

# NARROWING DEATH ELIGIBILITY IN IDAHO: AN EMPIRICAL AND CONSTITUTIONAL ANALYSIS

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## I. INTRODUCTION

The death penalty is a uniquely severe punishment – the ultimate, irreversible act of violence by state against citizen.<sup>1</sup> Because “death is different”<sup>2</sup> from all other punishments, the Eighth Amendment restricts its use, mandating that it “be reserved for the worst of crimes and limited in its instances of application.”<sup>3</sup> In other words, the death penalty may be imposed only upon the “worst of the worst.”<sup>4</sup>

The Supreme Court has developed two lines of doctrine designed to channel the death penalty’s application to the “worst of the worst.” First, and of central significance to this Article, the statutory scheme governing the imposition of the death penalty must meaningfully differentiate between those “worst” murderers, who may be subject to the death penalty, and the rest of murderers, who may not.<sup>5</sup> The legislature may achieve this differentiation, or narrowing, by defining capital first-degree murder narrowly, or by articulating aggravating circumstances that must be found at sentencing for a first-degree murder to be death-eligible.<sup>6</sup> Second, at the sentencing phase, the factfinder must consider mitigating information and make an individualized determination about whether death is warranted in a given case.<sup>7</sup>

This Article reports the findings of an empirical study designed to evaluate how effectively Idaho’s capital punishment scheme serves the constitutional

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1. *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring) (“The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.”).

2. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (plurality opinion).

3. *Kennedy v. Louisiana*, 554 U.S. 407, 446–47, *as modified* (Oct. 1, 2008) (“The rule of evolving standards of decency with specific marks on the way to full progress and mature judgment means that resort to the penalty must be reserved for the worst of crimes and limited in its instances of application.”); *see also* *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (“Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force. Capital punishment must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’”) (internal citations omitted).

4. *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (Souter, J., dissenting).

5. *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 877 (1983)).

6. *Id.* at 246.

7. *Tuilaepa v. California*, 512 U.S. 967, 972 (1994). Importantly, this individualized determination is a *separate* constitutional requirement from that of statutory narrowing. *See id.* (“We have imposed a separate requirement for the selection decision, where the sentencer determines whether a defendant eligible for the death penalty should in fact receive that sentence.”) (emphasis added). Statutory narrowing cannot be achieved through the weighing of aggravating and mitigating evidence, as that is a distinct constitutional requirement that supplements, rather than replaces, the narrowing requirement.

narrowing requirement in practice. The study involved a review of first- and second-degree murder convictions in cases filed from June 2002 through the end of 2019<sup>8</sup> to determine how many of these cases would have been factually eligible for the death penalty under the terms of Idaho's statutes – regardless of whether they were pursued as capital cases by the prosecution.

Based on this review, I found that 86 – 90% of all murder convictions were factually first-degree murder cases, and 93 – 98% of factual first-degree murder cases were eligible for the death penalty. These findings strongly suggest that Idaho's statute fails to fulfill the constitutional narrowing requirement. The overwhelming majority of murderers in Idaho are eligible for the death penalty; the legislature has done little to meaningfully narrow a subset of those who are most deserving of death.

The study also produced results on the frequency with which the death penalty is sought and imposed in death-eligible cases in Idaho. I found that the prosecution filed a notice of intent to seek the death penalty in 21% of factually death-eligible cases;<sup>9</sup> that the prosecution proceeded to a capital trial in 5% of death-eligible cases; and that a death sentence was obtained in 3% of death-eligible cases. These findings – which combine a high rate of death eligibility with a low rate of death-charging and death-sentencing – strongly suggest that death is an “unusual” punishment in Idaho, with important implications for its constitutionality under *Furman v. Georgia*.

This Article proceeds in three main parts. Part II explains the relevant Eighth Amendment doctrines that require statutory narrowing and forbid the arbitrary and capricious imposition of the death penalty. Part III presents the study and its findings. It analyzes the scope of Idaho's governing statutes, explains the study's methodology, and reports the study's findings, which strongly suggest that Idaho's capital punishment scheme fails to adequately narrow death eligibility in Idaho. Part IV analyzes the constitutional ramifications of these findings and concludes.

## II. THE CONSTITUTIONAL NARROWING REQUIREMENT

In 1972, the Supreme Court upended the existing capital punishment landscape by striking down death penalty statutes around the country as violating the Eighth and Fourteenth Amendments.<sup>10</sup> From the highly fractured set of opinions in *Furman v. Georgia*, one key imperative was clear: the Constitution prohibited capital punishment systems that lacked any meaningful basis for differentiating

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8. The list of first- and second-degree murder cases filed during the relevant time was provided by the Idaho Supreme Court. See *infra*, Part III.B, for a more detailed discussion of the method of selecting and reviewing cases.

9. By “factually death-eligible,” I mean cases coded as 1DCap, not 1DMaybeCap. See *infra*, Part III.B, for a definition of these codes.

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

those murderers who are condemned to death from those who are not.<sup>11</sup> Justice Stewart explained that within such arbitrary and capricious systems,

death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. . . . [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.<sup>12</sup>

In *Furman*, roughly 15 – 20% of convicted, death-eligible murderers were sentenced to death – a level of infrequency that the Court deemed unconstitutional.<sup>13</sup>

The Court has since clarified that capital sentencing discretion must be “suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.”<sup>14</sup> Current Supreme Court doctrine enforces this “guided discretion” in two primary ways: first, through the requirement of statutory narrowing, or the “eligibility decision;”<sup>15</sup> and second, through the requirement of individualized decision-making at sentencing, taking account of all relevant mitigating circumstances.<sup>16</sup>

This Article focuses on the first of these two requirements: that, “[t]o pass constitutional muster, a capital sentencing scheme must ‘genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found

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11. *Id.* at 309–10 (Stewart, J., concurring); see also *id.* at 313 (White, J., concurring).

12. *Id.* at 309–10 (Stewart, J., concurring).

13. Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 22 N.Y.U. L. Rev. 1283, 1288–89 (1997) (“In *Furman*, the Justices’ conclusion that the death penalty was imposed only infrequently derived from their understanding that only 15-20% of convicted murderers who were death-eligible were being sentenced to death. . . . While the Court did not indicate in *Furman* and *Gregg* what death sentence ratio (actual death sentences per convicted death-eligible murderers) a state scheme would have to produce to satisfy *Furman*, plainly any scheme producing a ratio of less than 20% would not.”).

14. *Gregg v. Georgia*, 428 U.S. 153, 188–89 (1976).

15. *Tuilaepa v. California*, 512 U.S. 967, 971 (1994).

16. *Lockett v. Ohio*, 438 U.S. 586, 608 (1978) (plurality opinion); *Sumner v. Shuman*, 483 U.S. 66, 85 (1987); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion) (“A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.”).

guilty of murder.’ ”<sup>17</sup> Narrowing may be accomplished either through a cabined definition of first-degree capital murder itself or through the enumeration of aggravating circumstances, to be found at the sentencing phase of a capital trial, that separate death-eligible from non-death-eligible cases.<sup>18</sup> Such statutory narrowing is intended to identify a subset of capital-eligible cases “in an objective, evenhanded, and substantively rational way from the many . . . murder cases in which the death penalty may not be imposed.”<sup>19</sup> Importantly, the exercise of prosecutorial discretion to winnow down capital cases is not an adequate substitute for legislative narrowing;<sup>20</sup> indeed, the risk of arbitrariness posed by standardless or insufficiently guided discretion is precisely the concern motivating the statutory narrowing requirement in the first place.<sup>21</sup>

In understanding the import of this doctrine, it bears remembering that every murder is aggravated in its own way: by definition, every murder involves deadly violence, every murder involves tragedy, every murder involves the taking of life without justification. The narrowing requirement operates within a universe of cases steeped in brutality and grief over senseless loss. Yet, because of the severity of capital punishment – because it closes the door on the possibility of rehabilitation and denies fellow human beings their most basic interest in their own humanity and in life itself – death cannot constitutionally be the appropriate punishment in each case. There must be some coherent, equitable, and non-arbitrary way of differentiating those cases deserving death<sup>22</sup> from those still-tragic cases that do not.

Since the late 1970’s, the Supreme Court has on multiple occasions weighed in on the adequacy of capital statutes’ narrowing function. With mixed success, capital defendants have challenged specific aggravating circumstances as

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17. *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 877 (1983)).

18. *Id.* at 246.

19. *Zant*, 462 U.S. at 879.

20. *Hidalgo v. Arizona*, 138 S. Ct. 1054 (Mem.), 1057 (2018) (Statement of Breyer, J.) (“[T]he Arizona Supreme Court seemed to suggest that prosecutors may perform the narrowing requirement by choosing to ask for the death penalty only in those cases in which a particularly wrongful first-degree murder is at issue. However, that reasoning cannot be squared with this Court’s precedent—precedent that insists that States perform the “constitutionally necessary” narrowing function “at the stage of legislative definition.”) (citations omitted).

21. Sam Kamin & Justin Marceau, *Waking the Furman Giant*, 48 U.C. DAVIS L. REV. 981, 992–95 (2015) (describing the Supreme Court’s consistent requirement of *legislative* narrowing and explaining why prosecutorial discretion is an inherently inadequate substitute).

22. Of course, this assumes that *any* offender deserves death. For purposes of this paper, I will not engage with the question of whether the death penalty is a humane punishment – or should be a constitutional punishment – in any case.

unconstitutionally vague,<sup>23</sup> insufficiently narrowing,<sup>24</sup> or duplicative of an element of the crime.<sup>25</sup>

In *Hidalgo v. Arizona*, the petitioner raised a type of failure-to-narrow claim that the Supreme Court had not yet considered, which looked collectively at the effect of all the enumerated aggravating circumstances, rather than individually at any particular one.<sup>26</sup> The petitioner asserted that “Arizona’s capital sentencing scheme, which includes so many aggravating circumstances that virtually every defendant convicted of first-degree murder is eligible for death, violates the Eighth Amendment.”<sup>27</sup> The Arizona Supreme Court assumed the accuracy of the petitioner’s empirical claim, but nonetheless upheld the statutory scheme’s constitutionality.<sup>28</sup> The U.S. Supreme Court declined to review the case, but Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, issued a rare statement accompanying the denial of certiorari, signaling interest in the petitioner’s underlying legal theory and inviting future consideration of the issue on a more complete factual record. Justice Breyer wrote:

In support of his Eighth Amendment challenge, the petitioner points to empirical evidence about Arizona’s capital sentence system that suggests about 98% of first-degree murder defendants in Arizona were eligible for the death penalty. That evidence is unrebutted. It points to a possible constitutional problem. And it was assumed to be true by the state courts below. Evidence of this kind warrants careful attention and evaluation. However, in this case, the opportunity to develop the record through an evidentiary hearing was denied. As a result, the record as it has come to us is limited and largely unexamined by experts and the courts below in the first instance. We do not have evidence, for instance, as to the nature of the 866 cases (perhaps they implicate only a small number of aggravating factors). Nor has it been fully explained whether and to what extent an empirical study would be relevant to resolving the constitutional question presented. Capital defendants may have the opportunity to fully develop a record with the kind of

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23. *Arave v. Creech*, 507 U.S. 463, 478 (1993) (upholding facial constitutionality of Idaho’s “utter disregard” circumstance “[i]n light of the consistent narrowing definition given . . . by the Idaho Supreme Court”).

24. *Godfrey v. Georgia*, 446 U.S. 420, 428–29 (1980) (reversing petitioner’s death sentence based on a finding that the offense was “outrageously or wantonly vile, horrible and inhuman,” where neither the plain meaning of the statute nor any state judicial limiting construction “implied any inherent restraint on the arbitrary and capricious infliction of the death sentence”).

25. *Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988) (holding that, because Louisiana’s first-degree murder statute itself adequately “narrows the class of death-eligible murderers,” an aggravating circumstance duplicative of an element of the offense presents no constitutional problem).

26. *Hidalgo v. Arizona*, 138 S. Ct. 1054 (2018) (statement of Breyer, J.) (citing Pet. for Cert. (i)).

27. *Id.*

28. *Id.* at 1056–57 (statement of Breyer, J.) (citing *State v. Hidalgo*, 390 P3d. 783, 791–92 (2017)).

empirical evidence that the petitioner points to here. And the issue presented in this petition will be better suited for certiorari with such a record.<sup>29</sup>

Justice Breyer's statement is a frank invitation to litigants and scholars to conduct further empirical research on the efficacy of capital sentencing schemes' narrowing function, and to subject that research to scrutiny and to adversarial testing.

This Article responds to that invitation. The study presented here is the first comprehensive, empirical evaluation of the narrowing function served by Idaho's death penalty statutes. It also reports on the frequency of death sentences per death eligible murder conviction. This work follows in the footsteps of empirical studies on the narrowing function of other statutory schemes, including in Colorado,<sup>30</sup> California,<sup>31</sup> Georgia,<sup>32</sup> Maryland,<sup>33</sup> and Nebraska;<sup>34</sup> as well as studies on the frequency of death sentences in death-eligible cases in states including Connecticut<sup>35</sup> and North Carolina.<sup>36</sup> These studies, collectively, point to serious concerns about the adequacy of statutory narrowing in death penalty states around

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29. *Id.* at 1057 (statement of Breyer, J.).

30. Justin Marceau, Sam Kamin, & Wanda Foglia, *Death Eligibility in Colorado: Many Are Called, Few Are Chosen*, 84 U. COLO. L. REV. 1069, 1070 (2012).

31. David C. Baldus, George Woodworth, Catherine M. Grosso, Michael Laurence, Jeffrey A. Fagan, & Richard Newell, *Furman at 45: Constitutional Challenges from California's Failure to (Again) Narrow Death Eligibility*, 16 J. OF EMPIRICAL LEGAL STUD. 693 (2019); Shatz & Rivkind, *supra* note 13, at 1311–13.

32. DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 268, n.31 (1990); Bill Rankin, Heather Vogell, Sonji Jacobs and Megan Clarke, *From 2007: A Matter of Life and Death: Death Still Arbitrary*, ATLANTA J. CONST., <https://www.ajc.com/news/state--regional/from-2007-matter-life-and-death-death-still-arbitrary/uQMik03eSLJ7VII4wvUZnN/>.

33. Raymond Paternoster, Robert Brame, Sarah Bacon, & Andrew Ditchfield, *Justice by Geography and Race: The Administration of the Death Penalty in Maryland, 1978–1999*, 4 U. MD. L.J. ON RACE, RELIGION, GENDER, & CLASS 1, 18–19, 52, fig. 1 (2004); see also Baldus, *supra* note 31, at 705 (interpreting results).

34. David C. Baldus et. al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973-1999)*, 81 NEB. L. REV. 486, 541 (2002).

35. John J. Donohue, III, *An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities*, 11 J. EMPIRICAL LEGAL STUD. 637, 641, 645–47, tbl.1 (2014).

36. Barbara O'Brien, Catherine M. Grosso, George Woodworth & Abijah Taylor, *Untangling the Role of Race in Capital Charging and Sentencing in North Carolina, 1990–2009*, 94 N.C. L. REV. 1997, 2023, 2024, tbl.2 (2016).

the country.<sup>37</sup> There is a real need for both the U.S. Supreme Court and state supreme courts to reexamine death penalty statutes' failure to narrow in light of empirical evidence developed in studies like this one.

### III. AN EMPIRICAL REVIEW OF IDAHO'S DEATH PENALTY STATUTES

In this Part, I present the statutory analysis, methodology, and findings of a study designed to evaluate empirically whether Idaho's capital scheme "genuinely narrow[s] the class of persons eligible for the death penalty."<sup>38</sup> First, I provide an overview and analysis of the Idaho statutes governing capital eligibility, as well as Idaho Supreme Court precedent interpreting them. This overview is important, both because it controls the categorization of cases in the study, and because it provides insight into whether the statutes, on their face, are likely to serve their required narrowing function. Second, I explain the methodology of the study. Third, I present the study's results and findings.

#### A. Idaho's Statutory Framework

An evaluation of whether Idaho's capital punishment statutes "genuinely narrow the class of persons eligible for the death penalty"<sup>39</sup> must begin with a careful review of the statutory text and its construction by Idaho courts. In Idaho, first-degree murder is a potentially capital crime, punishable by death or life imprisonment.<sup>40</sup> When the state seeks the death penalty, a conviction of first-degree murder is followed by a separate "special sentencing proceeding" commonly called the penalty phase.<sup>41</sup> If the penalty-phase jury unanimously finds the existence of at least one statutorily enumerated aggravating circumstance beyond a reasonable doubt, the "defendant shall be sentenced to death unless mitigating circumstances which may be presented are found to be sufficiently

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37. Some of these studies have been the basis of litigation. For example, the Colorado study was used, ultimately unsuccessfully, as the basis for a constitutional narrowing challenge. *People v. Holmes*, No. 12-CR-1522, slip op. at 6-7 (Colo. May 2, 2014) (order denying motion to declare death penalty statute unconstitutional on the basis of insufficient narrowing). The Connecticut Supreme Court considered Prof. Donohue's arbitrariness study when it decided that the death penalty as currently administered in that state violated the Connecticut constitution. *See State v. Santiago*, 318 Conn. 1, 159 (2015) (Norcott and McDonald, JJ., concurring).

38. *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (emphasis supplied) ("To pass constitutional muster, a capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.").

39. *Id.* at 244 (quoting *Zant v. Stephens*, 462 U.S. 862, 877 (1983)).

40. IDAHO CODE § 18-4004.

41. *Id.* at § 19-2515(5)(a).

compelling that the death penalty would be unjust.”<sup>42</sup> The jury must unanimously agree that the death penalty is warranted.<sup>43</sup>

As explained above, constitutional narrowing may occur either at the guilt phase – *i.e.*, in the statutory definition of capital first-degree murder – or at the penalty phase – *i.e.*, in the statutory identification of one or more aggravating circumstances.<sup>44</sup> Thus, we must understand the scope both of Idaho’s first-degree murder statute, codified at Idaho Code § 18-4003, and of its statutory aggravating circumstances, enumerated in Idaho Code § 19-2515(9). This Section will examine each of these statutes in turn.

#### i. First-Degree Murder

Some states, like Louisiana, attempt to narrow death eligibility through the first-degree murder statute itself.<sup>45</sup> Idaho has not taken this approach. Its first-degree murder statute<sup>46</sup> is broad – first, because it punishes premeditated murder, without more, and Idaho courts have interpreted “premeditation” broadly; and second, because felony murder is a strict liability offense with respect to death.<sup>47</sup>

In Idaho, *any* “willful, deliberate and premeditated killing” is first-degree murder.<sup>48</sup> By contrast, the Louisiana capital first-degree murder statute in *Lowenfield*, which the Supreme Court deemed adequately narrowing, prohibited killings with “specific intent to kill” *in addition to* some additional factor pertaining to the motive, vulnerability of the victim, or participation in an enumerated

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42. *Id.* at § 19-2515(3)(b).

43. *Id.*

44. *Tuilaepa v. California*, 512 U.S. 967, 972 (1994) (citing *Lowenfield v. Phelps*, 484 U.S. 231, 244-46 (1988) (“The aggravating circumstance may be contained in the definition of the crime or in a separate sentencing factor (or in both).”).

45. *Lowenfield*, 484 U.S. at 242–46.

46. IDAHO CODE ANN. § 18-4003.

47. IDAHO CODE ANN. § 18-4003(d). A third feature of Idaho’s first-degree murder scheme that lengthens its reach is that Idaho law makes few distinctions between those who participate in the commission of first-degree murder and those who kill directly. Aiders and abettors are principals under Idaho law, *see* IDAHO CODE ANN. § 18-204; IDAHO CODE ANN. § 19-1430, and those who do not kill directly are still death-eligible if they “intend[] a killing, or act[] with reckless indifference to human life . . . .” IDAHO CODE ANN. § 19-2515(1).

48. IDAHO CODE ANN. § 18-4003(a) (“All murder which is perpetrated by means of poison, or lying in wait, or torture, when torture is inflicted with the intent to cause suffering, to execute vengeance, to extort something from the victim, or to satisfy some sadistic inclination, or which is perpetrated by any kind of willful, deliberate and premeditated killing is murder of the first degree.”).

felony.<sup>49</sup> Similarly, the Kansas capital murder statute upheld in *Kansas v. Marsh* “require[d] that one or more specific elements beyond intentional premeditated murder be found.”<sup>50</sup>

Moreover, the Idaho Supreme Court has defined premeditation expansively. As a result, virtually all intentional killings could reasonably be charged under the first-degree murder statute. “Premeditated” is not synonymous with “planned out in advance.” The Idaho Supreme Court has repeatedly held that “premeditation does not require any appreciable space of time between the intention to kill and the killing; rather, it may be as instantaneous as successive thoughts of the mind.”<sup>51</sup> Circumstantial evidence is sufficient to prove “a deliberate and premeditated purpose to kill.”<sup>52</sup>

As a result of this expansive interpretation, spur-of-the-moment killings can nonetheless be “premeditated.” The Idaho Supreme Court has upheld findings of deliberation and premeditation where killings were apparently spontaneous responses to a triggering event. For example, in *State v. Snowden*, the defendant testified that he “blew [his] top” when the victim “swung and at the same time she kned me again.”<sup>53</sup> The defendant then “pushed the woman over beside a pickup truck which was standing near a business building. There he pulled his knife . . . and cut her throat.”<sup>54</sup> Despite the rapid progression of events, the Court found sufficient evidence of premeditation and deliberation “in view of the defendant’s acts in deliberately opening up a pocket knife, next cutting the victim’s throat, and then hacking and cutting until he had killed [the victim] and expended himself. The full purpose and design of defendant’s conduct was to take the life of the deceased.”<sup>55</sup>

Similarly, in the instant study, I reviewed multiple transcripts in which prosecutors and judges emphasized the short duration of the premeditation

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49. *Lowenfield*, 484 U.S. at 242 (quoting La. Ann. Code § 14:30A) (“First degree murder is the killing of a human being: (1) When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated escape, aggravated arson, aggravated rape, aggravated burglary, armed robbery, or simple robbery; (2) When the offender has a specific intent to kill or to inflict great bodily harm upon a fireman or peace officer engaged in the performance of his lawful duties; (3) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; (4) When the offender has specific intent to kill or inflict great bodily harm and has offered, has been offered, has given, or has received anything of value for the killing; or (5) When the offender has the specific intent to kill or to inflict great bodily harm upon a victim under the age of twelve years.”).

50. *Kansas v. Marsh*, 548 U.S. 163, 175–76 (2006) (quoting KAN. STAT. ANN. § 21-4624(e)).

51. *State v. Sheahan*, 77 P.3d 956, 975, 139 Idaho 267, 286 (2003) (quoting *Carey v. State*, 91 Idaho 706, 710, 429 P.2d 836, 840 (1967) (internal quotations and citations removed)).

52. *Sheahan*, 77 P.3d at 975, 139 Idaho at 286 (citing *State v. Wolfe*, 691 P.2d 1291, 1294, 107 Idaho 676, 679 (Ct.App. 1984)).

53. *Idaho v. Snowden*, 313 P.2d 706, 707, 79 Idaho 266, 269 (1957).

54. *Id.*

55. *Id.* at 711, 274.

requirement to support first-degree murder convictions despite a lack of evidence of advanced planning – especially where death was not instantaneous.<sup>56</sup>

Thus, Idaho’s definition of first-degree premeditated murder is broad – and so, too, is its definition of first-degree felony murder. Idaho’s first-degree felony murder provision does not require intent to kill. In Idaho, “[a]ny murder committed in the perpetration of, or attempt to perpetrate, aggravated battery on a child under twelve (12) years of age, arson, rape, robbery, burglary, kidnapping or mayhem, or an act of terrorism, . . . or the use of a weapon of mass destruction, biological weapon or chemical weapon, is murder of the first degree.”<sup>57</sup> The only required *mens rea* for first-degree felony murder in Idaho is that of the underlying felony;<sup>58</sup> no *mens rea* with respect to the killing must be established.<sup>59</sup>

By contrast, the Louisiana first-degree murder statute deemed adequately narrowing in *Lowenfield* required “specific intent to kill or to inflict great bodily harm” in addition to the commission of an enumerated felony.<sup>60</sup> Likewise, the Texas statutory scheme upheld in *Jurek v. Texas* makes death-eligible “intentional[.]” killings committed in the course of enumerated felonies.<sup>61</sup>

Taking all of this together, Idaho’s first-degree statute is substantially broader than those first-degree statutes that adequately narrowed death eligibility in *Lowenfield* and *Jurek*. Its first-degree statute is more akin to Arizona’s, which Justice Breyer described in the following terms:

Unlike the Louisiana and Texas statutes, Arizona’s capital murder statute makes all first-degree murderers eligible for death and defines first-degree murder broadly to include all premeditated homicides along with felony murder based on 22 possible predicate felony offenses. . . . Perhaps not surprisingly, Arizona did not argue below and

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56. See, e.g., Sentencing Hearing Transcript at 52, *State v. Mallory* (June 6, 2010) (No. CR 09-1472) (judge explaining that the minimum of four minutes required to cause death by strangulation could have led the jury to conclude there was “an opportunity to think about it and continue with it”).

57. IDAHO CODE ANN. § 18-4003(d).

58. *State v. Dunlap*, 313 P.3d 1, 20, 155 Idaho 345, 364 (2013) (“In order to commit felony murder, the defendant need not have had the specific intent to kill. Rather, the defendant must have had the specific intent to commit the predicate felony.”).

59. *State v. Lundquist*, 11 P.3d 27, 31, 134 Idaho 831, 835 (2000) (citing *State v. Dunlap*, 873 P.2d 784, 787, 125 Idaho 530, 533 (1993)) (“With regard to felony-murder, the element of malice aforethought is satisfied by the fact that the killing was committed in the perpetration of a felony.”)

60. *Lowenfield*, 484 U.S. at 242.

61. *Jurek v. Texas*, 428 U.S. 262, 265 (1976) (emphasis added) (quoting TEX. PENAL CODE ANN. art. 1257 (West 1973)) (“The punishment for murder with malice aforethought shall be death or imprisonment for life if: . . . (2) the person intentionally committed the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, forcible rape, or arson . . .”).

does not suggest now that the State's first-degree murder statute alone can meet the Eighth Amendment's narrowing requirement."<sup>62</sup>

Likewise, Idaho's first-degree murder statute does not, on its face, adequately fulfill the constitutional narrowing requirement – nor does it seem intended for that purpose. Thus, the key question becomes whether Idaho's aggravating circumstances meaningfully carve out a smaller subset of murderers who are eligible for the death penalty.

#### ii. Aggravating Circumstances

Idaho identifies eleven statutory aggravating circumstances, some of which may be satisfied in multiple ways.<sup>63</sup> At least one aggravator must be found by the jury beyond a reasonable doubt for the defendant to be sentenced to death.<sup>64</sup> These aggravators cover a wide range of circumstances that would predictably apply to a substantial percentage of first-degree murders.

Some of the aggravating circumstances are readily discernible and likely apply only to a narrow band of cases: for example, "[t]he defendant was previously convicted of another murder"<sup>65</sup> or "at the time the murder was committed the

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62. *Hidalgo v. Arizona*, 138 S. Ct. 1054, 1055 (2018) (statement of Breyer, J.).

63. IDAHO CODE § 19-2515(9) (2021) ("The following are statutory aggravating circumstances, at least one (1) of which must be found to exist beyond a reasonable doubt before a sentence of death can be imposed: (a) The defendant was previously convicted of another murder. (b) At the time the murder was committed the defendant also committed another murder. (c) The defendant knowingly created a great risk of death to many persons. (d) The murder was committed for remuneration or the promise of remuneration or the defendant employed another to commit the murder for remuneration or the promise of remuneration. (e) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity. (f) By the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life. (g) The murder was committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, kidnapping or mayhem and the defendant killed, intended a killing, or acted with reckless indifference to human life. (h) The murder was committed in the perpetration of, or attempt to perpetrate, an infamous crime against nature, lewd and lascivious conduct with a minor, sexual abuse of a child under sixteen (16) years of age, ritualized abuse of a child, sexual exploitation of a child, sexual battery of a minor child sixteen (16) or seventeen (17) years of age, or forcible sexual penetration by use of a foreign object, and the defendant killed, intended a killing, or acted with reckless indifference to human life. (i) The defendant, by his conduct, whether such conduct was before, during or after the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society. (j) The murder was committed against a former or present peace officer, executive officer, officer of the court, judicial officer or prosecuting attorney because of the exercise of official duty or because of the victim's former or present official status. (k) The murder was committed against a witness or potential witness in a criminal or civil legal proceeding because of such proceeding.").

64. *Id.*

65. *Id.* § 19-2515(9)(a).

defendant also committed another murder.”<sup>66</sup> Other aggravators are relatively concrete but have not been thoroughly analyzed by the Idaho Supreme Court, and questions remain about their legal scope. For example, for the aggravator “[t]he defendant knowingly created a great risk of death to many persons,” what level of risk qualifies as a “great risk” and how many people count as “many persons”?<sup>67</sup>

Other aggravators, by contrast, would predictably apply to a larger swath of murderers. Section 19-2515(9)(g)<sup>68</sup> is a near replica of the first-degree felony murder provision,<sup>69</sup> rendering the vast majority of felony-murders capital-eligible.<sup>70</sup> A previous version of the felony murder aggravator had required specific intent to kill, but that was amended in 1995 and the current version requires only that “the defendant killed, intended a killing, or acted with reckless indifference to human life.”<sup>71</sup>

Three more aggravators are both broad and inherently ambiguous or, as I will call them here, “fuzzy”: “[t]he murder was especially heinous, atrocious or cruel, manifesting exceptional depravity;”<sup>72</sup> “[b]y the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life;”<sup>73</sup> and “[t]he defendant, by his conduct, whether such conduct was before,

66. *Id.* § 19-2515(9)(b).

67. *Id.* § 19-2515(9)(c). In *State v. Abdullah*, the Supreme Court did not reach the question of whether the “great risk of death to many people” aggravator is unconstitutional as void for vagueness. 348 P.3d 1, 79, 158 Idaho 386, 464 (2015) (“Therefore, even if the great risk aggravator was unconstitutionally vague and should not have been submitted to the jury without a limiting construction from the Court, this Court affirms the jury’s finding to impose the death penalty based on the utter disregard aggravator.”).

68. IDAHO CODE § 19-2515(9)(g) (“The murder was committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, kidnapping or mayhem and the defendant killed, intended a killing, or acted with reckless indifference to human life.”).

69. Two differences are important: first, 9(g) does not include aggravated battery of a child under the age of 12 as a predicate felony, unlike Section 18-4003(d); and second, 9(g) does include a requirement that the defendant either direct killed or have a *mens rea* of recklessness or intent with respect to death, which is not a part of the first-degree statute.

70. The Idaho Supreme Court recently upheld the constitutionality of this aggravating circumstance against a *Lowenfield*-style challenge in *State v. Hall*, 419 P.3d 1042, 1085–86, 163 Idaho 744, 787–88, *cert. denied*, 139 S. Ct. 1618 (2019) (“However, the felony murder aggravator in section 19-2515(9)(g) does meet this [narrowing] requirement—it applies only to those murders which are committed in the perpetration of “arson, rape, robbery, burglary, kidnapping or mayhem.” This language may apply to many murders, but it certainly does not apply to every first-degree murder—which is all the narrowing required by *Tuilaepa*. Hall may disagree with this Court’s interpretation in *Wood*, but it was and is constitutional. We reaffirm our decision in *Wood*.”).

71. 1995 Idaho Sess. Laws 594 (changing the previous language, which required “specific intent to cause the death of a human being” to the current text).

72. IDAHO CODE § 19-2515(9)(e) (2021).

73. *Id.* § 19-2515(9)(f).

during or after the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.”<sup>74</sup> These “fuzzy” aggravators warrant further elaboration in order to determine the scope of death eligibility and the extent to which Idaho’s capital scheme satisfies the narrowing requirement. All three have been given limiting constructions by the Idaho Supreme Court and upheld as constitutional against challenges that they were void for vagueness<sup>75</sup> – yet even as limited, they have significant reach.

### 1. “Utter Disregard”

Of all the aggravators, 9(f), or “utter disregard,” is arguably the broadest. This aggravator has repeatedly withstood void-for-vagueness challenges,<sup>76</sup> including before the U.S. Supreme Court, which cited the Idaho Supreme Court’s limiting construction in upholding it.<sup>77</sup> Still, it remains an aggravating factor that could apply to many, if not most, first-degree murders.

Most recently, in *State v. Abdullah*, the Idaho Supreme Court reaffirmed the aggravator’s constitutionality, approving a jury instruction that explained its meaning in this way:

“Exhibited utter disregard for human life,” with regard to the murder or the circumstances surrounding its commission, refers to acts or circumstances surrounding the crime that exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer. “Cold-blooded” means marked by absence of warm feeling: without consideration, compunction, or clemency, matter of fact, or emotionless. “Pitiless” means devoid of or unmoved by mercy or compassion. A “cold-blooded, pitiless slayer” refers to a slayer who kills without feeling or sympathy. The utter disregard factor refers to the defendant’s lack of conscience regarding killing of another human being.<sup>78</sup>

“Utter disregard” does not require that the murderer “act sadistically or in a particularly outrageous fashion . . . .”<sup>79</sup> Moreover, unlike the “heinous, atrocious or cruel” aggravator, “utter disregard” does not require any comparative evaluation. In other words, there is no requirement that the defendant show *greater*

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74. *Id.* § 19-2515(9)(i).

75. *State v. Creech*, 670 P.2d 463, 471–72, 105 Idaho 362, 370–71 (1983) (“propensity”); *State v. Osborn*, 631 P.2d 187, 200–01, 102 Idaho 405, 418–19 (1981) (“utter disregard”); *Arave v. Creech*, 507 U.S. 463, 471–73 (1993) (“utter disregard”); *Osborn*, 631 P.2d at 200–201, 102 Idaho at 418 (“heinous, atrocious, and cruel”).

76. *E.g.*, *Osborn*, 631 P.2d at 200–201, 102 Idaho at 418–19.

77. *Arave*, 507 U.S. at 471–73.

78. *State v. Abdullah*, 348 P.3d 1, 78, 158 Idaho 386, 463 (2015).

79. *State v. Fain*, 774 P.2d 252, 269, 116 Idaho 82, 99 (1989).

callousness or lack of conscience than the average murderer to support this aggravating circumstance.<sup>80</sup>

Rather, in upholding trial findings of “utter disregard,” the Idaho Supreme Court has stressed facts such as the defendant’s calmness in committing the killing,<sup>81</sup> refusal to aid the victim after inflicting injury,<sup>82</sup> failure to show emotion or remorse about the injury or death,<sup>83</sup> trifling motive to kill,<sup>84</sup> considerable time for reflection,<sup>85</sup> callous disposal of the body,<sup>86</sup> injuring multiple people,<sup>87</sup> and

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80. See *State v. Hall*, 419 P.3d 1042, 1138, 163 Idaho 744, 840 (2018) (Kidwell, J. Pro Tem, dissenting) (“Moreover, the “utter disregard” aggravator does not even contain the “exceptional depravity” limitation. It is difficult to see how the language could guide any sentencer, or limit the class eligible to receive the death penalty, as most consider any murder an “utter disregard” for human life. Therefore, I would also find the “utter disregard” aggravator unconstitutional, as it is vague and contains no limiting construction.”).

81. *State v. Aragon*, 690 P.2d 293, 296, 302, 107 Idaho 358, 361, 367(1984).

82. *Id.*

83. See *State v. Carson*, 264 P.2d 54, 65, 151 Idaho 713, 724 (2011); *State v. Fetterly*, 710 P.2d 1202, 1208–09 109 Idaho 766, 772–73 (1985) (“The trial court also found that “several hours after the killing, and when shock would normally set in on the average human being, the defendant went back to the victim’s home, gathered up the victim’s belongings and commenced selling them around town as though nothing had happened; blatantly and openly drove the victim’s vehicle as though with permission.”).

84. *State v. Lankford*, 781 P.2d 197, 214, 116 Idaho 860, 877 (1989) (holding that “[t]he manner in which the [victims] were brutally murdered” – bludgeoned by a nightstick – “together with the fact that they were killed for the mere reason that the Lankfords wanted to steal their van support the court’s finding that the murders were committed with utter disregard for human life”).

85. *Paradis v. Arave*, 20 F.3d 950, 955–56 (9th Cir. 1994) (upholding “utter disregard” finding sustained by Idaho state courts, where trial court explained: “The facts . . . leave no doubt that the killing of Kimberly Ann Palmer was an unprovoked killing of a defenseless human being accomplished in a coldly premeditated fashion for the sole reason of insuring her silence concerning the death of Scott Currier. If the phrase, ‘utter disregard for human life’ means ‘cold-blooded’ or ‘pitiless’, then it is difficult to conjure up a situation in which the taking of a human life could be greatly more ‘cold-blooded’ or ‘pitiless’. The court believes that the term, ‘cold-blooded’ means that, after having considerable time to reflect upon the situation and consider available options, the perpetrator coolly and deliberately decides to take a human life. That is the situation presented in this case.”).

86. *Fetterly*, 710 P.2d at 1208, 109 Idaho at 772 (“The body was then callously disposed of by throwing it into the Snake River.”).

87. *State v. Paz*, 798 P.2d 1, 13–14, 118 Idaho 542, 554–55 (1990), *overruled by* *State v. Card*, 825 P.2d 1081, 121 Idaho 425 (1991) (“The Defendant intentionally shot Mr. Gould, whose back was to the Defendant, in the right shoulder at such an angle that the bullet traveled toward Mr. Gould’s spine. Then, the defendant intentionally shot Mr. Bright in the left side of the chest in the heart area. Finally, the Defendant intentionally shot Mr. Page, as Mr. Page was attempting to flee for his safety. Beyond a reasonable doubt this Defendant has exhibited the most callous disregard for human life and is a cold-blooded, pitiless killer.”).

concealment of responsibility for the killing.<sup>88</sup> The Court has also clarified that “[t]he age of a victim is a legitimate consideration” in determining the existence of “utter disregard.”<sup>89</sup>

Thus, in *State v. Carson*,<sup>90</sup> the Court upheld a jury finding of “utter disregard” in the beating death of a 3-month-old baby, citing as support the “casual” and “normal” behavior of the defendant at the emergency room, in which “[h]e would laugh at times,” and finding that “[t]he jury could reasonably have concluded that it was not out of concern for Baby that Defendant took him to the hospital, but Defendant did so in an attempt to avoid the consequences of his own conduct, knowing that he had better act like it was an accident.”<sup>91</sup> And in *State v. Aragon*,<sup>92</sup> the Court upheld a finding of “utter disregard” in a case involving the killing of an 8-month-old child by “a minimum of two and probably three blows,” as “supported by evidence that appellant acted calmly, yet violently, and refused to render aid to the victim, even though given several opportunities, and even though it was obvious the victim was in mortal peril. His only concern was to cover up his own participation in the incident.”<sup>93</sup>

## 2. “Heinous, Atrocious or Cruel”

The Idaho Supreme Court has differentiated between the “heinous, atrocious or cruel” aggravator and the “utter disregard” aggravator, explaining that the former relates to the manner of killing, while the latter relates to surrounding circumstances that demonstrate a lack of conscience or sympathy regarding killing.<sup>94</sup> While they are separate concepts, the Idaho Supreme Court has acknowledged that many murders that are “heinous, atrocious or cruel” will also have been committed with “utter disregard.”<sup>95</sup>

The U.S. Supreme Court has struck down similarly-worded aggravating circumstances in other states as unconstitutionally vague and overbroad,<sup>96</sup> while

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88. See *State v. Aragon*, 690 P.2d 293, 296, 302, 107 Idaho 358, 361, 367 (1984).

89. *State v. Beam*, 710 P.2d 526, 530, 109 Idaho 616, 620 (1985).

90. *State v. Carson*, 264 P.2d 54, 65, 151 Idaho 713, 724 (2011).

91. *Id.*

92. *Aragon*, 690 P.2d at 296, 302, 107 Idaho at 361, 367.

93. *Id.*

94. *State v. Fain*, 774 P.2d 252, 269, 116 Idaho 82, 99 (1989).

95. *Id.* (“One who commits a crime in an especially heinous way is punished for the heinousness of his crime, not because he acted with utter disregard for human life, although it may be expected that most especially heinous, atrocious or cruel murders will have been committed with utter disregard for human life.”).

96. *Maynard v. Cartwright*, 486 U.S. 356, 363–64 (1988) (holding unconstitutional an Oklahoma aggravating circumstance of “especially heinous, atrocious, or cruel,” and explaining that “[t]o say that

upholding others.<sup>97</sup> Borrowing interpretations of similar provisions by other state courts, the Idaho Supreme Court has provided additional gloss upon the “heinous, atrocious or cruel” aggravating circumstance – and in doing so, has upheld its constitutionality against vague-for-voidness challenges.<sup>98</sup> The Court clarified in *State v. Charboneau*

that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime which is unnecessarily torturous to the victim.<sup>99</sup>

The Court has further explained that “In interpreting this portion of the statute, the key word is ‘exceptional.’<sup>100</sup> It might be argued that every murder involves depravity. The use of the word ‘exceptional,’ however, confines it only to those situations where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence.”<sup>101</sup>

One difficulty with the *Charboneau* definition is that it establishes a comparative standard for heinousness – one that was intended to single out some cases as outside “the norm of capital felonies.”<sup>102</sup> *Charboneau* was decided at a time when judges, who might have the technical expertise and range of practical experience to identify cases outside the norm, were entrusted with capital sentencing. Today, however, juries, not judges, must decide whether aggravating circumstances exist, and given that *all* murders arguably involve heinousness and depravity, juries may have difficulty making this type of comparative assessment. Nonetheless, the Idaho Supreme Court has reaffirmed the continued

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something is ‘especially heinous’ merely suggests that the individual jurors should determine that the murder is more than just ‘heinous,’ whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is ‘especially heinous.’”); *Godfrey v. Georgia*, 446 U.S. 420, 428, 432–33 (1980) (reversing death sentence based on vague and overbroad “outrageously or wantonly vile, horrible and inhuman” aggravating circumstance, where there was no constitutional limiting construction by the Georgia Supreme Court).

97. *Proffitt v. Florida*, 428 U.S. 242, 255 (1976) (upholding “especially heinous, atrocious, or cruel” aggravating circumstance in light of limiting construction by state supreme court).

98. *E.g.*, *State v. Osborn*, 631 P.2d 187, 200, 102 Idaho 405, 418 (1981).

99. *State v. Charboneau*, 774 P.2d 299, 322, 116 Idaho 129, 152 (1989).

100. *Id.*

101. *Id.*

102. *Id.*

constitutionality of this aggravator and its limiting construction<sup>103</sup> – though not without dissent.<sup>104</sup>

The Idaho Supreme Court has upheld trial-level findings of “heinous, atrocious or cruel” in cases involving mutilation<sup>105</sup> or sexual assault,<sup>106</sup> but also when killings were committed through multiple forceful blows<sup>107</sup> – especially upon a young or otherwise vulnerable victim<sup>108</sup> – or multiple stab wounds,<sup>109</sup> or when there was evidence that the victim suffered before dying.<sup>110</sup> Thus, for example, the Court

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103. *State v. Hall*, 419 P.3d 1042, 1084, 163 Idaho 744, 786 (2018), *reh’g denied* (June 28, 2018), *cert. denied*, 139 S. Ct. 1618 (2019) (“Hall argues that section 19-2515(9)(e) was determined constitutional by this Court when judges were involved in capital sentencing, but the analysis changes when juries are involved, because they are less sophisticated and experienced. Admittedly, this Court’s determinations in *Leavitt* and *Lankford* relied on the capacity of judges to understand the law and interpret that language in a consistent way. However, the identity of the sentencing authority was not an issue in *Osborn*, when the terms of section 19-2515(9)(e) were defined and the limiting construction was adopted, nor was it mentioned when the Ninth Circuit approved this Court’s construction in *Arave*. As indicated above, the statutory aggravating circumstance in section 19-2515(9)(e) has been determined constitutional time and time again. Hall has provided no basis, principled or otherwise, to challenge this authority. There was no error in the use of this aggravator.”) (citations omitted).

104. *Id.* at 840, 1138 (Kidwell, J. Pro Tem, dissenting) (arguing that “the HAC aggravator is unconstitutionally vague, and the limiting construction of ‘exceptional depravity’ is also unconstitutionally vague”).

105. *State v. Leavitt*, 775 P.2d 599, 601, 607, 116 Idaho 285, 287, 293 (1989).

106. *Hall*, 419 P.3d at 1063–64, 1083–84, 163 Idaho at 765–66, 785–86.

107. *State v. Lankford*, 781 P.2d 197, 214, 116 Idaho 860, 877 (1989) (upholding a finding of HAC in light of “[t]he brutal manner in which Lankford bludgeoned the skulls of his two victims”); *State v. Pizzuto*, 810 P.2d 680, 711, 119 Idaho 742, 773 (1991) (upholding a finding of HAC in another double-murder by bludgeoning); *State v. Wells*, 864 P.2d 1123, 1125, 124 Idaho 836, 838 (1993) (upholding a finding of HAC in a similar double-homicide by bludgeoning where the victims were also “left laying in pools of blood while the money was removed and Wells left the scene.”).

108. *State v. Beam*, 710 P.2d 526, 530, 109 Idaho 616, 620 (1985) (“The age of a victim is a legitimate consideration in viewing the aggravating circumstances” of “heinous, atrocious[, and] cruel” and “utter disregard”); *State v. Aragon*, 690 P.2d 293, 302, 107 Idaho 358, 367 (1984).

109. *State v. Fetterly*, 710 P.2d 1202, 1208, 109 Idaho 766, 772 (1985) (upholding a finding of HAC where the victim was bound and gagged with duct tape, then stabbed with “considerable strength” at least five times).

110. *State v. Porter*, 948 P.2d 127, 145, 130 Idaho 772, 790 (1997) (“With respect to the first factor, we are inclined to agree with the district court that there was evidence to support the finding that Jones’ murder was especially heinous, atrocious, or cruel. The autopsy report established that the victim was severely beaten. Although the pathologist testified that the victim may have been knocked unconscious by the initial blow to her head, he also testified that she had numerous bruises on her forearms that appeared to be defensive wounds. According to testimony presented at the trial, the amount of blood found at the murder scene additionally indicates that many of the victim’s wounds were inflicted before she actually died. Thus, considerable evidence supports the court’s finding that, beyond a reasonable doubt, Jones suffered at the hands of her killer before she died.”).

upheld a finding of “heinous, atrocious or cruel” in a case of a defendant using “tremendous force” to hit an eight-month-old child with his fist.<sup>111</sup>

### 3. “Propensity”

The third “fuzzy” aggravator is that “[t]he defendant, by his conduct, whether such conduct was before, during or after the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.”<sup>112</sup> The Idaho Supreme Court has provided a limiting construction for “propensity,” as well, and in so doing upheld it against a vagueness challenge:

We would construe “propensity” to exclude, for example, a person who has no inclination to kill but in an episode of rage, such as during an emotional family or lover’s quarrel, commits the offense of murder. We would doubt that most of those convicted of murder would again commit murder, and rather we construe the “propensity” language to specify that person who is a willing, predisposed killer, a killer who tends toward destroying the life of another, one who kills with less than the normal amount of provocation. We would hold that propensity assumes a proclivity, a susceptibility, and even an affinity toward committing the act of murder.<sup>113</sup>

In upholding findings of propensity, the Supreme Court has considered the defendant’s track record of violence (including non-homicidal violence),<sup>114</sup> failure

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111. *Aragon*, 690 P.2d at 302, 107 Idaho at 367 (upholding a trial court finding of “heinous, atrocious and cruel” as “supported by evidence that the victim was severely injured through the use of tremendous force, even though the victim was an eight month old child who could not possibly pose a threat to appellant, or provoke him intentionally. The defendant himself admitted hitting the child with his fist.”).

112. IDAHO CODE § 19-2515(9)(i).

113. *State v. Creech*, 670 P.2d 463, 471–72, 105 Idaho 362, 370–71 (1983).

114. *Aragon*, 690 P.2d at 302, 107 Idaho at 367 (holding that propensity was “supported by appellant’s past criminal record, which includes charges of child abuse and assault with a deadly weapon, as well as the utter lack of remorse shown by appellant over the death of the child”); *State v. Wells*, 864 P.2d 1123, 1125, 124 Idaho 836, 838 (1993) (upholding conviction and sentence on two counts of first-degree murder for the murder of a bartender and a bar patron, where victims were killed by severe blows to the head with a heavy object; propensity finding was upheld given “conduct in the commission of the murders at hand” as well as evidence that the defendant was “a violent man, with a propensity toward rage and intimidation” and his “prior criminal record and record of intimidation, threats and disciplinary problems.”).

to rehabilitate when given opportunities in the past,<sup>115</sup> and personality traits<sup>116</sup> and mental health diagnoses<sup>117</sup> that would support the prospect of future violence. A prior or contemporaneous murder is not necessary for “propensity” to be established; indeed, if it were, “propensity” would be superfluous of two other aggravators, “The defendant was previously convicted of another murder,”<sup>118</sup> and “At the time the murder was committed the defendant also committed another murder.”<sup>119</sup>

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Bearing in mind that *all* first-degree murder cases involve the violent taking of innocent life, it can reasonably be expected that at least one of the eleven aggravating circumstances would apply to a large percentage of first-degree murder cases, especially when considering the felony murder aggravator and the three fuzzy aggravating circumstances.

To date, the Idaho Supreme Court has not adequately considered whether these aggravators, collectively, fulfill their constitutional purpose. Most of the narrowing challenges that the Idaho Supreme Court has considered – and rejected – have centered on the constitutionality of individual aggravators, as described above. But twenty years ago, in *State v. Hairston*, the Court also considered – and rejected – a more holistic argument that “Idaho’s death penalty structure . . . does not provide a meaningful guide for imposing the death penalty” because “the aggravating circumstances contained in I.C. § 19–2515 apply equally to all first-degree murder defendants and do not, therefore, provide a meaningful way to distinguish between those who deserve capital punishment and those who do

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115. *State v. Paz*, 798 P.2d 1, 16–17, 118 Idaho 542, 557–58 (1990), *overruled by State v. Card*, 825 P.2d 1081, 121 Idaho 425 (1991).

116. *Id.* (upholding a death sentence based in part upon a finding of propensity, supported by evidence “that this Defendant is easily provoked, that he irrationally reacts to that provocation, that he justifies his irrational behavior and does not understand why society is shocked by his conduct. The defendant has not been rehabilitated or deterred by past efforts of society.”).

117. *See State v. Fields*, 908 P.2d 1211, 1224, 127 Idaho 904, 907, 917 (1995), where the Supreme Court upheld a propensity finding in a stabbing during the course of a robbery. The underlying factual findings from the district court included a diagnosis of antisocial personality disorder and “borderline mental retardation,” a juvenile record, and multiple criminal offenses, including when on probation, notwithstanding a lack of disciplinary issues when in custody. Findings of Court in *Considering Death Penalty Under Section 19-2515*, Idaho Code at 169–74, *State v. Fields* (Idaho Mar. 7, 1991) (No. 16259). *See also State v. Lankford*, 781 P.2d 197, 214, 116 Idaho 860, 877 (1989), where the Court similarly held that a propensity finding was adequately supported by expert “testimony that Lankford was an aggressive anti-social personality prone to violence combined with the fact that Lankford was convicted of two murders.”

118. IDAHO CODE § 19-2515(9)(a).

119. *Id.* at § 19-2515(9)(b).

not.”<sup>120</sup> The Supreme Court cursorily rejected this aggregate challenge, “doubt[ing] Hairston’s underlying assumption” that “in all first degree murder trials in Idaho the judge finds at least one aggravating factor,” and also finding “no legal basis for the review of all Idaho first-degree murder cases that he suggests.”<sup>121</sup> Instead, the Court emphasized an aggravator-by-aggravator approach to determining whether the capital punishment scheme satisfied the narrowing requirement and provided adequate guidance to the sentencer:

Each aggravating circumstance must provide a principled basis for distinguishing between those who deserve the death penalty and those who do not. However, the Eighth and Fourteenth Amendments do not call for the elimination of all discretion in a judge’s capital sentencing decisions. The court’s discretion must be directed by “ ‘clear and objective standards’ ” to minimize the risk of wholly arbitrary and capricious action. Hairston has not challenged a particular aggravating circumstance, and we do not find Idaho’s death penalty scheme as a whole to be arbitrary and capricious.<sup>122</sup>

This brief discussion, however, was predicated on an insufficient factual record,<sup>123</sup> and the underlying issue demands more scrutiny in a future case. If raised properly, a challenge to the narrowing function of the death penalty scheme as a whole should be cognizable. The underlying constitutional requirement from the U.S. Supreme Court is that “a capital sentencing *scheme* must ‘genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.’”<sup>124</sup> The narrowing analysis cannot stop with an examination of each aggravating circumstance in isolation, because these aggravators function collectively to serve (or disserve) the goal of narrowing.

To illustrate the point, if we were to narrow a population into subgroups based on the first letter of each person’s last name, every category or subgroup, in isolation, would apply only to a narrow slice of the population. However, if we then counted *all* the A’s, and the B’s, and the C’s, and so forth, in practice there would be no narrowing at all. One of these categories would apply to every person, and we would be left with the original population in its entirety. So too with “aggravating circumstances.” If each aggravator, viewed in isolation, applies to only

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120. State v. Hairston, 988 P.2d 1170, 1182, 133 Idaho 496, 508 (1999).

121. *Id.*

122. *Id.* (citations omitted).

123. See Brief of Appellant at 52–54, *Hairston*, 988 P.2d at 1182, 133 Idaho at 508 (arguments by defense at pp. 52–54 of brief, and undeveloped evidentiary support – several first-degree capital cases where aggravating circumstances were found).

124. Lowenfield v. Phelps, 484 U.S. 231, 244 (1988) (emphasis added) (quoting Zant v. Stephens, 462 U.S. 862, 877 (1983)).

some murderers, but one of the aggravators applies to nearly all murderers, the narrowing requirement of the statute would not be meaningfully met.

This aggregate issue is precisely the claim raised recently in *Hidalgo v. Arizona*, and it is a pertinent question in Idaho, given the breadth of Idaho's first-degree murder statute and its expansive list of statutory aggravating circumstances.<sup>125</sup> It is also a question that the Idaho Supreme Court has yet to consider, when supported by empirical evidence about the functioning of the death penalty statutes in practice. One could make a compelling argument that Idaho's capital statutory scheme, on its face, fails to meaningfully narrow the field of those murderers eligible for the death penalty. However, this argument would be far more persuasive if supported empirically. In the real world, does the Idaho statutory scheme as a whole narrow from the field of murderers a subset who are eligible for the death penalty?

## B. Methodology

The goal of my study was to answer precisely this question, through a review of Idaho murder convictions in cases filed between June 2002 and 2019. I sought to determine both the overall death eligibility rate during this time period (a *Hidalgo* question) and the rate of death sentences among death-eligible cases (a *Furman* question). This Section describes the methodology of the study.

### i. Identifying the Universe of Cases and Collecting Records

My first step was to gather a universe of cases charged as first- or second-degree murder during a given time period, using case lists provided by the Idaho Supreme Court. I included cases that were filed between June 24, 2002 and the end of 2019. I selected June 24, 2002 as a starting date because the U.S. Supreme Court handed down its landmark decision in *Ring v. Arizona* on that date, requiring jury factfinding of aggravating circumstances that were necessary for a death verdict.<sup>126</sup>

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125. *Hairston*, 988 P.2d at 1183, 133 Idaho at 509. Additionally, Idaho no longer requires proportionality review by the state Supreme Court. *See id.* ("There is no legal basis for such a proportionality review. I.C. § 19-2827(c)(3) no longer requires a review of whether the death penalty in a case was 'disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.' The statute was amended . . . , and the amendment jettisons the requirement of proportionality review."). Although comparative proportionality review is neither constitutionally required, see *Pulley v. Harris*, 465 U.S. 37, 50 (1984); nor an adequate substitute for adequate narrowing of the statute itself, see *Hidalgo v. Arizona*, 138 S. Ct. 1054, 1057 (2018) (statement of Breyer, J.) (noting that constraints on capital eligibility through appellate review "are basically beside the point—they do not show the necessary legislative narrowing that our precedents require."); proportionality review may offer *some* constraint against the arbitrary imposition of the death penalty.

126. While Idaho did not amend its statutes pursuant to *Ring* until February, 2003, see 2003 Idaho Sess. Laws Ch. 19 (S.B. 1001), once the U.S. Supreme Court announced its decision, Idaho prosecutors knew the constitutional landscape had changed, in a way that undoubtedly affected prosecutorial decisions about whether to pursue cases as capital or non-capital cases.

Prior to that decision, Idaho judges, not juries, made sentencing decisions in capital cases. *Ring* demarcated a new era in the administration of the death penalty in Idaho; this study investigates the narrowing effect of Idaho's capital statutes during this post-*Ring* era.

From this initial universe, I excluded several categories of cases, some of which were apparent only upon a review of the case file. I excluded cases that resulted in an acquittal of all charges, cases dismissed without reinstatement of charges,<sup>127</sup> cases that resulted in a lesser conviction than first- or second-degree murder, and attempted murders and conspiracies to commit murder in which no victim died.<sup>128</sup> I also excluded all cases that were still pending as of the end of 2020 without conviction or without sentence, even those that were death noticed. Finally, I excluded 10 cases that were not death-eligible for reasons independent of aggravating circumstances: nine because the defendant was a minor when committing the killing,<sup>129</sup> and one because there was strong evidence in the record that the defendant was intellectually disabled, and the judge appeared to acknowledge as much at sentencing.<sup>130</sup>

I excluded voluntary and involuntary manslaughter convictions from the sample for several reasons.<sup>131</sup> First, because they are not murder convictions, they do not speak directly to the question asked by the Supreme Court as to whether the statute adequately selects a subset of murderers who are eligible for the death penalty.<sup>132</sup> Second, because voluntary manslaughter requires an affirmative finding of heat of passion and adequate provocation, when a defendant is so convicted, it is difficult to reach a contrary conclusion that adequate provocation did not exist.<sup>133</sup> Third, there is often significantly less information in the voluntary murder files about the crime and the existence of the aggravating circumstances, making a meaningful evidentiary review challenging.

The next step was collection of case files. I did not sample the universe of cases, but rather attempted to review each case that met my criteria. I thus avoided

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127. This occurred most frequently where the defendant was deceased or held incompetent to stand trial.

128. See *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (prohibiting the imposition of the death penalty for non-homicidal crimes against the person).

129. See *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that juveniles are categorically exempt from the death penalty under the Eighth Amendment).

130. *Atkins v. Virginia*, 536 U.S. 304, 306 (2002) (holding that individuals with intellectual disability are categorically exempt from the death penalty under the Eighth Amendment).

131. Other studies have taken different methodological approaches on this point. Compare Baldus, *supra* note 31, at 713–14 (including voluntary manslaughter cases), with Marceau, Kamin & Foglia, *supra* note 30, at 1100, 1100 n.161 (excluding cases resulting in a conviction of less than a second-degree felony, such as second-degree murder in the heat of passion and manslaughter).

132. *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 877 (1983)).

133. See Idaho Criminal Jury Instruction 707.

any concerns about sampling error that might arise with other studies. I obtained court records and case information in three primary ways. First, I obtained public court filings and transcripts from attorneys who represented the defendants in given cases – most helpfully, from the Idaho State Appellate Defender’s office, which gave me access to all available non-confidential case files from the many defendants represented by their office.<sup>134</sup> Second, my research assistants and I went to courthouses in Ada County, Twin Falls County, Canyon County, and Cassia County to review case files in hard copy or in online databases available at those courthouses.<sup>135</sup> Third, I used available online sources – including Westlaw; the University of Idaho’s Digital Commons case file repository, which contains clerk’s records from some cases litigated before the Idaho Supreme Court; the Idaho courts’ electronic case filing system, iCourt, which makes certain information about cases available to the public at large; and the Idaho Department of Correction offender search – to collect official information about the cases.

There was a wide variety in the quantity and quality of available information in different cases. Some information about the offense and possible aggravating circumstances was found in court filings such as indictments and notices of intent to seek the death penalty. However, often the most useful information was found in hearing transcripts, especially change of plea and sentencing hearing transcripts; and in many cases, such hearing transcripts were unavailable.

In 26 cases, I was unable to collect sufficient authoritative information to make a determination about whether the case would have been first-degree and/or death-eligible. Some cases had no available records even at the courthouse where the case was prosecuted; other cases had barebones information in the indictment or other similar documents, but little to no information about the circumstances of the crime or potential aggravating or mitigating circumstances. In 7 cases, I or my research assistants reviewed some amount of case file material, but there was insufficient information about the nature or circumstances of the crime in these files to make a determination on first-degree or death eligibility. In 19 cases, I could not obtain any substantive case documents at all, either because I was unable to access the courthouses to review the files, in light of COVID restrictions and budgetary limitations, or because there were no documents available at the courthouse. In Part III.C.6, I consider these excluded cases separately and attempt to provide some limited information about them and their potential impact on my

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134. The Office of the State Appellate Public Defender was created by statute in 1998 to handle, among other matters, all direct appeals in criminal cases for indigent defendants, as well as all capital post-conviction proceedings. IDAHO CODE §§ 19-868, 19-870.

135. Records from cases across the state were available in databases accessible from these courthouses; thus, the records obtained at the courthouses were not limited to cases in those four counties. Some records from other counties, however, would only have been available, if at all, in physical files at the county courthouse where the case was prosecuted. Because this study was conducted in the midst of the coronavirus pandemic, and given resource limitations, it was not possible to travel more widely in the state to visit more distant courthouses.

findings based on media accounts, but because of concerns about accuracy and completeness, I excluded them from my study's universe of cases.

#### ii. Record Review and Information Coding

During the case file review, I collected and coded information about several data points for each case:<sup>136</sup> Was a notice of intent to seek the death penalty filed? Was the death penalty sought at trial? What was the offense of conviction? Did the facts support a first-degree murder conviction, and if discernible, under what provision?<sup>137</sup> Was a conviction obtained by plea or verdict after trial? Was the sentence death or less than death? If the case was procedurally or factually first-degree murder, did any of the "clear" aggravators apply? If no "clear" aggravators applied, did any of the "fuzzy" aggravators apply?<sup>138</sup> I then included a narrative explanation of the reasons for the categorization of the case as first-degree or second-degree, and for the presence or absence of aggravating circumstances.

Finally, based on this review, I categorized each case into one of the following five categories, defined in Table 1:

**Table 1. Case Categorizations and Definitions**

<i>Categorization</i>	<i>Definition</i>
1DCap	High level of confidence the case was both first-degree and death-eligible
1DMaybeCap	High level of confidence the case was first-degree; significant possibility that it was death-eligible
1DNonCap	High level of confidence the case was first-degree; low possibility that it was death-eligible
2Dv1D	Unable to categorize as first-degree with confidence
2D	High level of confidence the case was not first-degree

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136. I organized and quantified this data on a per-prosecution, not per-murder, basis. Thus, if a defendant was convicted of two murders in the same criminal proceeding, I counted one capital case, not two capital murders. In the case of Erick Virgil Hall, who was prosecuted and sentenced to death for two different crimes in two different trials with different juries, I counted two separate cases.

137. If the defendant was convicted of first-degree murder, whether by plea or by jury trial, this counted as a procedural first-degree murder case. If the defendant was convicted of second-degree murder, but first-degree murder was supported based on admissions by the defendant, factual representations made by the prosecution, evidence elicited at hearings, or findings made by the judge, this counted as a factual first-degree murder case.

138. See *infra* in this section for additional information about how I exercised judgment in deciding whether these "fuzzy" aggravators applied.

Particularly in light of the varied information available in each case, my goal was to determine whether *any one* of the eleven aggravating circumstances applied in a given case (hence establishing death eligibility), not to catalog *every* aggravating circumstance that would apply. I first tried to ascertain whether any “clear” aggravator applied in the case; and if I could not identify any “clear” aggravator with confidence, I considered whether any “fuzzy” aggravator applied. Sometimes it was clear from a simple review of the convictions in the case that the case was death-eligible; if, for example, the defendant was convicted of murder in the course of a robbery under Idaho Code § 18-4003(d), the felony-murder aggravating circumstance, Section 19-2515(9)(g), would be satisfied, as long as the defendant and not an accomplice killed directly. Similarly, if the defendant was convicted of two first-degree murders, and it was clear from the indictment or information that those murders occurred on the same day, the multiple-murder aggravating circumstance, Section 19-2515(9)(b), would be satisfied.<sup>139</sup> At that point, my review of the file was complete, because a “clear” aggravator was supported. If I could not identify any “clear” aggravator, I considered whether any of the “fuzzy” aggravators – “heinous, atrocious or cruel,” “utter disregard,” or “propensity” – were supported by the evidence presented, the factual findings in the case, or the assertions made by the state. Determining the presence or absence of these “fuzzy” aggravators necessarily entails more discretion on the part of the reviewer, and I used several methods to try to ensure accuracy.

In categorizing cases, I used the “controlling fact-finding” (CFF) rule utilized by other social scientists who have conducted similar studies. As articulated by Baldus, *et al.*:

The rule holds, first, that if an authoritative factfinder (judge or jury) with responsibility for finding a defendant liable for M1 convicts the defendant of a crime less than M1 (i.e., M2 or VM), that finding is considered to be a CFF and the coder will code the case at the reduced level of homicidal liability in the absence of overwhelming evidence of jury nullification. The rule also holds that an authoritative fact finding of M1 liability or a M1 guilty plea is a CFF, and the case will be coded at that level of liability. The same rule applies with respect to allegations and findings of the presence or absence of [aggravating circumstances] in the case and the defendant’s admissions of their presence.<sup>140</sup>

As Baldus explains, this rule requires deference to judicial and jury decision-making, but not to prosecutorial decisions to charge a case at a lesser degree or reduce the charges as part of a plea agreement – which, of course, can be motivated

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139. However, in *State v. Shackelford*, the Idaho Supreme Court made clear that a jury would need to make a separate determination that this aggravator existed, beyond convicting the defendant of two murders “on or about” the same date. 247 P.3d 582, 615, 150 Idaho 355, 388 (2010), *abrogated* by *State v. Garcia*, 462 P.3d 1125, 166 Idaho 661 (2020).

140. BALDUS ET AL., *supra* note 32, at 711.

by goals such as the expedient resolution of the case and the exercise of prosecutorial discretion in favor of lenity, rather than a factual finding about the case.<sup>141</sup>

I did, however, give special consideration to prosecutorial decisions to allege inculpatory or aggravating facts, unless these allegations were rebutted by a factual finding from a judge or jury, such as a conviction on the lesser charge, or a unanimous finding that a particular aggravating circumstance did not exist.<sup>142</sup> Thus I gave weight to prosecutorial assertions in the information, in the notice of intent to seek the death penalty, and in other case filings; to incriminating testimony elicited by the prosecution; and to the state's arguments at sentencing and other hearings. My reasoning was threefold. First, because the prosecutor represents the state's interest and has a duty of candor to the court, for purposes of this study, I concluded that it was appropriate to assume that the prosecutor could prove facts as alleged in charging documents or presented through testimony in a hearing. Second, an important part of the way that a capital statute functions in practice is in the way it is used by prosecutors – the state agents charged with enforcing it. If prosecutors believe that a particular crime is plausibly “heinous and atrocious” under the laws – and no court has told them otherwise – that interpretation has significance in the way cases proceed. Third, and pragmatically, there often was not enough information in the record for me to make an independent judgment about whether prosecutorial assertions were supported by sufficient evidence. As a result, I explicitly qualified my research findings by saying that they were based on facts and findings in the record *and* assertions about the facts and their legal sufficiency by the state.

I also applied the “legal sufficiency rule” adopted by Baldus and others.<sup>143</sup> In categorizing whether a particular case was factually first-degree and whether a particular aggravator could apply, I used the standard of whether an Idaho appellate court would affirm that finding had a jury reached it in the case. Thus, I did not attempt to determine whether *I*, sitting as factfinder, would have found proof beyond a reasonable doubt, but rather whether a jury finding would have been upheld on appeal if reviewed for sufficient evidence. This standard does not credit exculpatory or mitigating evidence presented by the defendant.

When deciding whether the “legal sufficiency” test was met, I considered several sources. The most persuasive sources were factually similar cases in which an appellate court explicitly ruled on the sufficiency of the evidence to support a first-degree murder conviction or finding of an aggravating circumstance.<sup>144</sup> I also

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141. *Id.*

142. Where the jury could not unanimously agree about the existence of a particular aggravating circumstance, I did not give any controlling weight to that lack of agreement, because there was no unanimous conclusion that it did not exist. Rather, I applied the ordinary “sufficient evidence” standard, *see infra*.

143. BALDUS ET AL., *supra* note 32, at 712.

144. BALDUS ET AL., *supra* note 32, at 712.

considered whether factually analogous cases – either in the study itself or in prior Idaho cases – produced a first-degree conviction or finding of an aggravating circumstance that was not overturned by an appellate court.<sup>145</sup> As part of that inquiry, I reviewed the “Findings of Fact” written by trial judges in capital cases prior to 2002, when judges were charged with determining whether aggravating circumstances existed and produced written rationales in support of their findings and ultimate verdict. Finally, I considered Idaho’s statutory text and case law on first-degree murder and on the aggravating circumstances to make an educated determination of whether an Idaho court would have upheld a finding on appeal.

I modified the “legal sufficiency rule” somewhat given the purpose of this study, because in addition to considering evidence elicited in the case, as discussed above, I also relied on both the unproven factual and legal representations made by the prosecutor, as well as findings made by the judge, even if I could not verify their accuracy with evidentiary support, and admissions by the defense. Again, this modification is consistent with the question I am asking in the study, which includes whether, based on the facts and arguments asserted by the prosecution, the case would be death-eligible. There simply was not enough information in many of the cases to make an independent assessment of the sufficiency of the evidence without relying on representations made by the state. If the state, in its review of the case, determined that a notice of intent to seek the death penalty was warranted, assuming good faith and ethical conduct by the prosecution, that should mean something about the plausibility of a finding in favor of the state on that issue.

Thus, in addition to any controlling facts found (such as a first-degree conviction), there were several “triggers” for a finding that the case was death eligible or first-degree. First, if the case was death-noticed, and there was no explicit finding by the judge or jury, or concession by the prosecutor, that the aggravating circumstances alleged did *not* exist, I considered the case to be death-eligible.<sup>146</sup> Similarly, I deferred to a decision by the prosecutor to charge a case as a first-degree murder, even if it ultimately resulted in a second-degree murder conviction, as long as there was no overwhelming evidence or explicit finding by a jury or judge, whether through a trial verdict or a preliminary hearing finding of no probable cause, that there was insufficient evidence of first-degree murder.

In some cases, aggravating circumstances might have existed that I was not aware of because such information wasn’t available to me in the records I reviewed, especially if there was no sentencing hearing transcript available. For example, without the evidence and argument presented in a sentencing hearing transcript,

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145. The Idaho Supreme Court has an independent obligation to review “(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (2) Whether the evidence supports the jury’s or judge’s finding of a statutory aggravating circumstance from among those enumerated in section 19-2515, Idaho Code,” regardless of whether that issue is raised on appeal. IDAHO CODE 19-2827(c). *See also* *Beam v. Paskett*, 3 F.3d 1301, 1306 (9th Cir. 1993)).

146. In one case, there was a concession by the prosecutor that the aggravating circumstances were not supported, but the evidence clearly supported death eligibility.

and without access to presentence investigation reports, it would often be difficult to determine whether propensity could be proven in a given case.

Finally, I also collected information about the county of the case, the gender of the defendant and victim, and the race of the defendant and victim. Definitive information about race was rarely available in the files themselves, so I supplemented this by obtaining information about the race of offenders from the Idaho Department of Correction, organized by IDOC number; and about the race of victims from the Idaho State Police, organized by incident date and county. My research team was able to match this data to names of defendants and victims to produce data on race.

### C. Results

#### i. First-Degree Eligibility

An overwhelming majority of cases in the study, 86 – 90%, were factual or procedural first-degree cases. After excluding cases as discussed above, my full universe of first- and second-degree murder convictions consisted of 194 cases. Based on my review, 167 cases (86%) supported a first-degree murder charge, based on the facts and legal theories asserted by the prosecution. An additional 8 cases were a close call between first- and second-degree, thus I included a range of up to 90%.<sup>147</sup>

173 of the 194 cases (or 89%) were charged as first-degree.<sup>148</sup> Only 21 cases (or 11%) were charged as second-degree.<sup>149</sup> One reason why the rate of factual and procedural first-degree cases may be lower than the rate of cases charged as first-degree is because, pursuant to the CFF rule, I excluded any case where a jury acquitted on first-degree and returned a verdict of second-degree.<sup>150</sup>

The 86 – 90% first-degree eligibility rate that I found, and the 89% rate of real-world first-degree charging decisions, are consistent with the statutory analysis above, which concluded that Idaho's first-degree murder statute itself was neither intended to serve, nor likely to be serving, a narrowing function on its own; indeed,

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147. Although I excluded 10 cases in which the defendant was a juvenile or intellectually disabled and thus not death-eligible, it is worth noting that these defendants were still eligible to be convicted of first-degree murder, and thus I could have considered their cases in the calculation of the first-degree murder rate. Indeed, all ten of these cases were charged as first-degree cases and all ten factually supported first-degree convictions. If these cases were included, the first-degree eligibility rate would be between 177 and 185 out of 204, or 87 – 91%.

148. By this I mean that the charge included at least one first-degree murder count, which may include conspiracy or aiding and abetting.

149. 108 of the 194 cases (or 56%) resulted in at least one first-degree murder conviction; 86 (or 44%) resulted in at least one second-degree conviction, without a first-degree conviction.

150. Of course, just because a jury *did* acquit on first-degree does not mean that no reasonable jury could have reached the opposite verdict.

the vast majority of murder cases could plausibly fit into a definition of first-degree murder.<sup>151</sup>

## ii. Death Eligibility

The death eligibility rate of factual first-degree cases was also strikingly high: between 93 and 98%. Of the 167 cases that, based on my review, were factual or procedural first-degree convictions (i.e., could have supported a first-degree murder conviction), 155 (93%) were categorized as 1DCap because at least one aggravating circumstance was supported with a high degree of confidence. An additional 9 were categorized as 1DMaybeCap, so the upper limit of death eligibility was 98%. Only 3 were categorized as not death-eligible.

I also collected data about the type of aggravators identified in these death-eligible cases. Of the 155 cases categorized 1DCap, I identified one of the “clear” aggravators in about half (77 cases, or 50%). An additional 7 possibly had a “clear” aggravator, but definitely had a “fuzzy” aggravator. 71 more had at least one “fuzzy” aggravator. Thus 78, or 50%, were death-eligible because one of the “fuzzy” aggravators applied. This shows the significant effect of the “fuzzy” aggravators in expanding the scope of death eligibility.

If we consider cases that actually resulted in a first-degree conviction, the death eligibility rate is even higher. Of the 108 procedural first-degree convictions (i.e., cases which actually resulted in a first-degree conviction), 105 were categorized as 1DCap, and 2 more were categorized as 1DMaybeCap. Thus, between 97 and 99% of first-degree convictions were death-eligible.<sup>152</sup>

Table 2 below summarizes the death eligibility rate of different groupings of cases.

**Table 2. Idaho Death Eligibility Rates**

<i>Case category</i>	<i>Total #</i>	<i>1DCap</i>	<i>1DMaybeCap</i>	<i>Death eligibility rate (%)</i>
Factual / procedural 1D cases	167	155	9	93 – 98%
1D convictions (procedural 1D cases)	108	105	2	97 – 99%
Cases charged as 1D	173	146	9	84 – 89%
All Cases (1D and 2D)	194	155	9	79 – 85%

151. The results are similar to those found in the Colorado study. Marceau, Kamin & Foglia, *supra* note 30, at 1104 (finding that the “first-degree murder rate is 91.1%”).

152. Even among the 86 procedural second-degree cases (i.e., cases resulting in a second-degree conviction), 50 (or 58%) were categorized as factually first-degree capital cases. An additional 7 were 1DMaybeCap.

These are exceptionally high rates of death eligibility. Table 3 compares Idaho’s results to those found in other narrowing studies from other states. Idaho’s rate of death eligibility is similar to the extreme findings in the narrowing studies in California and Colorado, and in the *Hidalgo* litigation itself.

**Table 3. Interstate Comparison of Death Eligibility Rates**

State (date range)	Death eligibility (%)		
	% of procedural 1D murders	% of factual & procedural 1D murders	% of all murders (1D and 2D)
Idaho (2002 – 2019)	97 - 99%	93 - 98%	79 - 85%
Arizona (2002 – 2012)	98% <sup>153</sup>	-	-
California (1978 – 2002)	95% <sup>154</sup>	86% <sup>155</sup>	68% <sup>156</sup>
Colorado (1999 – 2010)	-	90.4% <sup>157</sup>	-
Georgia (1974 – 1979)	-	-	86% <sup>158</sup>
Georgia (1995 – 2004)	-	-	56 % <sup>159</sup>
Maryland (1978 – 1999)	-	-	~ 21% <sup>160</sup>
Nebraska (1973 – 1999)	-	-	25% <sup>161</sup>

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153. *Hidalgo v. Arizona*, 138 S. Ct. 1054, 1056 (2018) (describing petitioner’s evidence that, among first-degree murder cases in Maricopa County from 2002 – 2012, “one or more aggravating circumstances were present in 856 of 866” cases, or 98%). It is not entirely clear that the universe of cases referred to here is those *convicted* of rather than *charged with* first-degree murder, but this seems to be the best reading.

154. Baldus et al., *supra* note 31, at 713–14.

155. *Id.* at 714.

156. *Id.* (excluding the voluntary manslaughter cases).

157. Marceau, Kamin, & Foglia, *supra* note 30, at 1107.

158. BALDUS ET AL., *supra* note 32, at 268 n.31.

159. Rankin et al., *supra* note 32 (identifying “1,315 murder cases from 1995 through 2004 that could have been prosecuted for death” out of 2,328 cases reviewed).

160. Paternoster et al., *supra* note 33, 18–19, 52 fig. 1; *see also* Baldus et al., *supra* note 31, at 705 (interpreting results).

161. Baldus et al., *supra* note 34, at 541 (finding 175 of 689 homicides prosecuted, or 25%, were death-eligible).

### iii. Frequency of Seeking and Obtaining Death Sentences (Furman)

Prosecutors filed a notice of intent to seek the death penalty in 32 cases, or in 21% of the 155 death-eligible cases.<sup>162</sup> In 7 cases relating to 6 defendants (5% of the death-eligible cases), the state pursued death at a trial. Overall, death sentences were secured in only 4 cases (or 3% of the capital-eligible cases) (two for the same defendant).

Even among the 32 cases in which a notice of intent to seek the death penalty was filed, death was infrequently pursued to verdict. 23 of 32 cases with a notice of intent to seek death (72%) resolved in a guilty plea, where the prosecution generally agreed to withdraw its notice of intent to seek the death penalty in exchange for a guilty plea. Only 9 of the 32 cases (28%) resolved in jury trial, and the prosecution sought the death penalty in only 7 (22%) at trial. A death sentence was obtained in only 4 of 32 death-noticed cases (13%). In two of the other capital trials, the jury unanimously found at least one aggravating circumstance but did not return a death verdict.<sup>163</sup> In the remaining capital case, the jury could not reach a unanimous decision on the existence of any of the aggravating circumstances.<sup>164</sup>

It should be noted that between 2002 and 2019, two defendants outside the study were re-sentenced to death by juries, after their pre-2002 death sentences were reversed in post-conviction proceedings.<sup>165</sup> However, because these cases were charged in 1991<sup>166</sup> and 2000,<sup>167</sup> their cases were not included on the lists provided by the Supreme Court, which formed the universe of cases for my study.

The data in the study reveal an extraordinarily low frequency rate of death-sentencing. In *Furman*, the Supreme Court invalidated Georgia's system as arbitrary and capricious, where roughly 15 – 20% of convicted, death-eligible murderers

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162. I refer here to cases categorized as 1DCap, not 1DMaybeCap.

163. See *State v. Carson*, 151 Idaho 713, 716, 264 P.3d 54, 57 (2011) (jury unanimously found that the death penalty would be unjust); *State v. Sanchez*, 147 Idaho 521, 523, 211 P.3d 130, 132 (Ct. App. 2009) (jury could not reach unanimity on whether death penalty would be unjust).

164. *State v. McDermott*, No. 32071, 2009 WL 9150885, at \*2 (Idaho Ct. App. July 2, 2009).

165. See *Dunlap v. State*, 159 Idaho 280, 290–91, 360 P.3d 289, 299–300 (2015); *State v. Payne*, 146 Idaho 548, 579, 199 P.3d 123, 154 (2008) (vacating death sentence and remanding case for resentencing); *Jury Imposes Death Penalty for Greenbelt Killer*, KTVB (Mar. 13, 2010, 2:41 PM) <https://www.ktvb.com/article/home/jury-imposes-death-penalty-for-greenbelt-killer/277-364574943>. One additional defendant was entitled to jury resentencing after *Ring* but waived this right, and the judge reinstated his death sentence. *Judge Reinstates Death Penalty for Inmate*, LEWISTON TRIBUNE (May 14, 2010), [https://lmtribune.com/northwest/judge-reinstates-death-penalty-for-inmate/article\\_e2433f34-862f-55f8-8d27-5b6b8bc13300.html](https://lmtribune.com/northwest/judge-reinstates-death-penalty-for-inmate/article_e2433f34-862f-55f8-8d27-5b6b8bc13300.html).

166. See *Dunlap*, 360 P.3d at 298, 159 Idaho at 289.

167. See *Payne*, 199 P.3d at 132, 146 Idaho at 557.

were sentenced to death.<sup>168</sup> Idaho's frequency – 3% of the death-eligible cases – is much lower. When compared with results of studies in other states, Idaho's frequency rate is also lower than all other states that have been studied other than Colorado, which in 2020 abolished its death penalty and retroactively commuted all existing death sentences in the state.<sup>169</sup>

**Table 4. Comparison of Rate of Seeking and Obtaining Death Sentences**

State (date range)	% of death-eligible convictions		
	Notice of intent to seek death filed	Death sought at trial	Death sentence imposed
<b>Idaho (2002 – 2019)</b>	<b>21%</b>	<b>5%</b>	<b>3%</b>
California (1978 – 2002)	28% <sup>170</sup>	-	4.3% <sup>171</sup>
Colorado (1999 – 2010)	2.78% <sup>172</sup>	0.93% <sup>173</sup>	0.56% <sup>174</sup>
Connecticut (1973 – 2007)	-	-	5.8% <sup>175</sup>
Georgia (1995 – 2004)	25% <sup>176</sup>	-	4.3% <sup>177</sup>

168. Shatz & Rivkind, *supra* note 13, at 1288–89 (“In *Furman*, the Justices’ conclusion that the death penalty was imposed only infrequently derived from their understanding that only 15-20% of convicted murderers who were death-eligible were being sentenced to death. . . . [P]lainly any scheme producing a ratio of less than 20% would not.”).

169. Neil Vigdor, *Colorado Abolishes Death Penalty and Commutes Sentences of Death Row Inmates*, N.Y. TIMES (Mar. 23, 2020), <https://www.nytimes.com/2020/03/23/us/colorado-death-penalty-repeal.html>.

170. Baldus et al., *supra* note 31, at 724–25 (in California, “the prosecutor determines whether to charge the case capitally by alleging one or more special circumstances” and did so in 28% of death-eligible cases).

171. Baldus et al., *supra* note 31, at 724.

172. Marceau, Kamin, & Foglia, *supra* note 30, at 1111.

173. Marceau, Kamin, & Foglia, *supra* note 30, at 1111.

174. Marceau, Kamin, & Foglia, *supra* note 30, at 1112.

175. Donohue, *supra* note 35, at 641, 645–47, tbl.1.

176. Rankin et al., *supra* note 32 (“But prosecutors pursued a death sentence for only one in four of those killers.”).

177. Rankin et al., *supra* note 32 (“Only one in 23 of them landed on death row.”).

Maryland (1978 – 1999) <sup>178</sup>	26.9% <sup>179</sup>	13.7% <sup>180</sup>	5.8% <sup>181</sup>
Nebraska (1973 – 1999)	-	48% <sup>182</sup>	15.7% <sup>183</sup>
North Carolina (1990 – 2009)	-	-	6% <sup>184</sup>

#### iv. Guilty Pleas and Jury Trials

A significant majority of convictions across all cases resolved in a guilty plea rather than a jury verdict. There was a higher rate of guilty pleas for second-degree murder convictions—especially cases that were categorized as death-eligible but that resulted in second-degree convictions. Of the 50 death-eligible cases that resulted in a second-degree conviction, only 4 (8%) were decided by jury trial. 46 (92%) were resolved by plea. Table 5 provides more detailed information about the rate of trial verdicts and guilty pleas across different types of cases.

**Table 5. Rate of Trial Verdicts and Guilty Pleas**

Case Type	# of Cases	Verdict after Trial		Guilty Plea	
		#	%	#	%
All	194	61	31%	133	69%
1D conviction	108	42	39%	66	61%
2D conviction	86	19	22%	67	78%
1DCap (death-eligible)	155	45	29%	110	71%
1DCap but no capital trial	148	38	26%	110	74%

178. Paternoster et al., *supra* note 33, at 18–19, 52, fig. 1; *see also* Baldus et al., *supra* note 31, at 705 (interpreting results).

179. Paternoster et al., *supra* note 33, at 18–19, 52, fig. 1 (“Stage 2 = Subset of death eligible cases where the prosecutor files notice of intent to seek the death penalty (N = 353). The conditional probability of filing notice given a death eligible case is 353/1311 0.269.”).

180. Paternoster et al., *supra* note 33, at 18–19, fig. 1 (180/1311 = 13.7%) Note that this means that although Maryland and Idaho had a reasonably similar rate of death notices, Maryland was more “serious” about those notices. Idaho’s cases were much more likely to plead out.

181. Paternoster et al., *supra* note 33, at 18–19, fig. 1.

182. Baldus et al., *supra* note 34, at 545 (finding that 89 of 185 death-eligible cases, or 48%, proceeded to a penalty-phase capital trial).

183. Baldus et al., *supra* note 34, at 545 (finding 29 out of 185 death-eligible cases resulted in death sentence).

184. O’Brien et al., *supra* note 36, at 2023–24, tbl.2.

1DCap but 2D conviction	50	4	8%	46	92%
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One common critique of the death penalty is that it can be a tool of the prosecution to secure a guilty plea, pressuring a defendant who might otherwise be inclined to go to trial to take a deal in order to avoid death. These numbers appear to provide some support for this critique—especially the high rate of guilty pleas in capital-eligible cases that resulted in a second-degree conviction (92%) and among capital-eligible cases that the prosecution did not pursue all the way to a capital trial (74%).

In many cases, plea filings indicated that state had agreed not to seek the death penalty in exchange for a plea of guilty. Thus, the number of formal notices of intent to seek death is significantly less than the number of cases in which the prosecution threatened to pursue death and used that threat as leverage in the plea negotiation process. Because I could not get consistent information on whether an agreement not to pursue the death penalty was part of the plea negotiations, however, I did not track numbers on this issue.

#### v. Arbitrariness: Geography, Race & Ethnicity, Gender, and Egregiousness

I did not systematically collect data on offense egregiousness, nor did I catalog all possible aggravating and mitigating circumstances in each case. As a result, I cannot report findings, as Prof. John Donohue did in Connecticut,<sup>185</sup> about whether Idaho's system is "arbitrary and capricious" in the sense that the distribution of death sentences across the universe of death-eligible cases can be explained not by the merits of the case (*i.e.*, the weight of the aggravating and mitigating circumstances), but rather by an arbitrary factor such as race, gender, or geography.

I did, however, collect information about geography, race and ethnicity, and gender, and I can report some information on the correlation (though not causation) between prosecutorial decisions to pursue death and these factors. I also collected anecdotal information about offense egregiousness and report below on a number of highly-aggravated cases that did not produce a death verdict.

#### 1. Geography

Death-eligible cases were identified in 27 counties. There were roughly the same number of death-eligible cases in the three largest counties by population (Ada County, Canyon County, and Kootenai County) (76) as in the remaining counties put together (79). However, the rate of filing a notice of intent to seek the death penalty was about two-thirds higher in the largest three counties (26% compared to 15%), and while 9% of death-eligible cases proceeded to a capital trial and 6% of death-eligible cases resulted in death sentences in the three largest

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185. See Donohue, *supra* note 35.

counties, no cases proceeded to a capital trial in any of the remaining counties. This suggests that county size – and likely county resources – correlates with the rate of capital trials and sentences.<sup>186</sup> Table 6 provides more detailed findings on geography.

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186. For anecdotal support that county resources also have a causal effect on the charging decision, especially for small counties, see Jonathan Hogan, *In Death Penalty Cases, the Costs Quickly Add Up*, MAGICVALLEY.COM (Oct. 3, 2020), [https://magicvalley.com/news/local/crime-and-courts/in-death-penalty-cases-the-costs-quickly-add-up/article\\_1b7134f3-c065-53c9-8b0c-d9c7b9fed117.html](https://magicvalley.com/news/local/crime-and-courts/in-death-penalty-cases-the-costs-quickly-add-up/article_1b7134f3-c065-53c9-8b0c-d9c7b9fed117.html).

Table 6. Disposition of death-eligible cases, county by county

County	Death-eligible cases	Death-eligible cases w/ notice of intent to seek death		Death-eligible cases where death sought at trial		Death-eligible cases w/ death sentence	
		#	%	#	%	#	%
<b>Ada</b>	<b>40</b>	<b>7</b>	<b>18%</b>	<b>5</b>	<b>13%</b>	<b>3</b>	<b>8%</b>
Bannock	1	1	100%	0	0%	0	0%
Benewah	3	1	33%	0	0%	0	0%
Bingham	3	0	0%	0	0%	0	0%
Boise	1	1	100%	0	0%	0	0%
Bonner	5	1	20%	0	0%	0	0%
Bonneville	4	2	50%	0	0%	0	0%
Boundary	1	0	0%	0	0%	0	0%
<b>Canyon</b>	<b>27</b>	<b>9</b>	<b>33%</b>	<b>1</b>	<b>4%</b>	<b>0</b>	<b>0%</b>
Cassia	6	0	0%	0	0%	0	0%
Clearwater	2	0	0%	0	0%	0	0%
Custer	2	0	0%	0	0%	0	0%
Elmore	5	1	20%	0	0%	0	0%
Franklin	1	0	0%	0	0%	0	0%
Gem	1	0	0%	0	0%	0	0%
Idaho	2	0	0%	0	0%	0	0%
Jefferson	1	0	0%	0	0%	0	0%
<b>Kootenai</b>	<b>9</b>	<b>4</b>	<b>44%</b>	<b>1</b>	<b>11%</b>	<b>1</b>	<b>11%</b>
Latah	4	0	0%	0	0%	0	0%
Minidoka	2	0	0%	0	0%	0	0%
Nez Perce	8	0	0%	0	0%	0	0%
Oneida	1	0	0%	0	0%	0	0%
Owyhee	2	2	100%	0	0%	0	0%
Payette	3	1	33%	0	0%	0	0%
Shoshone	2	0	0%	0	0%	0	0%
Teton	1	1	100%	0	0%	0	0%
Twin Falls	18	1	6%	0	0%	0	0%
<b>Total</b>	<b>155</b>	<b>32</b>	<b>21%</b>	<b>7</b>	<b>5%</b>	<b>4</b>	<b>3%</b>
<i>3 biggest (population- Ada, Canyon, Kootenai)</i>	76	20	26%	7	9%	4	5%
<i>All but 3 biggest counties</i>	79	12	15%	0	0%	0	0%

## 2. Race and Ethnicity

Although information on race and ethnicity was not available in most of the case files I reviewed, I sought to obtain information about defendant and victim race from the Idaho Department of Correction (IDOC) and the Idaho State Police (ISP). Because I was unable to access information about all cases in the study – including some of the cases that resulted in death sentences – and because many of the relevant categories consisted of only a few cases, the data did not yield significant results. Nonetheless, I share the findings below.

Pursuant to a request for information, IDOC provided me information about the race and ethnicity of inmates convicted of first- and second-degree murder from 2002 to the present, categorized by IDOC number. My research matched these IDOC numbers to offender names on the IDOC website, thus providing case-specific information about the race of the defendant. For one additional inmate on death row, I was able to identify defendant race through Bureau of Justice Statistics data.<sup>187</sup> In all, I was able to determine the race of the defendant in 144 of the 155 death-eligible cases categorized as 1DCap.

I also obtained more limited information on victim race by searching the incident-based reporting system on the ISP website.<sup>188</sup> On this site, one can run a search for homicide offenses, organized by incident date and location, which provides information about the race and ethnicity of the victim in each incident, if known. This data, however, only goes back to 2005. By matching up the ISP information with information I collected about incident date and location of the cases in the study, my research team was able to ascertain race and ethnicity information in 81 death-eligible cases with a single victim.<sup>189</sup> Significantly, none of the cases that resulted in a capital trial or death sentence was available from the ISP data, and they are not included in the cases organized by victim race.

Table 7 below reports information about outcomes in death-eligible cases by race of defendant and by race of victim. It then reports information about outcomes in different combinations of race of defendant and race of victim. Many of the categories had such a small number of cases that the statistics have little significance. There were five or fewer defendants in each racial group other than White and Hispanic, and five or fewer victims in each racial group other than White and Hispanic. Moreover, all categories combining the race of defendant and race of victim had ten or fewer cases, aside from White defendant/White victim.

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187. BUREAU OF JUST. STATS., 2017: SELECTED FINDINGS, CAPITAL PUNISHMENT \*3 (July 2019), <https://www.bjs.gov/content/pub/pdf/cp17sf.pdf>.

188. IDAHO STATE POLICE, *Uniform Crime Reporting*, <https://nibrs.isp.idaho.gov/CrimeInIdaho/ReportsIndex/List> (last visited Mar. 6, 2021).

189. I excluded cases where there were multiple victims, both because these cases pose distinct issues of culpability, and because it was difficult to definitively ascertain the race of each victim in a multi-victim case.

The data reported in Table 7 shows that there was a slightly higher rate of death-noticing in cases where the defendant was Hispanic than those in which the defendant was White, and there was a slightly higher rate of death-noticing in cases where the victim was Hispanic than where the victim was White. Additionally, because of the small numbers of cases in all but one of the “Race of Defendant/Race of Victim” categories, little useful information can be derived from them.

Table 7. Disposition of cases by race of defendant and victim

Race of Defendant	Race of Victim (single-victim)	Death eligible	Death notice		Death sought at trial		Death sentence	
		#	#	% of death-eligible	#	% of death-eligible	#	% of death eligible
Asian		1	0	0%	0	0%	0	0%
Black		3	0	0%	0	0%	0	0%
Hispanic		26	7	27%	1	4%	0	0%
Native American		5	0	0%	0	0%	0	0%
Other		4	3	75%	1	25%	1	25%
White		105	21	20%	5	5%	3	3%
	<i>Asian</i>	1	1	100%	0	0%	0	0%
	<i>Black</i>	4	0	0%	0	0%	0	0%
	<i>Hispanic</i>	12	2	17%	0	0%	0	0%
	<i>Native American</i>	2	1	50%	0	0%	0	0%
	<i>Other</i>	0	0	-	0	-	0	-
	<i>White</i>	62	8	13%	0	0%	0	0%
White	<i>Black</i>	2	0	0%	0	0%	0	0%
White	<i>Native American</i>	1	1	100%	0	0%	0	0%
White	<i>White</i>	51	4	8%	0	0%	0	0%
Hispanic	<i>Black</i>	1	0	0%	0	0%	0	0%
Hispanic	<i>Hispanic</i>	10	1	10%	0	0%	0	0%
Hispanic	<i>Native American</i>	1	0	0%	0	0%	0	0%
Hispanic	<i>White</i>	4	2	50%	0	0%	0	0%
Black	<i>Black</i>	1	0	0%	0	0%	0	0%
Black	<i>Hispanic</i>	1	0	0%	0	0%	0	0%
Native American	<i>White</i>	3	0	0%	0	0%	0	0%
Other	<i>Asian</i>	1	1	100%	0	0%	0	0%
Other	<i>Hispanic</i>	1	1	100%	0	0%	0	0%
Other	<i>White</i>	1	0	0%	0	0%	0	0%

Although the utility of these results is limited given the sample size, it may be fruitful in the future to consider the correlation between defendant and victim race

and charging practices in death-eligible cases, using a larger sample of cases across time.

### 3. Gender

The study provides evidence of differential outcomes for cases, correlated with the gender of the defendant and the gender of the victim.

There was a somewhat higher rate of convictions of first-degree murder and death eligibility among female defendants (59% convicted of first-degree murder, 86% death-eligible) than male defendants (55% convicted of first-degree murder, 80% death-eligible). However, prosecutors filed a notice of intent to seek the death penalty at a much higher rate when the defendant was a man (23% of death-eligible cases) rather than a woman (5%); and there was a higher rate of death sentencing of male defendants (3% of death-eligible cases) than female defendants (0%).

Excluding multiple-murder cases and cases where the victim was a young child, when the victim was female rather than male, there was a higher rate of first-degree murder convictions (61% for female victims, compared to 46% for male victims), death eligibility (88% to 73%), filing of a death notice in eligible cases (27% to 16%), and death sentencing (6% to 1%).

These findings show that noticing intent to seek death and death sentencing are *correlated* with both the gender of the defendant (with male defendants more likely to be charged and sentenced capitally) and with the gender of the defendant (with cases involving female victims more likely to be charged and sentenced capitally). Because I did not compare the substantive facts of the individual cases, I did not reach any conclusions about causation – i.e., whether these charging and sentencing decisions were attributable to gender or to some other factor, such as the relative egregiousness of the crime or the presence of mitigating circumstances.

The findings are reported in more detail in Table 8 below.

Table 8. Case Outcomes by Gender of Defendant and Victim

Gender of Def.	Gender of Victim	Total cases	Convicted first degree		Death eligible		Death notice		Death sentence	
			#	%	#	% of total	#	% of death eligible	#	% of death eligible
Male	Adult Male	91	40	44%	64	70%	11	17%	1	2%
Male	Adult Female	52	31	60%	45	87%	13	29%	3	7%
Male	Multiple victim	16	14	88%	16	100%	4	25%	0	0%
Male	Child (male or female)	12	9	75%	11	92%	3	27%	0	0%
Female	Adult Male	13	8	62%	12	92%	1	8%	0	0%
Female	Adult Female	4	3	75%	4	100%	0	0%	0	0%
Female	Multiple victim	1	1	100%	1	100%	0	0%	0	0%
Female	Child (male or female)	4	1	25%	2	50%	0	0%	0	0%
Male-to-Female	Male	1	1	100%	0	0%	0	0%	0	0%
<b>TOTAL</b>		<b>194</b>	<b>108</b>	<b>56%</b>	<b>155</b>	<b>80%</b>	<b>32</b>	<b>21%</b>	<b>4</b>	<b>3%</b>
<b>MALE</b>	-	<b>171</b>	<b>94</b>	<b>55%</b>	<b>136</b>	<b>80%</b>	<b>31</b>	<b>23%</b>	<b>4</b>	<b>3%</b>
<b>FEMALE</b>	-	<b>22</b>	<b>13</b>	<b>59%</b>	<b>19</b>	<b>86%</b>	<b>1</b>	<b>5%</b>	<b>0</b>	<b>0%</b>
-	<b>MALE</b>	<b>104</b>	<b>48</b>	<b>46%</b>	<b>76</b>	<b>73%</b>	<b>12</b>	<b>16%</b>	<b>1</b>	<b>1%</b>
-	<b>FEMALE</b>	<b>56</b>	<b>34</b>	<b>61%</b>	<b>49</b>	<b>88%</b>	<b>13</b>	<b>27%</b>	<b>3</b>	<b>6%</b>

#### 4. Egregiousness

Additionally, anecdotal evidence suggests that the egregiousness of a case does not determine whether it will result in a death sentence. Three defendants in the study received death sentences: Erick Virgil Hall (twice),<sup>190</sup> Azad Abdullah,<sup>191</sup> and Jonathan Renfro.<sup>192</sup> Jonathan Renfro's offense – a robbery and murder of a police sergeant – appears to be the least aggravated of those that received a death sentence. While it is always difficult to place murders on a scale of egregiousness, other non-capital cases in the study appear to be similarly – and in some cases even more – aggravated when compared with those that resulted in death. I will describe some of these offenses in general terms, leaving more graphic detail for the footnotes.

At least four defendants charged during the relevant time period pled guilty to triple homicides, some involving young children and highly aggravated circumstances, and did not receive a death sentence: Adam Michael Dees,<sup>193</sup> John

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190. Hall was convicted and sentenced to death twice during this time period by two separate juries. In the first case, he was convicted of the kidnapping, rape, and murder of a flight attendant. *State v. Hall*, 419 P.3d 1042, 1063–1064, 163 Idaho 744, 765–66 (2018), *reh'g denied* (June 28, 2018), *cert. denied*, 139 S. Ct. 1618 (2019) (describing the disappearance of the victim, a flight attendant laid over in Boise, who was found dead, likely by strangulation, two weeks later in the Boise River, her sweater tied around her neck and her shirt around her wrist). He was later convicted again of rape and murder, this time of a woman in the Boise foothills. Rebecca Boone, *Jurors Find Hall Guilty of Second Boise-area Killing*, SPOKESMAN-REVIEW (Oct. 23, 2007), <https://www.spokesman.com/stories/2007/oct/23/jurors-find-hall-guilty-of-second-boise-area/>. He received the death penalty in both cases.

191. Abdullah was convicted of first-degree murder, arson, three counts of attempted first-degree murder, and felony injury to a child. *State v. Abdullah*, 348 P.3d 1, 28, 158 Idaho 386, 413 (2015) (Abdullah was found to have “murdered his wife . . . in their home and then set fire to the home with two of the children . . . and a young friend . . . asleep inside and one of their children . . . in the backyard.”).

192. Renfro was convicted of first-degree murder for “shooting Coeur d’Alene Police Sgt. Greg Moore in the face,” as well as “robbery, concealing evidence, and removing a gun from a police officer.” Thomas Clouse, *Jury convicts Jonathan Renfro of Murdering Coeur d’Alene Police Sgt. Greg Moore*, SPOKESMAN-REVIEW (Oct. 13, 2017), <https://www.spokesman.com/stories/2017/oct/13/jonathan-renfro-guilty-of-killing-coeur-dalene-pol/>.

193. John Sowell, *Foothills Triple Murder: Adam Dees Sent to Prison for Life without parole*, IDAHO STATESMAN (Aug. 28, 2015), <https://www.idahostatesman.com/news/local/crime/article41566386.html> (describing home invasion and murder of a family of three – ages 80, 77, and 52 – where victims “were shot in the head and struck repeatedly with a wooden baseball bat . . . [One victim] was also stabbed with a knife from the front of his neck down to his spine”).

Lee,<sup>194</sup> Jorge Alberto Lopez-Orozco,<sup>195</sup> and Jim Junior Nice.<sup>196</sup> At least ten defendants were convicted of double murders: Richard Carlin,<sup>197</sup> Michael Dauber,<sup>198</sup> John Joseph Delling,<sup>199</sup> Todd Colton Hagnas,<sup>200</sup> Brent High,<sup>201</sup> Joe Allen Kienholz,<sup>202</sup> Angel A. Morales-Larranaga,<sup>203</sup> Shana Parkinson,<sup>204</sup> Pete Kimball

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194. State v. Lee, 443 P.3d 268, 270, 165 Idaho 254, 256 (Ct. App. 2019), *petition for review denied* (July 9, 2019) (“John Lee shot and killed his mother, his landlord, and the manager of a fast food restaurant. Lee also shot and wounded another individual who was in the landlord’s office when Lee killed his landlord.”).

195. State v. Lopez-Orozco, 360 P.3d 1056, 1057, 159 Idaho 375, 376 (2015) (“[A] burned car was found in a remote desert area outside of Mountain Home, Idaho. Inside the car were the charred remains and bone fragments of Rebecca Ramirez Almarez . . . and her two sons, four-year-old R.R. and two-year-old M.H. Almarez and M.H. had suffered fatal gunshot wounds to the head, but R.R.’s cause of death was undetermined. The vehicle belonged to Defendant, who previously dated Almarez.”).

196. Nice was convicted of poisoning his three young children. According to prosecutors, “Nice used rat poison and over-the-counter medication to kill 6-year-old twins . . . and their 2-year-old sister . . .” *Dad Gets Life Term for Killing His 3 Kids*, DESERET NEWS (Nov. 12, 2006) <https://www.deseret.com/2006/11/12/19985250/dad-gets-life-terms-for-killing-his-3-kids>.

197. *N. Idaho Man Sentenced for Killing Ex-wife, Daughter*, AP (Aug. 24, 2018), <https://apnews.com/article/8508d6a949df49ffac1619a6529d5cf> (reporting how Carlin beat and stabbed his daughter and ex-wife to death, and also attacked his grandson, who survived).

198. *Idaho City Man Who Murdered and Dismembered 2 Gets Life in Prison*, KTVB (Oct. 28, 2016, 4:14 PM), <https://www.ktvb.com/article/news/crime/idaho-city-man-who-murdered-and-dismembered-2-gets-life-in-prison/343840854> (describing how Dauber “killed two men, chopped them into pieces, and discarded their remains in a remote area of Boise County”).

199. Rebecca Boone, *Delling Sentenced to Life in Idaho Road-trip Murders*, SPOKESMAN-REVIEW (Aug. 19, 2009), <https://www.spokesman.com/stories/2009/aug/19/delling-sentenced-to-life-in-idaho-road-trip/> (describing a thoroughly-planned “multistate murder spree,” in which Delling killed “two college students in a road trip across the West”).

200. Sven Berg, *Convicted Boise Murderer Charged with Prison Guard Assault*, MAGICVALLEY.COM (Feb. 2, 2015), [https://magicvalley.com/news/local/article\\_6f949070-aaf6-11e4-8964-4f456b17a0e6.html](https://magicvalley.com/news/local/article_6f949070-aaf6-11e4-8964-4f456b17a0e6.html) (“Todd Hagnas . . . in 2007 admitted to slashing one roommate’s throat and, months later, killing another roommate with a pick axe to the head, then setting their house on fire.”).

201. Kendel Murrant, *Killer’s Sentence Sparks Anger*, IDAHO PRESS (Oct 26., 2007), [https://www.idahopress.com/news/killers-sentence-sparks-anger/article\\_0af2cab3-af31-54ef-8caf-2ccb5e90d57e.html](https://www.idahopress.com/news/killers-sentence-sparks-anger/article_0af2cab3-af31-54ef-8caf-2ccb5e90d57e.html) (convicted of torturing and killing two men with an ax).

202. Thomas Clouse, *Idaho Couple’s Killer Gets 30-year Term*, SPOKESMAN-REVIEW (Jun. 16, 2009), <https://www.spokesman.com/stories/2009/jun/16/idaho-couples-killer-gets-30-year-term/> (describing how he committed a double-murder “so he and his friends could take the couple’s car for a joy ride”).

203. Scott Maben, *Man Gets Life in Prison for Killing Wife, Stepdaughter in North Idaho*, SPOKESMAN-REVIEW (Jan. 25, 2016), <https://www.spokesman.com/stories/2016/jan/25/man-gets-life-in-prison-for-killing-wife-stepdaugh/> (describing murder of wife and stepdaughter, age 6, by strangling).

204. State v. Parkinson, No. 32651, 2008 WL 9468203, at \*1 (Idaho Ct. App. Apr. 17, 2008) (describing murder by stabbing of ex-husband and his fiancé).

Roberts,<sup>205</sup> and William Taylor.<sup>206</sup> Several more were convicted of extremely heinous crimes, involving exceptional violence or torture, such as Larry Cragun,<sup>207</sup> Michael James Lee,<sup>208</sup> Patrick Nuxoll,<sup>209</sup> and Alofa Time.<sup>210</sup>

#### vi. Excluded Cases

Finally, I considered whether the cases excluded from the study for lack of authoritative case file information had a likely skewing effect on my results. It was plausible that the cases in which the existence of an aggravating circumstance was not immediately apparent from a limited review of court records and authoritative online sources were those which were less likely to be death-eligible, and thus the exclusion of these cases might bias my results toward a higher rate of death eligibility and underreport the narrowing effect of Idaho's statutes.

I tried to quantify this skewing effect in two ways.

First, I calculated how my results would change if I made two different conservative assumptions about the actual categorization of these cases. Under

205. Mike Butts, *Couple's Killer Pleads Guilty*, IDAHO PRESS (Feb. 6, 2010), [https://www.idahopress.com/news/couples-killer-pleads-guilty/article\\_99ff6824-e1c5-5da1-b3ed-34a67b439fa9.html](https://www.idahopress.com/news/couples-killer-pleads-guilty/article_99ff6824-e1c5-5da1-b3ed-34a67b439fa9.html) (describing murder of a "well-known Nampa couple . . . found tied up in their home on Dec. 29, 2003. They bled to death after being stabbed multiple times on or around Christmas Day, police said.").

206. Ruth Brown, *Ex-police Officer Found Guilty of Killing His Parents in Their Nampa Home in 2017*, IDAHO STATESMAN (June 5, 2019, 3:11 AM), <https://www.idahostatesman.com/news/local/crime/article230117559.html> (describing guilty verdict for killing his parents, where the mother "suffered 21 wounds to her head and neck that were inflicted by at least two instruments, [and the father] had broken bones in his throat and blows to the skull. Both victims had blows to the head so severe that they created 'baseball-sized' holes, authorities said.").

207. *Larry Cragun Gets Life Sentence in Fatal Hammer Attack*, SPOKESMAN-REVIEW (May 16, 2012), <https://www.spokesman.com/stories/2012/may/16/larry-cragun-gets-life-sentence-in-fatal-hammer/> (describing how Cragun broke into a mobile home and attacked a family with a kitchen knife and hammer, killing one and severely injuring three others).

208. Sentencing Transcript, at 199, 205, 211, 236–37, *State v. Lee*, 39345, 2012 WL 9495701 (Idaho App. Sept. 18, 2012) (describing how Lee raped and kidnapped his wife; bludgeoned his mother and stabbed her 22 times, much of it while she was alive; and tried to gouge out the eyes of his mother's partner).

209. Tom Holm, *Lewiston Man Convicted of Gruesome Murder of Friend*, SPOKESMAN-REVIEW (Nov. 1, 2018) <https://www.spokesman.com/stories/2018/nov/01/lewiston-man-convicted-of-gruesome-murder-of-frien/> (victim "slashed and bludgeoned more than 200 times").

210. John Miller, *Man Pleads Guilty to Beheading Wife*, SPOKESMAN-REVIEW (Dec. 22, 2016), <https://www.spokesman.com/stories/2006/dec/22/man-pleads-guilty-to-beheading-wife/> (reporting Time beheaded his wife, allegedly torturing her prior, then drove off with her head in his car, swerved into oncoming traffic, and killed a woman and her young daughter).

Scenario 1, all of the excluded cases—those charged as first-degree and those charged as second-degree—were categorized as factually first-degree, non-death eligible cases (1DNonCap). Under Scenario 2, all cases charged as first-degree murder by the prosecution were categorized as factually first-degree but non-death eligible (1DNonCap), while all cases charged as second-degree murder were factually second-degree cases (2D). Table 9(a) below explains the impact of these hypothetical scenarios:

**Table 9(a). Effect of Excluded Cases Under Hypothesized Scenarios<sup>211</sup>**

<i>Scenario</i>	<i>Total excluded cases</i>	<i>1DNonCap</i>	<i>2D</i>	<i>New overall rate of first-degree murders (% of all cases factually 1D)</i>	<i>New overall death eligibility rate (% of 1D cases categorized as 1DCap)</i>
<b>1</b>	26	26	0	87%	80%
<b>2</b>	26	18	8	84%	84%

Under both Scenario 1 and Scenario 2, the death eligibility rate is lower than the rate of 93% reported in Part III.C.2 above, but it remains high.

Second, I used media reports to try to bolster the available information about the cases I excluded for lack of sufficient authoritative information, and tentatively categorized these cases. Overall, my categorizations in these cases were considerably less informed and more tentative than those in the rest of the study.

If we added these results into those found through review of court records, there would be only a negligible impact on the results previously reported. The impact of these excluded cases is reported in more detail in Table 9(b) below.

**Table 9(b). Effect of Excluded Cases with Media-Based Categorization**

<i>Category</i>	<i># of cases</i> <sup>212</sup>	<i>1D Cap</i>	<i>1D Maybe Cap</i>	<i>1D Non Cap</i>	<i>2D</i>	<i>2D v 1D</i>	<i>First-degree rate (% of total cases categorized as 1D)</i>	<i>Death eligibility rate (% of 1D cases categorized as 1DCap)</i>
Excluded cases	26	14	3	0	5	3	65%	82%

211. I derived the numbers reported in this table by calculating the effect of including these cases on my previous findings that 167 out of 194 total cases were factually or procedurally first-degree, and 155 out of those 167 first-degree cases were factually death-eligible (1DCap).

212. For one case, I could find absolutely no information in the media.

Cases included in study	194	155	9	3	19	8	86%	93%
<b>Total</b>	<b>220</b>	<b>169</b>	<b>12</b>	<b>3</b>	<b>24</b>	<b>11</b>	<b>84%</b>	<b>92%</b>

#### IV. CONSTITUTIONAL IMPLICATIONS AND CONCLUSION

The findings presented above have significant implications for the constitutionality of Idaho's death penalty scheme. Idaho's first-degree murder statute does not meaningfully narrow capital eligibility, because 86 – 90% of all murder convictions in the study were factually or procedurally first-degree murder. Nor does Idaho's list of aggravating circumstances meaningfully narrow death eligibility, because 93 – 98% of factual or procedural first-degree murder cases in the study were death-eligible, with at least one aggravating circumstance present. As argued by the petitioner in *Hidalgo v. Arizona*, such a high rate of death eligibility shows that the capital scheme is failing to “genuinely narrow the class of persons eligible for the death penalty,”<sup>213</sup> and therefore violates the Eighth Amendment.<sup>214</sup>

Idaho's high rate of death eligibility does not translate into a high rate of capital charging or death sentencing. Indeed, prosecutors formally seek the death penalty only rarely, and a death sentence is even more infrequently imposed. The prosecution filed a notice of intent to seek the death penalty in 21% of factually death-eligible cases in the study;<sup>215</sup> proceeded to a capital trial in 5% of death-eligible cases; and obtained a death verdict in only 3% of death-eligible cases.

The small number of death sentences in Idaho, in isolation, may not present a constitutional problem; for if few people commit crimes that are serious enough to deserve the death penalty under the laws of the state, it is both logical and acceptable that commensurately few people receive it. But because – as this study shows – most murderers *are* eligible for the death penalty, *and* death is imposed upon only a handful, there is a substantial constitutional argument (1) that the capital scheme fails to fulfill its narrowing function and (2) that the death penalty, when administered, is “cruel and unusual.”

It is precisely the combination of broad statutory death eligibility and infrequent death sentencing that the Supreme Court has prohibited since *Furman*.<sup>216</sup> Justice Douglas called the “discretionary statutes” at issue in that case

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213. *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988).

214. *Hidalgo v. Arizona*, 138 S. Ct. 1054 (2018) (statement of Breyer, J.) (citing Pet. for Cert. (i)).

215. I refer here to cases categorized as 1DCap, not 1DMaybeCap.

216. See Marceau, Kamin, & Foglia, *supra* note 30, at 1082–83 (“Notably, then, it is this requirement of legislative narrowing that renders sensible the otherwise counterintuitive claim that a capital sentencing scheme that produces too low of a death sentence rate is unconstitutional. It is not that the State needs to execute more people in order to comply with the Eighth Amendment, but rather, the low death sentencing ratio is indicative of a failure to legislatively narrow the class of death-eligible defendants to the worst of the worst.”).

“pregnant with discrimination.”<sup>217</sup> Justice Stewart and White condemned a system where, among all who are death eligible, there is “a capriciously selected random handful upon whom the sentence of death has in fact been imposed.”<sup>218</sup>

The dramatic disparity between the high death eligibility rate and the low death charging and sentencing rates suggests that the primary reason for the small number of death sentences in Idaho is not legislative guidance about capital eligibility, but rather prosecutorial discretion. It is entirely appropriate for prosecutors to exercise discretion not to charge death-eligible cases capitally, in light of mitigating circumstances, resource constraints, and the preferences of the victim’s family. However, discretionary selectivity by prosecutors cannot satisfy the narrowing requirement. The Supreme Court has specifically required *legislative* narrowing of capital *eligibility* – rather than relying on *discretionary prosecutorial* selection of which death-eligible cases to pursue capitally.<sup>219</sup> Legislative narrowing necessarily involves the identification of objective and generally-applicable constraints; it consists of ex-ante value judgments about which substantive factors make cases “worse” and more deserving of the ultimate punishment. Legislatures may not constitutionally abdicate their narrowing responsibility to prosecutors. While prosecutorial discretion will always be a part of a capital system, over-reliance on *ad hoc* prosecutorial discretion risks inserting arbitrary and capricious factors into the system – including geographic happenstance, resource disparities, and implicit and explicit biases on the lines of race, gender, and ethnicity.<sup>220</sup> Moreover, the high level of death eligibility skews the adversarial system by giving prosecutors a significant tactical advantage, even when they have no intention of actually pursuing the death penalty to verdict. The death penalty becomes a bargaining chip that can pressure a defendant to waive his constitutional rights and plead guilty.

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217. *Furman v. Georgia*, 408 U.S. 238, 256–57 (1972) (Douglas, J., concurring).

218. *Id.* at 309–10 (Stewart, J., concurring); *Id.* at 313 (1972) (White, J., concurring) (expressing concern “that the death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.”).

219. *Zant v. Stephens*, 462 U.S. 862, 878 (1983) (“[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty.”); *Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988) (“[T]he narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses . . . , or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase.”); *Hidalgo v. Arizona*, 138 S. Ct. 1054, 1054, 1057 (2018) (Statement of Breyer, J.). See also Kamin & Marceau, *supra* note 21, at 992–95 (explaining why the prosecutorial discretion cannot be a substitute for the legislative narrowing required by the Supreme Court).

220. Marceau, Kamin, & Foglia, *supra* note 30, at 1072 (“The Eighth Amendment requires that determinations of life and death be made at the level of reasoned legislative judgment, and not on an *ad hoc* basis by prosecutors whose decisions, in reviewing individual cases, might be tainted by implicit biases.”).

The high rate of death eligibility and low rate of death sentencing also weakens the penological justifications for the death penalty. The U.S. Supreme Court has identified two primary punitive purposes that could justify capital punishment: deterrence and retribution.<sup>221</sup> Unless capital punishment “measurably contributes to one or both of these goals, it ‘is nothing more than the purposeless and needless imposition of pain and suffering,’ and hence an unconstitutional punishment.”<sup>222</sup> The infrequency of the death penalty in Idaho diminishes its deterrent value, because potential murderers cannot reasonably expect that they will be put to death if they commit their crime.<sup>223</sup> Moreover, repeated decisions by prosecutors and juries that deterrence and retribution are adequately served through a prison term rather than death suggests that society believes these penological purposes can be adequately achieved through a non-capital outcome. The low rate of usage of the death penalty, despite its wide availability, supports an argument that capital punishment is inconsistent with “evolving standards of decency”<sup>224</sup> – at least for the vast majority of capital-eligible crimes.

Nearly fifty years after *Furman* was decided, the death penalty’s use in Idaho is being constrained not by reasoned and even-handed legislative judgment, but by prosecutorial discretion. The data gathered in this study – showing a high rate of statutory death eligibility and a low rate of death charging and sentencing – is strong evidence that Idaho’s capital punishment scheme, on an aggregate level, does not meet the Eighth Amendment narrowing requirement.

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221. *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (“*Gregg v. Georgia* . . . identified ‘retribution and deterrence of capital crimes by prospective offenders’ as the social purposes served by the death penalty. Unless the imposition of the death penalty on a mentally retarded person ‘measurably contributes to one or both of these goals, it “is nothing more than the purposeless and needless imposition of pain and suffering,” and hence an unconstitutional punishment.’”) (citations omitted).

222. *Id.* at 319 (quoting *Enmund v. Florida*, 458 U.S. 782, 798 (1982)).

223. *Furman*, 408 U.S. at 312–13 (White, J., concurring) (“But the penalty has not been considered cruel and unusual punishment in the constitutional sense because it was thought justified by the social ends it was deemed to serve. At the moment that it ceases realistically to further these purposes, however, the emerging question is whether its imposition in such circumstances would violate the Eighth Amendment. It is my view that it would, for its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment. It is also my judgment that this point has been reached with respect to capital punishment as it is presently administered under the statutes involved in these cases. . . . I cannot avoid the conclusion that as the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice.”).

224. *Atkins*, 536 U.S. at 316 (looking to rarity of execution of intellectually disabled offenders in states where it is authorized as evidence of “national consensus” against the practice).