 (citation omitted) (quoting Mills v. Maryland, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting)). Acknowledging that such evidence is likely to be highly emotionally impactful, it noted that "[i]n the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Id.* at 825.

capital sentencing scheme from allowing for jury sentencing to sentencing by a three-judge panel.[194] Proponents of the legislation "believed that three-judge panels would result in more death sentences."[195] The reason for the legislation was that "[a]t the time, many citizens and legislators felt that Colorado juries had not been aggressive enough in their application of the death penalty."[196] Of course, in 2002, in *Ring v. Arizona*,[197] the United States Supreme Court invalidated Arizona's capital sentencing statute requiring judges to make factual findings with respect to aggravating circumstances.[198] A year later, the Colorado Supreme Court struck down Colorado's three-judge capital sentencing statute based on *Ring*, and everyone on Colorado's death row who had received a death sentence from a three-judge panel was resentenced to life without parole as a result.[199]

What we really need to be asking ourselves is whether we want to keep pushing ahead with reforms to make it easier for prosecutors to obtain death sentences or even whether we want to continue the status quo of spending extraordinary amounts of money and effort in pursuit of the death penalty.[200] Because even if the State of Colorado succeeded at

194. Woldt v. People, 64 P.3d 256, 258 (Colo. 2003) ("By means of its 1995 legislation, the Colorado General Assembly amended Colorado's death penalty statute to substitute a three-judge panel in place of the jury for the penalty phase of the trial in a capital case; the General Assembly left the guilt phase of the trial with the jury. What the sponsors and proponents did not anticipate in 1995 was that they were relying on an opinion of the U.S. Supreme Court which would be overturned some twelve years after issuance." (citation omitted)).

195. Robin Lutz, Comment, *Experimenting with Death: An Examination of Colorado's Use of the Three-Judge Panel in Capital Sentencing*, 73 U. COLO. L. REV. 227, 244 (2002).

196. *Id.* As one author noted,

> For example, jurors had recently decided not to impose a death sentence on Kevin Fears, who was found guilty of crimes which included two counts of first degree murder, one count of attempted first degree murder, and intimidation of a witness. Jurors had also failed to impose the death penalty on Michael Tenneson, who had killed two people in Colorado and was suspected of killing three others in Wisconsin. As of 1994, statistics revealed that juries in Denver County had only imposed the death penalty in one of nine capital cases brought by the district attorney in the preceding twenty years. Rates in other counties were similar: in the ten preceding years Adams County prosecutors attained a death verdict in one case of five, while Jefferson County prosecutors attained death verdicts in two cases of seven.

Id. at 244–45 (citations omitted).

197. 536 U.S. 584 (2002).

198. *Id.* at 609.

199. *See Woldt*, 64 P.3d at 259.

200. We should also note Colorado's existing capital sentencing scheme, as it is, contains a number of features that are constitutionally problematic. For example, the scheme as currently interpreted by the Colorado Supreme Court in *People v. Dunlap* allows for the injection of arbitrary factors into the criterion for death-eligibility and denigrates the jury's consideration of mitigation, and that the statute defines death eligibility so broadly that it creates a constitutionally unacceptable risk that the death penalty is arbitrarily enforced and applied in Colorado. *See* Marceau et al., *supra* note 141, at 1087–88. It is also extremely troubling that all three of the inmates currently on death row in Colorado are black men, all three were prosecuted by the Arapahoe County District Attorney's office, and all three attended the same high school. *See Colorado Death Penalty in Focus as Massacre Trial Enters New Phase*, HUFFINGTON POST (July 22, 2015, 9:47 AM), http://www.huffingtonpost.com/entry/colorado-death-penalty_55af9aeee4b0a9b948530a4d. Although we litigated many of these issues extensively in the Holmes case, the result in the case and the fact that Mr. Holmes is not appealing his conviction mean that an appellate court will not review

sentencing more people to death, the chances are good that, as a result, the recipients of a majority of those sentences would be people with significant intellectual or psychological deficits.

The alternative is that we could just stop. We could stop trying to change the rules, we could stop spending all this money, and we could stop trying to kill. Instead, we could join the chorus of public figures, including, most recently, Pope Francis,[201] Justices Breyer and Ginsburg,[202] and President Barack Obama,[203] who are now questioning the wisdom of continuing with this experiment. The death penalty does not increase justice, make us safer, or ease the pain caused by violent crime. The truth is that at its core, regardless of whether it may or may not have "worked" in a particular case, the death penalty is a broken system. When it succeeds, it largely succeeds in killing broken people. There is something profoundly disturbing about that.

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them in the context of this case. However, we continue to believe that Colorado's capital sentencing scheme as it currently stands is vulnerable to invalidation by an appellate court in the future.

201. In a September 24, 2015, address to Congress, Pope Francis called for the abolition of the death penalty in the United States. *See* Mark Berman, *Pope Francis Tells Congress 'Every Life is Sacred,' Says the Death Penalty Should Be Abolished*, WASH. POST (Sept. 24, 2015), https://www.washingtonpost.com/news/post-nation/wp/2015/09/24/pope-francis-tells-congress-the-death-penalty-should-be-abolished/.

202. *See* Glossip v. Gross, 135 S. Ct. 2726, 2755–77 (2015) (Breyer, J., joined by Ginsburg, J., dissenting) (concluding that it is "highly likely that the death penalty violates the Eighth Amendment").

203. On October 23, 2015, The Marshall Project released a video of an interview of President Obama conducted by Bill Keller, in which Obama calls several aspects of the death penalty "deeply troubling." *Exclusive: Obama Calls the Death Penalty "Deeply Troubling,"* MARSHALL PROJECT (Oct. 23, 2015, 3:20 AM), https://www.themarshallproject.org/2015/10/23/watch-obama-discuss-death-penalty-racial-profiling-with-the-marshall-project.