

THE TRUTH HURTS: A RESPONSE TO GEORGE BRAUCHLER AND RICH ORMAN

SAM KAMIN & JUSTIN MARCEAU

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In May of 2016, the *Denver Law Review* published a series of invited articles on the timely topic of the James Holmes murder trial. The Law Review solicited articles from the Defense, the Prosecution, and the Judge who participated in the Holmes case.¹ The defense lawyers and the judge both wrote articles relating to the Holmes litigation.² By contrast, the prosecutors, George Brauchler and Rich Orman, used the opportunity to write an attack on prior empirical studies of Colorado’s death penalty that we conducted.³ The Law Review has now offered us an opportunity to respond to the Brauchler and Orman attack on our work and our credibility.

1. Tyson L. Welch, *Foreword*, 93 DENV. L. REV. i, i (2016).

2. See Kristen Nelson, Tamara Brady & Daniel King, *The “Evil” Defendant and the “Hold-out” Juror: Unpacking the Myths of the Aurora Theater Shooting Case as We Ponder the Future of Capital Punishment in Colorado*, 93 DENV. L. REV. 595, 595 (2016); Carlos A. Samour, Jr., *Effectuating Colorado’s Capital Sentencing Scheme in the Aurora Theater Shooting Trial*, 93 DENV. L. REV. 577, 577 (2016).

3. See George Brauchler & Rich Orman, *Lies, Damn Lies, and Anti-Death Penalty Research*, 93 DENV. L. REV. 635, 635 (2016).

At the outset, we want to be clear that as scholars we welcome challenges to our work that allow us to revise our thinking, improve our methods, or better understand a legal problem. The scholarly enterprise is at its best when it is informed by vigorous debate and when ideas are tested through discourse and intellectual exchange. Indeed, we have already engaged in one very productive debate with a critic of our research.⁴ Unfortunately, Brauchler and Orman's article lacks any of the attributes of constructive scholarly criticism. The article does not cite any of the scholarly literature in this field (much less provide a basis for rejecting it); it does not meaningfully engage with the conclusions of our research. Instead, it resorts to name calling and ad hominem attack by repeatedly referring to us as disingenuous, biased, inexperienced, unethical, and uninformed. We were obviously disappointed to see such overtly political and ad hominem attacks in a law review article and we will use this Article to briefly respond to the merits of the Brauchler and Orman critique.

In Part I, we reiterate what we actually did—setting forth our methodology for studying Colorado's death penalty and responding to Brauchler and Orman's mischaracterization of our study design. In Part II, we discuss why we did what we did—elaborating on the well-established principles of Colorado and federal constitutional law that informed our study design. This Part serves as a rebuttal of the claims that our work is somehow divorced from the legal realities of state and federal law. Finally, in Part III, we reiterate our empirical findings and explain how they compel the conclusion that Colorado's death penalty is unconstitutional. The Eighth Amendment requires an objective, statutory standard for identifying the few who can be put to death from among the many who kill; neither the purported good faith of prosecutors, the availability of appellate review, nor opportunities for a jury to grant mercy can substitute for this requirement. Because Colorado's homicide statute does not provide an objective basis for meaningfully narrowing the class of death-eligible defendants, our state's death penalty scheme violates the Eighth Amendment.

I. THE STUDY: PURPOSE & METHODOLOGY

The central premise of the Brauchler and Orman article is that our study design is deeply "flawed"⁵ (using this term more than a dozen times), rests on "cherry-picked"⁶ data, and was conducted by "experts"

4. Sam Kamin & Justin Marceau, *Remember Not to Forget Furman: A Response to Professor Smith*, 100 IOWA L. REV. BULL. 117, 117–18 (2015); Robert J. Smith, *Forgetting Furman*, 100 IOWA L. REV. 1149, 1149 (2015).

5. *E.g.*, Brauchler & Orman, *supra* note 3, at 637.

6. *Id.*

(us) who are both unqualified⁷ to do an empirical study of capital punishment and hopelessly biased against the death penalty.⁸ In this Part, we will summarize our methodology and respond to the baseless claims that our research was flawed or biased.

A. Purpose of the Study—The Research Question and Our Biases

The opening paragraph of our study announces our purpose: to assess “whether Colorado’s statutory aggravating factors meaningfully narrow the class of death-eligible offenders.”⁹ As we will lay out in more detail below, the Eighth Amendment requires the states to make meaningful distinctions between who lives and who dies through comprehensible legislative definitions. With this standard in mind, we examined the Colorado first-degree murder statute and the aggravating factors that set out death eligibility to determine whether—in practice—they effectively reduced the pool of murderers to a much smaller group eligible for death.

We familiarized ourselves with the governing law and the best practices used by researchers in this field to study this question. As academics, we genuinely wanted to know how successful our state was in sorting out the worst of the worst killers. To answer this question, we built a database of every murder prosecution in the state commenced between January 1, 1999, and December 31, 2010, and studied the facts of each case to determine whether each defendant could have been convicted of a capital crime. What we found was that Colorado’s first-degree murder statute is one of the most capacious in the country—nearly 90% of all murderers could have been convicted of first-degree murder under the statute, and over 90% of those first-degree murderers were made statutorily eligible for a death sentence by the presence of an aggravating factor in their case. Based on these numbers, we determined that less than 1% of all eligible killers were being sentenced to death in Colorado. We thus concluded that the Colorado murder statute was failing in its task of identifying the worst of the worst killers and that as a result the exercise of capital punishment in this state violates the Eighth Amendment to the Constitution.

In Brauchler and Orman’s opinion, however, the entire study is a façade for the promulgation of anti-death penalty rhetoric.¹⁰ Our study,

7. See *id.* at 652–54. Brauchler and Orman repeatedly contend that we are simply too “inexperienced” to undertake this study. See, e.g., *id.* at 653–54 (citing our “apparent inexperience in the area of criminal law” as a reason for discounting the study).

8. E.g., *id.* at 640.

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

10. E.g., Brauchler & Orman, *supra* note 3, at 682 (“To achieve their goal of lowering the bar of punishment for aggravated murderers, the Authors—at the request of a murderer attempting to avoid the death penalty for his second murder—have applied their questionable expertise and nearly complete misunderstanding of Colorado’s death penalty laws to a biased and flawed set of data compiled by the murderer’s defense team to support a theory they had from the outset: the Colorado law is defective and unconstitutional.”).

they assert, suffers from “outcome-oriented methodology”¹¹ because the “[a]uthors are anti-death penalty attorneys.”¹² An entire section of their article claims that the “[p]urpose of the [s]tudy at the [o]utset [w]as to [d]efeate the [d]eath [p]enalty in Colorado.”¹³ While our study was commissioned by counsel for a capital defendant in Colorado, the research and findings are based on our own independent judgment and work, which we welcome anyone to replicate. The full methodology that we used in our study is now a matter of public record, having been submitted in litigation in a number of capital cases in Colorado.

As a general matter, Brauchler and Orman’s claim that no academic work, even an empirical study such as ours, can be viewed “in any way, as disinterested [or] unbiased” is nothing less than a frontal assault on academic scholarship and empirical research.¹⁴ To suggest that academics who hold any personal views on the issue they study are fundamentally incapable of conducting neutral research is an astonishingly sweeping and cynical perspective. Like Brauchler and Orman, we have personal views on the merits of the death penalty. Unlike them, however, we set out to study empirically the realities of the death penalty in Colorado in order to test our hypothesis. This is the very essence of scientific inquiry; if research must be discarded because its authors have personal views on the subject matter, then scientific inquiry is impossible.

Moreover, the suggestion that we have intentionally skewed our results to conform to our personal views treads dangerously close to libel.¹⁵ Our approach was not result-oriented, but was instead based on the best practices for empirical legal research in the capital punishment field.¹⁶ As we have averred under oath, our personal views on the death penalty did not impact the study methodology.¹⁷ We take the veracity and integrity

11. *Id.* at 652.

12. *Id.*

13. *Id.* at 654.

14. *Id.* at 640.

15. It is defamation per se in many jurisdictions, including Colorado, to imply that one lacks integrity. *See, e.g.,* *People v. Ryan*, 806 P.2d 935, 939 (Colo. 1991) (en banc) (holding that Colorado’s anti-libel statute could be applied “constitutionally to private defamers who knowingly publish or disseminate . . . any statement or object tending . . . to impeach the honesty, integrity, virtue, or reputation of a private individual” (alterations in original) (internal quotations omitted)); *Tronfeld v. Nationwide Mut. Ins. Co.*, 636 S.E.2d 447, 449–50 (Va. 2006) (describing common law defamation claims including claims where a person’s integrity is attacked). Brauchler and Orman repeatedly say that our work was biased and cannot be viewed “as disinterested” because our only goal is to see the death penalty abolished. *E.g.,* Brauchler & Orman, *supra* note 3, at 640. They claim that our ideology “influenced [our] outcome-based research and analysis.” *Id.*

16. *See, e.g.,* DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* 40–62 (1990) (detailing the methodology used in two death penalty studies); Marceau, Kamin & Foglia, *supra* note 9, at 1091–93 (providing a literature review of death penalty research).

17. Under Brauchler and Orman’s view, anyone with reservations about the death penalty, which is most scholars who have reflected on the issue, is unqualified to study the death penalty. *See* Brauchler & Orman, *supra* note 3, at 640 (“The Authors of *Many Are Called and Disquieting Discretion* are anti-death penalty. There is, of course, nothing wrong with that. However, they should

of our academic work seriously and would not compromise our reputations for this or any study. Our study is based on concrete, verifiable data and widely-accepted methodological approaches.¹⁸

But don't take our word for it. The accuracy and robustness of our conclusions have been verified by a separate study *conducted by the prosecution itself*.¹⁹ Although Brauchler and Orman are now quick to dismiss our conclusions as the product of bias and wanton "subjectivity,"²⁰ when their own team of experts and researchers reviewed our data, they found "death eligibility rates almost identical to ours (88.4% compared to our 90.4%)."²¹ The reason for this similarity is easy to explain—the application of the Colorado murder statute and aggravating factors in individual cases is not rocket science. We firmly believe that anyone who uses our dataset to replicate our research will answer our research question—do Colorado's aggravating factors effectively narrow the class of death-eligible defendants—the same way we did. The fact that a team of prosecutors came to empirical conclusions essentially indistinguishable from our own is perhaps the clearest refutation of the argument that our conclusions were driven by our own views on the death penalty.

If further refutation of the claim of subjective bias was necessary—and we argue that it is not—such evidence is easy to find. For example, one could engage in the most conservative measure of death eligibility imaginable by measuring only those aggravating factors in the Colorado statute that are objectively verifiable (thus not subject to *any* discretionary judgment calls by researchers).²² Even under this greatly simplified view of when the death penalty is available in Colorado, the data shows that the death eligibility rate is still far too high to pass constitutional muster. As we have previously explained:

We could separate out the following class of indisputably objective aggravating factors under the Colorado statute: (1) prior violent felony; (2) already serving a felony sentence at the time of the killing; (3) pregnant victim; (4) victim was a child; (5) possession of the murder weapon was a felony; (6) the defendant killed two or more people in one or more incidents; (7) felony murder; and (8) killing for pecuniary gain. *See Colo. Rev. Stat. § 18-1.3-1201(5)* (2014). Based on these aggravating factors alone, over a ten-year period of study, 368

not be perceived, in any way, as disinterested, unbiased academics examining a problem and reaching a conclusion.”).

18. *See* BALDUS ET AL., *supra* note 16, at 40–62.

19. *See* Prosecution Murder Study, *People v. Montour*, No. 2002-CR-782 (Colo. Dist. Ct., Douglas Cty. Mar. 29, 2013).

20. Brauchler & Orman, *supra* note 3, at 651.

21. Kamin & Marceau, *supra* note 4, at 121.

22. Of course this is not the approach adopted by the Colorado death penalty scheme which permits a death sentence when, among other things, any of seventeen aggravating factors are present. If Colorado's death penalty were limited to objectively identifiable aggravating factors, it would be a very different and narrower statute. *COLO. REV. STAT. § 18-1.3-1201(5)* (2016).

cases (out of the 596 first-degree murders within the study period) would have objective, indisputable aggravating factors.²³

In other words, if we limit our analysis solely to completely non-subjective aggravating factors, Colorado still has an aggravating factor rate of over 60%. This would be such a broad murder statute that it would fail constitutional muster even if all factors requiring judgment calls were excluded.²⁴ Just these eight factors would permit nearly two-thirds of all murderers to be put to death. And, of course, the Colorado statute includes many more than these eight aggravating factors.

The claims that our results are the product of subjectivity, bias, or result-oriented research are thus demonstrably false. Our dataset unequivocally shows a strikingly high aggravating factor rate (and a correspondingly low death-sentencing rate). Brauchler and Orman may not like this finding, but to call it biased in the face of concrete numbers is simply disingenuous.

B. The Dataset

Our study is perhaps the most thorough of its kind. One principle reason for this conclusion is that we did not sample murder cases within a jurisdiction, but instead studied every single murder case statewide during the relevant time period of our study. No other similar study has examined such a broad swath of cases across an entire state. Without mentioning this fact, Brauchler and Orman also take aim at our dataset, claiming that “defense [lawyers] limited the data [we] were [able] to consider.”²⁵ Once again, public filings make clear that this claim is false. Our dataset was created by the State Judicial Branch State Court Administrator’s Office (SCAO) rather than by the defense team and was subject to a complete review and revision by prosecutors in the course of litigation. Brauchler and Orman have, in their possession, an affidavit from the SCAO attesting under oath that they provided to the defense (who then provided us) a list of every murder during the relevant time period.²⁶

While it is true that defense counsel provided us with the cases that we analyzed, it is important to remember that they obtained the case list

23. Kamin & Marceau, *supra* note 4, at 121 n.25 (citing Appendix to Mr. Montour’s Brief in Reply to the Prosecution’s Motion to Vacate and to Its Submission of the Prosecution Montour Murder Study (PMMS) app. J, *People v. Montour*, No. 2002-CR-782 (Colo. Dist. Ct., Douglas Cty. Mar. 29, 2013) [hereinafter Montour Appendix]).

24. It should be noted that the Supreme Court has not itself ever suggested that a death sentencing scheme is unconstitutional based on the death eligibility rate alone. Instead the focus has been on the death sentencing rate—a low death sentencing rate suggests arbitrariness in the application of the ultimate penalty. But high death eligibility rates cause low death sentencing rates, and even with a death eligibility rate of only 60%, the Colorado death sentencing rate would still be well below the 15% constitutional floor suggested in *Furman*. Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. REV. 1283, 1288 (1997).

25. Brauchler & Orman, *supra* note 3, at 655.

26. See Marceau, Kamin & Foglia, *supra* note 9, at 1098 n.148.

from the SCAO and filed that list with the court in litigation. Defense attorneys were operating at our direction (rather than the other way around) regarding which cases to include in the study and which cases to exclude from the study. Mr. Brauchler's office had the full opportunity to, and did, thoroughly check the list for completeness and accuracy; prosecutors had full access to the SCAO and its research capabilities as well. All of the attorneys who participated in this process—including Brauchler's team—have an absolute duty of candor to courts.²⁷ In light of these factors, it was reasonable for us to rely on the good faith of the lawyers who collected the data used in our study.

Beyond accusations of bias, Brauchler and Orman suggest that we should have consulted with District Attorneys in the creation of the data set and given them an opportunity to note any missing murder cases from the relevant time period. As they put it, "A fair attempt to review all homicide cases over a limited period would have included seeking supplementation or amendment of the defense-provided list by seeking input from [prosecutors]."²⁸ In fact, our published study does exactly this. Our data was turned over to and reviewed extensively by the prosecution and its own team of experts. The State identified seven cases that qualified for the study but had not been initially included because their court files had been sealed in the district court.²⁹ The prosecution provided information from their own files and we included all seven cases (all of which we found to have the presence of at least one aggravating factor).³⁰ In court filings, Brauchler's own office conceded that there were no additional cases that they were aware of that satisfied the study criteria for the relevant time period.³¹

In short, Brauchler and Orman protest that our dataset was created by a (dishonest) defense team without any opportunity for input from the prosecution. In reality, the dataset was generated by the SCAO and was subject to screening and revision by the prosecution in the course of litigation.

27. A number of declarations and supporting documents filed in the *Montour* case by those responsible for providing, receiving, and reconciling the list, including the SCAO, the Office of Alternative Defense Counsel (OADC), and others, were filed with the Court. These materials, especially given the prosecution's ability to verify all of the information, clearly establish that our study included all known murder cases for the relevant time period. See *Montour* Appendix, *supra* note 23, app. D, E, H.

28. Brauchler & Orman, *supra* note 3, at 655.

29. The Court Programs Analyst for the State Judicial Department signed a Declaration that was filed with the Court, attesting to the very small number of murder cases statewide—less than five a year—that are subject to such sealing orders. See *Montour* Appendix, *supra* note 23, app. D; see also Marceau, Kamin & Foglia, *supra* note 9, at 1101–02.

30. Marceau, Kamin & Foglia, *supra* note 9, at 1101–02.

31. *Id.* at 1101–02, 1101 n.165.

C. Case Selection and the Coding of Individual Cases for Aggravating Factors

Our study of the effectiveness of Colorado's aggravating factors in legislatively narrowing the class of death-eligible offenders required us to examine the details of each individual murder case included in the dataset. Specifically, we examined the available information about each case to assess whether the case was a potential first-degree murder,³² and if so, whether at least one aggravating factor was applicable to the crime.³³

Brauchler and Orman criticize this aspect of our research because, in their view, our analysis was based on a "lack of reliable information" about each case.³⁴ In particular, they fault us for not having the police report or affidavit in support of probable cause in many cases, and for relying on media reports regarding the crimes in a non-trivial number of the files.³⁵ While this critique might appear reasonable, upon closer examination, it too fails to taint our research.

First, we note the information asymmetry under which we were operating. The files that we received from the defense team contained all of the information they were able to access from the SCAO. In the cases where we did not have certain court-related documents, including the probable cause documents, it is because the courts would not release those documents to us—often because they were sealed. We are entirely open to updating or amending our findings, and have done so as new documents, such as appellate decisions in the studied cases, became publicly available. If Brauchler and Orman think that we have misunderstood or misinterpreted cases, they should make available to us any information they possess that they think we are missing. In their article, however, they point to no actual errors in our analysis and offer no supplemental data to critique our methodology.

Relatedly, Brauchler and Orman identify as the "most concerning" defect with our dataset the fact that we did not have any "information for 420 of the cases."³⁶ They suggest that we "remarkably" coded approximately 31% of all of the cases in the study without examining a "single piece of paper" relating to this case.³⁷ This would, of course, be concerning (if not disqualifying) if it were true, but it is not. While it is true that a number of cases were removed from the study without our analyzing them, this approach follows the best practices in the field. Those best

32. Our assessment was actually focused on determining whether each particular case was either "factually" or "procedurally" first-degree murder. *Id.* at 1103 (defining and applying these terms of art).

33. *Id.* at 1102.

34. Brauchler & Orman, *supra* note 3, at 656.

35. *Id.* at 656–57.

36. *Id.* at 657.

37. *Id.*

practices call for researchers to remove cases from their dataset when those cases could never have been capital prosecutions, and that is exactly what we did.³⁸ We directed the interns and lawyers working for the Data Collection Team to exclude a number of cases from our dataset for ministerial reasons. Indeed, a careful reading of our study methodology explains that we instructed the Data Collection Team “to remove cases from the study based on three criteria: (1) the absence of a deceased victim . . . (2) the defendant was a juvenile . . . or (3) the defendant was convicted of [a particularly low level homicide, such as killings done in the heat of passion, thus suggesting that it was not a factual first-degree murder.]”³⁹ Brauchler and Orman do not (and could not) contest any of these rote determinations—they do not, for example, point to a single defendant who was wrongly excluded from our study on this basis. This criticism is nothing but a red herring.

Finally, while there is rhetorical force in chiding our study for relying in part on media accounts of crimes in analyzing our cases (when no other information was available), some clarification is necessary on this point as well. First, many of the narratives published in newspapers about murders include quotes from prosecutors, which we treated as particularly relevant.⁴⁰ For example, a quote from a prosecutor that the defendant made good on a previous threat to kill the victim would be relevant in determining that the defendant deliberated his killing. Likewise, a news account that multiple people were killed or that the victim was an infant would be highly relevant to assessing whether the crime had an aggravating factor. Importantly, when we did not believe the file contained sufficient information to determine whether a killing was a first-degree murder for which an aggravating factor could be proved, we coded the case accordingly, and it was removed from the dataset.

To be sure, our claim is not that the dataset is perfect. Ours was a sweeping project involving hundreds of cases from scores of jurisdictions throughout the state; information was kept unevenly in different counties but it was collected to the best abilities of those charged with that task. We have done all that we could to confirm the accuracy and

38. Although Brauchler and Orman critique these methodological decisions to exclude cases that are categorically ineligible for the death penalty, we are in fact making sure that our numbers do not exaggerate Colorado’s low death sentencing rate. Including such cases would skew the results *towards* the appearance of unconstitutionality by “faulting” the State for a low death-prosecution rate. Thus, removing those cases from consideration is a conservative measure that favors the State. The largest removal category—almost two-thirds of the total—were cases in which there was no deceased victim, such as attempted murders in which no one was killed. The State cannot constitutionally prosecute a defendant for the death penalty unless someone has been killed, *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008), so we can imagine no principled objection to these exclusions.

39. Marceau, Kamin & Foglia, *supra* note 9, at 1100–01, 1101 n.165.

40. See, e.g., John Ingold, *James Holmes Trial: Prosecutors Seek Death Penalty in Aurora Theater Shooting*, DENV. POST (Apr. 1, 2013, 3:10 AM), <http://www.denverpost.com/2013/04/01/james-holmes-trial-prosecutors-seek-death-penalty-in-aurora-theater-shooting/> (quoting George Brauchler and Rich Orman relating to James Holmes’s trial).

completeness of our data and continue to work to keep it up to date. Significantly, Brauchler and Orman cannot identify a single specific error in our findings associated with gaps in our data.

D. The Time Period Studied, 1999–2010

Brauchler and Orman also argue that the timeframe of our study was unrepresentative and “seriously flawed.”⁴¹ They claim that we manipulated the period under study in order to bolster a particular conclusion.⁴² This critique is characteristic of their shoot-the-messenger style and is woefully off-the-mark. Far from cherry-picking our data, we studied every murder case available to us at the time our study began.

Brauchler and Orman simultaneously complain that we did not study recent enough cases like that of James Holmes (2015), and that we did not go far enough back (pre-1999).⁴³ As we have previously explained, the reason for limiting our study to these twelve years were practical constraints on accessing data rather than decisions made by anyone involved in the research. Once again, declarations from the Court Programs Analyst of the Colorado Judicial Branch Division of Planning and Analysis and the Office of the Alternate Defense Counsel attest to the fact that the state judiciary provided us a list of every murder in the state that could be identified through electronically searchable means.⁴⁴ To put the matter plainly, 1999 was selected as the start of our study period because, prior to 1999, there was simply no comprehensive way to search for all murder cases in a given year. To have gone any further back in time would have run the risk of producing exactly the kind of incomplete and unrepresentative data that Brauchler and Orman wrongly accuse us of using.

In addition, we have no reason to believe (and Brauchler and Orman have offered no comprehensive data to suggest)⁴⁵ that Colorado’s death

41. Brauchler & Orman, *supra* note 3, at 657–60.

42. *See id.* at 657–59 (describing the time period used in the study as “seriously flawed and unrepresentative of the death penalty in Colorado” and claiming that “[t]he Montour defense team and the Authors chose the best possible dataset to get the results that they were trying to reach in an effort to spare Montour from a death sentence, and further, to attempt to declare Colorado’s long-standing death penalty unconstitutional”).

43. *Id.* at 659–60.

44. Apparently, the State Judicial Department underwent a computer conversion at the beginning of 1999 that makes impossible reliable, electronic data searches prior to that time. Accordingly, our study’s dataset starts on January 1, 1999, and goes through the end of the last complete calendar year before we commenced our study in mid-2011; that is, we looked at every murder case that could be made available to us. Marceau, Kamin & Foglia, *supra* note 9, at 1098.

45. In a careless half-hearted attempt to characterize our dataset as “cherry-picked,” Brauchler and Orman provide information about six pre-1999 cases they identified. The conclusion seems to be that if we had only looked back farther in time our conclusions would be fundamentally different. Brauchler & Orman, *supra* note 3, at 637, 658–60. Of course, Brauchler and Orman do not and cannot explicitly make this point because they do not have anything approaching complete data regarding all the murder cases in the years prior to 1999, as such data is unavailable. The examples they give, like so much in their article, is a rhetorical sleight of hand. It is absurd to believe that their analysis of six pre-1999 cases could possibly taint our 12-year, comprehensive study of over 1000

penalty operated in a fundamentally different way in the years prior to 1999.⁴⁶ And more importantly, we seriously doubt that such data from more than seventeen years ago, even if it were available, would shed considerable light on the current administration of Colorado's death penalty. Our study is an examination of the current functioning of Colorado's capital sentencing scheme, not a historical project about how things worked in the early 1990s.

Likewise, the claim that we deliberately omitted data from more recent years is absurd on its face. Brauchler and Orman repeatedly fault us for not including cases, like that of James Holmes, but the Holmes crime had not even occurred when our study was under way and Holmes's trial was not concluded until years after our study had been published. But lest there be any lingering doubt about not including more recent cases, we have continued analyzing cases arising after the end of our original study, and we will continue to publish those findings as they become available. Contrary to the claims of Brauchler and Orman, we are genuinely interested in what the data will show. Leading experts have concluded that ours is perhaps the best study of death eligibility conducted in the country to date,⁴⁷ but as new or better data becomes available, we strive to update our findings and improve our analysis.

E. Qualifications and Experience

Throughout their article, Brauchler and Orman refer to our research in scare quotes (they call it a "study" and refer to us as "experts").⁴⁸ It seems that their pejorative tone towards our research is based on their assumption that we are simultaneously too invested in death penalty re-

cases. Indeed, adding all of the cases they mention to our study (even though they are outside the study period) would make no significant difference in the aggravating factor rate or the death sentence rate, which is what we set out to study.

46. For the sake of completeness, it is worth noting that some aggravating factors were added in the years just before and after our study window. In 1998, Colorado added a hate-crime aggravator. H.B. 98-1160, 61st Gen. Assemb., 2d Reg. Sess., 1998 Colo. Sess. Laws, ch. 314, § 34 (codified at COLO. REV. STAT. § 16-11-103(5)(n) (1998), *repealed by* 2002 Colo. Sess. Laws, ch. 318, § 3). In 2000, the possession of a murder weapon being a felony was added. H.B. 00-1234, 62nd Gen. Assemb., 2d Reg. Sess., 2000 Colo. Sess. Laws, ch. 110, § 1 (codified at COLO. REV. STAT. § 16-11-103(5)(o) (2000), *repealed by* 2002 Colo. Sess. Laws, ch. 318, § 3). And in 2003, aggravators were added to include pregnant victims and persons who kill two or more persons across more than one incident. H.B. 03-1138, 64th Gen. Assemb., 1st Reg. Sess., 2003 Colo. Sess. Laws, ch. 340, § 5 (codified at COLO. REV. STAT. § 18-1.3-1201(5)(q) (2003)); H.B. 03-1297, 64th Gen. Assemb., 1st Reg. Sess., 2003 Colo. Sess. Laws, ch. 202, § 1 (codified at COLO. REV. STAT. § 18-1.3-1201(5)(p) (2003)).

47. See, e.g., Montour Appendix, *supra* note 23, app. C (consisting of the Declaration of Steven F. Schatz, the Philip and Muriel Barnett Professor at the University of San Francisco School of Law and a leading researcher in the field); see also Steven F. Schatz, *The Meaning of "Meaningful Appellate Review" in Capital Cases: Lessons from California*, 56 SANTA CLARA L. REV. 79, 82 n.15 (2016) ("The most recent and thorough discussion of the narrowing requirement appears in Sam Kamin & Justin Marceau, *Waking the Furman Giant*, 48 U.C. DAVIS L. REV. 981 (2015).").

48. E.g., Brauchler & Orman, *supra* note 3, at 651–52. At one point they criticize us for crediting our research with being original. *Id.* at 651 ("[T]he Authors rely on self-declared original research."). We don't know what they mean by this attack. Our research is undisputedly original.

search (having spent “the majority of [our] professional careers” on the issue) and simply too inexperienced (referring to us as “nonpractitioner academicians”).⁴⁹ We have already addressed the claim that our empirical analysis cannot be trusted because of our supposedly secret agenda to undermine the death penalty.⁵⁰ In this Part, we will briefly respond to the claim that we are unqualified to conduct a study such as ours.

First, we note that the argument⁵¹ that academics who are not currently practicing a particular kind of law in a particular jurisdiction are unfit to analyze and critique that legal system is both deeply cynical and remarkably hostile to the academy as a whole.⁵² It undermines the entire enterprise of legal scholarship to suggest that only practicing trial lawyers are qualified to make empirical assessments of how a legal institution works in practice. Brauchler and Orman criticize us for not being disinterested observers, but if anyone is disinterested here, it is those of us outside the Colorado criminal justice system rather than those who operate it on a daily basis.

As for our specific qualifications, one of us has a social science doctorate, whose background includes training in empirical study design and implementation. Both of us are among the nation’s most well-regarded legal academics on the topic of the death penalty: we are co-authors of the new edition of the leading textbook on this topic, we have individually and jointly been cited with regularity by state and federal courts, including a recent dissent in a U.S. Supreme Court decision and the decision of the Delaware Supreme Court invalidating its state’s death penalty statute.⁵³ We teach a course on capital punishment to law students and one of us regularly teaches the course to sociology students, and we have published numerous scholarly articles on the subject. Contrary to Brauchler and Orman’s claim, our background and experience make us uniquely qualified to engage in studies of this kind.⁵⁴ It is far more apt to

49. *Id.* at 651.

50. *See supra* Section I.A.

51. Under Brauchler and Orman’s reasoning the greatest empirical researchers in history, including David Baldus, would be categorically unfit to study the administration of the death penalty in any state because they are not lawyers. *See generally* Adam Liptak, *David C. Baldus, 75, Dies; Studied Race and the Law*, N.Y. TIMES (June 14, 2011), <http://www.nytimes.com/2011/06/15/us/15baldus.html>. This is patently absurd and anti-intellectual. Such reasoning ought not to have appeared in the pages of a law review.

52. Brauchler and Orman go so far as to suggest that only attorneys barred in a particular state are fit to study or critique that state’s statutes. Brauchler & Orman, *supra* note 3, at 653 (emphasizing that we are not “licensed to practice law in Colorado” as evidence of our inability to analyze the Colorado system accurately).

53. *Glossip v. Gross*, 135 S. Ct. 2726, 2761 (2015) (Breyer, J., dissenting). *See generally* Rauf v. State, 145 A.3d 430 (Del. 2016) (per curiam).

54. It is also simply inaccurate to say that we have never practiced law. One of us was an assistant federal public defender handling almost exclusively death penalty cases for two years, including a case that went to the U.S. Supreme Court. One of us has continued to practice law, including criminal and death penalty law, as an academic, and both of us consult with criminal lawyers, both on the defense and prosecution side. Sam Kamin, Professor, Vicente Sederberg Professor of Marijuana Law & Policy, Univ. of Denver Sturm Coll. of Law, Curriculum Vitae (2016),

wonder what qualifies Brauchler and Orman to critique the design of an empirical study, something neither of them have ever done.

II. COLORADO AND FEDERAL LAW INFORMING OUR STUDY'S METHODOLOGY

Contrary to claims made by Brauchler and Orman, we crafted our study in accord with governing Colorado and federal law. In fact, these laws drove our study.

A. Colorado Death Penalty Law

In addition to claims of bias and inexpertise, the central and defining substantive critique leveled against our study by Brauchler and Orman is that we fundamentally misunderstand Colorado law.⁵⁵ Specifically, they assert that we fail to see the full picture by focusing on the presence or absence of aggravating factors rather than viewing the Colorado capital statute more holistically.⁵⁶ For example, Brauchler and Orman call our failure to consider the weighing of aggravating and mitigating factors of the Colorado sentencing process in our assessment of legislative narrowing the “most obvious demonstration of the impact of [our] inexperience and bias.”⁵⁷ However, this critique turns on a fundamental mischaracterization of Colorado law and is simply incorrect as a matter of Eighth Amendment law.

To reiterate, our study was designed to assess whether Colorado's statutory aggravating factors were effective in meaningfully narrowing the class of death-eligible defendants. To make this determination, we assessed whether a defendant could have been convicted of first-degree murder and whether or not one or more aggravating factors was present

<http://www.law.du.edu/documents/directory/full-time/sam-kamin.pdf>; Justin F. Marceau, Professor, Animal Legal Def. Fund Professor of Law, Univ. of Denver Sturm Coll. of Law, Curriculum Vitæ (2016), <http://www.law.du.edu/documents/directory/full-time/justin-marceau.pdf>.

55. Brauchler & Orman, *supra* note 3, at 682 (stating that we “applied [our] questionable expertise and nearly complete misunderstanding of Colorado's death penalty laws to a biased and flawed set of data”).

56. *Id.* at 653 n.108. Brauchler and Orman go out of their way to criticize the most trivial mistakes and misstatements in our study in order to support their claim that we are unqualified to study Colorado's death penalty. Many of the “mistakes” are matters of style or semantics that have no relevance. More importantly, most of the instances where Brauchler and Orman attempt to “correct” us reveal their own ignorance of Colorado law. They repeatedly misstate and mischaracterize Colorado law. For example, they seize upon a sentence in our study that says that a “defendant convicted of conspiracy to commit first-degree murder, which is a class two felony, could be guilty of first-degree murder as an accomplice,” and claim definitively that this is a “misstatement of Colorado law.” *Id.* (quoting Justin Marceau, Sam Kamin & Wanda Foglia, *Death Eligibility in Colorado: Many Are Called, Few Are Chosen*, 84 U. COLO. L. REV. 1069, 1100 n.162 (2013)). In their view, “conspirators are not a subset of accomplices, nor vice-versa.” *Id.* We don't disagree. We were simply stating that one who has agreed with another to commit murder will often be guilty of that murder under the separate theory of accomplice liability and that one who has aided another in his commission of a murder (and is therefore liable for that killing as an accomplice) will often be found to have entered a conspiracy with the killer. Nothing we wrote in our article was contrary. Marceau, Kamin & Foglia, *supra* note 9, at 1100 n.162.

57. Brauchler & Orman, *supra* note 3, at 653.

in a given case. Upon finding that nearly all killings during the study period could have been prosecuted as first-degree murders and that more than 90% of first-degree murders in Colorado had one or more aggravating factors, we concluded that the Colorado capital statute was not serving as an effective, legislatively imposed limit on the imposition of the death penalty and that as a result, the statute fails constitutional muster. Our inquiry follows directly from the Supreme Court's own language.

Brauchler and Orman reject this analysis, arguing that there is no constitutional requirement of legislative narrowing because such a rule originated in *Furman v. Georgia*,⁵⁸ a seminal Supreme Court decision that they maintain does not create any binding precedent.⁵⁹ They identify our focus on *Furman* as "symptomatic" of our inexperience because we are "quoting not from the per curiam decision but to . . . concurring opinion[s] from the *Furman* decision."⁶⁰ They maintain, in other words, that because *Furman* was a plurality decision, it created no binding precedent beyond its holding. It is surprising that two capital litigators would so fundamentally mischaracterize one of the Supreme Court's most important death penalty decisions; the Court has repeatedly held that *Furman* is a critically important precedent.⁶¹ The words of Justice Scalia—one of the Court's great death penalty defenders—echo with exacting precision the reading of *Furman* we rely on in our study (and that Brauchler and Orman discount as deeply "flawed reasoning"): "The critical opinions [in *Furman*] . . . focused on the infrequency and seeming ran-

58. 408 U.S. 238, 239–40, 313–14 (1972).

59. See Brauchler & Orman, *supra* note 3, at 664–66.

60. *Id.* at 664 (footnote omitted).

61. See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) ("This is because '[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.'" (alteration in original) (quoting *Furman*, 408 U.S. at 382 (Burger, C.J., dissenting))); *Kansas v. Marsh*, 548 U.S. 163, 173–74 (2006) (detailing the standard for state death penalty systems that *Furman* established); *Tuilaepa v. California*, 512 U.S. 967, 974–75 (1994) ("We have held, under certain sentencing schemes, that a vague propositional factor used in the sentencing decision creates an unacceptable risk of randomness, the mark of the arbitrary and capricious sentencing process prohibited by *Furman*" (citation omitted)); *Stringer v. Black*, 503 U.S. 222, 240 (1992) (describing how the Court has applied *Furman*); *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988) ("Since *Furman*, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." (citations omitted)); *McCleskey v. Kemp*, 481 U.S. 279, 301–03 (1987) (discussing *Furman*'s impact on state death penalty schemes); *Sumner v. Shuman*, 483 U.S. 66, 70 (1987) ("In *Furman*, this Court, in effect, invalidated all such capital-punishment statutes because of its conclusion that statutes permitting juries absolute discretion in making the capital-sentencing determination resulted in the death penalty's being arbitrarily and capriciously imposed, in violation of the Eighth and Fourteenth Amendments."); *Pulley v. Harris*, 465 U.S. 37, 44 (1984) ("In *Furman*, the Court concluded that capital punishment, as then administered under statutes vesting unguided sentencing discretion in juries and trial judges, had become unconstitutionally cruel and unusual punishment."); *Zant v. Stephens*, 462 U.S. 862, 874 (1983) (describing the Court's opinion in *Furman* as a "central mandate"); *Godfrey v. Georgia*, 446 U.S. 420, 427–28 (1980) (describing *Furman*'s holding); *Coker v. Georgia*, 433 U.S. 584, 591–92 (1977) (describing *Furman*'s holding); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (stating that *Furman* established requirements that are necessary to render a death penalty statute constitutional).

domness [of state death penalty systems].”⁶² Avoiding rarity and randomness remains a mandate of *Furman* and the constitutional framework governing capital punishment in this country. Brauchler and Orman’s repeated suggestion that *Furman*, much less the requirement of narrowing, are not constitutional mandates is indefensible; indeed, the Justices have individually and as a Court repeatedly and without hesitation recognized *Furman* as creating this binding law on more than a dozen occasions at this point.⁶³

Furman and its progeny make clear that a capital statute must narrow the pool of all murderers to a small group eligible for death and that this narrowing must occur through legislative definition rather than the exercise of prosecutorial discretion. Explaining the holding of *Furman*, in *Zant v. Stephens*,⁶⁴ a case inexplicably missing from Brauchler and Orman’s analysis, the Court stated that the process of narrowing is a “constitutionally *necessary* function at the stage of *legislative* definition.”⁶⁵ In other words, narrowing is a legislative function, not a matter of moral judgment or prosecutorial discretion. The Court has recognized that the Eighth Amendment requires that narrowing occur through jury findings of a statutorily enacted “aggravating circumstance (or its equivalent) at either the guilt or penalty phase.”⁶⁶

This straightforward rule has huge implications that vindicate our research methods and are devastating to Brauchler and Orman’s critique. Brauchler and Orman live in a world where the requirement of legislatively enacted narrowing is not constitutionally mandated. Indeed, they blithely claim that “[o]f course, more than just the death penalty statute needs to be considered,”⁶⁷ rejecting the holding of *Furman*, *Zant*, and their progeny that narrowing is a legislative act. They even go so far as to claim that the most serious defect of our research is our failure to “include any analysis whatsoever concerning the jury’s consideration of mitigation and weighing mitigation against aggravation.”⁶⁸ We have responded at length to this misplaced attack elsewhere,⁶⁹ so a short rebuttal of this point will suffice.

Colorado’s capital sentencing framework is comprised of four stages (called “phases” or “steps”): (1) a jury finding of one or more aggravating factors; (2) the assessing of mitigating factors; (3) weighing aggravating factors against mitigating factors to determine whether the case

62. *Walton v. Arizona*, 497 U.S. 639, 657–58 (1990) (Scalia, J., concurring), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002).

63. See cases cited *supra* note 62.

64. 462 U.S. 862 (1983).

65. *Id.* at 878 (emphasis added).

66. *Tuilaepa*, 512 U.S. at 971–72 (internal quotation marks omitted).

67. Brauchler & Orman, *supra* note 3, at 644.

68. *Id.* at 663–64.

69. Kamin & Marceau, *supra* note 47, at 1038.

in mitigation is sufficient to justify mercy; and (4) even if the weighing does not favor life over death, a determination whether death is the appropriate penalty.⁷⁰ It is true that we included in our narrowing study only the first stage—the finding of aggravating factors.⁷¹ But we did so deliberately and with good reason. The assessing of mitigating factors and the purely “moral assessment”⁷² of whether mitigating factors outweigh aggravating factors are not objective and determinate questions of fact of the sort the Supreme Court has described when it speaks of narrowing. While they are very relevant to who lives and who dies under Colorado law, they cannot do the work of constitutional narrowing.

That is because the Supreme Court has made clear that the eligibility factors—those factors that make one eligible for the ultimate penalty—must be sufficiently objective that they “require an answer to a *factual question*.”⁷³ This is why our research question was whether the eligibility factors in Colorado—those determinate, factual questions that create the preconditions for a death sentence—are serving a meaningful narrowing function. While there may be other prerequisites to the imposition of a death sentence—the decision of a prosecutor to pursue the death penalty, a jury’s conviction of a capital crime, the decision that the case in mitigation does not outweigh the aggravating factors, the ultimate decision to spare or condemn the defendant—those are not the kind of objective, narrowing factors that the Supreme Court has mandated.

Confirming this point, the Supreme Court, subsequent to the publication of the Brauchler and Orman article, has further weakened the argument that Colorado’s third-stage (the weighing of aggravating and mitigating factors) is an eligibility question of the sort we were measur-

70. Dunlap v. People, 173 P.3d 1054, 1088–89 (Colo. 2007) (en banc).

71. Marceau, Kamin & Foglia, *supra* note 9, at 1110.

72. In Colorado, the third phase weighing decision is indisputably a moral, not factual, evaluation. See *People v. Young*, 814 P.2d 834, 845 (Colo. 1991) (en banc) (calling Colorado’s weighing decision a “moral evaluation”), *superseded by statute* COLO. REV. STAT. § 16-12-102(1) (1993), *as recognized by* *People v. Vance*, 933 P.2d 576 (Colo. 1997) (en banc), *disapproved by* *Griego v. People*, 19 P.3d 1 (Colo. 2001) (en banc) (regarding whether an order granting a new trial is final, which is immediately appealable); *id.* at 844 (“[T]he weighing of aggravating and mitigating factors differs fundamentally from the functions of a jury in finding facts and applying the law as instructed by the court.”); *id.* (stating that the “essence of the process of weighing aggravating and mitigating factors” is a “moral evaluation”). Brauchler should remember this from the James Holmes trial, at which the trial judge instructed jurors that “each of you will be called upon to deliberate to make decisions based on your individual reasoned moral judgment.” See Jury Instructions—Phase 2 of Sentencing Hearing, at Instruction No. 1, *People v. Holmes*, No. 12-CR-1522 (Colo. Dist. Ct., Arapahoe Cty. July 30, 2015) [hereinafter *Holmes Instructions*], [https://www.courts.state.co.us/userfiles/file/Court_Probation/18th_Judicial_District/18th_Courts/12-CR1522/011/Jury%20Instructions\(1\).pdf](https://www.courts.state.co.us/userfiles/file/Court_Probation/18th_Judicial_District/18th_Courts/12-CR1522/011/Jury%20Instructions(1).pdf); *id.* at Instruction No. 2 (mitigation may bear on “the defendant’s moral culpability”); *id.* at Instruction No. 5 (“Each 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.”); *id.* (“[T]he weighing process requires a critical evaluation of the mitigating factors and the aggravating factors so that you can make a reasoned moral judgment as to whether you are individually convinced beyond a reasonable doubt that the mitigating factors do not outweigh the aggravating factors.”).

73. *Tuilaepa v. California*, 512 U.S. 967, 978 (1994) (emphasis added).

ing in our study. In *Kansas v. Carr*,⁷⁴ the Court explained that the process of assessing mitigating evidence is not subject to clear standards of proof because it is not truly a factual or evidentiary matter:

[W]e doubt whether it is even possible to apply a standard of proof to the mitigating-factor determination (the so-called “selection phase” of a capital-sentencing proceeding). It is possible to do so for the aggravating-factor determination (the so-called “eligibility phase”), because *that is a purely factual determination*. The facts justifying death set forth in the Kansas statute either did or did not exist—and one can require the finding that they did exist to be made beyond a reasonable doubt. Whether mitigation exists, however, *is largely a judgment call* (or perhaps a value call); what one juror might consider mitigating another might not. And of course the ultimate question *whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy*—the quality of which, as we know, is not strained.⁷⁵

Carr’s reasoning reiterates the Court’s view that death eligibility turns on “purely factual” matters while issues of penalty selection turn on moral “judgment call[s].”⁷⁶ In Brauchler and Orman’s view, determining the ability of the Colorado death penalty system to meaningfully narrow requires an examination of the weighing of aggravators and mitigators (stage three of the Colorado system). But the Colorado Supreme Court unequivocally disagrees with this reading of the capital statute—“whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy.”⁷⁷ The existence of an aggravating factor alone does not guarantee a death sentence, to be sure, but proof of an aggravating factor serves as the definitive, objective, factual limit on the imposition of the death penalty, and it was there that our focus was rightly placed.⁷⁸ Despite sweeping ad hominem suggesting that we should be

74. 136 S. Ct. 633 (2016).

75. *Id.* at 642 (emphasis added).

76. *Id.*

77. *Id.*; see *People v. Rodriguez*, 794 P.2d 965, 973, 987 (Colo. 1990) (en banc) (stating that mercy and sympathy for the defendant can be considered at steps two (mitigation) and three (weighing)); see also Holmes Instructions, *supra* note 73, at Instruction No. 2 (“[A] mitigating factor is a fact or circumstance which, in fairness or mercy, may be considered as extenuating or reducing the degree of the defendant’s moral culpability or as diminishing the appropriateness of a death sentence.”); *id.* at Instruction No. 8 (“You may consider mercy for the defendant during Phase 2 of the sentencing hearing.”).

78. The statutory aggravating factor is the starting point for research in the field. See Katherine Barnes et al., *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death-Eligible Cases*, 51 ARIZ. L. REV. 305, 321 (2009) (“The purpose of statutory aggravators is to significantly narrow the immense discretion that prosecutors wield in making decisions to seek the death penalty and juries wield in making decisions to impose the death penalty.”); see also, e.g., JOHN J. DONOHUE III, CAPITAL PUNISHMENT IN CONNECTICUT, 1973–2007: A COMPREHENSIVE EVALUATION FROM 4686 MURDERS TO ONE EXECUTION 175 (2011); David C. Baldus et al., *Racial Discrimination in the Administration of the Death Penalty: The Experience of the United States Armed Forces (1984–2005)*, 101 J. CRIM. L. & CRIMINOLOGY 1227, 1229 (2011); Raymond Pateroster et al., *Justice by Geography and Race: The Administration of the Death Penalty in Maryland, 1978–1999*, 4 U. MD. L.J. RACE RELIGION GENDER & CLASS 1, 20 (2004); Glenn L. Pierce & Mi-

ashamed of our methodology, we proudly stand by our conclusion that statutory narrowing occurs in Colorado only through the application of aggravating factors.⁷⁹

B. Prosecutorial Discretion Is Not Constitutional Narrowing

Brauchler and Orman also take great umbrage with our discussion of one particular aggravating factor—that the defendant lay in wait for his victim. In the background section of our study we commented that “[f]or any murderer who kills ‘after deliberation,’ it will be the rare case in which the perpetrator did not also surprise the victim, or at least wait for an opportune moment to kill. Thus, the lying in wait aggravator has application in an extremely large number of murder cases in Colorado.”⁸⁰ Brauchler and Orman respond to this sentence in the following manner:

Failing to cite to any source for their conclusion, the Authors claim that this applies to almost any first degree murder after deliberation . . . Here, the Study seems to suffer from what one can understatedly call a dearth of practical experience. By contending that the absence of “lying in wait or ambush” aggravator is rare in a first degree murder prosecution, the Study demonstrates a misunderstanding of the nature of first degree murder prosecutions in Colorado and, likely, any other state. Indeed, our practical experience, and that of

chael L. Radelet, *Race, Region, and Death Sentencing in Illinois, 1988–1997*, 81 OR. L. REV. 39, 55–56 (2002); Shatz & Rivkind, *supra* note 24, at 1313, 1318–19.

79. Closely related, Brauchler and Orman repeatedly make the self-serving claim that our study is “replete with oversimplifications.” Brauchler & Orman, *supra* note 3, at 662. The alleged “over-simplification” that they press most fervently is our conclusion—borrowed from the Supreme Court—that low death sentencing rates naturally flow from unreasonably high death eligibility rates. *Id.* at 662–63. As Justice White explained in *Gregg*, when a death penalty system is sufficiently narrowed through aggravating factors, as in Georgia, “it becomes reasonable to expect that juries . . . will impose the death penalty in a substantial portion of the cases so defined.” *Gregg v. Georgia*, 428 U.S. 153, 222 (1976) (White, J., concurring). The counterintuitive nature of the Eighth Amendment claim we articulate is exactly consistent with the Supreme Court’s discussion of narrowing: Since 1972 a showing that too few people being sentenced to death (out of the too many eligible for death) will state an Eighth Amendment claim. Brauchler and Orman mock this claim, but there is nothing comical or simplistic about a straightforward application of constitutional law. As we acknowledge repeatedly in our own study, though it seems paradoxical to argue that a death sentencing rate that is too low evinces a constitutional problem, this is what the Eighth Amendment dictates. *See* Marceau, Kamin & Foglia, *supra* note 9, at 1078 n.37; *id.* at 1082 (“[I]t is this requirement of legislative narrowing that renders sensible the otherwise counterintuitive claim that a capital sentencing scheme that produces too low of a death sentence rate is unconstitutional.”). When death eligibility is too high—that is, when the legislatively enacted narrowing devices do not sufficiently limit the class of persons eligible for the death penalty—leading researchers and the Supreme Court have predicted exactly what our study shows—unconstitutionally low death sentencing rates. *Id.* at 1078, 1092–93. Thus, Brauchler and Orman claim that we “want it both ways” because we claim that too many defendants are death eligible while also citing the low death sentencing rate. Brauchler & Orman, *supra* note 3, at 644. This criticism betrays a lack of understanding of the Eighth Amendment doctrine at issue. High rates of death eligibility give rise to low death sentencing rates—because so many are eligible for death, a small percentage of those eligible will be sentenced to death. This point seems to be entirely lost on Brauchler and Orman.

80. Marceau, Kamin & Foglia, *supra* note 9, at 1089.

other prosecutors with whom we have discussed this issue, shows killing from ambush, or lying in wait, are the rare case. Very rare.⁸¹

While it is true that we did not cite a source for our assertion, one is ready at hand. Over a strenuous defense objection, lawyers in Brauchler and Orman's office argued that the lying in wait aggravator was supported by the evidence in the case of Edward Montour.⁸² Montour was charged, convicted, and subsequently sentenced to death for killing a prison guard with an industrial-size soup ladle while working in the kitchen. The prosecution argued that because the defendant surprised the victim or waited for an opportune moment to kill, the lying in wait aggravator applied to his case, and the trial court agreed:

The People have proven beyond a reasonable doubt that the Defendant concealed his purpose and his intention to kill Sergeant Autobee.

Clearly the concealment of physical presence is sufficient to establish a claim of lying in wait. The issue is whether concealment of purpose or intent is also sufficient to establish a claim of lying in wait. There is no specific Colorado case law on this issue. Other jurisdictions have indicated that lying in wait covers, in addition to physical concealment, concealment of purpose or intention. *See People v. Morales*, 770 P.2d 244 (Calif. 1989), and *People v. Carpenter*, 935 P.2d 708 (Calif. 1997). Given the facts outlined above in People's Exhibit 50 concerning the Defendant's waiting for the opportunity to strike the victim and the concealment of the purpose of his actions from the victim, this Court finds that this aggravator has been established beyond a reasonable doubt.⁸³

In other words, at the urging of Brauchler and Orman's own colleagues, a Colorado court has concluded that the lying in wait aggravator applies any time a defendant seeks to surprise the victim *or* any time the defendant seeks an advantageous opportunity to kill and conceals his or her purpose. This is the definition of lying in wait urged (successfully) by Brauchler's own office—we simply applied it.⁸⁴

We mention this critique of our use of the lying in wait aggravator because it is but one of many places in their article that Brauchler and Orman appeal for deference to their years of trial court experience. Perhaps what Brauchler and Orman mean to say is that they would not charge "lying in wait" in the vast majority of deliberate killings. This

81. Brauchler & Orman, *supra* note 3, at 661–62.

82. Sentencing Order at 10–11, *People v. Montour*, No. 02-CR-782 (Colo. Dist. Ct., Douglas Cty. Feb. 27, 2003).

83. *Id.* at 11.

84. There were twenty-two formal death prosecutions during the study period. *See* Marceau, Kamin & Foglia, *supra* note 9, at 1111. Of the twenty-one such prosecutions in which a notice of aggravating factors was filed, the lying in wait aggravating factor was alleged in nine cases, which belies the claim that Brauchler and Orman make about this factor being regarded as "very rare." Brauchler & Orman, *supra* note 3, at 662.

might be true, but it has no bearing whatsoever on our conclusions or on the constitutionality of the Colorado statute. Whether Brauchler and Orman may personally choose to apply a narrowing construction to this aggravating factor has no relevance to the question of whether, at the stage of legislative definition, the aggravating factors in the Colorado capital statute narrow the class of death-eligible defendants. Just as prosecutors cannot save Colorado's statute by promising, for example, that they would never seek death unless two or more aggravators are clearly present, they cannot by fiat redefine an aggravating factor so as to render its application less capacious. Constitutional narrowing must occur through legislative enactment of objective criteria, not through prosecutorial grace.

C. Colorado's First-Degree Murder Is Not Narrowly Circumscribed

Among Brauchler and Orman's many misstatements, one of the most blatant is their assertion that Colorado's "definition of 'first-degree murder'" is narrower than most all other states.⁸⁵ They make this claim to counter our findings (which their own office confirmed) that the aggravating factors do not do any meaningful narrowing work under the current statutory framework. And it is at least theoretically possible that for a state's narrowing to be done not just by the aggravating factors, but by a very specific first-degree murder statute. The problem, however, is that their characterization of Colorado's first-degree murder provision is entirely divorced from the textual reality and from the operation of the statute in practice.

Colorado law permits one to be convicted of first-degree murder based on an unintentional killing—killing with extreme indifference is a category of first-degree murder in our state.⁸⁶ Very few, if any, other states allow one to be guilty of the highest grade of murder for a single unintentional, non-felony murder. Furthermore, all felony murder in Colorado is first-degree murder; unlike most other states, Colorado's murder statute lacks a second-degree felony murder provision. Brauchler and Orman attempt to elide these damaging facts by arguing that the "most utilized theory of first-degree murder" is a killing that occurs "after deliberation," which they explain is narrower than first-degree murder in some other jurisdictions.⁸⁷ This is yet another example of the prosecutors attempting to use their own discretion to fix flaws in the capital statute. They argue that the relevant definition of first-degree murder is what their office is likely to prosecute as first-degree murder, rather than what the statute actually says. Of course, this is not how a legal system works—a statute is judged on its words, not simply on the way a pair of prosecutors choose to understand and apply those words. There is noth-

85. *Id.* at 644.

86. COLO. REV. STAT. § 18-3-102(1)(d) (2016).

87. Brauchler & Orman, *supra* note 3, at 644–45.

ing Brauchler and Orman can say that would change the plain reality of the Colorado statute, which is that it allows nearly 90% of murders to be prosecuted as first-degree murders. So instead, they ignore the actual Colorado statute and analyze only the “after deliberation” form of first-degree murder.

III. CONCLUSION: COLORADO’S DEATH PENALTY IS UNCONSTITUTIONAL

The Brauchler and Orman article strains mightily to convince readers that the death penalty in Colorado is simply a matter to be determined by public opinion. Their article is replete with data about the popularity of capital punishment in this state. From this data they conclude that Colorado’s death penalty is constitutional and that our research is irrelevant. Trust us, they seem to say, the death penalty is working fine.

This is one of the themes in their article; after the inflammatory language is stripped away, one is left with little more than a demand by two powerful prosecutors to be left alone. Pay no attention to those academics, they argue, the death penalty is working just fine, and the people of the state are happy with how we and other prosecutors are using it. It is a chilling and dark commentary on how these career prosecutors and politicians view academic scholarship. They attack the credibility and the methods of the messengers, rather than taking accountability for what we have shown are profound shortcomings in the current system.

What all of their invective cannot do, however, is change the facts or law regarding the death penalty in Colorado; as our study shows, Colorado’s death penalty statute fails to pass constitutional muster. We show that nearly every murder in Colorado could be charged as first-degree murder, and nearly every one of those is statutorily eligible for the death penalty. Our numbers could not be more clear, and the conclusion from them could not be more straightforward: Colorado’s death penalty is fatally, unconstitutionally defective. We would hope that Brauchler and Orman would spend their time constructively trying to fix a broken system rather than assailing our motives and attacking our concrete empirical evidence.