

CAPITAL PUNISHMENT IN COLORADO: 1859–1972

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INTRODUCTION

The history of capital punishment in Colorado is as old as the state's history of European settlement. It begins in 1859, when the first murder ever recorded in the new settlement of Denver was avenged by the hanging of the confessed perpetrator, John Stoefel. At the time, six-month-old Denver comprised part of Arapahoe County, in Kansas Territory. Although the community housed only 150 buildings (mostly saloons and gambling halls), some one thousand spectators attended the execution. Stoefel was driven in a two-horse wagon to a cottonwood tree in Cherry Creek, a rope was put around his neck, and he dropped to his death when the wagon was driven out from underneath him. (1) A fortnight later, the inaugural issue of the first Denver newspaper, the Rocky Mountain News, published the news about the crime and execution. (2)

This Article and its Appendix present information regarding every execution that occurred in Colorado between 1859 and 1972. The Article also examines the debates that changed the way in which the death penalty has been practiced in Colorado, including the movement of hangings from local counties to one central location in Cañon City in 1890, the temporary abolition of the death penalty in 1897, the continual search for a more "humane" way to execute, and the longstanding presence of strong abolition sentiment in the state. (3) It will review how this abolition sentiment led to a temporary moratorium on the death penalty in the mid-1960s, which ended with the defeat of a ballot initiative in 1966 that would, had it passed, have removed the death penalty from Colorado's statutes. This Article concludes with general observations regarding the role of the medical profession in Colorado executions; comments about cases in which reasonable doubts exist about the guilt of the executed defendant; and a general discussion of the importance of race and ethnic status in determining who was executed in the state. Overall, this Article argues that the history of the death penalty in Colorado prior to 1972 is a history of its gradual restriction. Further, it demonstrates that the death penalty has always sparked controversy in the state; Colorado has housed substantial anti-death penalty sentiment, often led by religious leaders and politicians, as well as criminal justice and prison officials.

The Article begins by defining what is meant by a "legal execution" and explaining how I obtained information on the cases. The Article then presents the names of those executed in Colorado, the dates of their crimes and dates (and days of week) of their executions, the number of murder victims in each case, and information on the estimated number of spectators who attended the execution if it was open to the public. Part II examines ten executions that occurred in counties before Colorado became a state and fifteen others that occurred in counties before all executions were moved to the State Prison in Cañon City in 1890. Part III reviews hangings in the 1890s, the state's efforts to make executions more humane and to remove the role of the executioner in causing the death, and the rise of abolitionist sentiment in the state during the decade. Part IV discusses

Colorado's experiment with complete abolition (1897–1901), which ended not because of increased crime in the state, but because angry vigilante mobs lynched criminals who they believed no longer deserved to live. Part V examines the executions in the first two-thirds of the twentieth century, beginning with hangings (1905–1933) and then, as a consequence of renewed efforts to make executions more “humane,” asphyxiations, (1934–1967). Part VI looks at the battles over the death penalty in the 1960s and early 1970s, both in Colorado and elsewhere in the U.S., which was fought in the legislature, the courts, and the arena of public opinion. The Article concludes with observations about key issues in Colorado's death penalty debate, including physician involvement, racial and ethnic bias, and the execution of the innocent.

I. COLORADO'S LEGAL EXECUTIONS: METHODOLOGICAL ISSUES AND GENERAL PATTERNS

This Section discusses how to define legal executions and differentiate them from lynchings, how to identify legal executions, and how information about them was collected. After identifying the relevant set of executions, I explain some general patterns.

A. Defining and Identifying Executions

In the 110 years after John Stoefel was hanged from the cottonwood tree in Cherry Creek in 1859, 101 additional legally mandated executions occurred in what would become the state of Colorado in 1876. The last of these 102 executions occurred in June 1967, when Luis Jose Monge, having fired his attorneys, was granted his wish and was asphyxiated at Colorado State Penitentiary in Cañon City. (4) He was the last person executed in the United States before the 1972 *Furman v. Georgia* decision, (5) in which the Supreme Court effectively invalidated all but a few death penalty statutes nationwide. (6) Across the country, no other executions occurred until 1977. (7) Colorado did not execute another person for three decades, until the state executed Gary Davis in 1997. (8) This Article focuses on the history of the death penalty in Colorado prior to the 1972 *Furman* decision and hence focuses on 102 of the 103 executions known as of 2003. (9)

Assembling a list of those executed in Colorado's history is neither a simple nor a straightforward task. Before November 1890, Colorado executions occurred in counties, and there has never been a “master list” that gives students of the death penalty the names, dates, and places where executions were carried out under county authority. The best single source for execution data, both in Colorado and in other states, comes from the scholarship of M. Watt Espy, an Alabama researcher whose work in documenting executions scholars regard as definitive. (10) As a starting point, Mr. Espy supplied his data for this project, which included the names and dates of approximately ninety percent of the executions included in the Appendix. Extensive searches in the Colorado State Archives, Denver Public Library, and Norlin Library at the University of Colorado-Boulder (as well as in several smaller libraries throughout the state) were conducted to supplement the Espy data and to collect information on each execution. In several cases in which the race of the victim who had been murdered by the executed prisoner was

unknown, information was obtained from death certificates from the Health Statistics Section, Colorado Department of Public Health and Environment.

To assemble a complete list of Colorado executions, decisions had to be made on how to accurately distinguish a legal execution—performed after a trial under statutory authority—from a lynching—in which a mob or group performs an execution without legal authority. Stephen J. Leonard has documented some 175 lynchings in Colorado between 1859 and 1919, including two in which the victims were burned to death and one in which a woman was lynched. (11) Sometimes a perfunctory trial before a vigilante court preceded a lynching, but that extra-legal trial should not cause today’s historians to classify the hanging as a legal execution. On the other hand, five cases listed as legal executions in the Appendix arguably should be classified as lynchings, (12) but are included in the inventory of legal executions because they were, at least, quasi-legal. Strictly speaking, these five executions occurred without statutory authority. In each, however, the prisoner received a formal trial, which included a judge, defense attorney, prosecutor, and jurors, and attempts by those in charge to provide the prisoner with minimal due process protections, such as the opportunity to cross-examine witnesses. The five defendants in these questionable cases were tried in forums known as “People’s Courts.”

People’s Courts were used in Denver between 1859 and 1861, when the territory of Colorado was organized. (13) At the time, Denver was under the jurisdiction of Arapahoe County, Kansas Territory, but the nearest functioning court system was in Leavenworth, Kansas. Thus, in pre-railroad days, Colorado lacked an effective, legally sanctioned criminal justice system. Hence, ad hoc People’s Courts developed, which varied slightly in structure from case to case but usually had one man serving as a judge and twelve others as jurors. (14) In at least one of these cases, the court summoned twenty-four prospective jurors and permitted the prosecutor and defense to strike six. (15) Given these efforts to ensure some measure of due process and the implausibility or impracticality of any alternative, this Article’s catalogue of legal executions includes these cases. These same criteria led to the exclusion of other defendants whose hangings followed perfunctory trials in jurisdictions in which and at times when legitimate legal remedies within the criminal justice system existed. Take, for example, the hanging of Joseph (Jack) Carr on November 6, 1869, in Evans, Weld County. After a quarrel, he shot the owner of a local hotel, who was a former member of the territorial legislature. Once apprehended shortly after the murder, Carr was then taken back, a people’s court was organized, with Capt. R. Sopris as judge, a jury empaneled, and after a trial lasting half an hour, the jury returned a verdict of murder in the first degree, and the judge sentenced him to be hung to the nearest tree, which was done. (16)

To today’s eye, this proceeding is merely a vigilante court with perfunctory hearings followed by lynch-mob justice. Furthermore, unlike in earlier years, the Territory of Colorado had an active death penalty statute after November 1861. (17) Hence, it is not included in this catalogue of legal executions.

B. General Patterns in Colorado Executions

Using this methodology, a total of 102 legal executions between 1859 and 1972 were identified. Only men were executed, (18) all of whom were convicted of murder. (19) Table 1, which follows this Article, summarizes these executions, breaking them into four categories: county authority, pre-statehood (ten cases), county authority after statehood (fifteen cases), hangings under state authority (forty-five cases), and asphyxiations under state authority (thirty-two cases). (20) Table 1 also lists the date of the offense, date of execution, the day of week on which the execution occurred, and the number of months between the crime and the execution.

As shown in Table 1, on eight occasions, two men were executed on the same day (21) and twice the state executed three people on a single day. (22) One of the double executions claimed the lives of Louis and John Pacheco, who are the only brothers to be executed in the state. (23) Table 2 categorizes some of the data from Table 1 so that various trends by decade can be examined. During the 1930s—Colorado’s busiest decade—twenty-five executions took place, seven in 1930 alone. Colorado’s execution total was also in double figures in the 1880s (thirteen), the 1890s (twelve), and in the 1940s (thirteen). There were, however, only ten executions (including the 1997 execution of Gary Davis) in the last half of the twentieth century.

Table 2 also collapses data from Table 1 to calculate the average time between the crime and execution. Prior to 1869, when there were few places to confine prisoners, executions typically occurred within two months of the crime. During next ninety years, prisoners’ executions occurred roughly one to two years after their crimes. By the 1960s, however, the average prisoner waited four years after the crime before his execution. The longest time between the commission of the crime and execution came in the case of Leroy Adolph Leick, executed in January 1960, after a six-year battle fought mainly over his mental competence for execution. (24) In sharp contrast, the average time between sentence and execution for the 749 inmates executed in the U.S. between 1977 and 2001 was ten years. (25)

Table 3, also collapsing case-by-case data from Table 1, shows that about seventy percent of Colorado executions occurred on Fridays. This finding holds for both executions under county authority (1889 and earlier) and those conducted in and after 1890 under state authority. This result occurred because Colorado statutes required that the trial judge, or state Supreme Court if the case was appealed, designate a week during which to conduct the execution. The sheriff or warden, however, had discretion to determine the exact day and hour. The Colorado Supreme Court defined that “week” as beginning at midnight Saturday and ending at midnight the following Saturday. (26) Friday executions allowed the prisoner to live most of the week and eliminated the need for those employees involved in the execution to work on weekends.

Table 4 shows that three-quarters of those executed in Colorado—78 out of 102—were sentenced to death for killing one victim. Five were convicted of killing four people, including three co-defendants who killed four people during a bank robbery in Lamar in

1928. (27) In 1957, the state executed John Gilbert Graham, the only person executed for killing more than four people, after his conviction for blowing up an airliner in 1955. (28) Finally, Table 5 displays the estimated attendance at executions that were conducted in public and open to all interested citizens. Executions were important social events, and often they attracted large audiences—some of the biggest crowds ever assembled in the state—from distant towns and cities. As discussed below, by the 1880s, the popularity of executions and their festive atmospheres prompted the state to turn them into private events. The largest crowd to witness an execution assembled in Denver in 1886 to watch Andrew Green slowly strangle to death.

Having observed some general patterns in Colorado executions, this Article now focuses on the laws and individual executions that form these patterns.

II. 1859–1889: THE LAWS, THE DEBATES, AND PUBLIC HANGINGS IN COUNTIES

Prior to 1890, Colorado counties conducted executions in Colorado by hanging. No central place existed to hold all executions in the state and most executions were public. This section reviews those hangings that occurred under county authority, the laws that permitted them, and the debate surrounding them. Ultimately the state moved executions behind the closed doors of one prison, largely because of the atmosphere of public executions that some felt demeaned the communities in which they were held.

A. The Debate

The justification that underlay Colorado executions in the 1860s disappeared with the opening of a territorial prison in Cañon City in 1871. (29) In addition to a formal criminal justice system, Colorado settlers in 1860 lacked jails or prisons, other than distant federal prisons, that housed those convicted of violent crimes for long periods of time. (30) An 1866 newspaper description of the first Denver execution under territorial law noted that “[p]revious to this the exigencies of the times threw the administration of justice for capital offenses into the hands of the people and People’s Courts, which, on account of the absence of places wherein to confine notorious criminals, were obliged to dispense justice in a very summary manner.” (31)

Supporters of the death penalty mainly cited its deterrent effect as a justification, while voices in opposition focused on religious principles and the basic immorality of revenge. A debate in the Rocky Mountain News in 1867 provides examples of the arguments from both sides. A lengthy letter to the editor complained that the death penalty is “clearly opposed to the divine precepts of Jesus, . . . [and] at variation with every principle of justice.” (32) The author denounced the death penalty as pure retaliation and revenge and pointed to several European countries to show that the death penalty was in decline. Finally, the author argued that imprisonment for life “is a more horrible thing to contemplate, in many instances, than death.” (33) In response, the editors of the Rocky Mountain News focused on the death penalty as a means of deterring future murderers from criminal violence, explaining:

It is a fact well known to all our pioneer settlers, that were it not for the visitation of the death penalty upon notorious offenders, our city would at one period have been so completely sunken in the wicked depravity of crime, as to have made it utterly impossible for a quiet, peaceable man, much less a God-fearing, law abiding one, to reside in it. (34)

Notably, this debate lacks any discussion of two leading modern justifications for the death penalty: retribution and the need to execute killers to help ease the grief of the families of the murder victims. Instead, these nineteenth-century justifications for the death penalty focused on religious principles, the need to execute killers because they could not be kept in prison for long periods of time, and deterrence.

B. The Legislation

Governor William Gilpin signed the first legislation authorizing the death penalty in the Territory of Colorado into law on November 5, 1861, (35) which was codified in 1868. (36) The first legal execution under territorial authority took the life of William S. Van Horn, who was hanged before a crowd of “thousands” in Central City on December 18, 1863. (37) A bill signed by Governor Edward M. McCook on February 11, 1870, amended the 1868 capital statute. (38) Legislative glitches, however, spared the lives of several murderers, because the 1870 legislation permitted defendants to avoid the death penalty by pleading guilty and avoiding a jury trial. As Perruso explains:

“The legislation . . . limited the availability of the death penalty to cases in which the jury found not only that the defendant was guilty of murder, but also that the killing was deliberate, premeditated, or committed during the perpetration (or attempted perpetration) of a felony.” (39)

The 1876 Denver trial of Filomeno Gallotti and two of his associates (“the Italian Murderers”) for a quadruple murder revealed this “loophole.” The murders were especially atrocious, and the defendants escaped several lynching attempts before their trial. Future Colorado Governor and U.S. Senator, Charles S. Thomas, served as Gallotti’s defense attorney. (40) Thomas successfully argued that no jury could be impaneled following a defendant’s guilty plea, which negated the possibility of a death sentence. The three defendants promptly received sentences of life imprisonment. (41)

Before this issue was resolved, Colorado achieved statehood, and the state’s first legislature adopted both the 1868 death penalty statute and the 1870 provision amending it. (42) On February 2, 1877, an African-American named James Miller, convicted of killing a white man at a dance hall after being harassed by another white patron, became the first prisoner who the state of Colorado legally executed. (43) Miller pled not guilty, thus closing the door to the type of relief won by the Italian Murderers.

In 1881, the legislature attempted to close the avenue through which the Italian Murderers escaped the gallows by repealing the provisions of the 1870 statute. They instead adopted a new statute with essentially the same provisions but adding a proviso

that in case a defendant pleaded guilty of murder, a jury should pass on the question whether the murder was deliberate and premeditated or not. Thus in the case of a positive finding, the death penalty could be imposed. (44)

This corrective action, however, was itself flawed because by repealing the 1870 statute the convictions of all those sentenced under its authority could not be sustained. (45) The Colorado Supreme Court revealed a similar flaw in an 1882 decision. The Colorado legislature had repealed a larceny statute in 1881 without a “savings clause” to maintain the applicability of the statute to all crimes committed prior to its repeal. (46) Similarly, in the 1883 decision *Garvey v. People*, (47) the Colorado Supreme Court held that any murder conviction under the 1870 statute could not be sustained because the amended statute did not contain a savings clause, thus prohibiting the retroactive application of the new 1881 statute. (48)

This 1883 decision also effectively spared the life of one of Colorado’s most notorious felons, alleged cannibal Alfred Packer. Packer received a death sentence for the murder of five companions on April 13, 1883, one month prior to the Garvey decision. In 1885, the Colorado Supreme Court invalidated Packer’s death sentence under Garvey but allowed the state to try Packer under Colorado’s manslaughter statute, which had avoided legislative tinkering. (49) In 1886, Packer was convicted of manslaughter and sentenced to forty years in prison, fifteen of which he served before being paroled in 1901. (50)

Following Packer’s flawed death sentence in 1883, the legislature finally corrected the statute to allow capital punishment of defendants who pled guilty. (51) For the first time, this statute established degrees of murder, setting a penalty of ten years to life for those found guilty of second-degree murder. (52)

C. The Controversy about Public Executions

Public executions—whether legally authorized or by lynching—were important social events in the community that served an entertainment function. Legal executions regularly attracted audiences of between one thousand and five thousand spectators. (53) By far the largest number of witnesses to an execution gathered in Denver on July 27, 1886, to watch Andrew Green die for the murder of a streetcar driver. (54)

Debate in Denver over whether hangings should be public accelerated in the month before Green’s execution. By that time, several eastern cities—including Boston, New York, and Philadelphia—had abolished public hangings, and some civic leaders feared that the spectacle of a public hanging would tarnish the image of the progressive, cosmopolitan city that Denver was trying to cultivate. (55) A year before, State Representative Lafe Pence of Ouray had tried to abolish public hangings following the lynching of a woman in his city. (56) Editorials in the Denver Tribune-Republican urged the sheriff to conduct the hanging in private, but other editorials in the Rocky Mountain News urged the sheriff to open the event to the public. (57) As a compromise, the sheriff allowed the public to witness Green’s execution but did not announce its site beforehand. Instead, the site became known only on the day of Green’s death when carpenters arrived

to construct the gallows. By the time they finished the job—still several hours before the hanging—some three thousand spectators had already assembled. (58)

Green was hanged with “twitch-up” gallows, which were thought to inflict less suffering on the prisoner and to run a lesser chance of blunder than the more traditional “long-drop” gallows. With long-drop hanging, the prisoner drops with a rope around his neck, and his weight causes death through strangulation or a broken neck. (59) With the “twitch-up” method, a weight greater than that of the condemned man’s body causes the death. (60) In Green’s case, the executioner attached a 310- pound weight to the rope, which was strung through series of pulleys on a horizontal beam. When the weight fell, taking with it the slack in the rope around his neck, Green shot up about four feet into the air. (61) The launch, however, failed to break Green’s neck, so the crowd of fifteen to twenty thousand spectators, (62) including a choir that sang several hymns during the ceremony, watched for nearly twenty-three minutes as Green slowly strangled to death. (63) In the aftermath, as King notes, “*the abolition of public hangings in Colorado, because of the Denver experience with Andrew Green, was an idea whose time had surely come.*” (64)

Overall, in the three decades prior to 1890, the death penalty invoked heated public debate in Colorado. Although some western lore and many western television shows often depict a citizenry that welcomed frequent executions, in fact, fewer than one execution occurred per year in the state and the executions were always debated. Eventually, increasing opposition to the festive atmosphere surrounding public executions led to their abolishment.

III. NINETEENTH-CENTURY HANGINGS UNDER STATE AUTHORITY

The botched execution of Andrew Green, and the spectacle surrounding it, fueled the movement to abolish public hangings in Colorado. To make executions less visible to the public, critics of public hangings urged legislators to “centralize” executions by moving all hangings in the state to one location and conducting them under the authority of the state rather than the counties. A growing desire to search for ways to apply the death penalty more humanely and with limited involvement of prison personnel accompanied increasing cultural opposition to public executions. This Section discusses the move from public hangings in counties to private executions in one central location.

A. The Shift to Centralized Executions

The outrage sparked by the circus and party atmosphere alone did not lead to the uproar by opponents of public executions. Rather, the perception of an “image problem”—a belief that public hangings were bad for business in the rapidly developing city—similarly fueled opposition to public executions. As William King notes:

“Hanging people in the public square had no place in a modern society that emphasized order and control; it effected an unsavory image, was bad for long-term growth and development, and should therefore be opposed by progressive-minded people.” (65)

Or, as Stuart Banner puts it:

“Public executions would be widely criticized in the nineteenth century, and much of the criticism would be directed at the crowd, who would be accused of drunkenness, irreverence, rowdiness, and similar sins. Respectable Americans of the nineteenth century would come to feel embarrassment at the idea of attending an execution, and superiority to the sort of person who would attend.” (66)

Six months after Green’s death, Governor Benjamin H. Eaton called for legislation outlawing public executions. It took almost three years after Green’s death, however, for the legislature to pass such a bill. On April 19, 1889, Governor Job A. Cooper signed a bill moving all executions within the walls of the state penitentiary in Cañon City. (67) Those who most strenuously objected to the new law included Colorado State Penitentiary Warden J.A. Lamping, who perceived executions as incompatible with the rehabilitative goals of the prison. (68) The last public hanging in Colorado took the life of Jose Abram Ortiz (69) in Conejos on July 16, 1889, three months after Governor Cooper signed the new legislation but three days before the ban took effect. (70)

Because of the fierce opposition to public executions, the 1889 legislation not only prevented the public from attending executions but also from learning any details about them. Thereafter, the warden in charge of the execution no longer announced the day and time of the execution in advance. The legislation mandated that state officials keep all details about the execution secret, although such officials later violated the rule at irregular intervals. Furthermore, the legislation permitted only a small group of spectators to witness each execution and prohibited the spectators from divulging any details. (71) The legislation mandated that immediately after the execution, “a post mortem examination of the body of the convict shall be made by the attending physician and surgeon” (72) Several other states passed similar secrecy laws at roughly the same time, but occasionally these laws were flouted, and prison officials and others in attendance leaked details about a given execution, such as information about the inmate’s demeanor in his last moments. (73)

The new laws were particularly aimed to restrict access to executions by children and women. Until 1890, children frequently attended public executions in Colorado; parents and other adults who believed the death penalty had a deterrent effect considered the experience particularly instructive. The elimination of public executions effectively ended the opportunity for women and children to witness the events. One death penalty historian, Stuart Banner, attributes the masculinization of executions partly to positions of power, with men more likely than women to have the jobs and connections necessary to secure invitations to hangings. (74) In addition, changing social mores led to the perception of attending executions as an un-feminine activity.

On November 8, 1890, Noverto Griego, convicted of killing a merchant in Trinidad, became the first of forty-five prisoners to be hanged at the Colorado State Penitentiary (then the Territorial Prison), in Cañon City. (75) In supervising the execution, Warden J.A. Lamping followed the law closely by not disclosing in advance the time of the hanging and by keeping secret all of the details of the hanging after it occurred. The warden could invite only six people—all men—to attend executions, none of whom were representatives of the press and all of whom were sworn to secrecy. (76) “Newspaper men of every description were positively forbidden admittance, and the utmost secrecy was observed until after the execution, when it was readily ascertained who the witnesses were and that everything had worked well.” (77)

B. Hangings in the 1890s and the Influence of Changing Technology

When the legislature charged the state prison—against Warden Lamping’s wishes—with the responsibility of conducting executions after 1890, no one coveted the duty of serving as the hangman. Consequently, there was an attempt to build a hanging machine that would not require a prison worker or volunteer citizen to spring open a trap door on the gallows and otherwise supervise the execution. At the same time, the authorities wanted a hanging machine that accomplished its mission quickly and did not cause prolonged suffering for the inmate.

As seen in Table 2, eleven more hangings occurred in the prison at Canon City after Griego’s death during the 1890s. The next hanging took place in January 1891, and James Joyce, convicted of killing a coworker after a day of heavy drinking, was the victim. (78) According to the Rocky Mountain News, the surgeons declared that the execution was “*the most successful and painless execution that has ever been performed in America.*” (79) They credited Warden Lamping for this achievement and particularly a hydraulic process that was used in the hanging. In effect, this invention, “*which is intended to do away with the repugnant duties of the executioner,*” (80) required the prisoner to hang himself. The Rocky Mountain News described:

“The criminal . . . stepped upon a small carpeted platform, two feet by three feet . . . and the plug was drawn out of the can in the adjacent room, and as the water, weighing some forty pounds, trickled away it lessened the weight on the end of an iron rod until that dropped off, and Joyce’s soul took its flight into eternity.” (81)

The hanging machine was used again eight months later on William H. Davis, (82) who had been convicted of killing his foster mother and her paramour. (83) A few months after Davis’s death, the New York Times printed a more detailed description of Colorado’s unique hanging machine:

“In the centre of the death chamber is a platform about four feet square, raised, perhaps, five inches above the level of the stone floor. Over this platform dangles the noose. The hangman’s rope runs over a pulley wheel at the ceiling and disappears through a small aperture into the adjoining room. To the end of the rope, in this second room, is attached an iron weight of 370 pounds. This weight is supported, six feet from the floor, by a cross

beam which may be likened to the beam of a large pair of balancing scales. On its end opposite the weight is suspended a small wooden cask containing about two gallons of water. This water cask may be moved from right to left and an exact balance thereby given to the cask and the iron weight. In the bottom of the cask is a wooden plug and connected with it is a small, strong cord leading from the plug to the platform in the death chamber.

When . . . [the condemned inmate] steps on the platform . . . [h]is weight on the platform removes the plug from the cask, the water rushes from it until the cask is sufficiently lightened, and then the heavy weight on the opposite end of the beam drops on a thick mattress on the floor. (84)

When the weight dropped, the prisoner, attached by his neck to the other end of it, abruptly went skyward. This “twitch-up” method of hanging led to the expression that the inmate was “jerked to Jesus.”” (85)

After Davis’s execution, the state hanged nine other men from the gallows in Cañon City before the end of the nineteenth century. No executions occurred between 1892 and 1895 because Governor Davis Waite opposed the death penalty, (86) but seven took place during 1895 and 1896. These included two men hanged on May 11, 1895 for separate crimes: Thomas Jordan, who shot a coworker, (87) and Peter Augusta, who killed a man in a lover’s triangle. (88) The attending physician described the executions as “the most skillful that had been made in his seventeen years’ experience as prison surgeon,” even though Jordan’s neck did not immediately break and he dangled from the gallows for eleven minutes before death was pronounced. (89) Jordan’s execution had been vigorously contested by his attorneys; he was the first prisoner hanged at Cañon City to appeal his conviction to the Colorado Supreme Court. (90) Concerns about his sanity were so paramount that Governor Albert W. McIntire visited Jordan on death row so he could ascertain with first-hand personal information whether clemency was in order. (91) The last executions of the nineteenth century took the lives of three codefendants hanged in June 1896 for their roles in killing a Trinidad police officer. (92) Although no one knew it at the time, these executions proved to be the end of an era in Colorado, as the state later abolished the death penalty.

IV. ABOLITION AND REINSTATEMENT: 1897–1901

Unlike most other states that today retain capital punishment, Colorado experimented with the total abolition of the death penalty. Unfortunately for death penalty opponents, angry mobs viewed the abolition of the death penalty as a license to resort to lynching. Leading newspapers, fearing that national opinion might associate the lynch mobs with a perception of Colorado as uncivilized or barbaric, tried to frame the discussion as the absence of capital punishment rather than the barbarity of the mobs. The legislature soon followed to put Colorado’s executioner back in business.

In 1846, Michigan became the first state in the U.S. to abolish the death penalty. Rhode Island and Wisconsin followed in 1852 and 1853, respectively. Iowa temporarily

abolished the death penalty in 1872, but restored it in 1878, and Maine abolished the death penalty between 1876 and 1883. Colorado followed as the next state to experiment with abolition. (93)

Efforts to abolish the death penalty in Colorado, led mainly by religious leaders, greatly accelerated in the mid-1890s. On March 15, 1893, by a nineteen to thirteen vote, the state senate passed a bill abolishing the death penalty, (94) but the house of representatives defeated the measure two weeks later, thirty to nineteen. (95) On February 28, 1895, a bill abolishing the death penalty passed without debate in the state senate. (96) The Denver Post applauded the move, although the editors added that the bill would strengthen the anti-death penalty position if it also removed any hope of a pardon for the prisoner. (97) Ultimately the bill died in the house of representatives, (98) but it successfully resurfaced two years later.

On March 29, 1897, Governor Alva Adams signed legislation abolishing the death penalty for all crimes and substituting life imprisonment at hard labor for those convicted of first-degree murder. (99) Two years later, Governor Adams applauded the repeal in his annual message to the legislature, calling it “the most forward step in criminal legislation that has yet been taken in Colorado.” (100)

During three years after abolition, there were no strong efforts to restore the death penalty to the law books. In early 1899, the Boulder Daily Camera editorialized: “There is no call for a revival of that relic of barbarism, capital punishment. Colorado, in the vanguard of progress, must take no step backward.” (101)

Despite that optimism, three lynchings early in the new century rekindled efforts to bring the executioner back into the state’s employ. The first lynching occurred in Cañon City in January, 1900, after four prisoners escaped from the state penitentiary, murdering a guard in the process. (102) All four men were soon recaptured. When Thomas Reynolds, the one who had killed the guard, returned to Cañon City, an angry mob of five hundred citizens seized him and lynched him from the nearest telegraph pole. (103) When Governor Charles S. Thomas and Secretary of State Charles Stonaker heard the news, Secretary Stonaker recognized at once that the lynching would fuel renewed debate over the death penalty:

“Lynching is a horrible thing, . . . but this affair has been horrible from the start. If lynching was ever justifiable, it was in this case, but I cannot put myself in the position of indorsing [sic] it . . . Capital punishment will never be restored. The people have outgrown it. It was useless. It was not a deterrent of crime. It is merely an end of the criminal.” (104)

Nonetheless, within a few days, the Denver Times renewed its call for restoration of the death penalty. (105)

Four months later, a mob of roughly six thousand citizens lynched Calvin Kimblern, an African-American suspected of killing two young girls. No investigation was ever

undertaken to identify the lynchers; the coroner refused to investigate the death because, he said, Kimblern was not a human being. Governor Charles S. Thomas justified the lynching as “a natural outburst of indignation of the people of Pueblo.” (106) He pointed out that because no death penalty existed, Kimblern would have received a prison sentence for the crimes, and people seeking a commutation of Kimblern’s sentence would then bother a future governor. Thus, he reasoned, the absence of the death penalty—not racial hatred run amuck—bore the blame for the lynching. (107)

Newspapers around the state echoed this theme. On the day after the lynching, the Denver Post quoted editorials in the Denver Republican, Colorado Springs Gazette, and Pueblo Chieftain calling for a restoration of the death penalty:

“The horror of the lynching at Pueblo has shocked the public, but it is the legitimate outcome of the abolishment of capital punishment. No punishment short of death would have fitted Kimblern’s atrocious crime Repealing the law providing for the death penalty was at least a piece of silly sentimental folly.” (108)

The Rocky Mountain News added:

“To prevent the recurrence of such horrors the death penalty should be restored In the case of such crimes as those committed by Kimblern a jury may be relied upon to fix the penalty at death, and the certainty that it will do so will stop the blackening of Colorado’s fair name with lynchings.” (109)

Six months later, a thirteen-year-old white girl named Louise Frost was sexually assaulted and murdered in Limon, allegedly by a sixteen-year-old black youth named John Preston Porter, Jr. After Porter’s apprehension in Denver, local newspapers quickly announced that his guilt was unquestionable, (110) and the calls for the return of capital punishment resurfaced. The Denver Post wrote:

“[T]he laws of Colorado, since the repeal of the law legalizing hanging, provide no adequate punishment for such inhuman brutes as those who commit outrageous crimes like that at Limon. Indeed, with capital punishment abolished there is in such cases a direct invitation to the outraged people to take the law into their own hands and visit upon the head of the brutal murderer such condign punishment as cannot fail to shock the whole community A few more object lessons will doubtless convince the people of the state that capital punishment should be restored to the statute books. While it may be true that ordinary life or long term imprisonment may be a fit punishment for the crime committed, there are times when nothing short of the death penalty will satisfy the demands of justice.” (111)

Back in Limon, mobs began to search all trains coming from Denver to see if one brought Porter back to the city for trial. (112) On November 15th, the Rocky Mountain News announced that Porter had confessed with the headline “Porter Condemned to Death By His Own Confession.” (113) The next day, the Rocky Mountain News reported that following a meeting in Limon, citizens had decided to hang Porter but chose not to

disgrace the state by resorting to torture. The Rocky Mountain News wrote, *“In addition to deciding that the execution would be a hanging the men of Lincoln County voted to notify all negroes [sic] of bad character to leave the county. Notices will be posted. If they do not go they will be quietly escorted across the border.”* (114) That afternoon, a crowd of three hundred met the train carrying Porter as it arrived in Limon and brought him to the site of the murder. Two hours later, the father of the victim took a torch and lit the fire that burned Porter at the stake. (115)

As historian Stephen Leonard characterized, *“In less than half a century the 1859 People’s Court had devolved into a mob shaking with pure enjoyment as they roasted a human being.”* (116) The following Sunday, ministers throughout Denver condemned the mob action, but several also called for the reintroduction of capital punishment as a method to deter future lynchers. (117) Again, some newspapers called for a repeal of the law that had abolished capital punishment. (118) As the spotlight shifted to the debate of capital punishment, pressure to condemn the lynchers lessened.

Thus, death penalty foes had a short-lived victory. Just four years after the abolition of the death penalty, the Colorado legislature again debated the death penalty. On February 8, 1901, by a forty-one to twenty-four margin, the state house of representatives voted to reinstate capital punishment following an intense debate. The sponsor of the legislation *“referred feelingly to the parents of Louise Frost,”* and one opponent accused those who supported the bill of *“cold and deliberate murder.”* (119) The bill passed the state senate on March 29. (120) Governor James B. Orman would not sign the reinstatement bill—but he did not veto it—and on July 31, 1901, it became effective without his signature. (121) As before, the new law permitted few witnesses to attend the executions (122) and dictated that virtually all aspects of the hangings to remain secret. (123) Juries decided whether to sentence defendants convicted of first-degree murder to death or imprisonment for life at hard labor. The new law rendered defendants under the age of eighteen at the time of conviction ineligible for the death penalty, as well as those convicted solely on circumstantial evidence. (124) To the regret of today’s students of the death penalty, the law also specified that “[n]o account of the details of any such execution, beyond the statement of the fact that such convict was on the day in question duly executed according to law at the state penitentiary, shall in any manner be published in this state.” (125) After the new capital punishment statute became law, only five more lynchings occurred within Colorado’s borders. (126) The decline in lynching was a national phenomenon, but to supporters of the death penalty in Colorado, the decline naturally resulted from the return of the state-employed hangman. Whether the death penalty deterred homicide remained an open question, but the pro-death penalty newspapers and legislators were no doubt pleased at the death penalty’s resurrection as a deterrent to would-be lynch mobs. (127)

V. TWENTIETH-CENTURY EXECUTIONS IN COLORADO

Sixty-five people were put to death in Colorado between 1905 and 1967, with just over half (thirty-three) hanged. Growing concerns about botched executions prompted the state to execute those sent to their deaths after 1933 by asphyxiation in the gas chamber.

This Section will review these executions, as well as the reasons behind Colorado's change in its method of execution.

A. Hangings, 1905–1933

In the first thirty-three years of the twentieth century, Colorado executed an average of one man per year with its “twitch-up” hanging machinery in Cañon City. In February, 1905, in *Andrews v. People*, a unanimous Colorado Supreme Court held that the new death penalty statute was constitutional. (128) J. Newton Andrews, however, was not the first to be hanged under its authority. Instead, Azel Galbraith, (129) whose execution was delayed pending the outcome of the Andrews case, was the first prisoner to hang in Colorado in the twentieth century. Galbraith, convicted of killing his wife and their eight-year-old son, went to his death on March 6, 1905.

The state next hanged Andrews and his codefendant, Fred Arnold. (130) They were convicted of entering a Denver home in a robbery attempt, murdering a sixty-three-year old resident, and wounding her son. At age nineteen, Arnold remains the only teenager and the youngest person ever executed in the state. The state also executed a fourth man in 1905: a deputy sheriff named Joseph Johnson, who was hanged for the murder of a prominent democratic politician in Trinidad. (131)

Colorado executed seven more men before 1920. The state sent Harry Hillen to his death for the senseless murder of a real estate agent during a robbery in Denver. (132) Hillen confessed to the murder, explaining that it was triggered “because he snarled at me. I can't stand snarls.” (133) The state executed seven inmates in the 1920s, the first four of whom were convicted of double murders. (134) Four of the seven received their sentences for domestic murders, which resulted from jealousy or lovers' quarrels. (135) Two cousins, Raymond Noakes and Arthur Osborn, were the last two hanged in the 1920s. (136) They killed their neighbor after an argument over access to a road on the neighbor's property.

Colorado executed as many people in 1930 as it had during all of the 1920s. Those executed in 1930 included three codefendants hanged the same night for the murder of four men during an attempted bank robbery in Lamar. (137) Although those murders were highly aggravated, two other men faced the executioner for killing their wives in domestic arguments. (138)

Four more executions followed in 1931, including Colorado's second triple-execution, which, like the first, (139) resulted from a botched bank robbery. Claude Ray, John Walker, and Andrew Halliday robbed a bank in Kansas and shot a sheriff in Eads, Colorado, as they attempted their escape. (140) In 1931, the state hanged quadruple murderer John Foster, convicted of pouring gasoline on his wife and three children and lighting them afire. (141)

B. The Continuing Struggle to Abolish or Perfect Executions

Weak undercurrents pushed to abolish the death penalty in the early twentieth century, but Colorado instead opted to shift methods of execution. For example, in 1916, the State Federation of Women's Clubs proposed a bill to abolish the death penalty. Heated argument broke out at the meeting of the Denver Ministerial Alliance when asked to support the bill. In the debate, Rev. John H. Houghton, rector of the St. Mark's Episcopal Church, left no doubt about where he stood on the measure, stating, "*Look at this disgraceful Bulger [an accused murderer]—I would hang him tomorrow. A man not worth one-ninety-thousandth part of a cent to the community. He should be hanged like a dog.*" (142) Similar debates raged in other states: Kansas abolished the death penalty in 1907, Minnesota in 1911, Washington in 1913, Oregon in 1914, North Dakota in 1915 (except for murder committed by a prisoner already serving a life sentence), South Dakota in 1915, Tennessee in 1915 (except for rape), and Missouri in 1917. (143) In Colorado, however, efforts to reform the death penalty in the years surrounding World War I failed.

Reform efforts accelerated again in the 1930s, focusing on improving the techniques of executions or abolishing the practice altogether. Colorado's "twitch-up" execution apparatus never worked with the perfection hoped for by its inventors. Although it is difficult to say with certainty, King reports that "*in forty of the forty-four instances where this method was employed in Colorado between 1890 and 1933 . . . death by strangulation was the result; in only four instances did the neck of the felon actually break.*" (144) By the 1930s, the weight that jerked the prisoner into the air had increased to six hundred pounds (145) and eventually even to one thousand pounds. (146) When the state hanged eighty-pound Eddie Ives (147) in 1930, the hanging rope came off the pulley, and Ives "*flew up to the ceiling, then dropped back to the floor.*" (148) This mishap required a second attempt at Ives's hanging. (149) These events fueled cries to find a more dependable, if not humane, execution method. Supporters of the change included Warden F.E. Crawford, "*a kindly and considerate man who abhorred executions and who regarded hanging as a form of punishment out of the Middle Ages.*" (150) During his tenure from 1927 to 1931, Crawford supervised a dozen hangings.

The Colorado legislature became dissatisfied with the state's use of the death penalty, and efforts to completely outlaw capital punishment resurfaced. In 1933, President Franklin D. Roosevelt joined those calling for the abolition of the death penalty. (151) In March of 1933, by a vote of twenty to twelve, the Colorado senate passed a bill abolishing the death penalty. (152) This bill, amidst two hundred others that dealt with a broad range of non-death penalty issues, ultimately died without action in the state house of representatives on May 8th, when members voted to adjourn. (153) Earlier that year, both the senate (154) and the house of representatives passed legislation formally switching the state's method of execution from hanging to asphyxiation. Arguably, this reform defused opposition to the death penalty by furthering the belief that executions were indeed "humane" and weakening abolitionists' claims that executions were inherently cruel. On March 31, 1933, Governor Edwin C. Johnson signed the bill, changing the method of execution for all capital offenses committed after that date. (155) Nevada

adopted the gas chamber in 1921 and first used it in 1924. Hence, when Colorado began its search for a new method of execution, lethal gas, as the most modern method available, was seen as the most technically advanced and civilized. In 1933, Colorado became the second state to adopt asphyxiation as its official means of execution. (156)

In May 1933, Warden Roy Best visited Carson City, Nevada, to inspect that state's execution apparatus. Once he knew what he wanted—a huge three-seat model—Best turned to the Denver firm of Eaton Metal Products Co. and paid them twenty-five hundred dollars to handle the construction. (157) Eaton Metals usually built boilers, but soon they found themselves with a side business of constructing gas chambers. Eventually they built gas chambers for all but one of the eleven states that adopted that method of execution. (158) Colorado used its three-seat gas chamber—nicknamed “Roy's Penthouse” in honor of Warden Best (159)—until 1955, (160) when the state constructed a new execution chamber and the builders deemed the original gas chamber too big and bulky for the new building. A lean, trim, one-seat model, also built by Eaton Metal Products, replaced the old three-seat chamber. (161) To the extent that concerns over painful and lingering deaths caused by bungled hangings threatened the future of Colorado's death penalty, the introduction of the gas chamber allowed the executioner to continue to practice in the state.

C. Asphyxiations, 1934–1967

On June 22, 1934, William Cody Kelley became the first prisoner to die in Colorado's gas chamber. (162) Kelley and an accomplice were convicted and sentenced to death for the beating death of a rancher, but the accomplice's death sentence was commuted and he spent fifteen years in prison running a business and building a savings account. (163) As done before many, if not most, subsequent asphyxiations, prison authorities first tested the gas chamber by executing a pig. Apparently their preparations led to success. Echoing a theme that newspapers claimed in several other cases, the Rocky Mountain News described the execution as “*far quicker and much more humane than any of the hangings which have preceded it.*” (164) Warden Best, pleased with the machine he helped design, pronounced the execution “the most successful and painless one ever conducted at the penitentiary.” (165) Still, the proclaimed success did not eliminate room for improvement. Although prison officials described the double execution of Pete Catalina (166) and Angelo Agnes (167) in 1939 as “*the quickest and most humane execution we ever had,*”¹⁶⁸ ironically, the public later learned that the gas chamber leaked during the execution—leading spectators to flee the room. (169) Two years later, the Denver Post claimed that the execution of Joe Coats (170) was “*the easiest and quickest death of any of the fourteen men*” who died in Colorado's gas chamber. (171) Clearly, the prison officials and the newspapers wanted to reassure the public that the prisoners were being executed humanely.

The next two to die in the gas chamber received convictions for murdering both a rancher and his son, and wounding his wife, in a robbery near Greeley. The killers, Louis and John Pacheco, died sitting in two of the three chairs in Roy's Penthouse. The two,

Mexican-Americans born in Colorado, (172) remain the only brothers executed in the state. (173)

Arguably the most controversial execution in the history of the state also took place in the 1930s, when the state executed a mentally retarded inmate named Joe Arridy for the rape and murder of a young Pueblo girl. (174) Arridy's conviction rested solely on the basis of his confession. In addition to Arridy, the state also executed Frank Aguilar, who possessed the murder weapon, for the crime. (175) Notably, as Aguilar's execution occurred, one of the witnesses suffered a heart attack and died. (176) Although his execution was otherwise routine, Arridy's stay on death row differed from the experiences of other condemned inmates. While on death row, he became close friends with Warden Best, who ultimately spoke out against the execution and purchased toys and picture books to help the inmate pass the time. (177)

Colorado executed thirteen individuals Colorado during the 1940s. At least one of those took the life of another mentally retarded inmate. (178) Even the sheriff who investigated the crime concluded that Sullivan was a "decidedly subnormal person." (179) The Colorado Supreme Court wrote: "*The experts were . . . practically unanimous in saying that [the] defendant's intellect was below 'the average normal level;' that he was 'of inferior intelligence' and 'mentally' below eighteen years of age.*" (180) Sullivan's attorneys had challenged the execution by arguing that Colorado banned the death penalty for those under age eighteen. The court reasoned that "[t]his has nothing to do with 'age' as used in the statute . . . Had the legislature intended 'mental age' it would have used no such equivocal language." (181)

Only three executions occurred in the 1950s. The last involved perhaps the most notorious killer in the history of the state, John Gilbert Graham. (182) Graham planted twenty-five sticks of dynamite in his mother's suitcase as she departed on a United Airlines flight from Denver to Portland, Oregon. Eighteen minutes after the plane departed from Denver's Stapleton Airport, the suitcase exploded, killing Mrs. Graham and forty-three others on the plane. Despite the magnitude of the crime, the motive was simple: Graham's troubled relationship with his mother. Also famous for its innovative use of cameras in the courtroom, Graham's 1956 trial was filmed and recorded from a special booth in the courtroom that hid the equipment and camera operators from view. Denver news shows regularly broadcasted excerpts from the ongoing trial. According to the Denver Post: "*When the trial was over, the judge, the jury foreman, and prosecution and defense attorneys said that to their knowledge the broadcast did not distract anyone and did not interfere with the fairness of the trial.*" (183) After his execution in 1957, Colorado's gas chamber was not used again during that decade.

Six men died in Colorado's gas chamber during the 1960s, all of whom committed highly premeditated and aggravated crimes. The first individual executed during this decade was Leroy Leick, who killed his wife after an unsuccessful two-year attempt to hire someone to do the job instead. (184) In 1961, David Early was executed for the murder of a Denver attorney and the attorney's wife and child. (185) The murders occurred only four days after Early's release from a federal penitentiary. Harold Wooley was executed for

the murder of an affluent Denver man, (186) and Walter Hammil was convicted of the sexual assault and murder of an eleven-year-old Denver boy. (187) John Bizup, who spent eighteen of his thirty years in and out of reform schools and jails, was executed in 1964 for the murder of a Pueblo cab driver. (188)

During the next three years, Colorado did not perform any executions. Then, in 1967, a Coloradoan of Puerto Rican ancestry, Luis Jose Monge, (189) gave up his appeals and asked to be executed following a conviction for killing his wife and three of their ten children. After sharing a final meal with his seven surviving children, Monge went to the gas chamber on June 2, 1967. On the eve of the execution, seventy protestors denounced the death penalty in a rally at the state capitol. Unbeknownst to Coloradoans at the time, Monge would be the last person ever asphyxiated in Colorado, the last person executed in the state for thirty years, and the last person to be executed in the United States until 1977.

VI. THE MOVEMENT TO ABOLISH THE DEATH PENALTY

During the 1950s and 1960s, Colorado's death penalty faced both political and legal challenges. Colorado legislators attempted to abolish the death penalty on several occasions. In addition to legislators, many prominent figures supported this movement: including prison wardens, district attorneys, governors, and the religious community. This movement ultimately failed, however, largely because several heinous murders both in Colorado and elsewhere in the U.S. in the mid- 1960s shifted sentiment to support capital punishment. On the other hand, efforts throughout the country to urge the U.S. Supreme Court to review the constitutionality of the death penalty had more success. This Section examines the political efforts in Colorado and legal efforts elsewhere.

A. The Reemergence and Retreat of Anti-death Penalty Sentiment

The Colorado legislature attempted several efforts to abolish the death penalty in the 1950s and 1960s. In February, 1955, for example, Castle Rock republican Ed G. Seidensticker and Arapahoe County democrat Byron Johnson introduced abolitionist legislation in the state house of representatives. (190) A month later, the house came "within a whisker" of passing the ban, (191) first approving the abolition bill but soon thereafter returning it to a committee for more study. (192) Similarly in 1957, a bill championed by the Women's International League for Peace and Freedom and sponsored by republican Representative Rena Mary Taylor of Palisade passed a house committee on a six to five vote, (193) but ultimately failed in the full house. (194)

Yet the issue stubbornly persisted. In many ways, the death penalty comprised part of a wide array of civil rights and human rights issues that Americans were reexamining at the time, including rights for racial and ethnic minorities and the roles of women. In 1959, the Colorado senate overwhelmingly defeated an abolitionist measure by Senator Everett Cook (D- Cañon City). Senator Cook estimated that the abolition of the death penalty would save taxpayers more than \$750,000. (195) Two years later, an abolitionist bill, as well as a bill establishing a statewide referendum on the issue, failed in the senate

judiciary committee. (196) In 1964, the senate rejected a referendum that imposed a five-year moratorium on the death penalty after heated debate over Biblical directives on capital punishment. (197) Ultimately a resolution calling for a referendum on a constitutional amendment to abolish the death penalty passed the senate in 1964, but it failed to muster enough votes to pass through a house committee. (198)

This bill appeared again in the 1965 legislative session, this time introduced by republican Representatives John Mackle of Longmont and Ruth Clark of Ft. Collins. On its initial reading, it passed the house by an “overwhelming” margin. (199) Ten days later, the senate approved the referendum. Again, leadership on the issue was provided by a republican, Senator Donald E. Kelley of Denver. (200) The resolution provided that all offenses committed after January 1, 1967, would carry a maximum sentence of life imprisonment. Citizens would vote as part of the 1966 general election, eighteen months after the legislature’s action. When Governor John Love signed the legislation on May 6, 1965, he set the stage for a spirited debate on the issue throughout the state. (201) Governor Love also pledged not to authorize any executions until the voters spoke. So when the Colorado Supreme Court, in November 1965, upheld the executions of three men—Luis Jose Monge, Michael John Bell, and Sylvester Lee Garrison—Coloradoans knew that the executions would not occur until after the referendum was conducted. (202) The Colorado District Attorneys Association was one of the first groups to publicly support the abolition of the death penalty. Just a month after Governor Love signed the legislation authorizing a referendum, the group passed a resolution calling for the abolition of the death penalty by a “decisive” and “overwhelming” margin. (203) According to the Rocky Mountain News:

“Dist. Atty. Rex Scott of Boulder said, “As far as district attorneys are concerned, the death penalty makes our job tougher, increases trial costs and increases the number of insanity pleas.”

He claimed capital punishment is not a deterrent to murder, carries over from the Dark Ages concept of eye for an eye, and creates the danger of executing an innocent person. He said the penalty is discriminatory in that under the same set of circumstances one jury would sentence a man to die and another would give him life imprisonment. Race and financial positions also enter into juries’ verdicts he said.” (204)

Other members of law enforcement professions had mixed feelings about abolishing the death penalty. Although no reliable polls were taken, evidence indicates that police officers did not share the prosecutors’ anti-death penalty attitude. A poll of one hundred Colorado law enforcement officers in September 1966, for example, found “unanimous” support for the death penalty. On the other hand, in 1974, members of the Colorado Correctional Association voted to oppose the death penalty by a reportedly “overwhelming” margin. (205)

The prosecutors and prison employees of the 1960s were not the first of their respective professions to harbor anti-death penalty attitudes. Rather, several wardens who supervised executions in Colorado stood opposed to the death penalty, at least privately.

Warden Lamping first exhibited this sentiment when he opposed moving the site of executions to Cañon City in the late 1880s. (206) Later, the death penalty so offended Warden Thomas J. Tynan that he refused to enter the death chamber on at least two occasions. (207) Warden Tynan's successor, F.E. Crawford, who served from 1927 to 1931, also opposed the death penalty. (208) Roy Best shared similar opinions while, during his twenty-two-year term as warden, supervising twenty-six executions (more than any other warden in the state's history) and the construction of Colorado's first gas chamber. (209) Warden Harry C. Tinsley, who served as warden from 1955 to 1965 and supervised eight executions, also opposed the death penalty. (210) In 1965, Tinsley became not only the Chief of the Colorado Department of Corrections but also the Honorary Chairman of a new statewide anti-death penalty group. (211) In that position, he stood at the forefront of the efforts to ban the death penalty in the 1966 referendum. (212)

Those supporting the 1966 referendum to abolish the death penalty noted that several former Colorado governors had voiced opposition to the death penalty. Governor Davis H. Waite, in office in the late nineteenth century, was an early foe. (213) Governor Alva Adams signed the 1897 bill that temporarily abolished the death penalty. (214) In 1901, Governor James Orman refused to sign the bill reinstating the death penalty but allowed it to become law without his signature. (215) In the early twentieth century, Governor John F. Shafroth also opposed the death penalty, although executions did occur while he was in office. (216) Similarly, Governor William H. Adams, in office between 1927 and 1933, did not allow his personal opposition to the death penalty to stop executions during his tenure. (217) In the middle of his term as governor during the 1950s, Edwin C. Johnson published an opinion piece in the Rocky Mountain News titled "I Hate Capital Punishment." At the same time, however, Governor Johnson pledged to carry out the law and enforce the death penalty in cases which warranted it. (218) Two days before the article's publication, Governor Johnson proved his point by not intervening to stop the execution of Besalirez Martinez. (219)

The religious community became increasingly involved in organizing against the death penalty during the 1960s and led the fight to outlaw capital punishment in the 1966 referendum. Charles Milligan, a professor of Christian Ethics at the Iliff School of Theology in Denver, provided one of the first calls for abolition in 1961. (220) By 1965, a Denver Post poll of Colorado religious leaders found that a majority stood against the death penalty. (221) By this time, the debate over the death penalty encompassed several other groups.

In early 1965, the Colorado branch of the American Civil Liberties Union, which had never adopted a stance on capital punishment, began to reconsider its silence. (222) Later that year, the Colorado Council to Abolish Capital Punishment was formed, headed by Denver attorney Edward H. Sherman. (223) The Council also named Harry C. Tinsley, Chief of Corrections for the State of Colorado and former warden of Colorado State Prison, as honorary chairman. (224) Among other events, the Colorado Council to Abolish Capital Punishment sponsored an eight-day speaking tour of the state in early October by former San Quentin, California, Prison Warden Clinton Duffy. (225) The

Colorado Young Democrats (226) also publicly opposed the death penalty. The president of the group's Denver branch promised "to go door-to-door" to convince voters to abolish the death penalty. (227)

Yet a series of unrelated, unusually brutal murders, which shook both Colorado and the nation in the four months before the 1966 referendum, arguably affected the vote more than any statements for or against the death penalty. On July 9, 1966, University of Colorado student Elaura Jaquette was raped and bludgeoned to death in a room in the auditorium of the Boulder campus. (228) Four days later, eight student nurses were found slain in their Chicago apartment, crimes that soon led to the arrest of Richard Speck. (229) On August 1, Charles Joseph Whitman killed fifteen people and wounded thirty-one others by firing from the top of the University of Texas's bell tower in Austin. (230) Then, less than a week before the referendum, the bullet-ridden bodies of an Arizona couple were found stuffed in a privy in a U.S. Forest Service campground forty miles north of Durango, Colorado. (231) To no one's surprise, the November 1966 referendum to abolish the death penalty failed by nearly a two-to-one margin, with 110,452 voters in favor of abolition and 207,908 supporting retention. (232)

Governor Love wasted little time in ending the moratorium on executions. After waiting for the passage of the Christmas season, on January 4, 1967, he lifted the stays that he had granted to Monge, Bell, and Garrison, as well as the stays that he had given to two other condemned inmates, John Major Young and Joe Albert Segura. His action allowed the Colorado Supreme Court to set execution dates (233) and it did so within the next month, scheduling Garrison's execution for late April, Bell's in mid-May, (234) Monge's in early June, and Segura's soon thereafter. Because Young's direct appeal was still pending, the court did not set an execution date for him. (235) By that time, Garrison had already spent more than seven years on death row in Cañon City. On the day before his May 1967 execution date, however, Governor John Love issued a five-week stay to allow the defense attorneys to take their appeal to federal court. Despite the stay, Warden Wayne Patterson allowed Garrison to eat the "last meal" that had already been prepared in anticipation of his death. (236) A federal judge eventually reduced the sentences of both Garrison—who also ate "last meals" on two other occasions—and Segura to life in June 1971. (237) Garrison had spent over eleven years on death row and was ultimately paroled in 1978. (238)

In sum, the political opposition to the death penalty in Colorado in the 1960s directly and indirectly resulted in fewer executions. The political opposition directly led to a delay in executions that allowed more time for death-row inmates to obtain relief from the courts. Indirectly, the political opposition impacted public opinion to an extent that may have caused fewer prosecutors to seek death sentences and fewer juries to impose them. In the end, however, the movement failed to achieve its goal of persuading Colorado politicians to abolish the death penalty.

B. The Assault on the Death Penalty in the Courts

As in Colorado, the pace of executions throughout the United States steadily declined between the 1930s and the 1960s. The nation averaged 166 executions per year in the 1930s, 128 in the 1940s, and seventy-two in the 1950s. Public support for the death penalty also began to decline in the 1950s—partly because of three especially controversial executions: Ethel and Julius Rosenberg for espionage in New York in June, 1953, under federal authority (239) and Caryl Chessman in California in May 1960. (240) The prosecution of Dr. Sam Sheppard in Ohio in 1954, perceived by many as unfair, also eroded support for the death penalty in the 1950s. (241) By 1966, only forty-seven percent of the American public voiced support for the death penalty. Between 1960 and 1966, the average number of executions in the U.S. fell to twenty-seven. After Luis Monge's (242) execution in Colorado in June 1967, no executions occurred anywhere in the United States for nearly a decade because of litigation in the U.S. Supreme Court. (243)

In the decade before 1967, Colorado was not the only state moving in the direction of abolition. Delaware briefly abolished the death penalty in 1958, (244) and the abolitionist jurisdictions of Alaska and Hawaii became states in 1959. (245) In 1964, a large majority of Oregon voters threw out the death penalty through a public referendum, (246) and in 1965, New York and Vermont greatly restricted the availability of death sentences in their jurisdictions. (247) Governors such as Edmund ("Pat") Brown in California, Endicott Peabody in Massachusetts, Michael DiSalle in Ohio, Milton Shapp in Pennsylvania, and Winthrop Rockefeller in Arkansas lent their voices to the abolitionists' chorus. (248) Scholars began to outline strategies to abolish capital punishment, (249) and Supreme Court Justices William Brennan, William O. Douglas, Abe Fortas, (250) and Arthur Goldberg (251) began to invite challenges to the constitutionality of the death penalty.

Meanwhile, in 1963, University of Pennsylvania law professor Anthony Amsterdam began to consult with the New York-based NAACP Legal Defense Fund (LDF) and develop strategies to fight death sentences in state and federal courts throughout the country. These efforts would profoundly affect the administration of the death penalty throughout the country, including Colorado. Some victories in the courts, as well as narrow losses that left room for new challenges, energized these efforts. For example, in 1968, the U.S. Supreme Court's ruling that attorneys could exclude only the most unyielding opponents of the death penalty from jury service in capital cases added many citizens with general reservations against the death penalty to pools of eligible jurors. (252) At the time of that decision, many observers believed that another execution would never occur in the United States. (253) Furthermore, an increasing recognition of the role of race in the administration of the death penalty, (254) especially for those convicted of rape, led some to anticipate the decisions of appellate courts. Nonetheless, even after extensive research by University of Pennsylvania criminologist Marvin Wolfgang documented widespread racial bias in the death penalty for rape, (255) the Eighth Circuit Court of Appeals, in *Maxwell v. Bishop*, refused to intervene. (256) Nine years later, the Supreme Court abolished the death penalty for non-homicidal rape, not on grounds of

racial bias but because “a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment.” (257)

In addition to arguments related to evolving standards of decency and race, death penalty opponents attacked capital punishment because of pure arbitrariness in its application. On appeal to the U.S. Supreme Court, the petitioners in *Maxwell* argued for mandatory standards on which jurors should frame their life-and-death decisions in capital cases and a bifurcated trial system to allow jurors to hear testimony relating to their penalty decision in a separate proceeding following the trial. (258) Given the very real hope that the Supreme Court would decide these issues, governors or various state and federal courts suspended all executions in the nation pending the Court’s decision. (259) The Court’s 1970 ruling, however, disposed of the case on narrow grounds pertaining to jury selection and sidestepped the constitutional questions. Almost immediately, however, the Court announced that existing stays of execution would remain in effect until it addressed these broader issues in other cases. (260) Thus, the status of the death penalty in Colorado in the late 1960s and early 1970s was fueled by events that occurred far beyond the state’s borders.

In May 1971, by identical six-to-three votes, the Supreme Court dealt two setbacks to the abolitionist strategy in *McGautha v. California* and *Crampton v. Ohio*, ruling that states were free to give juries unguided discretion in sentencing decisions (261) and that the Constitution did not require separate guilt and punishment proceedings in capital trials. (262) But despite these decisions, in the following month, the Supreme Court announced that it would hear a series of cases to determine whether the death penalty itself constituted “cruel and unusual punishment,” in violation of the Eighth and Fourteenth Amendments. With this, the stays of execution continued and the case of *Furman v. Georgia* moved to center stage.

Early in 1972, the California Supreme Court, by a six-to-one vote, abolished the death penalty in that state, holding that it violated the “cruel or unusual” clause in the California constitution. (263) That ruling reduced the death sentences for 102 men and five women to life imprisonment. (264) Furthermore, because the decision interpreted the state constitution, it could not be appealed to federal courts. Clearly, the abolitionist position had gained strength.

The U.S. Supreme Court finally decided *Furman v. Georgia* in June 1972, marking a monumental victory for the foes of capital punishment. By a five-to-four vote, with each justice writing a separate opinion, the Court held that the death penalty statutes under review—and, by implication, all others in the country—constituted cruel and unusual punishment in violation of the Eighth and Fourteenth amendments. (265) Justices Douglas, Marshall, Brennan, Stewart, and White voted with the majority, while Justices Powell, Blackmun, Rehnquist, and Chief Justice Burger all dissented. (266) At the time, most observers agreed with Jack Greenberg, the Executive Director of the Legal Defense Fund, who stated: “There will no longer be any more capital punishment in the United States.” (267) *Furman* and its related cases led to death sentences commuted to prison

terms for some 631 men and two women then on death row in thirty-two states. Two Colorado inmates were among those who received commuted sentences: John Major Young, Jr., (268) and James D. Mainer. (269)

In the end, important questions remained undecided regarding the constitutionality of mandatory death sentences, in which no sentencing discretion was possible, statutes that attempt guide the discretion of jurors by specifying aggravating and mitigating circumstances, and capital statutes for non-homicidal crimes. Additionally, with a one-vote majority, *Furman* was a fragile victory for abolitionists. States quickly returned to their legislative drawing boards to devise capital punishment statutes that would survive the Supreme Court's mandate.

Various states, led by Florida, adopted "post-*Furman*" death penalty statutes. (270) Per *Furman*'s mandate, these "guided discretion" statutes required that determinations of guilt and punishment occur in separate proceedings and that jurors consider specified aggravating and mitigating factors to decide between a death and a prison sentence. By 1976, thirty-five states had passed new death penalty laws and more than five hundred inmates were confined to America's death rows. (271)

Public support for the death penalty had also grown markedly since *Furman*; by this time some two-thirds of Americans supported it. By 1976, the Supreme Court decided five cases stemming from these new statutes. In *Woodson v. North Carolina* (272) and *Roberts v. Louisiana*, (273) the Court rejected mandatory death sentences as constitutionally impermissible, thus requiring some sort of individualized decisions in death penalty cases. In three other cases, *Gregg v. Georgia*, (274) *Proffitt v. Florida*, (275) and *Jurek v. Texas*, (276) the Court upheld "guided discretion" statutes—in which legislatures gave judges and jurors guidelines to decide between a prison and a death sentence—as constitutional. America's executioners, including Colorado's, again had the green light. (277)

The legal battle over the death penalty in the 1960s and early 1970s effectively mothballed American death chambers for a decade and resulted in a number of reforms that shaped the practice of the death penalty for years thereafter. Capital punishment in America was forever changed.

VII. PATTERNS AND CONCLUSIONS

In conclusion, this Section describes four general observations about the death penalty in Colorado concerning: 1) the role of the medical profession and mental health professionals in the death penalty in Colorado; 2) the possibility that innocent people have been executed; 3) the possibility of racial and ethnic bias in the administration of the death penalty; and 4) the general trends toward permanent abolition of the death penalty in the state.

A. Physician Involvement, Insanity, and Mental Retardation

The extent of the medical profession's involvement in Colorado death penalty cases unexpectedly emerged as a finding from the case vignettes presented in the Appendix. The involvement of the medical profession grew, rather than declined, during the first seventy years of the twentieth century. It included witnessing executions, pronouncing death, and performing autopsies of the executed inmates as well as significant involvement in determining the mental status of defendants, and, by extension, defendants' degrees of premeditation, intent, and culpability for their criminal behavior.

Colorado statute required some involvement by physicians. The 1889 death penalty statute required the warden to invite the "physician of the Penitentiary" and "one practicing surgeon resident in the State" to the execution, and "[i]mmediately after said execution, a post mortem examination of the body of the convict shall be made by the attending physician and surgeon . . ." (278) Physicians often could take any unclaimed bodies of executed inmates and use them for dissection.

Apparently at least some of these post-mortem exams included the removal of the heart from the prisoner's body. When Ralph Fleagle (279) was hanged in 1930, "[t]he body was cut down and taken to the prison hospital where the heart was removed by a surgeon to comply with a state law." (280) In 1934, after William Kelley (281) became the first Coloradoan to die in the gas chamber, some fifteen to twenty physicians observed the execution and the autopsy. According to the *Denver Post*: "The long established custom of 'cutting the executed man's heart out,' adopted in hanging days to make sure of the victim's death, was not followed on Wednesday" However, "as a last measure of precaution, [the physicians] did cut [Kelly's] heart artery." (282)

The medical profession, however, had a greater role than simply observing executions and performing post-mortem exams. Prosecutors, juries, trial and appellate judges, and governors alone did not decide who should live and who should die in Colorado, but these decisions also rested to a remarkable degree on the observations of the medical profession. Defendants facing capital charges often pleaded not guilty by reason of insanity, leading to many battles between experts to determine the prisoner's fate.

Although the number of Colorado defendants facing capital murder charges who avoided conviction or execution because of a mental health defense or support from mental health professionals in clemency applications is unknown, some inmates certainly went to their deaths after their insanity defense failed. (283) In some cases, inmates were sent to death row even after at least some experts supported the insanity plea. For example, two psychologists and four psychiatrists believed that David Early was paranoid schizophrenic, (284) and one psychiatrist thought that John Bizup was insane. (285) Other mental health professionals disagreed, and the men were executed. In at least one other case, that of Guiseppe Alia, the state likely executed a severely mentally ill man, either because he could not afford a mental health defense or perhaps because the outrageousness of his crime—the murder of a Catholic priest during Sunday Mass—rendered jurors deaf to his insanity plea. (286) In two other cases, (287) questions about

the defendants' mental status persisted after insanity defenses failed and the men lived on death row. In at least five other cases, (288) the sanity of defendants on death row was questioned, unsuccessfully, even though they had not attempted an insanity defense at trial.

Physicians also played roles in cases in which mentally retarded inmates were executed. (289) Colorado banned the execution of the mentally retarded by statute in 1993 (290) and the U.S. Supreme Court banned the practice outright in 2002. (291)

Apparently, however, at least four mentally retarded inmates went to their deaths in Colorado's gas chamber. In 1935, Leonard Belongia was executed despite testimony from one physician that Belongia had the mentality of a ten-year-old. (292) Four years later, Joe Arridy, with an I.Q. of 46, was executed when his conviction rested on a very controversial confession. (293) In 1943, John Sullivan was executed even though the sheriff and several experts believed that he had subnormal intelligence. (294) Finally, in 1962, Walter Hammil was executed despite acknowledgement by the examining physicians that he was mentally retarded. (295)

Few professional rules or guidelines limited the involvement of physicians in capital cases prior to the 1970s. In contrast, today's ethical standards by the American Medical Association sharply limit involvement of physicians in death penalty cases and executions. These restrictions are based on a basic tenant of the medical profession, *primum non nocere*, or "first of all do no harm." (296) These standards prohibit physicians from using their expertise to assist executioners and from attending or observing an execution in their capacity as physicians. Furthermore, although these standards prohibit physicians from declaring death, they allow physicians to certify death from outside the execution chamber once another person has declared that the prisoner has expired. (297) Despite these guidelines, many physicians today still condone participation by physicians in capital cases and executions even if that behavior violates the above standards. (298) Accordingly, involvement of physicians in capital cases raises questions that are far from resolved today.

B. Innocence

The State of Colorado has never acknowledged that anyone executed under its authority was, in fact, innocent of the crime. Thus any claims that a given inmate was indeed innocent will likely spark controversy. Additionally, DNA evidence has not definitely cleared an executed inmate. Therefore, any claim of innocence is necessarily a probability statement, suggesting that a given defendant, for example, "may have been" or "probably was" innocent. Furthermore, looking back through history, the judgments made by jurors and judges in such cases are very difficult to second-guess. American history, however, is replete with examples of inmates convicted of murder who, despite the judgments of the prosecutors, jurors, and judges involved, actually were innocent. (299) Often, these exonerations resulted from pure luck. (300)

Like inmates throughout the U.S. today, some Colorado inmates facing execution steadfastly maintained their innocence prior to execution. (301) Some admitted that they actually killed the victim but claimed that they did so in self- defense (302) or by accident. (303) Others claimed that they indeed had committed second-degree or lesser types of criminal homicide but not capital murder. (304)

In other cases, in addition to the defendant's claims of innocence, some very reasonable people had doubts about the defendant's guilt. These include the case of Joe Arridy, in which a mentally retarded defendant sealed his fate with a very questionable confession. (305) Merrick Rosengrants was executed in Leadville despite no prior record of criminality, an alibi witness who did not testify at trial, and the belief of several Leadville citizens that his innocence claim was indeed true. (306) Five years later, Cyrus Minich (307) was also hanged in Leadville, despite the Colorado Supreme Court's acknowledgement that "[t]he conviction, it is true, is based upon circumstantial evidence." (308) When the Colorado legislature reenacted the death penalty in 1901, it banned executions of defendants "convicted on circumstantial evidence alone." (309) This led three Colorado Supreme Court justices to dissent when the court sustained John Berger's (310) conviction and death sentence, arguing that "[t]he whole record is sufficiently satisfying to sustain the verdict of guilty of murder, but not to warrant the infliction of the death penalty." (311) Looking at these cases individually, in hindsight, some chance exists that the defendants may have been guilty, but combining the probabilities, likely there is a high probability that at least one person executed in Colorado's history was indeed not guilty of capital murder.

C. Race and Ethnicity

Several studies have documented racial bias in the administration of the death penalty in the United States prior to the *Furman* decision in 1972. (312) Unfortunately, no systematic empirical study has addressed the possibility of race or ethnic bias in the administration of the death penalty in Colorado. No studies have compared cases in which defendants were executed to determine if there were equally or more aggravated cases in which the defendants were not executed, and if those differences correlate with such extra-legal factors as race, gender, or geographic region. Yet, some Colorado cases present plausible situations in which one can conclude that race or ethnic status influenced the decision to execute. Table 6 presents data on the race of the defendants and victims in all Colorado death penalty cases. This Table classifies non-Hispanic white immigrants as white, and therefore the Table does not reflect the extent to which anti-Italian or anti-Irish sentiments may have affected death penalty decisions. The data shows that nearly one-quarter of those executed in Colorado were members of racial or ethnic minorities (25/102 or 24.3 percent). If the tallies include the eight Italian and Irish immigrants executed in the state, the proportion of racial minorities executed increases to nearly one-third of all executions in Colorado. (313)

On the other hand, only about ten percent of those executed in Colorado were convicted of killing ethnic or racial minorities. The vast majority (91/102 or 89.2 percent) was convicted of killing whites. Colorado executed only one white for the murder of an ethnic

or racial minority: Pete Catalina, a native of Italy was convicted of the murder of a Mexican. (314) Whether, or how much, any anti-Italian sentiment contributed to this sentence is unknown. (315)

Ten African-Americans have been executed in Colorado; the last in 1947. (316) Six received this punishment for killing whites (317) and four for killing other blacks. (318) Unlike the vast majority of executed defendants, none of the black defendants executed for killing other blacks were convicted of killing strangers. (319) Similarly, only one of the five Hispanics executed for killing other Hispanics was sent to death row for killing a stranger: Besalirez Martinez killed the owner of a tavern. (320) The other four killed friends or family. Victor Nunez killed a man in a lover's triangle; (321) Antonio Casias was hanged for murdering a woman friend because of jealousy; (322) Emelio Herrera shot his wife in a domestic argument; (323) and Luis Monge (Puerto Rican) killed his wife and three of their children, also in a domestic argument. (324) In general, the state applies the death penalty less frequently to punish murders of family members and friends than to punish murders by strangers. (325) Therefore, these patterns suggest that minority defendants, on average, were executed in Colorado for less aggravated crimes than their white counterparts.

Racial antagonism played a role in at least two cases in which African-Americans were executed for killing whites. James Miller, an African-American veteran of the Civil War, was so outraged at being tossed out of a dance hall because of his race that, in the heat of the moment, he randomly fired a shot inside the building, killing an innocent white patron. (326) Similarly, Nelivelt Moss was hanged for murdering a white woman, allegedly in retaliation for a racial slur that she had used against Moss. (327)

Ethnic bias appears to have played a role in the executions of two Italian natives and one Asian. In 1888, Nicolai Femenella was executed for killing an Irish immigrant during quarrels between groups of Italian and Irish railroad workers. (328) In 1908, Guiseppe Alia, another Italian immigrant, was hanged for killing a Catholic priest. (329) The crime outraged Denver citizens, and this public sentiment combined with Alia's apparent psychosis outweighed the pleas of the Italian government to stop the hanging. (330) Finally, at the peak of World War II, a Denver restaurant owner of Japanese ethnicity named George Honda was convicted of stabbing his wife. (331) Plausibly, this relatively common domestic homicide became a capital case because of anti-Japanese sentiments fueled by the Japanese attack on Pearl Harbor, which preceded the murder by only six months.

Although individual case studies may suggest or reveal racial or ethnic biases, no systematic empirical study of Colorado homicides prior to 1972 has measured the overall strength of these biases in determining which convicted murderers lived and which were sent to the executioner. Such a study would need to gather data from a large sample of homicide cases and rank them on levels of aggravation (e.g., whether additional felonies were involved, number of victims, defendant's prior record of felony convictions) and compare the sentences given to white defendants with other defendants for similar types of homicides. (332) Future researchers might also attempt to compile a list of every

person sentenced to death in Colorado and compare the racial and ethnic characteristics of those executed with those whose sentences were commuted by judicial or executive authorities. (333)

D. General Trends Toward Abolition

There are several general trends that can be seen by stepping back and examining the entire 123 years of Colorado history reported in the Article. Unquestionably, the general trend was in the direction of the abolition of the death penalty. We first saw growing disgust at witnessing retributive punishments, leading to a ban on public executions in 1889.

History is replete with examples of attempts to “humanize” methods of execution, beginning with the invention and use of the “jerk-up” hanging machine and moving to the introduction of the gas chamber in 1933, and, after the end of the study period, to lethal injection. We also can see an expanding role of state and federal courts in receiving death penalty appeals and (see Table 2) a gradual increase in the time between the crime and the execution (especially post-1950).

Colorado has also seen an experiment with abolition. This experiment failed not because arguments that the death penalty was needed to deter homicides persuaded political leaders, but rather because these leaders were so easily convinced that the death penalty was needed to deter lynchers. In 1901, when the legislature decided to bring back the executioner, absolutely no data were presented claiming that the death penalty was needed to reduce rates of criminal homicide.

Approximately every thirty years in Colorado’s pre-1972 history brought major efforts to reform or abolish the death penalty. The 1890s brought the movement to abolish public hangings and move them to within the walls of the prison, as well as abolition efforts that finally met success in 1897. In the 1930s, abolition efforts led to the introduction of the gas chamber and the expulsion of the hangman. Furthermore, in 1933, the state Senate—but not the House of Representatives—voted to abolish the death penalty altogether. In 1955 and again in 1957, abolition bills in the Colorado House of Representatives garnered strong support but not enough to pass. Finally, in 1965, the legislature effectively ducked the issue by passing legislation permitting the 1966 referendum on the issue.

Colorado was among several jurisdictions moving toward the abolition of the death penalty. The last two hangings in Great Britain occurred in 1964, (334) and Canada abolished the death penalty “for ordinary crimes” in 1976. (335) According to Amnesty International, by the end of 2002, some 111 countries throughout the world had abolished the death penalty in law or in practice. (336) Colorado and thirty-seven other states in the U.S. have been moving in the opposite direction: together, the states executed some 820 prisoners in the twenty-six years between January 1, 1977 and December 31, 2002.³³⁷ Thus, our children and grandchildren must determine whether this resurgence in

America's use of the executioners' services is permanent or just another temporary phase like Colorado has seen before.

ENDNOTES

* Professor, Department of Sociology, University of Colorado at Boulder. This paper was inspired by the seminal scholarship of the country's top death penalty historian, M. Watt Espy, now living in retirement in Headland, Alabama. I thank Ingrid DeFranco and the students enrolled in SOCY 4014, Fall 2001 (especially Ashley Holmes and Krista Gehring) for their assistance in gathering part of the information on the executions listed in Appendix. I also thank the research staff at the Colorado State Archives, the Stephen H. Hart Library of the Colorado Historical Society, and the Western History and Genealogy Department of the Denver Public Library. Many scholars and experts contributed in various ways to this Article, including William M. King, Daniel Leonetti, Charles Milligan, Robert Perske, James Sunderland, and Katie Corr and her colleagues at the University of Colorado Law Review. I especially appreciate the many valuable suggestions contributed by Stephen Leonard.

1. Olga Curtis, Denver's First Murderer, DENVER POST, May 7, 1978, Empire Magazine, at 66.
2. Murder and Execution, ROCKY MOUNTAIN NEWS, Apr. 23, 1859, at 3 [hereinafter Murder and Execution]. At its beginning, the newspaper was published as a weekly.
3. There are two unpublished papers in the Colorado State Archives that give valuable background information on the death penalty in Colorado. See Robert W. Gordon, A Legislative History of Capital Punishment for the Territory and State of Colorado, 1861 to 1965 (1965) (unpublished manuscript, on file with the Colorado Historical Society). John O. Sindall, Capital Punishment in Colorado (1973) (unpublished manuscript, on file with the Colorado Historical Society).
4. See *infra* Appendix, notes 632–40 and accompanying text.
5. 408 U.S. 238 (1972).
6. After Furman was handed down, there were still some questions about some narrowly defined and/or mandatory capital statutes. MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 299–302 (1973).
7. Gary Gilmore, the first “post-Furman” prisoner to be put to death in the United States, was executed by a firing squad in Utah on January 17, 1977. Like Monge, Gilmore dropped his appeals and asked to be executed. For a complete and up-to-date list of all those executed in the United States since 1976, see Death Penalty Information Center, at <http://deathpenaltyinfo.org/facts.html#Executions> (last visited Apr. 15, 2003).

8. Lisa Levitt Ryckman, *Davis Pays Final Price*, ROCKY MOUNTAIN NEWS, Oct. 14, 1997, at 5A. As this Article went to press in early 2003, Davis remained the only person executed in Colorado since 1967. This de facto moratorium on executions has occurred despite strong efforts by the Colorado legislature to increase the use of the death penalty. See Roxane J. Perruso, *And Then There Were Three: Colorado's New Death Penalty Sentencing Statute*, 68 U. COLO. L. REV. 190 (1997); Robin Lutz, Note, *Experimenting with Death: An Examination of Colorado's Use of the Three-Judge Panel in Capital Sentencing*, 73 U. COLO. L. REV. 227 (2002).

9. For detailed information on the death penalty in Colorado post-1972, see Lutz, *supra* note 8, at 227.

10. See, e.g., Francis X. Clines, *A Dismayed Historian of the Gallows*, N.Y. TIMES, Nov. 18, 1992, at A16.

11. See STEPHEN J. LEONARD, *LYNCHING IN COLORADO, 1859–1919* 3 (2002) [hereinafter LEONARD, *LYNCHING IN COLORADO*]; Stephen J. Leonard, *Avenging Mary Rose: The Lynchings of Margaret and Michael Cuddigan in Ouray, Colorado, 1864*, 37 COLO. HERITAGE 34 (1999) [hereinafter Leonard, *Avenging Mary Rose*].

12. See *infra* Appendix, notes 339–46 and accompanying text (cases of John Stoefel, Moses Young, Marcus Gredler, James A. Gordon, and Patrick Waters). Indeed, these five cases are included in Professor Leonard's seminal work on Colorado lynchings, so there is some overlap in our work. LEONARD, *LYNCHING IN COLORADO*, *supra* note 11, at 3.

13. LEONARD, *LYNCHING IN COLORADO*, *supra* note 11, at 15–29; Francis S. Williams, *Trials and Judgments of the People's Courts of Denver*, 27 COLO. MAG. 294 (1950).

14. B. Richard Burg, *Administration of Justice in the Denver People's Courts*, 7 J. OF THE WEST 510 (1968). In addition to the five defendants who were hanged under the jurisdiction of the People's Courts, Burg also describes the case of William F. Hadley, who was sentenced to death by a People's Court on June 25, 1860. However, on the eve of his execution, Hadley bribed a guard, escaped, and was never heard from again. *Id.* at 515.

15. See *infra* Appendix, note 346 and accompanying text (case of Patrick Waters). 16. *Murder of Daniel Steele at Evans*, ROCKY MOUNTAIN NEWS, Nov. 8,

1869, at 4; see also LEONARD, *LYNCHING IN COLORADO*, *supra* note 11, at 64–65; CAROL REIN SHWAYDER, *1 WELD COUNTY—OLD & NEW* A32 (1983). 17. See *infra* note 19 and accompanying text.

18. Although Colorado has never executed a woman, there was at least one lynching that claimed the life of a woman. On January 19, 1884, Michael and Margaret Cuddigan were

lynched in Ouray after being arrested (on skimpy evidence) of killing a ten-year-old foster child who was in their care. Margaret was twenty-one at the time of her death and was seven months pregnant. See LEONARD, *LYNCHING IN COLORADO*, supra note 11, at 73–86; Leonard, *Avenging Mary Rose*, supra note 11. There is also a possibility that a Hispanic woman was lynched in Trinidad in 1873. LEONARD, *LYNCHING IN COLORADO*, supra note 11, at 74. This research project has not identified any woman who was ever sentenced to death in Colorado.

19. Although every person legally executed in Colorado since 1859 was convicted of murder, there were other crimes that at one time or another also carried the death penalty. A mandatory conviction of first-degree murder was legislated for those convicted of causing a death by anarchy. See COLO. REV. STAT. § 40-23-14 (2002). Those performing abortions in which the woman died also faced a mandatory conviction for murder. See *id.*, § 40-2-23. The 1861 Session Laws made the death penalty mandatory for those convicted of perjury that resulted in the conviction and execution of an innocent person. Act of Nov. 5, 1861, § 80, 1861 Colo. Terr. Sess. Laws 290, 306; see also COLO. REV. STAT. § 35-1717 (1908). In 1939, in the wake of the 1932 New Jersey kidnapping of the son of aviator Charles Lindbergh, the legislature made kidnapping in which the victim suffers bodily harm a capital offense. See Act of Apr. 3, 1939, § 1(a), 1939 Colo. Sess. Laws 319. Finally, prisoners serving a life sentence faced a death sentence for assaults while attempting to escape:

Every person undergoing a life sentence in the state penitentiary who, while escaping or attempting to escape, commits an assault with intent to commit bodily injury upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury, shall be guilty of a felony, and upon conviction thereof, be punishable by death.

COLO. REV. STAT. § 40-7-49 (repealed).

20. In 1988, Colorado changed its method of execution from asphyxiation to lethal injection. See Act of May 29, 1988, § 1, 1988 Colo. Sess. Laws 671.

21. See *infra* Appendix, notes 349–54 and accompanying text (cases of Franklin Foster and Henry Stone), 370 and accompanying text (case of Merrick Rosengrants), 371 and accompanying text (case of Franklin Gilbert), 401–02 and accompanying text (case of Thomas A. Jordan), 403 and accompanying text (case of Peter Augustana), 414–15 and accompanying text (cases of J. Newton Andrews and Fred Arnold), 459–62 and accompanying text (cases of Raymond Jasper Noakes and Arthur Alonzo Osborn), 474–79 and accompanying text (cases of Howard L. Royston and George J. Abshier), 514–17 and accompanying text (cases of Louis Pacheco and John Pacheco), 530–34 and accompanying text (case of Pete Catalina), 535–36 and accompanying text (case of Angelo Agnes).

22. See *infra* Appendix, notes 407–09 and accompanying text (cases of William Holt, Albert Noble and Deonicio Romero), 489–93 and accompanying text (cases of Claude Ray, John Walker, and Andrew Halliday).

23. See *infra* Appendix, notes 514–17 and accompanying text (cases of Louis Pacheco and John Pacheco).

24. See *infra* Appendix, notes 603–12 and accompanying text (case of Leroy Adolph Leick).

25. TRACY L. SNELL & LAURA M. MARUSCHAK, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, BULLETIN, CAPITAL PUNISHMENT 2001, at 12 (Dec. 2002). This time span would be even longer if those who gave up their appeals and asked to be executed were removed from the analysis.

26. *In re Tyson*, 22 P. 810, 812 (Colo. 1889); *Mora v. People*, 35 P. 179, 182 (Colo. 1893).

27. See *infra* Appendix, notes 474–79 and accompanying text (cases of Ralph Emerson Fleagle, Howard L. Royston, and George J. Abshier).

28. See *infra* Appendix, notes 598–602 and accompanying text (case of John Gilbert Graham).

29. Cañon City is located in south central Colorado, approximately one hundred miles south of Denver and forty miles west of Pueblo. A member of the Territorial Legislature from Cañon City, Thomas Macon, was instrumental in the decision to locate the prison at Cañon City. At the time, both Denver and Golden were fighting over which city would be named capital of the new state. Representative Macon supported Denver over Golden, and this support won him enough votes from legislators in northern Colorado to have the prison located in Cañon City. ROSEMAE WELLS CAMPBELL, *FROM TRAPPERS TO TOURISTS: FREMONT COUNTY, COLORADO, 1830–1950* at 46 (1972). For more information on the history of the Colorado State Penitentiary, see Colorado Department of Personnel and Administration, State Penitentiary Records at the Colorado State Archives, at <http://www.archives.state.co.us/pen/history.htm> (last accessed Apr. 15, 2003).

30. Denver did not have a jail until 1861, three years after the city was founded. LEONARD, *LYNCHING IN COLORADO*, *supra* note 11, at 106.

31. Justice Appeased, *ROCKY MOUNTAIN NEWS*, May 30, 1866, at 1 [hereinafter Justice Appeased].

32. Laura de Forch Gordon, Capital Punishment, *ROCKY MOUNTAIN NEWS*, Apr. 24, 1867, at 2.

33. Id.

34. Id.

35. See Perruso, *supra* note 8, at 194; Act of Nov. 5, 1861, div. IV, § 20, 1861 Colo. Terr. Sess. Laws 290, 293. For two years prior to that bill, provisional laws also punished murder with a mandatory death sentence. See Provisional Laws and Joint Resolutions Passed at the First and Called Sessions of the General Assembly of Jefferson Territory, Part First, § 2 (1860).

36. COLO. TERR. REV. STAT. ch. XXII, § 20 (1868).

37. See *infra* Appendix, notes 347–48 and accompanying text (case of William S. Van Horn).

38. See Act of Feb. 11, 1870, 1870 Colo. Terr. Sess. Laws 70.

39. Perruso, *supra* note 8, at 194 (emphasis added).

40. PAUL H. GANTT, *THE CASE OF ALFRED PACKER, THE MAN EATER* 146 n.213 (1952). Thomas served as governor between 1899 and 1901 and as Senator between 1913 and 1921. Id.

41. Id. at 81. A similar issue recently led a New York court to invalidate a portion of the current New York death penalty law. The statute allows for the imposition of a death sentence only by a jury. Defendants pleading guilty to capital murder (which is allowed only on the consent of the prosecutor and permission of the judge) cannot be sentenced to death. The New York Court of Appeals has ruled that this provision coerces guilty pleas and punishes the right to trial by jury—at least in cases where the prosecutor has filed a notice of intent to seek a capital sentence. It has invalidated one death sentence imposed under the statute on this ground. See *People v. Harris*, 779 N.E.2d 705 (N.Y. 2002).

42. Perruso, *supra* note 8, at 195 (citing Colo. Gen. Laws ch. XXIV, div. IV, § 615 (1877); Colo. Gen. Laws ch. XXIV, div. XV, §§ 868, 869 (1877)).

43. See *infra* Appendix, note 362 and accompanying text (case of James Miller).

44. GANTT, *supra* note 40, at 81 (citing Colo. Laws 1881, at 70).

45. Id. at 82.

46. See *Hirschburg v. People*, 6 Colo. 145 (1882); GANTT, *supra* note 40, at 82.

47. 6 Colo. 559 (1883).

48. See *id.*; GANTT, *supra* note 40, at 82.

49. GANTT, *supra* note 40, at 82. See also Colorado Department of Personnel & Administration, The Alfred Packer Collection at the Colorado State Archives, at <http://www.archives.state.co.us/packer.html> (last accessed Apr. 15, 2003).

50. See Colorado Department of Personnel & Administration, The Alfred Packer Collection at the Colorado State Archives, at <http://www.archives.state.co.us/packer.html> (last accessed Apr. 15, 2003). Packer died in 1907. *Id.*

51. WILLIAM M. KING, GOING TO MEET A MAN 13–14 (1990).

52. Perruso, *supra* note 8, at 195 (citing Colo. Gen. Stat. ch. XXV, div. IV, § 709 (1883)).

53. See *infra* Table 5.

54. See *infra* Appendix, note 386 and accompanying text (case of Andrew Green).

55. KING, *supra* note 51, at 91.

56. *Id.* at 92–93.

57. *Id.* at 92–98.

58. *Id.* at 119.

59. Hangings caused relatively instantaneous death if the victim's spinal cord was severed. However, this happened in only a minority of hangings. More often, the rope would cut off blood supply to the brain, taking several minutes before death would come, or the prisoner would be asphyxiated, causing the prisoner to gasp for breath for several moments while he slowly suffocated. If the drop was too long, the prisoner would be decapitated. Consequently, hanging as a method of executions was always controversial. STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 44–48 (2002). It was hoped that the “twitch-up” method of hanging would increase the proportion of executed prisoners who succumbed to a broken neck. *Id.*

60. *Id.* at 92.

61. The rope used to hang Green was manufactured by a St. Louis company that specialized in making rope for this purpose. One hundred feet of the rope was ordered for Green's hanging, leaving enough left over to be used for the hanging of Nicolai Femenella, two years after Green's death. See *infra* Appendix, notes 378–380 and accompanying text; KING, *supra* note 51, at 117.

62. KING, *supra* note 51, at 119, 131.

63. *Id.* at 150.

64. *Id.* at 142.

65. *Id.*

66. BANNER, *supra* note 59, at 37.

67. *Id.* at 151; Act of Apr. 19, 1889, § 1, 1889 Colo. Sess. Laws 118. The law repealed all previous death penalty statutes and took effect on July 19, 1889, ninety days after the governor signed it. However, the repeal took effect immediately on the date the governor signed the law in April. There was no savings clause. Consequently, two defendants sentenced to death for murders committed in May and June 1889 later had their convictions and sentences vacated by the U.S. Supreme Court. See *In re Medley*, 134 U.S. 160 (1890); *In re Savage*, 134 U.S. 176 (1890).

68. William Hazlett, Capital Punishment Has Bloody History, ROCKY MOUNTAIN NEWS, Dec. 19, 1960, at 24. At least one later warden agreed. Harry C. Tinsley, who supervised seven executions from 1955 to 1964, told the Rocky Mountain News that he thought “[a]n execution serves to upset the order and dignity of a prison.” William Hazlett, Hand of Every Person Guides Executioner, ROCKY MOUNTAIN NEWS, Dec. 20, 1960, at 6.

69. See *infra* Appendix, notes 390–92 and accompanying text (case of Jose Ortiz).

70. Judicially Hanged: Ortiz, the Mexican Murderer, Suffers the Penalty of Law for His Crime, ROCKY MOUNTAIN NEWS, July 17, 1889, at 1 [*hereinafter* Judicially Hanged]. The last public execution in the United States took place before a crowd of ten to twenty thousand spectators in Owensboro, Kentucky in 1936. BANNER, *supra* note 59, at 156.

71. BANNER, *supra* note 59, at 156. However, the rule on the number of spectators was irregularly enforced. For example, thirty people witnessed the hanging of E.J. Farmer in 1932. See *infra* Appendix, notes 495–96 and accompanying text. The next year, sixty legislators and state employees watched as Nelivelt Moss was hanged. See *infra* Appendix, notes 499–500 and accompanying text. In 1933, fifteen physicians were permitted to witness the execution of William Kelley, who was the first person to die in Colorado’s gas chamber. See *infra* Appendix, notes 507–13 and accompanying text. There were fifty spectators present when Paul J. Schneider was executed in 1949. See *infra* Appendix, notes 585–87 and accompanying text. Before Pete Catalina was put to death in 1939, Warden Best invited twenty inmates to watch as the gas chamber was tested by killing a pig. See *infra* Appendix, notes 530–34 and accompanying text. It was thought that watching the pig gasp for its final breaths would deter the prisoners from future criminality.

72. Act of Apr. 19, 1889, § 5, 1889 Colo. Sess. Laws 120.

73. BANNER, *supra* note 59, at 163.

74. *Id.* at 159.

75. See *infra* Appendix, note 393 and accompanying text (case of Noverto Griego).

76. The Crime Expiated: Noverto Griego Probably Pays the Penalty of His Awful Deed Today, TRINIDAD DAILY NEWS (Colo.), Nov. 7, 1890, at 4. “The law requires that only the penitentiary Warden, the prison physician and one assistant, one friend of the condemned man whom he may name, the Sheriff of the county in which the murder took place, and a jury of six men to be selected by the Warden shall witness the execution.” Graves to Hang Himself, N.Y. TIMES, Jan. 24, 1892, at 16 [*hereinafter* Graves to Hang Himself].

77. Hung for Murder, PUEBLO CHIEFTAN (Colo.), Nov. 9, 1890, at 1 [*hereinafter* Hung for Murder].

78. See *infra* Appendix, notes 394–96 and accompanying text (case of James T. Joyce).

79. Without a Tremor, ROCKY MOUNTAIN NEWS, Jan. 18, 1891, at 1 [*hereinafter* Without a Tremor].

80. Graves to Hang Himself, *supra* note 76, at 16.

81. Without a Tremor, *supra* note 79, at 1.

82. See *infra* Appendix, note 397 and accompanying text (case of William H. Davis).

83. This time newspapers credited Deputy Warden George E. Dudley for the invention of the new machine. Hanged in Prison, ROCKY MOUNTAIN NEWS, Sept. 23, 1891, at 1 [*hereinafter* Hanged in Prison].

This death machine is the only one of its kind on record. It is the invention of a tender-hearted Deputy Warden who had been assigned to cut the rope at a previous execution, but who, rather than perform that duty, set his wits at work to invent a contrivance which would do the undesirable work for him. This he did. His conscience is now serene.

Graves to Hang Himself, *supra* note 76, at 16. The Deputy Warden did not receive lasting credit for his invention. By 1971 the Denver Post reported that the machine was “[c]reated by a convict, whose name has now been forgotten.” Cary Stiff, The Do-It-Yourself Hanging Machine, DENVER POST, June 13, 1971, Empire Magazine, at 45.

Despite this technology, someone still had to serve as the executioner. One of Colorado’s executioners was John J. (“Jack”) Eeles, a veteran guard who was widely disliked by prisoners for his role in executions. In October 1929, the country’s worst prison riot to

date occurred in Cañon City, taking the lives of eight guards and five convicts. Among those murdered was Eeles. WAYNE K. PATTERSON & BETTY L. ALT, *SLAUGHTER IN CELL HOUSE 3: THE ANATOMY OF A RIOT* 3, 78 (1997). The next correctional officer murdered on duty in Colorado was Eric Autobee, who was murdered at Limon Correctional Institution in 2002.

Kieran Nicholson, *Inmate Kills Corrections Worker, State Says Officer Is 1st Killed by Prisoner Since '29*, DENVER POST, Oct. 20, 2002, at B1.

84. *Graves to Hang Himself*, supra note 76, at 16.

85. See, e.g., infra Appendix, notes 372–74 and accompanying text (case of Thomas Coleman), 375 and accompanying text (case of George N. Woods). Reference to Woods being “jerked to Jesus” can be found in DUANE A. SMITH, *ROCKY MOUNTAIN BOOM TOWN, A HISTORY OF DURANGO* 51 (1980).

86. In discussing the execution of Thomas Jordan, who was put to death soon after Governor Waite left office, the Rocky Mountain News reported “Governor Waite’s position upon capital punishment was well known. He was opposed to it, and during his administration it was practically admitted that Jordan would be safe from the noose of the hangman.” *The Condemned, Executive Clemency Prolongs Life for Two Murderers*, ROCKY MOUNTAIN NEWS, May 12, 1895, at 1 [hereinafter *The Condemned*].

87. See infra Appendix, notes 401–02 and accompanying text (case of Thomas A Jordan).

88. See infra Appendix, note 403 and accompanying text (case of Peter Augusta).

89. *Two Men Executed*, TRINIDAD DAILY NEWS (Colo.), May 14, 1895, at 1.

90. *Jordan v. People*, 36 P. 218 (Colo. 1894).

91. *The Condemned*, supra note 86, at 1.

92. See infra Appendix, notes 407–09 and accompanying text (cases of William Holt, Albert Noble, and Deonicio Romero).

93. Iowa, Maine and Wisconsin totally abolished the death penalty; Michigan retained it for treason until 1963, and Rhode Island retained it for murder of a guard by a lifetime prisoner. HUGO ADAM BEDAU, *THE DEATH PENALTY IN AMERICA, CURRENT CONTROVERSIES* 9 (1997).

94. S.J. Res. 962–63, 9th Leg., (Colo. 1893).

95. *The Capital Punishment Bill*, ROCKY MOUNTAIN NEWS, Apr. 1, 1893, at 8.

96. No Work for Hangman, ROCKY MOUNTAIN NEWS, Mar. 1, 1895, at 8.
97. Capital Punishment, DENVER POST, Mar. 1, 1895, at 4.
98. H.R.J. Res. 853, 10th Leg., (Colo. 1895).
99. Act of Mar. 29, 1897, § 1, 1897 Colo. Sess. Laws 135; Hanging Is Abolished, DENVER POST, Mar. 29, 1897, at 1; No More Hanging by Law, ROCKY MOUNTAIN NEWS, Mar. 30, 1897, at 10. The Act also abolished the secrecy requirements surrounding executions imposed by the 1889 legislation.
100. Message of Governor Alva Adams, S.J. Res. 39, 41, 12th Leg., (Colo. 1899). Governor Adams also noted that of the twenty-five inmates condemned to death since executions were moved to the state penitentiary, thirteen were reprieved by the courts or the governor. *Id.* at 40.
101. Editorial, BOULDER DAILY CAMERA, Jan. 31, 1899, at 2.
102. One of the escaped convicts was Anton Woode, who was convicted of murder on April 8, 1893, and sentenced to twenty-five years in prison. The murder was committed when Woode was eleven years of age.
103. Reynolds Lynched at Cañon City, ROCKY MOUNTAIN NEWS, Jan. 27, 1900, at 1; A Rope Awaits Wagoner: Convict Reynolds Lynched Last Night, DENVER POST, Jan. 27, 1900, at 1; No Inquest Over Reynolds' Remains, DENVER TIMES, Jan. 27, 1900, at 1.
104. What the Governor Thought of Lynching, ROCKY MOUNTAIN NEWS, Jan. 27, 1900, at 8.
105. In an editorial in the Denver Times, it was stated that: The Cañon City citizens who took the law into their own hands felt that there has been too much leniency shown criminals in this state, where sentimentality has overbalanced common sense. Prisoners at the penitentiary are accorded too many privileges, and escape, legal or otherwise, has been made too easy. The people of Cañon City believed that in self-protection, an object lesson should be given these prisoners The lynchers also had in mind a hint to the legislature that if the law does not provide adequate punishment for criminals the people will.
- Editorial, Restore Capital Punishment, DENVER TIMES, Jan. 28, 1900, at 12. Several other newspapers from throughout the state echoed the call for reinstatement. Restore Capital Punishment, DENVER TIMES, Jan. 29, 1900, at 4 (quoting excerpts from editorials from ten other Colorado newspapers).
106. LEONARD, LYNCHING IN COLORADO, *supra* note 11, at 146.

107. *Id.* at 143, 146–47.
 108. Capital Punishment Must Be Restored, DENVER POST, May 4, 1900, at 4.
 109. Restore Capital Punishment, ROCKY MOUNTAIN NEWS, May 24, 1900, at 4
 110. Guilt Points Its Finger at Porter, ROCKY MOUNTAIN NEWS, Nov. 13, 1900, at 1.
 111. Punishment for the Limon Ravisher, DENVER POST, Nov. 13, 1900, at 4.
 112. Determined Men Search the Trains for Porter, ROCKY MOUNTAIN NEWS, Nov. 13, 1900, at 2.
 113. Porter Condemned to Death by His Own Confession, ROCKY MOUNTAIN NEWS, Nov. 15, 1900, at 1.
 114. Mob Much Disappointed, ROCKY MOUNTAIN NEWS, Nov. 16, 1900, at 2.
 115. JOHN H. MONNETT & MICHAEL MCCARTHY, COLORADO PROFILES: MEN AND WOMEN WHO SHAPED THE CENTENNIAL STATE 205–14 (1996); Fearful Revenge for Murder of Louise Frost, ROCKY MOUNTAIN NEWS, Nov. 17, 1900, at 1. When asked to comment on the lynching, Governor Charles S. Thomas (1899– 1901) stated: “My opinion is that there is one less negro [sic] in the world.”
- LEONARD, LYNCHING IN COLORADO, *supra* note 11, at 149 (quoted in Thomas Is Waggish, BOULDER DAILY CAMERA, Nov. 17, 1900, at 2).
116. LEONARD, LYNCHING IN COLORADO, *supra* note 11, at 124.
 117. Oppose Mob Rule, DENVER TIMES, Nov. 19, 1900, at 16.
 118. See, e.g., Once More, the Death Penalty, DENVER TIMES, Nov. 17, 1900, at 4; The Porter Burning, DENVER TIMES, Nov. 19, 1900, at 7 (presenting excerpts from editorials from several newspapers from throughout the state); Whether to Restore the Death Penalty, DENVER TIMES, Jan. 28, 1901, at 6.
 119. Calls Them Murderers, DENVER POST, Feb. 9, 1901, at 10.
 120. Passed the Senate, DENVER POST, Mar. 29, 1901, at 2.
 121. Act of May 2, 1901, ch. 64, sec. 2, § 1176, 1901 Colo. Sess. Laws 153–54. In declining to veto the bill, Governor Orman stated that he believed it would be repealed by the next legislature and that he had doubts about the constitutionality of the bill’s provisions. Kills Two Bills: Capital Punishment Becomes a Law Through Lapse of Time, ROCKY MOUNTAIN NEWS, May 1, 1901, at 12.

122. The statute specified that the warden shall invite to be present thereat the sheriff of the county wherein the conviction was had, the chaplain and physician of the penitentiary, two practicing surgeons, residents of the state, the spiritual adviser [sic] of the convict, if any, and six reputable citizens of the state, of full age. Act of May 2, 1901, § 6, 1901 Colo. Sess. Laws 155–56.

123. Those who violated the secrecy provision were subject to a fine of between fifty and five hundred dollars, or by one to six months in jail. *Id.* § 9, at 157.

124. *Id.* § 2, at 154.

125. *Id.* § 6, at 156.

126. LEONARD, LYNCHING IN COLORADO, *supra* note 11, at 174.

127. For a discussion of the many parallels between the practice of capital punishment today in the United States and the practice of lynchings a century years ago, see FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* (2003).

128. *Andrews v. People*, 79 P. 1031 (Colo. 1905).

129. See *infra* Appendix, notes 410–13 and accompanying text (case of Azel D. Galbraith).

130. See *infra* Appendix, notes 414–15 and accompanying text (cases of J. Newton Andrews and Fred Arnold).

131. See *infra* Appendix, notes 416–17 and accompanying text (case of Joseph Johnson).

132. See *infra* Appendix, notes 432–37 and accompanying text (case of Harry Edgar Hillen).

133. Shot Chase Dead When He Snarled, Bandit Confesses, *ROCKY MOUNTAIN NEWS*, Oct. 28, 1913, at 1 [hereinafter Shot Chase Dead When He Snarled].

134. See *infra* Appendix, notes 446–48, 449, 450–53, 454–55 and accompanying text (cases of George Bosko, Daniel Borich, Joe McGonigal, and Ray Shank).

135. See *infra* Appendix, notes 449, 450–53, 454–55, 456–58 and accompanying text (cases of Daniel Borich, Joe McGonigal, Ray Shank, and Antonio Casias).

136. See *infra* Appendix, notes 459–62 and accompanying text (cases of Raymond Jasper Noakes and Arthur Alonzo Osborn).

137. See *infra* Appendix, notes 474–79 and accompanying text (cases of Ralph Fleagle, Howard Royston, and George J. Abshier).

138. See *infra* Appendix, notes 470–73 and accompanying text (case of Harold Weiss), 480–85 and accompanying text (case of Emelio Herrera).

139. See *infra* Appendix, notes 474–79 and accompanying text (cases of Ralph Emerson Fleagle, Howard L. Royston, and George J. Abshier).

140. See *infra* Appendix, notes 489–93 and accompanying text (cases of Claude Ray, John Walker, and Andrew Halliday).

141. See *infra* Appendix, note 494 and accompanying text (case of James V. Foster).

142. Hang Bulger Like Dog, Cries Church Rector, *ROCKY MOUNTAIN NEWS*, Jan. 4, 1916, at 12.

143. *BEDAU*, *supra* note 93, at 9.

144. *KING*, *supra* note 51, at 92. Actually, forty-five men were hanged in Cañon City between 1890 and 1933 (see Table 1). Unfortunately, King does not provide the source for these tallies. Another report states that “Only two of the last fifteen hanged on the queer gallows have received broken necks.” Killer Strangles in Fourteen Minutes on Colorado Gallows, *DENVER POST*, Dec. 2, 1933, at 1 [hereinafter *Killer Strangles in Fourteen Minutes*]. Data presented in Appendix, *infra*, taken from newspaper accounts, indicate whether or not the inmate’s neck was broken in thirty-two of the forty-five hangings. Of the thirty-two, it was reported that the neck was broken in twenty-two cases. Of the last ten hangings where the type of death was reported, only two men had their necks broken. See *infra* Appendix, notes 384–493 and accompanying text.

145. Lethal Gas Chamber Soon Will Be Built at State Pen, *ROCKY MOUNTAIN NEWS*, May 21, 1933, at 3.

146. A one thousand pound weight was used to hang Claude Ray, John Walker, and Andrew Halliday in 1931. Charles T. O’Brien, Three Manter Bandits Hanged: Noose Fails to Break Necks and Slayers Strangle to Death, *DENVER POST*, Jan. 31, 1931, at 1.

147. See *infra* Appendix, notes 463–69 and accompanying text (case of Edward Ives).

148. Frances Melrose, Little Eddie Ives Played Big Role in Changing Execution, *ROCKY MOUNTAIN NEWS*, Jan. 17, 1977, at 8; see also Alice Spencer Cook, The Man Was Hanged Twice, *DENVER POST*, Apr. 6, 1958, *Empire Magazine*, at 6.

149. Botched hangings were not unheard of in Colorado’s past. When James Miller was hanged in 1877, the entire trap door on the scaffold fell beneath him, and Miller’s feet came to rest on it when he dropped. The trap door had to be removed so he could dangle

freely. See *infra* Appendix, note 362 and accompanying text. In 1881, the rope broke as W.H. Salisbury was being hanged, forcing the executioners to hang him a second time. See *infra* Appendix, note 369 and accompanying text. Later that year, the trap door failed to open so Thomas Coleman could be hanged; he had to be removed from the gallows while repairs (which later proved to be successful) were made. See *infra* Appendix, notes 372–74 and accompanying text. The secrecy provisions surrounding Colorado executions make it impossible to determine how many executions conducted at Cañon City were “botched.” We do know, however, that during one asphyxiation, the spectators had to scatter when the gas chamber leaked. *Death Chamber at Pen Tested*, ROCKY MOUNTAIN NEWS, Dec. 5, 1939, at 1. See *infra* Appendix, notes 530–34 and accompanying text (case of Pete Catalina).

150. W.T. Little, *What About Executions Before 1890?*, ROCKY MOUNTAIN NEWS, July 6, 1965, at 76.

151. BANNER, *supra* note 59, at 224.

152. *Measure to Abolish Death Penalty Is Passed by State Senate and Sent to House*, ROCKY MOUNTAIN NEWS, Mar. 18, 1933, at 5; *Death Penalty Bill May Save Doomed Men*, DENVER POST, Mar. 29, 1933, at 2.

153. S. 86, 1933 Leg., Evening Sess. (Colo. May 8, 1933); *Vote for Adjournment Kills Scores of Bills in General Assembly*, DENVER POST, May 9, 1933, at 4.

154. *Colorado Senate Approves Lethal Gas for Executions*, DENVER POST, Feb. 2, 1933, at 4.

155. *Act of Mar. 31, 1933, ch. 61, 1933 Colo. Sess. Laws, 420–22; Governor Signs Lethal Gas Bill*, ROCKY MOUNTAIN NEWS, Apr. 1, 1933, at 1.

156. By 1955, a total of eleven states had turned to lethal gas as the execution method. BANNER, *supra* note 59, at 199.

157. *\$2,500 for Death House*, ROCKY MOUNTAIN NEWS, June 15, 1933, at 14; *Maurice Leckenby, State Pen Death Chamber Nearing Completion Here*, ROCKY MOUNTAIN NEWS, Sept. 24, 1933, at 6.

158. Cary Stiff, *The Death House by the Side of the Road*, DENVER POST, May 16, 1971, at 18 [hereinafter *Stiff, The Death House*]. Eaton Metal Products built all the gas chambers used in the U.S. except the one used in North Carolina. *Id.*; see also, *Execution Chamber Styles*, ROCKY MOUNTAIN NEWS, Feb. 27, 1938 (includes picture of Denver workman putting the final touches on the gas chamber that would soon be installed in San Quentin, California); Cary Stiff, *Denverite ‘Refined’ Death*, DENVER POST, Sept. 15, 1966, at 88; Bill Pardue, *Denver Firm Receives Inquiries on Gas Chambers*, ROCKY MOUNTAIN NEWS, Dec. 6, 1976, at 43.

159. Id.

160. Colorado never had a triple execution using gas; its only two triple executions (1896 and 1931) were by hanging. There were also four double hangings (1895, 1905, 1928, and 1930).

161. Stiff, *The Death House*, *supra* note 158, at 18; see also, State's New Gas Chamber to Claim 1st Victim Friday, *ROCKY MOUNTAIN NEWS*, Sept. 2, 1956, at 5. This new gas chamber, in which eight prisoners eventually died, now sits outside the prison museum in Cañon City. By the time the new chamber was constructed, Colorado's original gas chamber had been turned into a grain storage building. Id. It has since been discarded.

162. See *infra* Appendix, notes 507–13 and accompanying text (case of William Cody Kelley).

163. Id.

164. Wallis M. Reef, *Kelley Meets Swift Death by Lethal Gas*, *ROCKY MOUNTAIN NEWS*, June 23, 1934, at 1.

165. Charles T. O'Brien, *Kelley Executed in New Gas Cell*, *DENVER POST*, June 23, 1934, at 1.

166. See *infra* Appendix, note 530–34 and accompanying text (case of Pete Catalina).

167. See *infra* Appendix, note 535–36 and accompanying text (case of Angelo Agnes).

168. *Agnes and Catalina Executed Together in Lethal Chamber*, *DENVER POST*, Sept. 30, 1939, at 1 [hereinafter *Agnes and Catalina Executed Together*].

169. *Death Chamber at Pen Tested*, *supra* note 149, at 1.

170. See *infra* Appendix, notes 541–49 and accompanying text (case of Joe Coates).

171. *Coates Begg for Prayer in Death Chair*, *DENVER POST*, Jan. 11, 1941, at 1.

172. See *infra* Appendix, notes 514–517 and accompanying text.

173. In 1928, cousins Raymond Noakes and Arthur Osborn, who had been raised like brothers, were hanged. See *infra* Appendix, notes 459–462 and accompanying text.

174. See *infra* Appendix, notes 525–29 and accompanying text (case of Joe Arridy).

175. Id.

176. “Last night’s attack was apparently caused by the excitement of the execution.” Puebloan Witness Dies at Execution, PUEBLO CHIEFTAN (Colo.), Aug. 11, 1937, at 1.

177. See ROBERT PERSKE, DEADLY INNOCENCE? 125 (1995).

178. See *infra* Appendix, notes 558–561 and accompanying text (case of John Sullivan).

179. Handyman Is Held in Slaying of Woman at Manitou Springs, DENVER POST, Jan. 12, 1942, at 5 [hereinafter Handyman Is Held in Slaying].

180. *Sullivan v. People*, 139 P.2d 876, 877 (Colo. 1943).

181. *Id.*

182. See *infra* Appendix, notes 598–602 and accompanying text (case of John Gilbert Graham).

183. *Howard Pankratz*, Colo. A Leader in Courtroom Cameras, DENVER POST, Dec. 12, 2002, at 7A.

184. See *infra* Appendix, notes 603–12 and accompanying text (case of Leroy Adolph Leick).

185. See *infra* Appendix, notes 613–17 and accompanying text (case of David Francis Early).

186. See *infra* Appendix, notes 618–22 and accompanying text (case of Harold David Wooley).

187. See *infra* Appendix, notes 623–25 and accompanying text (case of Walter J. Hammil).

188. See *infra* Appendix, notes 626–31 and accompanying text (case of John Bizup, Jr.).

189. See *infra* Appendix, notes 632–40 and accompanying text (case of Luis Jose Monge). Feb. 24, 1955, at 16.

190. House Measure Bans Death Penalty in State, ROCKY MOUNTAIN NEWS,

191. Bill to End Capital Punishment Returned to House Committee, ROCKY MOUNTAIN NEWS, Mar. 29, 1955, at 44.

192. The vote to bury the bill was 34–29. House Move Kills Death Penalty Ban, DENVER POST, Mar. 29, 1955, at 3.

193. Bill Voiding Death Penalty Squeaks by House Group, ROCKY MOUNTAIN NEWS, Feb. 27, 1957, at 41; House Will Debate Capital Punishment, ROCKY MOUNTAIN NEWS, Mar. 2, 1957, at 34; House Kills Bill Banning Death Penalty in Colorado, ROCKY MOUNTAIN NEWS, Mar. 5, 1957, at 5.

194. The vote was thirty-six to twenty-three. Bill to Ban Death Penalty Turned Down by House, DENVER POST, Mar. 5, 1957, at 14.

195. Tom Gavin, Senate Dumps Death Penalty Measure Again, ROCKY MOUNTAIN NEWS, Mar. 5, 1959, at 5.

196. The measures failed by identical five to two votes. Anti-Death Penalty Bill Dies, ROCKY MOUNTAIN NEWS, Mar. 2, 1961, at 24.

197. This bill was defeated on a twenty-three to nine vote. Dan Thomasson, Senate Defeats Moratorium on Death Penalty, ROCKY MOUNTAIN NEWS, Feb. 18, 1964, at 5.

198. Plan to Bar Death Penalty Is Introduced, ROCKY MOUNTAIN NEWS, Jan. 22, 1965, at 44.

199. Leonard Larsen, House Votes to Put Death Penalty on Ballot, DENVER POST, Apr. 10, 1965, at 20.

200. The referendum was approved by an eighteen to twelve margin. Martin Moran, Senate Wants Voters to Weigh Death Law, ROCKY MOUNTAIN NEWS, Apr. 20, 1965, at 5; Charles Roos, Senate Okays Death Penalty Vote Bill, DENVER POST, Apr. 20, 1965, at 13.

201. Death Penalty Bill is Signed, DENVER POST, May 6, 1965, at 34; Love Signs Law Permitting Vote on Capital Punishment, ROCKY MOUNTAIN NEWS, May 7, 1965, at 65.

202. Rendall Ayers, State Supreme Court Orders 3 Executions, DENVER POST, Nov. 1, 1965, at 23.

203. State DAs Condemn Death Law, DENVER POST, June 20, 1965, at 20.

204. William Logan, Colorado DAs Ask Death Penalty End, ROCKY MOUNTAIN NEWS, June 20, 1965, at 12. Oct. 5, 1974, at 27.

205. Correctional Group Opposes Death Penalty, ROCKY MOUNTAIN NEWS,

206. See discussion of Lamping, *supra* Part III.A.

207. See *infra* Appendix, notes 425–31 and accompanying text (case of Lewis J. Wechter), 438–40 and accompanying text (case of George Quinn).

208. Little, *supra* note 150, at 76.

209. Pasquale Marranzino, No Sponge from Roy’s Closet, *ROCKY MOUNTAIN NEWS*, May 31, 1954, at 23.

210. Little, *supra* note 150, at 76.

211. Rendall Ayers, Tinsley Honed for Challenges, *DENVER POST*, Sept. 12, 1965, at 35 (stating he would support the death penalty only in cases in which police officers were murdered); Anti-Capital Punishment Council Will Incorporate, *ROCKY MOUNTAIN NEWS*, Dec. 1, 1965, at 73. Warden Tinsley later was among those who filed amicus briefs in *Furman v. Georgia*. See *Furman v. Georgia*, 408 U.S. 238, 287, n.35 (1971).

212. Later wardens not only opposed the death penalty, but also followed Tinsley’s lead by taking an active role in speaking out against capital punishment. Wayne K. Patterson, who served as warden from 1965–1972 and pulled the lever releasing the cyanide pellets that killed Luis Monge in 1967, remains to this day a staunch opponent of the death penalty. Karen Bailey, Ex Warden Against Capital Punishment, *ROCKY MOUNTAIN NEWS*, July 2, 1985, at 14; Glenn Troelstrup, Ex-Warden Still Opposes Death Penalty, *DENVER POST*, Dec. 19, 1976, at 52; see also *infra* Appendix, notes 632–40 and accompanying text (case of Luis Jose Monge). Alex Wilson, the Warden in 1974, also opposed the death penalty and pledged that he would never personally carry one out. He took the position that executions should not take place at the prison because “it is an extremely derogative thing to do.” Joan Zyda, Warden Personally Against Executions, *DENVER POST*, June 9, 1974, at 36. In 1974, Wilson allegedly told an audience that “[p]eople who are in favor of capital punishment are nuts.” John Boslough, Warden Rakes Death Penalty, *DENVER POST*, Sept. 27, 1974, at 2.

However, when this quote was printed in *The Denver Post*, he denied the statement, pointing out that many people he admired were in favor of the death penalty. ‘Nuts’ Quote Is Denied by Warden, *DENVER POST*, Sept. 29, 1974, at 2.

213. *The Condemned*, *supra* note 86, at 9. Governor Waite’s term lasted from 1893 until 1895.

214. See *supra* note 96 and accompanying text.

215. See *supra* note 121 and accompanying text.

216. See *infra* Appendix, notes 425–31 and accompanying text (case of Lewis J. Wechter). Governor Shafroth served between 1909 and 1913.

217. See *infra* Appendix, notes 459–62 and accompanying text (cases of Raymond Jasper Noakes and Arthus Alonzo Osborn).

218. Ed C. Johnson, *I Hate Capital Punishment but a Governor Must Do His Job*, *ROCKY MOUNTAIN NEWS*, Sept. 9, 1956, at 5. Johnson served as governor between 1955 and 1957.

219. See *infra* Appendix, notes 595–97 and accompanying text (case of Besalirez Martinez). Other governors, although apparently not opposed to the death penalty, did visit condemned inmates before executions to better inform their clemency decisions. Governor Albert W. McIntire (1895–1897) visited Thomas Jordan. See *infra* Appendix, notes 401–02 and accompanying text. Governor Ralph L. Carr (1939–1943) visited Joe Coates and Martin Sukle. See *infra* Appendix, notes 541–49, 552–55 and accompanying text.

220. *End to Death Penalty Envisaged in Colorado*, *DENVER POST*, Dec. 16, 1961, at 6. Among relevant scholarship published by Professor Milligan is: *A Protestant's View of the Death Penalty*, in *THE DEATH PENALTY IN AMERICA* 175 (Hugo Adam Bedau ed., 1964); *Reflections on the Gas Chamber*, 23 *ILIFF REV.* 3 (1966); *The Effect of Cruelty on Those Who Inflict It, with Special Reference to the Eighth Amendment*, 12 *CONTEMP. PHIL.* 24 (1991); *The 'Cruel and Unusual' Proscription in the Eighth Amendment*, in *THE BILL OF RIGHTS: BICENTENNIAL REFLECTIONS* 103 (Yeager Hudson & Creighton Peden eds., 1993).

221. Eva Hodges, *Clergymen Oppose Capital Punishment in Poll*, *DENVER POST*, Mar. 20, 1965, at 1 (Religion Section).

222. Morgan Lawhon, *State's ACLU Mulls Death Penalty*, *DENVER POST*, Jan. 31, 1965, at 14.

223. Rendall Ayers, *Colo. Anti-Death Penalty Unit Formed*, *DENVER POST*, Nov. 29, 1965, at 3.

224. *Anti-Capital Punishment Council Will Incorporate*, *ROCKY MOUNTAIN NEWS*, Dec. 1, 1965, at 73.

225. Cary Stiff, *Chessman Views Given by Ex-Warden Duffy*, *DENVER POST*, Oct. 3, 1966, at 48. Warden Duffy was a dogged opponent of the death penalty. See generally, Clinton Duffy, 88 *MEN & 2 WOMEN* (1962).

226. The Colorado Young Democrats first took a stand against the death penalty in 1958, when a resolution supporting abolition passed by a narrow margin (661 to 620) at their state convention. Roberta McIntyre, *End Capital Punishment, Dems Urge*, *ROCKY MOUNTAIN NEWS*, June 2, 1958, at 5.

227. Denver Young Dems Push Drive to End Death Penalty, DENVER POST, Aug. 16, 1966, at 28.

228. Clark Secrest, Girl Found Slain in CU Auditorium, DENVER POST, July 10, 1966, at 1.

229. Eight Nurses Massacred, DENVER POST, July 14, 1966, at 1; Richard Speck, 49, Chicago Killer of 8 Student Nurses 25 Years Ago, N.Y. TIMES, Dec. 6, 1991, at 21 (obituary).

230. Texas Toll: 16 Dead, 31 Shot, DENVER POST, Aug. 2, 1966, at 1.

231. The victims' names were Milton and Mildred Moeller. Harry Gessing, Missing Pair Found Slain in Colo. Camp, DENVER POST, Nov. 3, 1966, at 1. One month later, Thomas Julius Sergent was arrested for the murders. Robert Kistler, Slay-Suspect Sergent Facing Early Return, DENVER POST, Dec. 14, 1966, at 3. Sergent was subsequently convicted of first degree murder. *Sergent v. People*, 497 P.2d 983, 984 (Colo. 1972).

232. Fritz Lalendorf, Daylight Time OK'd: Voters Retain Death Penalty, ROCKY MOUNTAIN NEWS, Nov. 9, 1966, at 5.

233. Gov. Love Lifts Execution Stays, DENVER POST, Jan. 5, 1967, at 18.

234. Bell and another death row inmate, Ernest Alsip, were killed by guards in an escape attempt on May 1, 1971. Alan Cunningham, 2 Inmates Die in Escape Try in View of Students, ROCKY MOUNTAIN NEWS, May 2, 1971, at 5.

235. Cary Stiff, Joe Segura Execution Date Due, DENVER POST, Feb. 19, 1967, at 31.

236. Fred Brown, Governor Grants Garrison 5-Week Stay of Execution, DENVER POST, May 4, 1967, at 1.

237. The death sentences were set aside because of the improper removal of jurors who had reservations about the death penalty from the trial juries. *Segura v. Patterson*, 402 F.2d 249, 251–252 (1968). Carol McMurrough, Court Decisions Move 2 Men Off Death Row, DENVER POST, June 29, 1971, at 3; Carol McMurrough, Garrison Leaves Prison Death Row, DENVER POST, June 30, 1971, at 21.

238. Bill McBean, Slayer Cheated Death and Won, DENVER POST, Apr. 26, 1978, at 3. On Thanksgiving Day, 1978, Lt. Gov. George Brown granted Garrison a pardon while Governor Love was traveling out of state. Love immediately rescinded the pardon upon his return. Dick Foster, Top State Jobs Have Heated History; Lieutenant Governors Not Always Loyal to Governors, ROCKY MOUNTAIN NEWS, Oct. 10, 1999, at 5A. Garrison's suit to have the pardon restored failed. Dick Foster, Governors Hold Solemn Power, Face Public's Wrath in Deciding Pardons, ROCKY MOUNTAIN NEWS, Feb. 25, 2001, at 4A. By 1994, Garrison had worked for the City of Denver as a janitor for

sixteen years. He still lived with his mother and his only legal problems since being released were two traffic tickets. Greg Lopez, Politicians ‘Forget About the Person,’ Death Row Survivor Says, ROCKY MOUNTAIN NEWS, Mar. 16, 1994, at 4.

239. The Rosenbergs’ guilt remains controversial. See, e.g., WALTER SCHNEIR & MIRIAM SCHNEIR, INVITATION TO AN INQUEST: A NEW LOOK AT THE ROSENBERG-SOBEL CASE (1968).

240. Chessman had attained worldwide notoriety for several well-received books that he wrote while on death row. See, e.g., CARYL CHESSMAN, CELL 2455 DEATH ROW (1960). In addition, he was executed for kidnapping for the purpose of robbery, which many felt should not have been a capital offense. See EDMUND G. (PAT) BROWN, PUBLIC JUSTICE, PRIVATE MERCY: A GOVERNOR’S EDUCATION ON DEATH ROW 20–52 (1989).

241. This case later became the basis for a popular television show, “The Fugitive.” The state sought the death penalty for Dr. Sheppard for the murder of his wife, but in a compromise verdict, he was convicted of second-degree murder and sentenced to life imprisonment. In 1966 a retrial was ordered on the grounds that massive, pervasive, and prejudicial publicity had attended his prosecution. *Sheppard v. Maxwell*, 384 U.S. 333 (1966). At retrial he was acquitted when bloodstain evidence indicated that he was not the killer.

242. See *infra* Appendix, notes 632–40 and accompanying text (case of Luis Jose Monge).

243. *Furman v. Georgia*, 408 U.S. 238 (1972).

244. BEDAU, *supra* note 93, at 22–23.

245. See *id.*

246. Hugo Adam Bedau, The 1964 Death Penalty Referendum in Oregon: Some Notes from a Participant-Observer, 26 CRIME & DELINQUENCY 528, 534–535 (1980).

247. MELTSNER, *supra* note 6, at 52.

248. *Id.* at 222, 255.

249. See, e.g., Gerald H. Gottlieb, Testing the Death Penalty, 34 S. CAL. L. REV. 268 (1961).

250. Fortas later published his views in Abe Fortas, The Case Against Capital Punishment, N.Y. TIMES MAG., Jan. 23, 1977, at 9.

251. Justice Arthur J. Goldberg, joined by Justices William J. Brennan and William O. Douglas, invited a challenge to the death penalty for rape in his dissent in *Rudolph v. Alabama*, 375 U.S. 889 (1963). His clerk at the time was (now) Harvard Law Professor Alan Dershowitz. See Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1773 (1970).

252. *Witherspoon v. Illinois*, 391 U.S. 510, 520–22 (1968).

253. See MELTSNER, *supra* note 6, at 123–24.

254. *Id.* at 27–31.

255. Some 405 of the 455 men executed for rape (eighty-nine percent) between 1930 and 1967 were African-American. See Marvin E. Wolfgang & Marc Riedel, *Rape, Racial Discrimination, and the Death Penalty*, in *CAPITAL PUNISHMENT IN THE UNITED STATES* 99–121 (Hugo Adam Bedau & Chester M. Pierce eds., 1976). Colorado never authorized the death penalty for those convicted of rape.

256. The decision was written by future Supreme Court Justice (and future death penalty opponent) Judge Harry Blackmun. *Maxwell v. Bishop*, 398 F.2d 138 (1968).

257. *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

258. *Maxwell v. Bishop*, 398 U.S. 262 (1970).

259. MELTSNER, *supra* note 6, at 148.

260. *Id.* at 227–28.

261. *McGautha v. California*, 402 U.S. 183, 196 (1971). This holding was opposite to what the Supreme Court was to hold the next year in *Furman*, although *McGautha* involved a Due Process challenge, whereas *Furman* challenged the death penalty under the Eighth Amendment.

262. *Crampton v. Ohio*, 402 U.S. 183, 221–22 (1971).

263. *People v. Anderson*, 493 P.2d 880, 898 (Cal. 1972).

264. MELTSNER, *supra* note 6, at 282.

265. *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972).

266. Ironically, in later years two of the dissenters, Justices Powell and Blackmun, would announce their unequivocal opposition to the death penalty. In 1991, then-retired Justice Lewis Powell told his biographer, “I have come to think that capital punishment should

be abolished . . . [because it] serves no useful purpose.” JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 451–52 (1994).

In 1994, while still on the Court, Justice Blackmun (who, while a Federal Circuit judge, wrote the decision in *Maxwell v. Bishop*, denying the claim that the death penalty for rape was racially tainted) wrote:

From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored . . . along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court’s delusion that the desired level of fairness has been achieved . . . I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.

Callins v. Collins, 510 U.S. 1141, 1145 (1994) (citation omitted).

267. MELTSNER, *supra* note 6, at 291.

268. Young (black) was sentenced to death for the 1965 murder of a Colorado Springs service station attendant. Jack Olsen, 2 in Colo. Death Row Spared by Court Ruling, DENVER POST, June 29, 1972, at 3.

269. Mainer (white) was sentenced to death for killing his former wife in January, 1970. *Id.* Response to Furman: An Exercise in Futility? 64 J. CRIM. L. & CRIMINOLOGY 10 (1973).

270. Charles W. Ehrhardt & L. Harold Levinson, Florida’s Legislative

271. Among those states was Colorado. In a referendum in November 1974, Colorado voters approved the reinstatement of the death penalty. Death Penalty, Other Amendments Ok’d, ROCKY MOUNTAIN NEWS, Nov. 6, 1974, at 41; Perruso, *supra* note 8, at 199.

272. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

273. *Roberts v. Louisiana*, 428 U.S. 325 (1976).

274. *Gregg v. Georgia*, 428 U.S. 153, 206–07 (1976).

275. *Proffitt v. Florida*, 428 U.S. 242, 259–60 (1976).

276. *Jurek v. Texas*, 428 U.S. 262, 276 (1976).

277. For a history of the death penalty in Colorado 1976–1997, see Perruso, *supra* note 8 and Lutz, *supra* note 8. Both of these papers describe how in 1995 Colorado shifted the responsibility for sentencing in capital cases from juries to a three-judge panel. On June

24, 2002, the Supreme Court ruled that sentencing authority in capital cases should remain in the hands of the jury. *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 2443 (2002). Colorado Governor Bill Owens responded immediately by calling a special session of the legislature, which convened in Denver on July 8, 2002. Julia C. Martinez & Howard Pankratz, *State to Rewrite Death Penalty; Special Session Planned in Wake of Court Ruling*, DENVER POST, June 27, 2002, at B1. A bill requiring a unanimous jury recommendation before the death penalty could be imposed was signed into law by Governor Owens on July 12. John Sanko, *Governor Signs Death Penalty Law; Juries Will Make Life-or-Death Calls Instead of Judges*, ROCKY MOUNTAIN NEWS, July 13, 2002, at 2B.

278. Act of Apr. 19, 1889, §§ 3, 5, 1889 Colo. Sess. Laws 118, 119, 120. In 1901, the new Colorado death penalty law added a second surgeon to attend the execution and participate in the post-mortem. Act of May 2, 1901, ch. 64, §§ 6, 8, 1901 Colo. Sess. Laws, 153, 155, 156–57. In 1955, the law was changed to eliminate the requirement for surgeons, instead requiring the presence of “two other duly licensed physicians.” Act of Apr. 9, 1955, § 1, 1955 Colo. Sess. Laws 280.

279. See *infra* Appendix, notes 474–79 and accompanying text (case of Ralph Emerson Fleagle).

280. Charles T. O’Brien, *Ralph Fleagle Dies on Gallows*, DENVER POST, July 11, 1930, at 1, 4.

281. See *infra* Appendix, notes 507–513 and accompanying text (case of William Cody Kelley).

282. O’Brien, *supra* note 165 at 1, 3.

283. See, e.g., *infra* Appendix, notes 441–45 and accompanying text (case of Oscar Cook), 454–55 and accompanying text (case of Ray F. Shank), 459–62 and accompanying text (cases of Raymond Jasper Noakes and Arthur Alonzo Osborn), 495–96 and accompanying text (case of E.J. Farmer), 525–29 and accompanying text (case of Joe Arridy), 576–79 and accompanying text (case of John Henry Brown), 582–84 and accompanying text (case of Robert S. Battalino), 585–87 and accompanying text (case of Paul J. Schneider), 598–602 and accompanying text (case of John Gilbert Graham), 603–12 and accompanying text (case of Leroy Adolph Leick), 618–22 and accompanying text (case of Harold David Wooley), 632–40 and accompanying text (case of Luis Jose Monge).

284. See *infra* Appendix, note 613–17 and accompanying text (case of David Francis Early).

285. See *infra* Appendix, notes 626–31 and accompanying text (case of John Bizup, Jr.).

286. See *infra* Appendix, note 420 and accompanying text (case of Giuseppe Alia).

287. See *infra* Appendix, notes 450–53 and accompanying text (case of Joe McGonigal), 569–71 and accompanying text (case of Charles Silliman).

288. See *infra* Appendix, notes 401–02 and accompanying text (case of Thomas A. Jordan), notes 446–48 and accompanying text (case of George R. Bosko); notes 463–69 and accompanying text (case of Edward Ives); note 494 and accompanying text (case of James V. Foster); and notes 588–594 and accompanying text (case of John J. Berger).

289. For a discussion of physicians' involvement in death penalty cases involving mentally retarded defendants, see George J. Annas, *Moral Progress, Mental Retardation, and the Death Penalty*, 347 *NEW ENG. J. MED.* 1814 (2002).

290. Act of Apr. 29, 1993, ch. 155, § 1, 1993 Colo. Sess. Laws 543, 544 (currently codified at *COLO. REV. STAT. ANN.* § 16-11-103(1)(a) (West 2002)).

291. *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 2252 (2002).

292. See *infra* Appendix, notes 518–22 and accompanying text (case of Leonard (Lee) Belongia).

293. See *infra* Appendix, notes 525–29 and accompanying text (case of Joe Arridy). For a variety of reasons, mentally retarded citizens are more likely than others to confess to crimes that they did not commit. See, e.g., James Ellis & Ruth Luckasson, *Mentally Retarded Criminal Defendants*, 53 *GEO. WASH. L. REV.* 414 (1985); et al., *Words without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 *U. CHI. L. REV.* 495 (2002).

294. See *infra* Appendix, notes 558–61 and accompanying text (case of John Sullivan).

295. See *infra* Appendix, notes 623–25 and accompanying text (case of Walter J. Hammil).

296. COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, AMERICAN MEDICAL ASSOCIATION, *PHYSICIAN PARTICIPATION IN CAPITAL PUNISHMENT*, 270 *J. AM. MED. ASS'N* 365, 365 (1993).

297. *Id.*; COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, AMERICAN MEDICAL ASSOCIATION, *CODE OF MEDICAL ETHICS: CURRENT OPINIONS WITH ANNOTATIONS, 2000–2001*, at 15–19 (2000).

298. Neil J. Farber et al., *Physicians' Willingness to Participate in the Process of Lethal Injection for Capital Punishment*, 135 *ANNALS OF INTERNAL MED.* 884, 887 (2001); see also Linda L. Emanuel & Leigh B. Bienen, *Editorial, Physician Participation in Executions: Time to Eliminate Anonymity Provisions and Protest the Practice*, 135 *ANNALS OF INTERNAL MED.* 922 (2001).

299. MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE 5–10 (1992).

300. For a discussion of the role of “Lady Luck” in exonerating convicted defendants, see, e.g., Michael L. Radelet & Hugo Adam Bedau, *The Execution of the Innocent*, 61 *LAW & CONTEMP. PROBS.*, Autumn 1998, at 117–18. Examples of cases where an innocent death row inmate owes their vindication to luck include cases in which previously silent eyewitnesses step forward, the inmate or his friends are able to convince a journalist or journalism class to take an interest in the case, and cases where biological material that can be used for DNA analysis is left at the crime scene.

301. See *infra* Appendix, notes 349–54 and accompanying text (case of Henry Stone); note 363 and accompanying text (case of Victor Nunez); note 369 and accompanying text (case of W.H. Salisbury); notes 421–24 and accompanying text (case of James Lynn); notes 441–45 and accompanying text (case of Oscar Cook); notes 463–69 and accompanying text (case of Edward Ives); notes 507–13 and accompanying text (case of William Cody Kelley); notes 618–22 and accompanying text (case of Harold David Wooley).

302. See *infra* Appendix, notes 358–61 and accompanying text (case of Theodore Myers); note 375 and accompanying text (case of George N. Woods); notes 387–92 and accompanying text (case of Nicolai Femenella); notes 486–88 and accompanying text (case of William Moya); notes 541–49 and accompanying text (case of Joe Coates).

303. See *infra* Appendix, note 386 and accompanying text (case of Andrew Green); notes 537–40 and accompanying text (case of Harry Leopold).

304. See *infra* Appendix, notes 497–98 and accompanying text (case of Joe Maestas).

305. See *infra* Appendix, notes 528–29 and accompanying text (case of Joe Arridy).

306. See *infra* Appendix, note 370 and accompanying text (case of Merrick Rosengrants).

307. See *infra* Appendix, notes 382–85 and accompanying text (case of Cyrus Minich).

308. *Minich v. People*, 9 P. 4, 14 (Colo. 1885).

309. Act of May 2, 1901, ch. 64, § 2, 1901 Colo. Sess. Laws 153, 154.

310. See *infra* Appendix, notes 595–97 and accompanying text (case of Besalirez Martinez).

311. *Berger v. People*, 224 P.2d 228, 246 (Colo. 1950), cert. denied, 342 U.S. 837 (1951).

312. For review of this literature, see WILLIAM J. BOWERS ET AL., *LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864–1982*, at 205–17 (1984).

313. At least four Italian immigrants were executed in Colorado. See *infra* Appendix, notes 387–89 and accompanying text (case of Nicolai Femenella); note 403 and accompanying text (case of Peter Augusta); note 420 and accompanying text (case of Giuseppe Alia); and notes 530–34 and accompanying text (case of Pete Catalina). Also, four Irish immigrants were executed in Colorado. See *infra* Appendix, note 346 and accompanying text (case of Patrick Waters); notes 379–81 and accompanying text (case of Marshall Clements); notes 401–02 and accompanying text (case of Thomas A. Jordan); and note 403 and accompanying text (case of Peter Augusta). Also hanged was a “Mohammedan” born to Turkish parents in Serbia, see *infra* Appendix, note 449 and accompanying text (case of Daniel Borich), and a Romanian Jew, see *infra* Appendix, notes 470–73 and accompanying text (case of Harold Weiss). Despite a history of anti-Chinese sentiment in the state, see Leonard, *Avenging Mary Rose*, *supra* note 11, at 130–35, no defendants of Chinese ethnicity have ever been executed in Colorado. Nor have any American Indians, save Joe Maestas, who was half Mexican and half Navajo. See *infra* Appendix, notes 497–98 and accompanying text. The only other American Indian sentenced to death in Colorado that was identified in this research project was Pablo Hatch, sentenced to death on May 10, 1896, from Montezuma County. Prison records in the Colorado State Archives indicate that Hatch died in the prison from a hemorrhage to his lungs on October 27, 1896.

314. See *infra* Appendix, notes 530–34 and accompanying text (case of Pete Catalina).

315. For the role of anti-Italian attitudes in Colorado lynchings, see Leonard, *Avenging Mary Rose*, *supra* note 11, at 135–42.

316. See *infra* Appendix, notes 576–79 and accompanying text (case of John Brown). It should be noted that for the purposes of this Article, any person with at least one-half African-American heritage is coded as African-American.

317. See *infra* Appendix, notes 355–57 and accompanying text (case of George Smith); note 362 and accompanying text (case of James Miller); note 386 and accompanying text (case of Andrew Green); notes 421–24 and accompanying text (case of James Lynn); notes 499–500 and accompanying text (case of Nelivelt Moss); and notes 541–49 and accompanying text (case of Joe Coates).

318. See *infra* Appendix, notes 372–74 and accompanying text (case of Thomas Coleman); note 398 and accompanying text (case of Charles Smith); notes 535–36 and accompanying text (case of Angelo Agnes); and notes 576–79 and accompanying text (case of John Henry Brown).

319. See *infra* Appendix, notes 372–74 and accompanying text (case of Thomas Coleman); note 398 and accompanying text (case of Charles Smith); notes 535–36 and

accompanying text (case of Angelo Agnes); and notes 576–79 and accompanying text (case of John Brown).

320. See *infra* Appendix, notes 595–97 and accompanying text (case of Besalirez Martinez).

321. See *infra* Appendix, note 363 and accompanying text (case of Victor Nunez).

322. See *infra* Appendix, notes 456–58 and accompanying text (case of Antonio Casias).

323. See *infra* Appendix, notes 480–85 and accompanying text (case of Emilio Herrera).

324. See *infra* Appendix, notes 632–640 and accompanying text (case of Luis Jose Monge).

325. See, e.g., Michael L. Radelet & Glenn L. Pierce, Choosing Those Who Will Die: Race and the Death Penalty in Florida, 43 *FLA. L. REV.* 1, 24 (1991).

326. See *infra* Appendix, note 362 and accompanying text (case of James Miller).

327. See *infra* Appendix, notes 499–500 and accompanying text (case of Nevlivelt Moss).

328. See *infra* Appendix, notes 387–89 and accompanying text (case of Nicolai Femenella).

329. See *infra* Appendix, note 420 and accompanying text (case of Giuseppe Alia).

330. *Id.*

331. See *infra* Appendix, notes 562–65 and accompanying text (case of George Masayoshi Honda).

332. The best example of this type of work was conducted by David Baldus and his colleagues in Georgia and presented to the Supreme Court in *McCleskey v. Kemp*, 481 U.S. 279 (1987). See DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* (1990). For a more recent study estimating data from Illinois, see Glenn L. Pierce & Michael L. Radelet, Race, Region, and Death Sentencing in Illinois, 1988–1997, 81 *OR. L. REV.* 39 (2002).

333. A good source of data for such a study are Colorado prisoner records, which are available on microfilm at the Colorado State Archives. Among the data given for each prisoner are the date of conviction and sentence. Names and prisoner numbers of inmates from 1871–1973 and more information about the state archives are can be found at Colorado Department of Personnel & Administration, State Penitentiary Records at the

Colorado State Archives, at <http://www.archives.state.co.us/pen/history.htm> (last accessed Apr. 15, 2003).

334. See generally, ELWYN JONES, *THE LAST TWO TO HANG* (1966).

335. *THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* 83 (Hugo Adam Bedau ed., 1997).

336. Amnesty International, *Facts and Figures on the Death Penalty*, at <http://web.amnesty.org/rmp/dplibrary.nsf/index?openview> (last accessed Apr. 15, 2003).

337. See Death Penalty Information Center, *Executions by Year*, <http://www.deathpenaltyinfo.org/article.php?scid=8&did=146> (last accessed Apr. 15, 2003).