

THE GEOGRAPHY OF CRUEL AND UNUSUAL PUNISHMENT

On January 9, 2017, Beth McCann, the newly elected district attorney for the City and County of Denver, announced she would not seek the death penalty against criminal defendants in her jurisdiction, stating: “I don’t think that the state should be in the business of killing people.”¹ To McCann, life imprisonment without the possibility of parole achieves better punitive, deterrent, and economic results than the death penalty.² In addition to not seeking the death penalty in Denver County as a matter of policy, she stated that she would support a statewide repeal of the death penalty either by popular vote or by the Colorado legislature.³

In direct contrast, a little over one month earlier, George Brauchler, the district attorney for Colorado’s 18th Judicial District, decided to pursue the death penalty against Brandon Johnson, an African-American man accused of murdering his 6-year-old son.⁴ To justify his decision, Brauchler stated, “This is Colorado’s law. This isn’t my law This is what Colorado has said makes for an aggravated murder, not what I’ve said.”⁵

These two competing visions of what Colorado law is and means demonstrate the life-and-death power of prosecutorial discretion. Denver County shares a border with the 18th Judicial District’s Arapahoe County.⁶ In practical terms, a criminal defendant accused of murder on the southeast corner of Colfax Avenue and Yosemite Street might face the death penalty. However, on the northwest corner, the maximum sentence that same person could receive for the same crime is life without the possibility of parole. The only differences between these two scenarios—between life and death—are a few feet, a county border, and an elected DA.

GEOGRAPHIC ARBITRARINESS AND THE EIGHTH AMENDMENT

The Eighth Amendment’s prohibition on cruel and unusual punishment forbids the arbitrary and capricious application of the death penalty.⁷ Recognizing that the death penalty systems in place in 1972 were arbitrary and capricious, the U.S. Supreme Court effectively struck down every

1. *New DA McCann Says Denver Is Done with the Death Penalty*, 9NEWS, Jan. 9, 2017, <http://www.9news.com/news/local/next/new-da-mccann-says-denver-is-done-with-the-death-penalty/384633301>.

2. *Id.*

3. *Id.*

4. Danika Worthington, *DA Seeks Death Penalty Against Father Charged with Killing 6-year-old Son*, DENVER POST, Dec. 2, 2016, <http://www.denverpost.com/2016/12/02/brauchler-death-penalty-against-father-charged-with-killing-son/>.

5. *Id.*

6. *ArapaMAPLite*, ARAPAHOE CTY., <http://gis.arapahoegov.com/ArapaMAPLite/>. (last visited Jan. 30, 2017).

7. U.S. CONST. amend. VIII.

state death penalty statute.⁸ In that case, Justice Brennan described one way to recognize arbitrary death sentences: when a state seeks death for one defendant and strays from the usual punishment for similar crimes, “there is a substantial likelihood that the State, contrary to the requirements of regularity and fairness embodied in the [Eighth Amendment], is inflicting the punishment arbitrarily.”⁹

Recently, Justices Breyer and Ginsburg of the U.S. Supreme Court questioned whether the death penalty, when viewed geographically, was applied so arbitrarily that it violated this constitutional prohibition.¹⁰ Citing numerous empirical studies of death sentences across the United States, Justice Breyer wrote, “[W]ithin a death penalty State, the imposition of the death penalty heavily depends on the county in which a defendant is tried.”¹¹ The justices raised many concerns regarding geographic disparity of death sentences, including “that the disparity reflects the decisionmaking authority, the legal discretion, and ultimately the power of the local prosecutor.”¹²

Most courts, lawyers, and scholars discuss the death penalty in terms of its statewide application.¹³ However, this state-by-state analysis can mislead people into false conclusions about what occurs at the county-level. Recent empirical studies have shown that death sentences “cluster” in just a small number of counties even within those states that pass the most death sentences.¹⁴ Although 32 states currently have death penalty statutes, fewer than 10% of U.S. counties passed a death sentence between 2004 and 2009.¹⁵

Prosecutorial discretion is an important determining factor in who faces and receives the death penalty in the United States generally and Colorado in particular.¹⁶ An empirical study of Colorado’s death penalty by scholars Justin Marceau, Sam Kamin, and Wanda Foglia found that “while the death penalty was an option in approximately 90% of all first-degree murders, it was sought by the prosecution initially in only 3% of those killings, pursued all the way through sentencing in only 1% of those

8. *Furman v. Georgia*, 408 U.S. 238 (1972) (holding the death penalty as applied currently in the states as violating the Eighth Amendment).

9. *Id.* at 276–77 (Brennan, J., concurring).

10. *Glossip v. Gross*, 135 S. Ct. 2726, 2761 (2015) (Breyer, J., dissenting) (“Geography . . . plays an important role in determining who is sentenced to death.”).

11. *Id.*

12. *Id.*

13. Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. Rev. 227, 227 (2012).

14. *Id.* at 228 (2012) (“[R]oughly 1% of counties in the United States returned death sentences at a rate of one or more sentences per year from 2004 to 2009.”).

15. *Id.*

16. *See, e.g., McClesky v. Kemp*, 481 U.S. 279, 312 (recognizing that local prosecutors decide whether to bring the death penalty in particular cases).

killings, and obtained in only 0.6% of all cases.”¹⁷ Two out of three of Colorado’s death row inmates were sentenced by the same county, leading Marceau, Kamin, and Foglia to suggest that “geographic location more than aggravation tends to predict the likelihood of a death sentence.”¹⁸

Recognizing the problems in Colorado’s death penalty, Colorado Governor John Hickenlooper granted a reprieve to Nathan Dunlap, one of Colorado’s three death row inmates who had exhausted his appeals.¹⁹ In this May 2013 executive order, Governor Hickenlooper described numerous cases wherein defendants committed truly heinous offenses, but received mandatory life sentences instead of the death penalty, stating: “I once believed that the death penalty had value as a deterrent. Unfortunately, people continue to commit these crimes in the face of the death penalty. The death penalty is not making our world a safer or better place.” The governor’s reprieve not only saved the life of Nathan Dunlap, but it has the practical effect of placing a moratorium on the death penalty for the remainder of Hickenlooper’s time in office. It also continued a trend in Colorado’s modern death penalty; since the reinstatement of capital punishment in 1976, Colorado has executed only one person.²⁰

Being term-limited from running again in 2018, Governor Hickenlooper’s tenure is coming to a close.²¹ With the current governor’s departure, the future of Colorado’s death penalty could radically change from its modern past. George Brauchler, the district attorney for the 18th Judicial District and outspoken proponent of the death penalty, has already indicated that he is “seriously thinking about running.”²² It seems unlikely that Colorado’s moratorium would remain in place under such an administration.

CONCLUSION

Whether a state has authorized capital punishment is only one, preliminary factor in determining which criminal defendants face and receive death sentences. As recent Colorado politics at both the state-level and county-level demonstrate, a criminal defendant’s fate also depends on

17. Justin Marceau, Sam Kamin, & Wanda Foglia, *Death Eligibility in Colorado: Many Are Called, Few Are Chosen*, 84 U. COLO. L. REV. 1069, 1071–72 (2013).

18. *Id.* at 1074 n.11.

19. *Death Sentence Reprieve*, Exec. Order No. D 2013-006, https://www.colorado.gov/governor/sites/default/files/d_2013-006_death_sentence_reprieve.pdf.

20. *Capital Punishment*, COLORADO STATE PUBLIC DEFENDER, <http://www.coloradodefenders.us/information/capital-punishment-in-colorado-1859-1972/>. (last visited Jan. 30, 2017).

21. Mark K. Matthews, *The Race for Colorado Governor in 2018 Is Starting to Take Shape*, DENVER POST, Dec. 31, 2016, <http://www.denverpost.com/2016/12/31/colorado-2018-governor-race/>.

22. Corey Hutchins, *An Early Look at the 2018 Republican Race for Colorado Governor*, COLO. INDEP., Nov. 17, 2016, <http://www.coloradoindependent.com/162566/2018-governors-race-coloraod-gop-republican>.

where in the state the alleged crime took place, as well as the personal beliefs of the local district attorney.

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